CENTRAL BUREAU OF INVESTIGATION
*v.*
AMITBHAI ANIL CHANDRA SHAH AND ANOTHER
(Criminal Appeal No.1503 of 2012)

SEPTEMBER 27, 2012

**[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]**

*Code of Criminal Procedure, 1973 – s.406 – Sohrabuddin Sheikh killing case – Allegation that the killing was orchestrated by senior officers in the Gujarat police and at the behest of Amitbhai Shah, the then Home Minister in the State of Gujarat – Criminal proceedings against Amitbhai Shah – Central Bureau of Investigation (CBI) directed to investigate the case – Plea of CBI before Supreme Court for cancellation of the bail earlier granted to Amitbhai Shah by the Gujarat High Court and for transfer of the Sohrabuddin case for trial outside Gujarat on the ground that Amitbhai Shah was in a position to greatly jeopardize the efforts of the CBI to bring home the charges against him – Held: Bail granted to Amitbhai Shah by the Gujarat High Court not cancelled on ground that it would deprive Amitbhai Shah of the privilege granted to him by the High Court two years ago – However, Amitbhai Shah to give an undertaking in writing to the trial court that he would not commit any breach of the conditions of the bail bond and would not try to influence any witnesses or tamper with the prosecution evidence in any manner – Amitbhai Shah further directed to report to the CBI office every alternate Saturday – Further, taking into account the manner in which the Sohrabuddin case has proceeded before the Court, and in order to preserve the integrity of the trial, strong case made out for transferring the trial of the case outside the State – Decision to transfer the case not a reflection on the State judiciary but intended to save the trial court in the State from undue stress and to avoid any possible misgivings in*





*the minds of the ordinary people about the case getting a fair trial in the State – Sohrabuddin case accordingly transferred to Mumbai – Bail – Cancellation of.*

*Code of Criminal Procedure, 1973 – s.406 – Transfer of trial – Some broad factors to be kept in mind while considering an application for transfer of trial – Re-stated.*

**The instant appeal and the transfer petition were the result of the developments following the orders passed by the Supreme Court in Writ Petition (Criminal) No.6 of 2007 (*Rubabbuddin Sheikh* v. *State of Gujarat* & Others) seeking direction for investigation of the case concerning the killing of Sohrabuddin Sheikh- an underworld criminal, allegedly in a staged encounter orchestrated by senior officers in the Gujarat police and at the behest of Amitbhai Shah (the then Minister of State for Home in the State of Gujarat) and the disappearance of his wife, Kausarbi by the Central Bureau of Investigation (CBI). This Court by order dated January 12, 2000 passed in the aforesaid writ petition had directed the CBI to investigate the Sohrabuddin case.**

**The appeal was filed by CBI against the order passed by the Gujarat High Court in Criminal Miscellaneous No.12240/2010 granting bail to Amitbhai Anil Chandra Shah in the Sohrabuddin case while in the connected transfer petition, a prayer was made to transfer the Sohrabuddin case outside the State of Gujarat for trial.**

**It was submitted by the CBI that Amitbhai Shah was part of the larger conspiracy to kill Sohrabuddin and, later on, his wife and finally Tulsiram Prajapati, as he was a witness to the abduction of Sohrabuddin and his wife by the police party; that taking advantage of his position as the Minister, he constantly obstructed proper investigation into the killings of Sohrabuddin and Kausarbi even when the matter came to the notice of this**

**Court and this Court issued directions for a thorough investigation into their killings; that he was in a position to place his henchmen, top ranking policemen at positions where they could sub-serve and safeguard his interests; and that his release on bail and permission to freely stay in Gujarat would greatly jeopardize the efforts of the CBI to bring home the charges against him. It was further submitted by the CBI that apart from Amitbhai Shah, some of the other accused in the case were senior police officers with great clout and resourcefulness and they were fully capable of subverting a fair trial in Gujarat.**

**The counsel appearing on behalf of Amitbhai Shah opposed the prayer for cancellation of his bail. Insofar as the transfer of the case is concerned, he stated that Amitbhai Shah was prepared to face the trial anywhere and he would, therefore, accept the transfer of the case without demur. The transfer petition was, however, opposed by the State and the other accused.**

**Dismissing the appeal but allowing the transfer petition, the Court**

**HELD: 1.1. This Court is not inclined to cancel the bail granted to Amitbhai Shah about two years ago as it feels reluctant to deprive Amitbhai Shah of the privilege granted to him by the High Court. [Para 29] [963-F-G]**

**1.2. However, the apprehension expressed by the CBI that Amitbhai Shah may misuse the freedom and try to subvert the prosecution cannot be lightly brushed aside. It is accordingly, directed that Amitbhai Shah shall give an undertaking in writing to the trial court that he would not commit any breach of the conditions of the bail bond and would not try to influence any witnesses or tamper with the prosecution evidence in any manner. It is further directed that Amitbhai Shah will report to the CBI office every alternate Saturday at 11.00 AM. It is further made clear that the grant of bail to Amitbhai Shah in the**



**Sohrabuddin case shall have no effect in the Prajapati case [Writ petition (criminal) no.115 of 2007 filed by Narmada Bai, the mother of Tulsiram Prajapati] and in that case whether Amitbhai Shah is to be kept in judicial custody or granted bail would be decided by the court on the basis of the materials on record of that case and without taking into consideration the grant of bail to him in the Sohrabuddin case. [Para 30] [963-G-H; 964-A-C]**

**1.3. The grant of bail to Amitbhai Shah in Sohrabuddin case shall be no consideration for grant of bail to the other accused in that case and the prayer for bail by the other accused in the Sohrabuddin case shall be considered on its own merits. [Para 31] [964-C-D]**

**1.4. In case Amitbhai Shah commits any breach of the conditions of the bail bond or the undertaking given to the court, as directed above, it will be open to the CBI to move the trial court for cancellation of his bail. In that case, if the allegations pertain to the period posterior to this order, the trial court shall examine the matter carefully and take an independent decision without being influenced by this order declining to cancel the bail granted to him. [Para 32] [964-D-E]**

*Rubabbuddin Sheikh v. State of Gujarat & Others* **(2010) 2 SCC 200: 2010 (1) SCR 991 – referred to.**

**2.1. The manner in which the Sohrabuddin case has proceeded before this Court in itself, without anything else, makes out a strong case for transferring the trial of the case outside the State. There are instances as would appear from the proceedings in the Sohrabuddin case when this Court had reasons not to feel entirely happy at the way the courts below dealt with the matter. In order to preserve the integrity of the trial it is necessary to shift it outside the State. [Paras 33, 37 and 38] [964-F-G; 966-E-G]**

**2.2. The decision to transfer the case is not a reflection on the State judiciary and it is made clear that this Court reposes full trust in the judiciary of the State. As a matter of fact, the decision to transfer the case outside the State is intended to save the trial court in the State from undue stress and to avoid any possible misgivings in the minds of the ordinary people about the case getting a fair trial in the State. [Para 39] [966-H; 967-A-B]**

**2.3. In** *Nahar Singh Yadav* ***case*****, this Court observed that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are: (1) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution; (2) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant; (3) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of traveling and other expenses of the official and non-official witnesses; (4) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and (5) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or**



**indirectly with the course of justice." The conditions at serial numbers (1), (2), (3) and (5) are squarely attracted in this case. [Para 40] [967-B-C-H; 968-A-C]**

**2.4. In another decision in** *Ravindra Pal Singh,* **this Court directed for transfer of the case outside State because some of the accused in a case of fake encounter were policemen. The case in hand has far more stronger reasons for being transferred outside the State. Accordingly, this Court directs for the transfer of Special Case No.05/2010 pending in the court of Additional Chief Metropolitan Magistrate, CBI, Court Room No.2, Mirzapur, Ahmedabad titled *CBI* versus *D.G. Vanzara & Others* to the court of CBI, Bombay. The Registrar General of the Gujarat High Court is directed to collect the entire record of the case from the court of Additional Chief Metropolitan Magistrate, CBI, Room No.2, Mirzapur, Ahmedabad and to transmit it to the Registry of the Bombay High Court from where it would be sent to a CBI court as may be decided by the Administrative Committee of the High Court. The Administrative Committee would assign the case to a court where the trial may be concluded judiciously, in accordance with law, and without any delay. The Administrative Committee would also ensure that the trial should be conducted from beginning to end by the same officer. The CBI is directed to positively complete the investigation within six weeks and submit the final charge-sheet before the transferee court in Mumbai. [Paras 41, 42] [968-C-G; 969-A]**

**2.5. The Sohrabuddin case thus stands transferred to Mumbai by this order. It is the case of the CBI that the case of Sohrabuddin and the case of Tulsiram Prajapati are closely connected and in order to avoid any miscarriage of justice, both the cases can only be tried before the same court. It will, therefore, be open to the CBI to make an application for transfer of the Tulsiram**

**Prajapati case also to the same court where the Sohrabuddin case is transferred. In case, such an application is filed, the court will pass appropriate orders, in accordance with law, after hearing all concerned. [Para 43] [969-B-C]**

*Nahar Singh Yadav and another v. Union of India and others* **(2011) 1 SCC 307: 2010 (13) SCR 851 and** *Ravindra Pal Singh v. Santosh Kumar Jaiswal and other* **(2011) 4 SCC 746: 2011 (3) SCR 970 – relied on.**

**Case Law Reference:**

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|---|---|---|
| **2010 (1) SCR 991** | **referred to** | **Para 3** |
| **2010 (13) SCR 851** | **relied on** | **Para 40** |
| **2011 (3) SCR 970** | **relied on** | **Para 41** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1503 of 2012.

From the Judgment & Order dated 29.10.2010 of the High Court of Judicature Gujarat in Criminal Misc. No. 12240 of 2010.

WITH

T.P. (Crl) No. 44 of 2011

Vivek Tankha, H.P. Raval, Indira Jaising, ASGs., Tushar Mehta, AAG, Ram Jethmalani, Mahesh Jethmalani, Gopal Subramanium (AC), Bhagwati Prasad, P.S. Narsimha, M.N, Krishanmani, Pallav Shishodia, Pradeep Ghosh, Maheen Pradhan, Rajat Khattry, Vaibhav Srivastava, Ejaz Khan, Subramonium Prasad, Harsh Parashar, Sameer Sodhi, S. Udaya Kumar Sagar, Pranav Diesh, Karan Kalia, Ashish Dixit, Anindita P., Hemantika Wahi, Jesal, Gaurav Khanna, Anando Mukherjee, Huzefa Ahmadi, Ejaz Maqbool, Mrigank Prabhakar, Anas Tanwir, Sonam Anand, B.K. Prasad, Pushpinder Singh,



Dushyant Kumar, Vasu Sharma, Merusagar Samantaray, Shubhashis R. Soren, Babita Yadav, Bhupender Yadav, Devang Vyas, Vidhya Dhar Gaur, S.S. Shamshery, V.M. Vishnu, R.C. Kohli, Garima Prashad, Mukul Kumar, Sushma Suri, E.C. Agrawala, A. Sumathi, Sibo Sankar Mishra, Anish Kumar Gupta, Arivnd Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

**AFTAB ALAM, J.** 1. Leave granted.

2. This order deals with an appeal and a transfer petition filed by the Central Bureau of Investigation (the CBI). The appeal (arising from SLP (Criminal) No.9003 of 2010) is directed against the order dated October 29, 2010 passed by the Gujarat High Court in Criminal Miscellaneous No.12240/ 2010 granting bail to Amitbhai Anil Chandra Shah (respondent no.1 in this appeal and accused No.16 in the transfer petition) in case No.RC BS1/S/2010/0004 (Criminal Case No.5 of 2010) ("the Sohrabuddin case"), who until his arrest in the case was the minister of State for Home in the State of Gujarat. In the transfer petition, a prayer is made to transfer the Sohrabuddin case outside the State of Gujarat for trial. Both the appeal and the transfer petition are the result of the developments following the orders passed by the Court in Writ Petition (Criminal) No.6 of 2007 (*Rubabbuddin Sheikh v. State of Gujarat & Others*) seeking a direction for the investigation of the case concerning the killing of Sohrabuddin and the disappearance of his wife, Kausarbi by the CBI. In order to put the two issues in context, therefore, it is necessary to slightly go back into the facts of that case and see how the matter unfolded before it came to the present stage.

3. This Court by order dated January 12, 2010[1] passed in the aforesaid writ petition directed the CBI to investigate the case relating to the killings of Sohrabuddin and his wife

1. (2010) 2 SCC 200

Kausarbi. The order came to be passed after the proceedings in this Court in regard to those killings had gone on for over four years, initially on the basis of two letter-petitions and subsequently under the aforesaid writ petition. At the beginning, the State of Gujarat stoutly and vociferously denied that the encounter in which Sohrabuddin was killed was stage-managed and it was only later that it came around to accept that it was actually so and his wife, Kausarbi too was killed while she was in illegal police custody and her body was disposed of in a manner as to make it untraceable. Some sort of an investigation was made by the Gujarat Police and a charge-sheet was submitted on July 16, 2007 against thirteen (13) persons who were members of the Anti Terrorist Squad, Gujarat Police and the Special Task Force, Rajasthan Police. On behalf of the writ-petitioner (Rubabbuddin Sheikh, the brother of the slain Sohrabuddin), however, it was submitted that the charge-sheet was deceptive and was designed more to cover up rather than uncover the entire conspiracy behind the murder of Sohrabuddin and his wife. It was pointed out that the Gujarat Police had completely ignored the killing of Tulsiram Prajapati in a similar police encounter one year after the killing of Sohrabuddin who was killed simply because he was a witness to the abduction of Sohrabuddin and his wife by the police party. On September 30, 2008 the Court was informed that following the submission of the charge-sheet, even as the matter was under the scrutiny of this Court, the case was hurriedly committed and the trial court had fixed the hearing on the charge on a day to day basis. The Court on that date stayed further proceedings in Sessions Case no. 256 of 2007 and directed for the records of the case to be put in the safe custody of the Registrar General of the Gujarat High Court.

4. In further proceedings before this Court, the State of Gujarat took the stand that all that was required to be done was done in the matter and there was nothing more for this Court to do. It was argued on behalf of the State that with the submission of the charge-sheet this Court's power and authority



to monitor the investigation came to an end and the case came under the exclusive jurisdiction of the magistrate/trial court who would proceed further on the basis of the charge-sheet submitted by the police.

5. This Court felt otherwise. It appeared to the Court that there were a number of aspects of the case, including the killing of Tulsiram Prajapati that were not addressed at all by the Gujarat Police. The State of Gujarat, however, continued to maintain that the killing of Tulsiram Prajapati in the police encounter had no connection with the killings of Sohrabuddin and his wife. That being the position taken by the State it was but natural for the State police not to investigate any linkages between the killings of Sohrabuddin and his wife on the one hand and the killing of Tulsiram Prajapati on the other.

6. Among the number of reasons that weighed with the Court to ask the CBI to investigate into the killings of Sohrabuddin and his wife, even after the submission of charge-sheet by the Gujarat Police was the trenchant refusal by the State of Gujarat and the State police to see any connection between the killings of Sohrabuddin and his wife and the killing of Tulsiram Prajapati. In the order dated January 12, 2010 by which the investigation of the case was entrusted to the CBI, the Court commented upon the persistent effort to disconnect the Prajapati encounter from the killings of Sohrabuddin and his wife as under:

> "From the charge-sheet, it also appears that the third person was 'sent somewhere'. However, it appears that the literal translation of the charge-sheet in Gujarati would mean that he was 'anyhow made to disappear'. From this, we are also satisfied that *an attempt was made by the investigating agency of the State of Gujarat to mislead the Court."* (paragraph 63 of the order)
>
> "The possibility of the third person being Tulsiram Prajapati cannot be ruled out, *although the police authorities or the*

*State had made all possible efforts to show that it was not Tulsiram. In our view, the fact surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness."* (paragraph 65 of the order)

*"No justification can be found for the Investigating Officer Ms. Johri walking out of the investigation with respect to Tulsiram Prajapati's death without even informing this Court."* (paragraph 66 of the order)

(emphasis added)

7. Further, recounting the many deficiencies in the investigation by the Gujarat Police, this Court also noticed its omission to analyse the call details of the accused. The Court observed:

*"So far as the call records are concerned, it would be evident from the same that they had not been analysed properly, particularly the call data relating to three senior police officers either in relation to Sohrabuddin's case or in Prajapati's case."* (paragraph 66 of the order)

8. In light of the above and a number of other acts of omission and commission as appearing from the eight Action Taken Reports (submitted in course of hearing of the writ petition) and the Gujarat Police charge-sheet, this Court asked the CBI to investigate the killings of Sohrabuddin and his wife Kausarbi, giving the following directions:

"82. Accordingly, in the facts and circumstances even at this stage the police authorities of the State are directed to hand over the records of the present case to the CBI Authorities within a fortnight from this date and thereafter the CBI Authorities shall take up the investigation and complete the same within six months from the date of taking over the investigation from the State police



authorities. *The CBI Authorities shall investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a larger conspiracy.* The report of the CBI Authorities shall be filed in this Court when this Court will pass further necessary orders in accordance with the said report, if necessary. We expect that the police authorities of Gujarat, Andhra Pradesh and Rajasthan shall cooperate with the CBI Authorities in conducting the investigation properly and in an appropriate manner."

(emphasis added)

9. It may here be noted that another writ petition [being Writ Petition (Criminal) No.115 of 2007] filed by Narmada Bai, the mother of Tulsiram Prajapati, relating to the encounter killing of her son was till that stage being heard along with the Sohrabuddin case (Writ Petition (Criminal) No.6 of 2007). But in the concluding part of the order, in regard to Prajapati's case it was directed as follows:

"*Writ Petition (Crl.) No.115 of 2007*

84. So far as WP (Crl.) No.115 of 2007 is concerned, let this matter be listed after eight weeks before an appropriate Bench."

10. As directed by this Court, the CBI took up the investigation into the Sohrabuddin case after instituting a fresh FIR on February 1, 2010. In the call records of the accused that had not been worked out in the hands of Gujarat Police, the CBI claims to have found a valuable source of important clues. On the basis of the call records, the statements of witnesses and other materials collected by it, the CBI claims that it has unearthed a conspiracy of much larger proportions. It submitted a charge-sheet on July 23, 2010 in which, in addition to the thirteen accused named in the charge-sheet of the Gujarat Police, another 6 persons were also named as accused, being

part of the larger conspiracy. In the charge-sheet submitted by the CBI, one of the accused is Amitbhai Shah, who till then was the minister of State for Home in the State Government. The accusation against Amitbhai Shah is that he was the lynchpin of the conspiracy.

11. Following the submission of the charge-sheet by the CBI, on July 25, 2010, Amitbhai Shah was arrested and was sent to judicial custody.

12. As noted above, this Court had asked the CBI to investigate all aspects of the case relating to the killings of Sohrabuddin and his wife Kausarbi, including the possibility of a larger conspiracy. The CBI, therefore, felt that it was both authorized and under the obligation to investigate the Prajapati case as well, as it *prima facie* appeared to be integrally connected with the Sohrabuddin case. The Gujarat Police, however, would neither hand over the records of the Prajapati case to the CBI nor allow it to make any independent investigation in the Prajapati case. On the contrary, the Gujarat Police purported to complete its investigation and, like the case of Sohrabuddin, rather hurriedly filed the charge-sheet in the case on July 30, 2010, followed by a supplementary charge-sheet on July 31, 2010, before the Judicial Magistrate, First Class, Danta, Banaskantha District. The magistrate, equally quickly committed the case to the court of Sessions in two days' time on August 2, 2010 even without a proper compliance with the provisions of section 207 of the Code of Criminal Procedure.

13. According to the charge-sheet, Prajapati was indeed killed in a fake encounter but there was nothing more to it than that. There was no attempt to investigate any larger conspiracy or to try to connect it with the Sohrabuddin case. On the other hand, the whole effort was to present it as a separate case, quite unconnected with the case of Sohrabuddin.

14. In the meanwhile, Amitbhai Shah was granted bail by



the Gujarat High Court, by order dated October 29, 2010 passed in Criminal Miscellaneous Application No.12240 of 2010. Against the order passed by the High Court, the CBI immediately came to this Court in SLP (Crl.) No.9003 of 2010, giving rise to the present appeal seeking cancellation of bail granted to Amitbhai Shah. On October 30, 2010, notices were issued to respondent nos.1 and 2, i.e. Amitbhai Shah and the State of Gujarat. At the time of issuance of notice, on the prayer made on behalf of the CBI to stay the operation of the bail order passed by the High Court on the ground that once released on bail the accused would tamper with prosecution evidence, it was stated on behalf of respondent no.1 that he would leave Gujarat the following morning and would stay out of the State till further orders that may be passed by this Court.

15. On November 25, 2010, the CBI submitted a copy of its final report before this Court, copies of which were directed to be given to the parties.

16. On December 14, 2010, it was brought to the notice of the Court that the Prajapati case had so far not been listed before the Bench to which it was assigned and, consequently, no order was passed in that case by the Court. Nevertheless, the trial court was proceeding to start the trial of the accused on the basis of the charge-sheet submitted by the Gujarat Police. A grievance was made that in case the trial court was allowed to proceed, it might be too late by the time any order is passed by this Court in the Prajapati case. At that stage, Mr. Tushar Mehta, Sr. AAG appearing for the State of Gujarat fairly stated that no further proceeding would take place in the case arising from the charge-sheet submitted by the Gujarat Police in the Prajapati case until this Court passed some orders on the status report submitted by the CBI in this case and the Writ Petition (Crl.) No.115 of 2007 was taken up by the Court.

17. On January 13, 2011, the CBI filed the present transfer petition (Transfer Petition (Criminal) No.44 of 2011) for transfer

of the Sohrabuddin case bearing Special Case No.5 of 2010 pending in the court of Additional Chief Metropolitan Magistrate, CBI, Mirzapur Ahmedabad, titled "*CBI* v. *D.G. Vanzara & Ors*" to the CBI court in Mumbai or any other State and for a further direction for the constitution of a special court. This, in short, is about the proceedings of the Sohrabuddin case before this Court.

18. At this point, we may also take a brief look at the Prajapati case, Writ Petition (Criminal) No.115 of 2007 before this Court. It is interesting to note that in the first counter affidavit filed in the Prajapati case, the State took the stand that the petition filed under Article 32 of the Constitution was not maintainable because a case was already registered with the police according to which the son of the writ petitioner was killed in a police encounter. It was contended that the writ petition filed in the Sohrabuddin case was for a writ of *habeas corpus* and it was for that reason alone that it was entertained by this Court. There was no such angle in the present case. In the counter affidavit it was further stated that Tulsiram Prajapati was a dreaded criminal, involved in 21 criminal cases. As to the manner of his death, the counter affidavit reiterated and fully supported the police version as stated in the two FIRs relating to his alleged escape from the police custody while being taken back after court remand and his death in a police encounter on the following day. It was pointedly denied that Tulsiram Prajapati was a witness in the Sohrabuddin case. It was asserted that there was no connection in the two cases.

19. However, by the time the writ petition came up for hearing, another affidavit was filed on behalf of State of Gujarat on August 19, 2010. In this affidavit it was conceded that Tulsiram Prajapati was killed in a fake encounter. It was, however, submitted that the State, CID (Crime) had already filed a charge-sheet in the case. It was further the stand of the State that the encounter killing of Tulsiram Prajapati had nothing to do with the killings of Sohrabuddin and Kausarbi.



20. It is, thus, to be seen that the Prajapati case also followed exactly the same pattern as the case of Sohrabuddin. Initially, there was a complete denial by the State that he was killed in any kind of a fake encounter. But, when it became impossible to deny that the story of the encounter was false, an investigation was swiftly made by the Gujarat Police and charge-sheet was submitted. On the basis of the charge-sheet, on the one hand an attempt was made to proceed with and conclude the trial proceedings as quickly as possible and on the other hand this Court was told that after the submission of the charge-sheet it was denuded of the authority to direct any further investigation. There was, thus, clearly an attempt not to allow the full facts to come to light in connection with the two cases.

21. Further, in the Prajapati case the State insisted till the end that though he was too killed in a fake encounter there was no connection between his killing and the killings of Sohrabuddin and his wife, Kausarbi.

22. The Prajapati case came up before the Court and it was allowed by judgment and order dated April 8, 2011[2]. The Court debunked the contention that there was no connection between the killings of Sohrabuddin and Kausarbi and the killing of Tulsiram Prajapati (see paragraphs 47 to 60 of the judgment) and also rejected the claim of the State Government that the investigation made in his case was complete and satisfactory. It directed the State Government to handover the investigation of the Prajapati case as well, to the CBI.

23. In pursuance of the Court's direction, the CBI investigated the Prajapati case and even as the hearing on the present appeal and the transfer petition was underway submitted the charge-sheet on September 4, 2012. In the Prajapati charge-sheet Amitbhai Shah and a number of very senior police officers of the State are cited as accused.

2. (2011) 5 SCC 79.

24. The facts and circumstances noted above, very briefly, provide the background in which the case of the CBI for cancelling the bail granted to Amitbhai Shah (accused No.16 in transfer petition and respondent No.1 in criminal appeal) in Sohrabuddin case and transferring that case for trial outside Gujarat is to be considered.

25. Mr. Tankha, senior advocate, appearing for the CBI made a strong plea for cancelling the bail of Amitbhai Shah and transferring the Sohrabuddin case outside Gujarat. Mr. Ram Jethmalani, learned senior advocate, appearing on behalf of Amitbhai Shah with equal vehemence opposed the prayer for cancellation of his bail. However, insofar as the transfer of the case is concerned, at the end of the hearing he stated that Amitbhai Shah was prepared to face the trial anywhere and he would, therefore, accept the transfer of the case without demur. The transfer petition was, however, opposed by the State and the other accused, namely, Dahyaji Gobarji Vanzara (respondent No.1 in the transfer petition), Rajkumar Pandyan (respondent No.2 in the transfer petition), Naransinh Harisinh Dabhi (respondent No.5 in the transfer petition) Balkrishan Lalkrishna Chaubey (respondent No.6 in the transfer petition) and Narendra Kantilal Amin (respondent No.12 in the transfer petition) and their respective counsel were heard by the Court at length.

26. The submissions made by the CBI in support of the prayer for the cancellation of bail and the transfer of the case were substantially the same. It was submitted on its behalf that Amitbhai Shah presided over an extortion racket. In his capacity as the minister for Home, he was in a position to place his henchmen, top ranking policemen at positions where they could sub-serve and safeguard his interests. He was part of the larger conspiracy to kill Sohrabuddin and later on his wife and finally Tulsiram Prajapati, as he was a witness to the abduction of Sohrabuddin and his wife by the police party. Taking advantage of his position as the minister, he constantly obstructed any



proper investigation into the killings of Sohrabuddin and Kausarbi even when the matter came to the notice of this Court and this Court issued directions for a thorough investigation into their killings. It was at his behest and under his pressure that the top ranking police officers tried to cover up all signs of his involvement in the killings of Sohrabuddin, Kausarbi and Tulsiram Prajapati and systematically suppressed any honest investigation into those cases and even tried to mislead this Court. Even after the investigation was handed over to the CBI, he made things very difficult for them and the CBI was able to do the investigation against great odds. It is further submitted that the phone records pertaining to the periods when Sohrabuddin and his wife were abducted, Sohrabuddin was killed and his wife was killed and her body was disposed of by burning and of the later period at the time of killing of Sohrabuddin showed Amitbhai Shah in regular touch with the policemen, accused in the case, who were actually executing the killings and the other allied offences. There was no reason for the minister for State of Home to speak directly on phone to police officers, far below him in the chain of command and the explanation given on his behalf in regard to those phone calls was on the face of it false and unacceptable. Apart from the phone records, there were many other materials and incontrovertible circumstances to establish the charges against Amitbhai Shah.

27. It was submitted that his release on bail and permission to freely stay in Gujarat would greatly jeopardize the efforts of the CBI to bring home the charges against him. Even after his arrest and while in jail, he had sufficient resources and influence to tamper with the evidence and to intimidate the prosecution witnesses. It was contended that allowing the appellant to enjoy the privilege of bail and further to let him stay in Gujarat would have a very debilitating effect on the prosecution case. It was further contended that apart from Amitbhai Shah, some of the other accused in the case were senior police officers with great clout and resourcefulness and

they were fully capable of subverting a fair trial in Gujarat.

28. Mr. Ram Jethmalani, senior advocate appearing for Amitbhai Shah submitted, with equal force, that the allegations made by the CBI against his client were no more than a pack of lies. He submitted that the direction of this Court handing over the investigation of the Sohrabuddin case to the CBI gave a handle to the Central Government to wreck political vendetta on the democratically elected Government in Gujarat. He further submitted that the CBI was being used in this case to frame up his client in a completely false case. He contended that the Gujarat Police had made a proper investigation but the CBI put the charge-sheet submitted by the Gujarat Police in this case upside-down. It forged and fabricated evidences against Amitbhai Shah and set-up an entirely false case against him. He also submitted that the High Court had rightly granted bail to Amitbhai Shah and there was no reason for this Court to cancel it.

29. At this stage, we do not wish to express any opinion on the submissions made from the two sides lest any remark made in the order might cause prejudice to either the accused or the prosecution in the trial. However, on hearing Mr. Tankha for the CBI, Mr. Ram Jethmalani, senior advocate for Amitbhai Shah, Mr. Huzefa Ahmadi, for the writ petitioner Rubabbuddin Sheikh and Mr. Gopal Subramanium, learned *Amicus Curiae,* we are not inclined to cancel the bail granted to Amitbhai Shah about two years ago. Had it been an application for grant of bail to Amitbhai Shah, it is hard to say what view the Court might have taken but the considerations for cancellation of bail granted by the High Court are materially different and in this case we feel reluctant to deprive Amitbhai Shah of the privilege granted to him by the High Court.

30. However, the apprehension expressed by the CBI that Amitbhai Shah may misuse the freedom and try to subvert the prosecution cannot be lightly brushed aside. We, accordingly, direct that Amitbhai Shah (respondent No.1 in criminal appeal)



shall give an undertaking in writing to the trial court that he would not commit any breach of the conditions of the bail bond and would not try to influence any witnesses or tamper with the prosecution evidence in any manner. We further direct that Amitbhai Shah will report to the CBI office every alternate Saturday at 11.00 AM. It is further made clear that the grant of bail to Amitbhai Shah in the Sohrabuddin case shall have no effect in the Prajapati case and in that case whether Amitbhai Shah is to be kept in judicial custody or granted bail would be decided by the court on the basis of the materials on record of that case and without taking into consideration the grant of bail to him in the Sohrabuddin case.

31. The grant of bail to Amitbhai Shah in Sohrabuddin case shall be no consideration for grant of bail to the other accused in that case and the prayer for bail by the other accused in the Sohrabuddin case shall be considered on its own merits.

32. In case Amitbhai Shah commits any breach of the conditions of the bail bond or the undertaking given to the court, as directed above, it will be open to the CBI to move the trial court for cancellation of his bail. In that case, if the allegations pertain to the period posterior to this order, the trial court shall examine the matter carefully and take an independent decision without being influenced by this order declining to cancel the bail granted to him.

33. Coming now to the question of transferring the case outside Gujarat, the manner in which the Sohrabuddin case has proceeded before this Court in itself, without anything else, makes out a strong case for transferring the trial of the case outside the State. It is also noted above that Mr. Jethmalani made the declaration that his client is prepared to face the trial at any place and wherever the trial is held he would expose the falsity of the CBI case. However, the State and a number of other accused were strongly opposed to the transfer of the case outside the State for trial. On behalf of CBI, on the other hand,

it was contended that there was hardly any hope of any fair trial of the case in that State.

34. At this stage, we may note an episode in the proceedings before the magistrate that is cited by the CBI as one of the grounds in support of its prayer for the transfer of the case outside the State. On July 26, 2010, one of the accused N.K. Amin filed a petition before the ACJM under section 306 of the Code of Criminal Procedure for grant of pardon and for being considered as an approver. In the application he stated that he desired to give statement/ evidence about the facts within his knowledge concerning the offence for which he was being prosecuted and further that he was ready and willing to give his statement under section 164(2) [sic (5)] so as to become an approver in the case. The magistrate did not pass any order on that application but strangely gave its notice to other accused in the case. The other accused took time to file their responses until the magistrate referred the matter to the High Court under section 395 of the Code of Criminal Procedure after almost five weeks of the filing of the petition. The reference was eventually dismissed by the High Court as incompetent. In the meanwhile, on August 21, 2010, Smt. Jayshree Amin, the wife of N.K. Amin filed a complaint to the CBI alleging threats to her husband's life in Sabarmati jail. The CBI duly forwarded the letter received from Smt. Jayshree Amin to the ACJM but no action was taken on that letter. N.K. Amin finally filed a petition on January 18, 2011 requesting the ACJM not to pass any order on his application under section 306(Exh.8) and section 164(5) (Ex.49). In this petition, he made the complaint that on his application under section 306 the court did not pass any order but delayed the matter by giving the other accused time for filing their objection. As a result there was grave threat to his life in the jail. In any event, after he received a copy of the charge-sheet filed by the CBI and found that in that charge-sheet three other policemen (namely, Ajay Parmar, Santaram Chandrabhan Sharma and Vijay Arjunbhai Rathod) were not arrayed as accused, he had,



for the time being, decided not to make any statement before the court keeping his options open after the case is committed to the court of sessions.

35. On behalf of the CBI, it is submitted that on receiving the application from N.K. Amin the learned magistrate adopted a procedure unknown to law but that gave sufficient time to the other accused to win back N.K. Amin over to their side by giving him intimidations and/or inducements.

36. In the counter affidavit filed on behalf of the State and N.K. Amin a number of accusations are made against the CBI on this issue. It is evident that since filing the application for being made an approver in the case, N. K. Amin has changed his mind (to which he is fully entitled). But the fact of the matter is that both the petitions dated July 26, 2010 and January 18, 2011 filed by him before the ACJM and the orders passed by the learned magistrate on those petitions are part of the judicial record and cannot be simply denied away.

37. Besides the above there are other instances as would appear from the proceedings in the Sohrabuddin case when this Court had reasons not to feel entirely happy at the way the courts below dealt with the matter.

38. On hearing Mr. Tankha, appearing for the CBI, Mr. Ahmadi representing the writ petitioner, Mr. Tushar Mehta appearing on behalf of the State of Gujarat, and the counsel appearing for the different accused and Mr. Subramanium, the learned *amicus*, and on a careful consideration of all the material facts and circumstances as also having regard to the past experience in the Sohrabuddin matter, we are convinced that in order to preserve the integrity of the trial it is necessary to shift it outside the State.

39. The decision to transfer the case is not a reflection on the State judiciary and it is made clear that this Court reposes full trust in the judiciary of the State. As a matter of fact, the

decision to transfer the case outside the State is intended to save the trial court in the State from undue stress and to avoid any possible misgivings in the minds of the ordinary people about the case getting a fair trial in the State.

40. In *Nahar Singh Yadav and another v. Union of India and others*[3], this Court on a consideration of the earlier decisions laid down certain conditions which may require a case to be transferred outside the State. In paragraph 29 of the decision it observed as follows-

> "Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 CrPC should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:
>
> (i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;
>
> (ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;
>
> (iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the

3. (2011) 1 SCC 307,



> State exchequer in making payment of traveling and other expenses of the official and non-official witnesses;
>
> (iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and
>
> (v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

We find that the conditions at serial numbers (1), (2), (3) and (5) are squarely attracted in this case.

41. In another decision in *Ravindra Pal Singh v. Santosh Kumar Jaiswal and others*[4], this Court directed for transfer of the case outside State because some of the accused in a case of fake encounter were policemen. The case in hand has far more stronger reasons for being transferred outside the State. We, accordingly, direct for the transfer of Special Case No.05/2010 pending in the court of Additional Chief Metropolitan Magistrate, CBI, Court Room No.2, Mirzapur, Ahmedabad titled *CBI* versus *D.G. Vanzara & Others*[4] to the court of CBI, Bombay. The Registrar General of the Gujarat High Court is directed to collect the entire record of the case from the court of Additional Chief Metropolitan Magistrate, CBI, Room No.2, Mirzapur, Ahmedabad and to transmit it to the Registry of the Bombay High Court from where it would be sent to a CBI court as may be decided by the Administrative Committee of the High Court. The Administrative Committee would assign the case to a court where the trial may be concluded judiciously, in accordance with law, and without any delay. The Administrative Committee would also ensure that the trial should be conducted from beginning to end by the same officer.

4. (2011) 4 SCC 746.

42. On behalf of the CBI, it was stated that they need six weeks' further time to complete the investigation. They are directed to positively complete the investigation within six weeks and submit the final charge-sheet before the transferee court in Mumbai.

43. The Sohrabuddin case stands transferred to Mumbai by this order. It is the case of the CBI that the case of Sohrabuddin and the case of Tulsiram Prajapati are closely connected and in order to avoid any miscarriage of justice, both the cases can only be tried before the same court. It will, therefore, be open to the CBI to make an application for transfer of the Tulsiram Prajapati case also to the same court where the Sohrabuddin case is transferred. In case, such an application is filed, the court will pass appropriate orders, in accordance with law, after hearing all concerned.

44. In the result, the appeal is dismissed but the transfer petition is allowed.

B.B.B. Appeal dismissed Transfer Petition allowed.



AJAY KUMAR PARMAR

*v.*

STATE OF RAJASTHAN

(Criminal Appeal No. 1496 of 2012)

SEPTEMBER 27, 2012

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

*Code of Criminal Procedure, 1973 – ss. 207 to 209 and s. 164 – Power of Magistrate – FIR alleging commission of rape – Thereafter prosecutrix approaching the Chief Judicial Magistrate (CJM) on her own seeking to record her statement u/s. 164 Cr.P.C – As per order of CJM, Judicial Magistrate recording her statement u/s. 164 – The prosecutrix in her statement u/s. 164 exonerating the accused of the allegations – Police filing charge-sheet – The Judicial Magistrate, in view of the statement of the prosecutrix u/s. 164, discharging the accused – The order of Magistrate set aside by Revisional Court as well as High Court – On appeal, held: Order of Magistrate rightly set aside – The statement u/s. 164 was not recorded correctly as the prosecutrix was not produced before the Magistrate by police and that her statement was recorded without identifying her – The order of discharge was a nullity without jurisdiction as the matter was cognizable by the Sessions Court – Magistrate had no jurisdiction to probe into the matter – He was bound under law to commit the case to the Sessions Court – It was also not permissible to examine weight of the evidence at that stage – The signature of the prosecutrix on the papers before CJM and Judicial Magistrate also did not tally with signatures on FIR and Medical Report which creates suspicion.*

*Evidence Act, 1872 – s. 73 – Comparison of signature/ writing by the court – Held: There is no legal bar to prevent the court from such comparison – But the court as a matter*

*of prudence and caution should be slow to base its findings solely upon the comparison made by it – The court can apply its observation on the expert opinion or that of any other witness.*

**FIR was lodged against the appellant-accused alleging rape. Prosecutrix, thereafter appeared before Chief Judicial Magistrate and lodged a complaint stating that the police was not investigating the case properly and filed an application that her statement be recorded u/s. 164 Cr.P.C. The application was allowed. Consequently, the Judicial Magistrate recorded the statement of the prosecutrix u/s. 164 Cr.P.C. to the effect that the FIR lodged by her was false; that her statement u/s. 161 Cr.P.C. was also false and that no offence was ever committed by the appellant-accused.**

**After conclusion of the investigation, police filed charge-sheet against the appellant. The Judicial Magistrate, taking note of the statement u/s. 164 Cr.P.C., passed an order of not taking cognizance of offences u/ss. 376 and 342 IPC and discharged the appellant-accused.**

**State filed revision and the same was allowed by Sessions Court reversing the order of the Magistrate. The order of Sessions Court was affirmed by High Court. Hence the present appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The revisional court as well as the High Court have rightly held that the statement under Section 164 Cr.P.C. had not been recorded correctly. The said courts have rightly set aside the order of the Judicial Magistrate, not taking the cognizance of the offence. A statement u/s. 164(5) Cr.P.C. can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. In case**



**such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. [Paras 5] [982-B-D]**

*Jogendra Nahak and Ors. v. State of Orissa and Ors.* **AIR 1999 SC2565: 1999 (1) Suppl. SCR 39 – relied on.**

**1.2. The Chief Judicial Magistrate, who entertained the application and further directed the Judicial Magistrate, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else. The application filed before the Chief Judicial Magistrate, has been signed by the prosecutrix, as well as by her counsel. However, there has been no identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, proceeded to deal with the application without identification of the prosecutrix and has no where mentioned that he knew the prosecutrix personally. The Judicial Magistrate, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, or before the Judicial Magistrate, alongwith her parents or any other person related to her. In such circumstances, the statement so recorded, loses its significance and legal sanctity. The fact-situation reveals that the court proceeded with utmost haste and any action taken so hurridly, can be labelled as arbitrary. [Paras 7, 16 and 17] [982-G-H; 986-G-H; 987-A-B, D-E]**

*Mahabir Singh v. State of Haryana* **AIR 2001 SC 250: 2001 (1) Suppl. SCR 37 – relied on.**

**2.1. When an offence is cognizable by the Sessions court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the Penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else. Thus, the Magistrate had no business to discharge the appellant. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction. [Paras 9 and 10] [983-G-H; 984-A-D]**

*Sanjay Gandhi v. Union of India* **AIR 1978 SC 514: 1978 (2) SCR 861 – relied on.**

**2.2. It was not permissible for the Judicial Magistrate, to take into consideration the evidence in defence produced by the appellant at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency alongwith the charge-sheet. Any document which the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Cr.P.C. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such**



**material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. [Para 11] [984-D-H]**

*State of Orissa v. Debendra Nath Padhi* **AIR 2003 SC 1512;** *State ofOrissa v. Debendra Nath Padhi* **AIR 2005 SC 359: 2004 (6) Suppl.SCR 460;** *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* **AIR 2005 SC 3512: 2005 (3) Suppl. SCR 371;** *Bharat Parikh v. C.B.I. and Anr.* **(2008) 10 SCC 109: 2008 (10) SCR 950;** *Rukmini Narvekar v. Vijaya Satardekar and Ors.* **AIR 2009 SC 1013: 2008 (14) SCR 271 – relied on.**

**2.3. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where *prima facie* case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings. At the stage of application of Section 227, the court has to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. [Para 12] [985-B-D]**

*P. Vijayan v. State of Kerala and Anr.* **AIR 2010 SC 663: 2010(2) SCR 78 ;** *R.S. Mishra v. State of Orissa and Ors.* **AIR 2011 SC 1103 2011 (2) SCR 338 – relied on.**

**2.4. The scheme of Cr.P.C. particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions make it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory. [Para 13] [985-D-E]**

**2.5. Where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to informant and grant of being heard in the matter, becomes mandatory. In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law. [Para 15] [986-E-F]**

*Minu Kumari and Anr. v. State of Bihar and Ors.* **AIR 2006 SC 1937: 2006 (3) SCR 1086;** *Bhagwant Singh v. Commissioner of Police andAnr.* **AIR 1985 SC 1285: 1985 (3) SCR 942 – distinguished.**

**3.1. In comparision of signatures of the prosecutrix on FIR and on Medical Report with the signatures appearing upon the application filed before the Chief Judicial Magistrate, for recording her statement under Section 164 Cr.P.C., as also with, the signature on the statement alleged to have been made by her under Section 164 Cr.P.C., and after examining the same, *prima facie* it appears that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them. [Para 18] [987-E-G]**

**3.2. From the signatures on the FIR and Medical Report, it appears that she is not an educated person and can hardly form her own signatures. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached the court and how she knew that her statement could be recorded by the Magistrate. [Para 24] [990-G-H; 991-A]**

**3.3. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 i.e. Sections 45, 47 and 73. Section 73 of the**



**Evidence Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision. [Paras 19 and 23] [987-H; 988-A; 989-F-H; 990-A-B]**

*Ram Chandra and Anr. v. State of Uttar Pradesh* **AIR 1957 SC 381;** *Ishwari Prasad Misra v. Mohammad Isa* **AIR 1963 SC 1728: 1963 SCR 722;***Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee* **AIR 1964 SC 529;** *Fakhruddin v. The State of Madhya Pradesh* **AIR 1967 SC 1326;** *State of Maharashtra v. Sukhdeo Singh and Anr.* **AIR 1992 SC 2100: 1992 (3) SCR 480 ;** *Murari Lal v. State of Madhya Pradesh* **AIR 1981 SC 363;** *Neelalohithadasan Nadar v. George Mascrene and Ors.* **1994 Supp. (2) SCC**

**619;** *O. Bharathan v. K. Sudhakaran and Anr.* **AIR 1996 SC 1140;** *Lalit Popli v. Canara Bank and Ors.* **AIR 2003 SC 1795;** *Jagjit Singh v. State of Haryana and Ors.* **(2006) 11 SCC 1: 2006 (10) Suppl. SCR 521 ;** *Thiruvengada Pillai v. Navaneethammal* **AIR 2008 SC 1541: 2008 (3) SCR 23;** *G. Someshwar Rao v. Samineni Nageshwar Rao and Anr.* **(2009) 14 SCC 677: 2009 (11) SCR 676 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1999 (1) Suppl. SCR 39** | **Relied on** | **Para 5** |
| **2001 (1) Suppl. SCR 37** | **Relied on** | **Para 6** |
| **1978 (2) SCR 861** | **Relied on** | **Para 8** |
| **AIR 2003 SC 1512** | **Relied on** | **Para 11** |
| **2004 (6) Suppl. SCR 460** | **Relied on** | **Para 11** |
| **2005 (3) Suppl. SCR 371** | **Relied on** | **Para 11** |
| **2008 (10) SCR 950** | **Relied on** | **Para 11** |
| **2008 (14) SCR 271** | **Relied on** | **Para 11** |
| **2010 (2) SCR 78** | **Relied on** | **Para 12** |
| **2011 (2) SCR 338** | **Relied on** | **Para 12** |
| **2006 (3) SCR 1086** | **Distinguished** | **Para 15** |
| **1985 (3) SCR 942** | **Distinguished** | **Para 15** |
| **AIR 1957 SC 381** | **Relied on** | **Para 19** |
| **1963 SCR 722** | **Relied on** | **Para 19** |
| **AIR 1964 SC 529** | **Relied on** | **Para 19** |
| **AIR 1967 SC 1326** | **Relied on** | **Para 19** |
| **1992 (3) SCR 480** | **Relied on** | **Para 19** |
| **AIR 1981 SC 363** | **Relied on** | **Para 20** |



| | | |
|---|---|---|
| **1994 Supp. (2) SCC 619** | **Relied on** | **Para 21** |
| **AIR 1996 SC 1140** | **Relied on** | **Para 22** |
| **AIR 2003 SC 1795** | **Relied on** | **Para 22** |
| **2006 (10) Suppl. SCR 521** | **Relied on** | **Para 22** |
| **2008 (3) SCR 23** | **Relied on** | **Para 22** |
| **2009 (11) SCR 676** | **Relied on** | **Para 22** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1496 of 2012.

From the Judgment & Order dtaed 9.1.2012 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 458 of 1998.

Aishwarya Bhati, Jyoti Upadhyay for the Appellant.

Irshad Ahmad 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 9.1.2012 passed by the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 458 of 1998, by way of which, the High Court has upheld the judgment and order dated 25.7.1998, passed by the Sessions Judge in Revision Petition No. 5 of 1998. By way of the said revisional order, the court had reversed the order of discharge of the appellant for the offences under Sections 376 and 342 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') dated 25.3.1998, passed by the Judicial Magistrate, Sheoganj.

2. The facts and circumstances giving rise to this appeal are as follows:

A. An FIR was lodged by one Pushpa on 22.3.1997,

against the appellant stating that the appellant had raped her on 10.3.1997. In view thereof, an investigation ensued and the appellant was medically examined. The prosecutrix's clothes were then also recovered and were sent for the preparation of FSL report. The prosecutrix was medically examined on 22.3.1997, wherein it was opined by the doctor that she was habitual to sexual intercourse, however, a final opinion regarding fresh intercourse would be given only after receipt of report from the Chemical Examiner.

B. The statement of the prosecutrix was recorded under Section 161 of Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C.'), by the Dy.S.P., wherein she narrated the incident as mentioned in the FIR, stating that she had been employed as a servant at the residence of one sister Durgi for the past six years. Close to the residence of sister Durgi, Dr. D.R. Parmar and his son Ajay Parmar were also residing. On the day of the said incident, Ajay Parmar called Pushpa, the prosecutrix home on the pretext that there was a telephone call for her. When she reached the residence of Ajay Parmar, she was raped by him and was restrained from going out for a long period of time and kept indoors without provision of any food or water. However, the next evening, she was pushed out surreptitiously from the back exit of the said house. She then tried to commit suicide but was saved by Prakash Sen and Vikram Sen and then, eventually, after a lapse of about 10 days, the complaint in question was handed over to the SP, Sirohi. Subsequently, she herself appeared before the Chief Judicial Magistrate, Sirohi on 9.4.1997, and moved an application before him stating that, although she had lodged an FIR under Section 376/342 IPC, the police was not investigating the case in a correct manner and, therefore, she wished to make her statement under Section 164 Cr.P.C.

C. The Chief Judicial Magistrate, Sirohi, entertained the said application and disposed it of on the same day, i.e.



9.4.1997 by directing the Judicial Magistrate, Sheoganj, to record her statement under Section 164 Cr.P.C.

D. In pursuance thereof, the prosecutrix appeared before the Judicial Magistrate, Sheoganj, which is at a far distance from Sirohi, on 9.4.1997 itself and handed over all the requisite papers to the Magistrate. After examining the order passed by the Chief Judicial Magiastrate, Sirohi, the Judicial Magistrate, Sheoganj, directed the public prosecutor to produce the Case Diary of the case at 4.00 P.M. on the same day.

E. As the public prosecutor could not produce the Case Diary at 4.00 P.M, the Judicial Magistrate, Sheoganj, directed the Public prosecutor to produce the Case Diary on 10.4.1997 at 10.00 A.M. The Case Diary was then produced before the said court on 10.4.1997 by the Public prosecutor. The Statement of the prosecutrix under Section 164 Cr.P.C., was recorded after being identified by the lawyer, to the effect that the said FIR lodged by her was false; in addition to which, the statement made by her under Section 161 Cr.P.C., before the Deputy Superintendent of Police was also false; and finally that no offence whatsoever was ever committed by the appellant, so far as the prosecutrix was concerned.

F. After the conclusion of the investigation, charge sheet was filed against the appellant. On 25.3.1998, the Judicial Magistrate, Sheoganj, taking note of the statement given by the prosecrutix under Section 164 Cr.P.C., passed an order of not taking cognizance of the offences under Sections 376 and 342 IPC and not only acquitted the appellant but also passed strictures against the investigating agency.

G. Aggrieved, the public prosecutor filed a revision before the Learned Sessions Judge, Sirohi, wherein, the aforesaid order dated 25.3.1998 was reversed by order dated 25.7.1998 on two grounds, firstly, that a case under Sections 376 and 342 IPC was triable by the Sessions Court and the Magistrate, therefore, had no jurisdiction to discharge/acquit the appellant

on any ground whatsoever, as he was bound to commit the case to the Sessions Court, which was the only competent court to deal with the issue. Secondly, the alleged statement of the prosecutrix under Section 164 Cr.P.C. was not worth reliance as she had not been produced before the Magistrate by the police.

H. Being aggrieved by the aforesaid order of the Sessions Court dated 25.7.1998, the appellant moved the High Court and the High Court vide its impugned judgment and order, affirmed the order of the Sessions Court on both counts.

Hence, this appeal.

3. Ms. Aishwarya Bhati, learned counsel appearing on behalf of the appellant, has submitted that in view of the statement of the prosecutrix as recorded under Section 164 Cr.P.C., the Judicial Magistrate, Sheoganj, has rightly refused to take cognizance of the offence and has acquitted the appellant stating that no fault can be found with the said order, and therefore it is stated that both, the Revisional Court, as well as the High Court committed a serious error in reversing the same.

4. On the contrary, Shri Ajay Veer Singh Jain, learned counsel appearing for the State, has opposed the appeal, contending that the Magistrate ought not to have refused to take cognizance of the said offences and has committed a grave error in acquitting the appellant, after taking note of the statement of the prosecutrix which was recorded under Section 164 Cr.P.C. The said statement was recorded in great haste. It is further submitted that, as the prosecutrix had appeared before the Magistrate independently, without any assistance of the police, her statement recorded under Section 164 Cr.P.C. is not worth acceptance. Thus, no interference is called for. The appeal is liable to be dismissed.

5. We have considered the rival submissions made by the



learned counsel for the parties and perused the records.

A three Judge bench of this Court in *Jogendra Nahak & Ors. v. State of Orissa & Ors.,* AIR 1999 SC 2565, held that Sub-Section 5 of Section 164, deals with the statement of a person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. Such statements would be very helpful to the accused to get bail and discharge orders.

6. The said judgment was distinguished by this Court in *Mahabir Singh v. State of Haryana,* AIR 2001 SC 2503, on facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 Cr.P.C. by the Magistrate, without knowing him personally or without any attempt of identification of the said person, by any other person.

7. In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three Judge bench in *Jogendra Nahak & Ors.* (Supra), which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 Cr.P.C. The Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else.

8. In *Sanjay Gandhi v. Union of India,* AIR 1978 SC 514, this court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held :

> "….it is not open to the committal Court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. *The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code.* Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in re-moulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, …..*the Magistrate has simply to commit for trial before the Court of Session.* If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused."
>
> (Emphasis added)

9. Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the



evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the Penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

10. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old Cr.P.C., empowered the Magistrate to exercise such a power. However, in the Cr.P.C. 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

11. More so, it was not permissible for the Judicial Magistrate, Sheoganj, to take into consideration the evidence in defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency alongwith the charge-sheet. Any document which the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. (Vide: *State of Orissa v. Debendra Nath Padhi,* AIR 2003 SC 1512; *State of Orissa v. Debendra Nath Padhi,* AIR 2005 SC

359; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.,* AIR 2005 SC 3512; *Bharat Parikh v. C.B.I. & Anr.,* (2008) 10 SCC 109; and *Rukmini Narvekar v. Vijaya Satardekar & Ors.,* AIR 2009 SC 1013)

12. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings. At the stage of application of Section 227, the court has to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. (Vide: *P. Vijayan v. State of Kerala & Anr.,* AIR 2010 SC 663; and *R.S. Mishra v. State of Orissa & Ors.,* AIR 2011 SC 1103).

13. The scheme of the Code, particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions make it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory.

The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court.

14. The Magistrate, in exercise of its power under Section 190 Cr.P.C., can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 Cr.P.C., if



any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case.

15. We find no force in the submission advanced by the learned counsel for the appellant that the Judicial Magistrate, Sheoganj, has proceeded strictly in accordance with law laid down by this Court in various judgments wherein it has categorically been held that a Magistrate has a power to drop the proceedings even in the cases exclusively triable by the Sessions Court when the charge-sheet is filed by the police. She has placed very heavy reliance upon the judgment of this Court in *Minu Kumari & Anr. v. State of Bihar & Ors.,* AIR 2006 SC 1937 wherein this Court placed reliance upon its earlier judgment in *Bhagwant Singh v. Commissioner of Police & Anr.,* AIR 1985 SC 1285 and held that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to informant and grant of being heard in the matter, becomes mandatory.

In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law.

16. The application filed before the Chief Judicial Magistrate, Sirohi, has been signed by the prosecutrix, as well as by her counsel. However, there has been no identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, Sirohi, proceeded to deal with the application without identification of the prosecutrix and

has no where mentioned that he knew the prosecutrix personally. The Judicial Magistrate, Sheoganj, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, Sirohi or before the Judicial Magistrate, Sheoganj, alongwith her parents or any other person related to her. In such circumstances, the statement so recorded, loses its significance and legal sanctity.

17. The record of the case reveals that the Chief Judicial Magistrate, Sirohi, passed an order on 9.4.1994. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a place far away from Sirohi, on the same date with papers/ order etc. and the said Judicial Magistrate directed the public prosecutor to produce the Case Diary on the same date at 4.00 P.M. The case Diary could not be produced on the said day. Thus, direction was issued to produce the same in the morning of the next day. The statement was recorded on 10.4.1997. The fact-situation reveals that the court proceeded with utmost haste and any action taken so hurridly, can be labelled as arbitrary.

18. The original record reveals that the prosecutrix had lodged the FIR herself and the same bears her signature. She was medically examined the next day, and the medical report also bears her signature. We have compared the aforementioned signatures with the signatures appearing upon the application filed before the Chief Judicial Magistrate, Sirohi, for recording her statement under Section 164 Cr.P.C., as also with, the signature on the statement alleged to have been made by her under Section 164 Cr.P.C., and after examining the same, *prima facie* we are of the view that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them.

19. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') i.e. Sections 45, 47 and 73.



Section 73 of the said Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. (Vide: *Ram Chandra & Anr. v. State of Uttar Pradesh,* AIR 1957 SC 381; *Ishwari Prasad Misra v. Mohammad Isa,* AIR 1963 SC 1728; *Shashi Kumar Banerjee & Ors. v. Subodh Kumar Banerjee,* AIR 1964 SC 529; *Fakhruddin v. The State of Madhya Pradesh,* AIR 1967 SC 1326; and *State of Maharashtra v. Sukhdeo Singh & Anr.,* AIR 1992 SC 2100).

20. In *Murari Lal v. State of Madhya Pradesh,* AIR 1981 SC 363, this Court, while dealing with the said issue, held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative text-book and the courts own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.

21. In *A. Neelalohithadasan Nadar v. George Mascrene & Ors.,* 1994 Supp. (2) SCC 619, this Court considered a case involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counter foil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the Court takes upon itself the task of comparing signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in *State (Delhi Administration) v. Pali Ram,* AIR 1979 SC 14; and *Ram Pyarelal Shrivastava v. State of Bihar,* AIR 1980 SC 1523.

22. In *O. Bharathan v. K. Sudhakaran & Anr.,* AIR 1996 SC 1140, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the Court will exercise its power for comparing the signatures and where

it will refer the matter to an expert. The observations of the Court are as follows:

> "The learned Judge in our view was not right.....taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by the Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to the ultimately rendered."

(See also: *Lalit Popli v. Canara Bank & Ors.,* AIR 2003 SC 1795; *Jagjit Singh v. State of Haryana & Ors.,* (2006) 11 SCC 1; *Thiruvengada Pillai v. Navaneethammal,* AIR 2008 SC 1541; and *G. Someshwar Rao v. Samineni Nageshwar Rao & Anr.,* (2009) 14 SCC 677).

23. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court



may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

24. The aforesaid discussion leads to the following inferences:

I. In respect of an incident of rape, an FIR was lodged. The Dy.S.P. recorded the statement of the prosecutrix, wherein she narrated the facts alleging rape against the appellant.

II. The prosecutrix, appeared before the Chief Judicial Magistrate, Sirohi, on 9.4.1997 and lodged a complaint, stating that the police was not investigating the case properly. She filed an application that her statement be recorded under Section 164 Cr.P.C.

III. The prosecutrix had signed the said application. It was also signed by her lawyer. However, she was not identified by any one.

IV. There is nothing on record to show with whom she had appeared before the Court.

V. From the signatures on the FIR and Medical Report, it appears that she is not an educated person and can hardly form her own signatures.

VI. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached

the court and how she knew that her statement could be recorded by the Magistrate.

VII. More so, she appeared before the Chief Judicial Magistrate, Sirohi, and not before the area Magistrate at Sheoganj.

VIII. The Chief Judicial Magistrate on the same day disposed of the application, directing the Judicial Magistrate, Sheoganj, to record her statement.

IX. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a far distance from Sirohi, where she originally went, on 9.4.1997 itself, and her statement under Section 164 Cr.P.C. was recorded on 10.4.1997 as on 9.4.1997, since the public prosecutor could not produce the Case Diary.

X. Signature of the prosecutrix on the papers before the Chief Judicial Magistrate, Sirohi and Judicial Magistrate, Sheoganj, do not tally with the signatures on the FIR and Medical Report. There is apparent dissimilarity between the same, which creates suspicion.

XI. After completing the investigation, charge-sheet was filed before the Judicial Magistrate, Sheoganj, on 20.3.1998.

XII. The Judicial Magistrate, Sheoganj, vide order dated 25.3.1998, refused to take cognizance of the offences on the basis of the statement of the prosecutrix, recorded under Section 164 Cr.P.C. The said court erred in not taking cognizance on this count as the said statement could not be relied upon.

XIII. The revisional court as well as the High Court have



rightly held that the statement under Section 164 Cr.P.C. had not been recorded correctly. The said courts have rightly set aside the order of the Judicial Magistrate, Sheoganj, dated 25.3.1998, not taking the cognizance of the offence.

XIV. There is no provision analogous to Section 207-A of the old Cr.P.C. The Judicial Magistrate, Sheoganj, should have committed the case to the Sessions court as the said application could be entertained only by the Sessions Court. More so, it was not permissible for the court to examine the weight of defence evidence at that stage. Thus, the order is insignificant and inconsequential being without jurisdiction.

25. In view of the above, we do not find any force in the appeal. It is, accordingly, dismissed. The judgment and order of the revisional court, as well as of the High Court is upheld. The original record reveals that in pursuance of the High Court's order, the case has been committed by the Judicial Magistrate, Sheoganj, to the Court of Sessions on 23.4.2012. The Sessions Court is requested to proceed strictly in accordance with law, expeditiously and take the case to its logical conclusion without any further delay. We make it clear that none of the observations made herein will adversely affect either of the parties, as the same have been made only to decide the present case.

K.K.T. Appeal dismissed.

MANUBHAI RATILAL PATEL TR. USHABEN
*v.*
STATE OF GUJARAT & ORS.
(Criminal Appeal No. 1572 of 2012)

SEPTEMBER 28, 2012

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

*CONSTITUTION OF INDIA, 1950:*

*Art.226 - Petition for writ of habeas corpus challenging the order of remand -Held: A writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal - The effect of order of High Court regarding stay of investigation could only have bearing on the action of investigating agency - Investigation is neither an inquiry nor a trial - It is within the exclusive domain of police to investigate and is independent of any control by the Magistrate - The sphere of activity is clear cut and well demarcated - Thus viewed, there is no error in the order passed by High Court refusing to grant a writ of habeas corpus as the detention by virtue of judicial order passed by the Magistrate remanding the accused to custody is valid in law.*

*CODE OF CRIMINAL PROCEDURE, 1973:*

*s.2(h) - 'Investigation' - Explained.*

**An FIR for offences punishable u/s 467, 468, 471, 409 and 114 IPC was registered against the appellant on 20.6.2012. He filed a petition u/s 482 Cr.P.C. in the High Court for quashing of the FIR. Meanwhile, the appellant was arrested on 16.7.2012. On 17.7.2012, the Magistrate**





**remanded him to police custody. On 17.7.2012, the High Court stayed the further proceedings in respect of the investigation. On 19.7.2012, the appellant filed an application for bail u/s 439 Cr.P.C. which was declined by the Magistrate. The Sessions Judge rejected the prayer for grant of interim bail and fixed the bail application for hearing. The appellant then filed a habeas corpus petition before the High Court contending that since the investigation was stayed by the High Court in exercise of power u/s 482 Cr.P.C., the Magistrate could not have exercised the powers u/s 167(2) Cr.P.C. remanding him either to police or judicial custody, and as such, his detention was illegal and non est in law. The High Court dismissed the writ petition.**

**In the instant appeal filed by the accused, it was contended that once there was stay of the investigation, the detention was unsustainable.**

**Dismissing the appeal, the Court**

**HELD: 1.1 The principle laid down in Kanu Sanyal*, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits. [Para 21] [1007-E-F]**

**Kanu Sanyal v. Dist. Magistrate, Darjeeling and others* **1974 (3) SCR 279=AIR 1974 SC 510;** *Naranjan Singh v. State of Punjab* **1952 SCR 395 =AIR 1952 SC 106;** *Col. Dr. B. Ramachandra Rao v. The State of Orissa and others* **AIR 1971 SC 2197;** *Talib Hussain v. State of Jammu and Kashmir* **AIR 1971 SC 62 and** *Sanjay Dutt v. State through C.B.I., Bombay* **(II) 1994 (3) Suppl. SCR 263 = (1994) 5 SCC 410 - referred to.**

**1.2 Keeping in view the concepts with regard to the writ of habeas corpus, especially pertaining to an order**

**passed by the Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code of Criminal Procedure, 1973 relating to remand. There are two provisions in the Code which provide for remand, i.e., ss. 167 and 309. The Magistrate has the authority u/s 167(2) to direct for detention of the accused in such custody, i.e., police or judicial, if he thinks that further detention is necessary. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner. The exercise of jurisdiction clearly shows that the act of directing remand of an accused is fundamentally a judicial function, and while doing so the Magistrate does not act in executive capacity. [Para 23-25] [1008-A-C-F; 1009-B]**

*Ranjit Singh v. The State of Pepsu (now Punjab)* **1959 Suppl. SCR 727 = AIR 1959 SC 843;** *Kanu Sanyal v. District Magistrate, Darjeeling and others* **1974 (1) SCR 621= AIR 1973 SC 2684;** *Ummu Sabeena v. State of Kerala and others* **2011 (13) SCR 185 = (2011) 10 SCC 781;** *Re. Madhu Limaye and others* **1969 (3) SCR 154 = AIR 1969 SC 1014;** *Ram Narayan Singh v. State of Delhi* **1953 SCR 652 = AIR 1953 SC 277;** *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni* **1992 (3) SCR 158 = AIR 1992 SC 1768 - referred to.**

*Secretary of State for Home Affairs v. O'Brien* **(1923) AC 603 (609) and** *Greene v. Secretary of States for Home Affairs* **1942 AC 284 - referred to.**

*P. Ramanatha Aiyar's Law Lexicon* **(1997 edition) and** *Halsbury's Laws of England,* **4th Edn. Vol. 11, para 1454 - referred to.**

**1.3 The term "investigation" as defined in s.2(h) of the Code, includes all the proceedings under the Code for the collection of evidence conducted by a police**



**officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. [Para 26] [1009-C-D]**

*H.N. Rishbud and another v. State of Delhi* **1955 SCR 1150 = AIR 1955 SC 196;** *Adri Dharan Das v. State of West Bengal* **2005 (2) SCR 188 = AIR 2005 SC 1057;** *Niranjan Singh v. State of Uttar Pradesh* **1956 SCR 734 = AIR 1957 SC 142;** *S.N. Sharma v. Bipen Kumar Tiwari* **1970 (3) SCR 946 = (1970) 1 SCC 653 and** *State of Bihar v. J.A.C. Saldanha and others* **1980 (2) SCR 16 = (1980) 1 SCC 554 - referred to.**

**1.4 In the instant case, the arrest had taken place a day prior to the passing of order of stay. It is also manifest that the order of remand was passed by the Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have bearing on the action of the investigating agency. The order of remand which is a judicial act, does not suffer from any infirmity. [Para 32] [1010-E-F]**

**1.5 It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, the order of remand cannot be regarded as untenable in law. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. [Para 32] [1011-A-B]**

**1.6 The court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has**

**been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, there is no error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law. [Para 32] [1011-C-E]**

**Case Law Reference:**

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|---|---|---|
| **(1923) AC 603 (609)** | **referred to** | **Para 13** |
| **1942 AC 284** | **referred to** | **Para 14** |
| **1959 Suppl. SCR 727** | **referred to** | **Para 14** |
| **1974 (1) SCR 621** | **referred to** | **Para 15** |
| **2011 (13) SCR 185** | **referred to** | **Para 16** |
| **AIR 1971 SC 2197** | **referred to** | **Para 18** |
| **1969 (3) SCR 154** | **referred to** | **Para 19** |
| **1953 SCR 652** | **referred to** | **Para 19** |
| **1952 SCR 395** | **referred to** | **Para 20** |
| **AIR 1971 SC 62** | **referred to** | **Para 20** |
| **1994 (3) Suppl. SCR 263** | **referred to** | **Para 22** |
| **1974 (3) SCR 279** | **referred to** | **Para 20** |
| **1992 (3) SCR 158** | **referred to** | **Para 25** |
| **1955 SCR 1150** | **referred to** | **Para 27** |
| **2005 (2) SCR 188** | **referred to** | **Para 28** |
| **1956 SCR 734** | **referred to** | **Para 9** |
| **1970 (3) SCR 946** | **referred to** | **Para 30** |
| **1980 (2) SCR 16** | **referred to** | **Para 31** |



CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1572 of 2012.

From the Judgment & Order dated 07.08.2012 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 2207 of 2012.

Sushil Kumar Jain, B.M. Mangukiya, Puneet Jain, Christi Jain, Pratibha Jain for the Appellant.

Hemantika Wahi, Jesal, Nandani Gupta for the Respondent.

The Judgment of the Court was delivered by

**DIPAK MISRA, J.** 1. Leave granted.

2. The appellant was an accused in FIR No. I-CR No. 56/12 registered at Pethapur Police Station on 20th of June, 2012 for offences punishable under Sections 467, 468, 471, 409 and 114 of the Indian Penal Code (for short 'the IPC'). Challenging the registration of the FIR and the investigation, the accused-appellant (hereinafter referred to as "the accused") preferred Criminal Miscellaneous Application No. 10303 of 2012 on 11.7.2012 under Section 482 of the Code of Criminal Procedure (for brevity "the Code") in the High Court of Gujarat at Ahmedabad for quashing of the FIR. A prayer was also made for stay of further proceedings in respect of the investigation of I-CR No. 56/12.

3. The unfurling of factual scenario further shows that the

matter was taken up on 17.7.2012 and the High Court issued notice and fixed the returnable date on 7.8.2012 and allowed the interim relief in terms of prayer No. (C) which pertained to stay of further proceedings in respect of the investigation.

4. The exposition of facts reveals that the accused was arrested on 16.7.2012 and produced before the learned Judicial Magistrate First Class, Gandhinagar at 4.00 p.m. on 17.7.2012. The police prayed for remand of the accused to police custody which was granted by the learned Magistrate upto 2.00 p.m. on 19.7.2012. On 18.7.2012, it was brought to the notice of the concerned investigation agency about the stay order passed by the High Court on 17.7.2012 and prayer was made not to proceed further with the investigation in obedience to the order passed by the High Court. It is pertinent to note that an application for regular bail under Section 439 of the Code was filed on 19.7.2012 before the learned Magistrate. Apart from other grounds, it was highlighted that when a petition was pending before the High Court for quashment of the First Information Report and a stay order had been passed pertaining to further investigation, the detention was illegal and hence, the accused was entitled to be admitted to bail.

5. The learned Magistrate dwelled upon the allegations made against the accused and declined to release him on bail regard being had to the nature of offences. Dealing with the order passed by the High Court, he observed that the order passed by the Hon'ble High Court pertained to stay of further investigation although no investigation was required to be carried out during judicial custody and, as the accused was involved in commission of grievous offences, it would not be just to enlarge him on bail.

6. Being aggrieved by the aforesaid order, the accused preferred Criminal Miscellaneous Application No. 539 of 2012 in the Court of learned Sessions Judge, Gandhinagar and also prayed for grant of interim bail. The learned Sessions Judge rejected the prayer for grant of interim bail and fixed the main



application for hearing on 24.7.2012.

7. Dissatisfied with the aforesaid orders, the accused preferred a habeas corpus petition before the High Court of Gujarat forming the subject matter of Special Criminal Application No. 2207 of 2012. It was contended before the High Court that since the investigation was stayed by the High Court in exercise of power under Section 482 of the Code, the learned Magistrate could not have exercised power under Section 167(2) of the Code remanding the accused either to police or judicial custody. It was submitted that the power of the Magistrate remanding the accused to custody during the course of investigation stood eclipsed by the order of stay passed by the High Court and, therefore, the detention was absolutely illegal and non est in law. It was also urged that as the detention of the accused was unlawful, a writ of habeas corpus would lie and he deserved to be set at liberty forthwith as long as the stay order was operative.

8. The aforesaid stand put forth by the learned counsel was combated by the State contending, inter alia, that it could not be said that there had been no investigation as arrest had already taken place and hence, stay of further investigation would not nullify the order of remand, be it a remand to police custody or judicial custody. Highlighting the said stance, it was propounded that the order of remand could not be treated as impermissible warranting interference by the High Court in exercise of jurisdiction of writ of habeas corpus.

9. The High Court adverted to the chronology of events and held thus: -

> "From the chronology of events as emerging from the petition as well as affidavit-in-reply, it is not in dispute that the arrest of the petitioner was effected on 16/07/2012. Whereas the quashing petition came to be filed on 17/07/2012 and the stay order was granted on 17/07/2012 at about 04.30 p.m. and the remand of the accused -

petitioner to police custody was granted on 17/07/2012 till 02.00 p.m. of 19/07/2012. It is also required to be noted that order passed by learned JMFC has not been challenged anywhere and has attained finality. Thereafter, the order passed by this Court in CRMA No. 10303 of 2012 has been served on the Police authority on 17/07/2012 at 09.30 p.m. On the next day i.e. on 18/07/2012, the Investigating Officer seems to have informed learned JMFC about the stay granted by the High Court and has attended High Court in connection with anticipatory bail application preferred by the petitioner. It is also not the case of the petitioner that after the service of order of stay, any other investigation has been carried by the Investigating Officer. On 19/07/2012 itself the applicant preferred an application for bail under Section 437 of the Code, which came to be rejected and the accused was remanded to judicial custody and as such the petitioner - accused is in judicial custody as on now. It is pertinent to note that the learned JMFC has rightly observed in his order upon bail application that the High Court has stayed further investigation only."

10. After so stating, the High Court dealt with the issue whether the custody of the accused could be said to be illegal. It was opined by the High Court that it was not possible to accept the stand that once the investigation was stayed, there could not have been exercise of jurisdiction under Section 167(2) of the Code, for stay of investigation would not eradicate the FIR or the investigation that had been already carried out pursuant to lodging of FIR. It was further opined that it was only an ad-interim order and if the stay order would eventually be vacated or the quashing petition would not be entertained, the investigation would be continued. The High Court further observed that solely because the investigation was stayed, it would not be apposite to say that there was no investigation and the order passed by the learned Magistrate was flawed.

11. Addressing to the issue of remand, the High Court opined that the order of remand of the accused to custody could not be said to be a part of the investigation and hence, the said order was not in conflict with the order passed under Section 482 of the Code of Criminal Procedure in Criminal Miscellaneous Application No. 10303 of 2012.

Reference was made to Section 2(h) of the Code which defines 'investigation' and it was ruled that the order passed by the learned Magistrate could not be termed as a part of the investigation. Eventually, the High Court opined that it could not be held that when the order was passed by the learned JMFC, there was no investigation and, therefore, there was no force in the argument that the learned JMFC could not have remanded the accused in such a situation in exercise of powers under Section 167 of the Code, and secondly, the act of the learned JMFC remanding the accused to custody is a judicial act which cannot be termed as part of the investigation and cannot be considered to have been covered under the stay granted by the High Court in CRMA No. 10303 of 2012. It was further held that illegal or unauthorised detention or confinement is a sine qua non for entertaining a petition for writ of habeas corpus and the custody of the petitioner being in pursuance of a judicial act, it could not be termed as illegal.

12. At this juncture, it is seemly to note that the appellant had knocked at the doors of the High Court in a habeas corpus petition. The writ of habeas corpus has always been given due signification as an effective method to ensure release of the detained person from prison. In *P. Ramanatha Aiyar's Law Lexicon* (1997 edition), while defining "habeas corpus", apart from other aspects, the following has been stated: -

> "The ancient prerogative writ of habeas corpus takes its name from the two mandatory words habeas. corpus, which it contained at the time when it, in common with all forms of legal process, was framed in Latin. The general purpose of these writs, as their name indicates, was to obtain the production of an individual."

13. In *Secretary of State for Home Affairs v. O'Brien*[1], it has been observed that it is perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of liege.

14. In *Ranjit Singh v. The State of Pepsu (now Punjab)*[2], after referring to *Greene v. Secretary of States for Home Affairs*[3], this Court observed that the whole object of proceedings for a writ of habeas corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible. The Bench quoted Lord Wright who, in Greene's case, had stated thus:

> "The incalculable value of Habeas Corpus is that it enables the immediate determination of the right to the appellant's freedom."

Emphasis was laid on the satisfaction of the court relating to justifiability and legality of the custody.

15. In *Kanu Sanyal v. District Magistrate, Darjeeling and others*[4], it was laid down that the writ of habeas corpus deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty.

16. Speaking about the importance of the writ of habeas corpus, a two-Judge Bench, in *Ummu Sabeena v. State of*

1. (1923) AC 603 (609).
2. AIR 1959 SC 843.
3. 1942 AC 284.
4. AIR 1973 SC 2684.



*Kerala and others*[5], has observed as follows: -

> "…the writ of habeas corpus is the oldest writ evolved by the common law of England to protect the individual liberty against its invasion in the hands of the executive or may be also at the instance of private persons. This principle of habeas corpus has been incorporated in our constitutional law and we are of the opinion that in a democratic republic like India where Judges function under a written Constitution and which has a chapter on fundamental rights, to protect individual liberty the Judges owe a duty to safeguard the liberty not only of the citizens but also of all persons within the territory of India. The most effective way of doing the same is by way of exercise of power by the Court by issuing a writ of habeas corpus."

In the said case, a reference was made to *Halsbury's Laws of England,* 4th Edn. Vol. 11, para 1454 to highlight that a writ of habeas corpus is a writ of highest constitutional importance being a remedy available to the lowliest citizen against the most powerful authority.

17. Having stated about the significance of the writ of habeas corpus as a weapon for protection of individual liberty through judicial process, it is condign to refer to certain authorities to appreciate how this Court has dwelled upon and expressed its views pertaining to the legality of the order of detention, especially that ensuing from the order of the court when an accused is produced in custody before a Magistrate after arrest. It is also worthy to note that the opinion of this Court relating to the relevant stage of delineation for the purpose of adjudicating the legality of the order of detention is of immense importance for the present case.

18. In *Col. Dr. B. Ramachandra Rao v. The State of Orissa and others*[6], it was opined that a writ of habeas corpus

5. (2011) 10 SCC 781.
6. AIR 1971 SC 2197.

is not granted where a person is committed to jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal.

19. In *Re. Madhu Limaye and others*[7], the Court referred to the decision in *Ram Narayan Singh v. State of Delhi*[8] and opined that the court must have regard to the legality or otherwise of the detention at the time of return.

20. In *Kanu Sanyal v. Dist. Magistrate, Darjeeling and others*[9], contentions were raised to the effect that the initial detention of the petitioner in District Jail, Darjeeling was illegal because he was detained without being informed of the grounds for his arrest as required under clause (i) of Article 22 of the Constitution and that the Sub-Divisional Magistrate, Darjeeling had no jurisdiction to try and, therefore, he could not authorise the detention of the petitioner under Section 167 of the Code. The two-Judge Bench adverted to the aforesaid aspects and referred to the earlier decisions in *Naranjan Singh v. State of Punjab*[10], *Ram Narain Singh* (supra), *B.R. Rao* (Supra) and *Talib Hussain v. State of Jammu and Kashmir*[11] and noted that three views had been taken by this Court at various times pertaining to the relevant date to determine the justifiability of the detention and opined as follows:-

> "This Court speaking through Wanchoo, J. (as he then was) said in *A.K. Gopalan v. Government of India;* [(1966) 2 SCR 427 = (AIR 1966 SC 816)]. "It is well settled that in dealing with the petition for habeas corpus the Court is to see whether the detention on the date on which the application is made to the Court is legal, if nothing more has intervened between the date of the application and the

7. AIR 1969 SC 1014.
8. AIR 1953 SC 277.
9. AIR 1974 SC 510
10. AIR 1952 SC 106
11. AIR 1971 SC 62.



> date of the hearing". In two early decisions of this Court, however, namely, *Naranjan Singh v. State of Punjab,* [(1952 SCR 395) = AIR 1952 SC 106)] and *Ram Narain Singh v. State of Delhi,* [(1953 SCR 652) = (AIR 1953 SC 277)] a slightly different view was expressed and that view was reiterated by this Court in *B.R. Rao v. State of Orissa* (AIR 1971 SC 2197) where it was said; "In habeas corpus the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings." And yet in another decision of this Court in *Talib Husain v. State of Jammu & Kashmir* (AIR 1971 SC 62) Mr. Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that "in habeas corpus proceedings the Court has to consider the legality of the detention on the date of the hearing." *Of these three views taken by the Court at different times, the second appears to be more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court cannot order release of the person detained by issuing a writ of habeas corpus.* But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, the earliest date with reference to which the legality of detention may be examined is the date of filing of the application for habeas corpus and the Court is not, to quote the words of Mr. Justice Dua in AIR 1971 SC 2197 "concerned with a date prior to the initiation of the proceedings for a writ of habeas corpus"."
>
> (emphasis supplied)

After so stating, the Bench opined that for adjudication in the said case, it was immaterial which of the three views was accepted as correct but eventually referred to paragraph 7 in the case of *B.R. Rao* (supra) wherein the Court had expressed the view in the following manner: -

> "….in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings."

Eventually, the Bench ruled thus: -

> "The production of the petitioner before the Special Judge, Vizakhapatnam, could not, therefore, be said to be illegal and his subsequent detention in the Central Jail, Vizakhapatnam, pursuant to the orders made by the Special Judge, Vizakhapatnam, pending trial must be held to be valid. This Court pointed out in AIR 1971 SC 2197 that a writ of habeas corpus cannot be granted "where a person is committed to Jail custody by a competent court by an order which prima facie does not appear to be without jurisdiction or wholly illegal"."

21. The principle laid down in *Kanu Sanyal* (supra), thus, is that any infirmity in the detention of the petitioner at the initial stage cannot invalidate the subsequent detention and the same has to be judged on its own merits.

22. At this juncture, we may profitably refer to the Constitution Bench decision in *Sanjay Dutt v. State through C.B.I., Bombay (II)*[12] wherein it has been opined thus: -

> "It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order."

12. (1994) 5 SCC 410.



23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand, i.e., Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of the accused in such custody, i.e., police or judicial, if he thinks that further detention is necessary.

24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner. It is apt to note that in *Madhu Limaye* (supra), it has been stated that once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters.

25. In *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni*[13], it has been stated that where an accused is placed in police custody for the maximum period of fifteen days allowed under law either pursuant to a single order of remand or more than one order, when the remand is restricted on each occasion to a lesser number of days, the further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act.

26. Presently, we shall advert to the concept of investigation. The term "investigation" has been defined in Section 2(h) of the Code. It reads as follows: -

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

27. A three-Judge Bench in *H.N. Rishbud and another v. State of Delhi*[14], while dealing with "investigation", has stated that under the Code, investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

13. AIR 1992 SC 1768.

14. AIR 1955 SC 196.



28. In *Adri Dharan Das v. State of West Bengal*[15], it has been opined that arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding the various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime.

29. In *Niranjan Singh v. State of Uttar Pradesh*[16], it has been laid down that investigation is not an inquiry or trial before the court and that is why the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial.

30. In *S.N. Sharma v. Bipen Kumar Tiwari*[17], it has been observed that the power of police to investigate is independent of any control by the Magistrate.

31. In *State of Bihar v. J.A.C. Saldanha and others*[18], it has been observed that there is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment and further investigation of an offence is the field exclusively reserved for the executive in the police department.

32. Coming to the case at hand, it is evincible that the arrest had taken place a day prior to the passing of order of stay. It is also manifest that the order of remand was passed by the learned Magistrate after considering the allegations in the FIR but not in a routine or mechanical manner. It has to be borne in mind that the effect of the order of the High Court regarding stay of investigation could only have bearing on the action of the investigating agency. The order of remand which is a judicial act, as we perceive, does not suffer from any infirmity. The only ground that was highlighted before the High Court as well as before this Court is that once there is stay of investigation, the order of remand is sensitively susceptible

15. AIR 2005 SC 1057.

16. AIR 1957 SC 142.

17. (1970) 1 SCC 653.

18. (1980) 1 SCC 554.

and, therefore, as a logical corollary, the detention is unsustainable. It is worthy to note that the investigation had already commenced and as a resultant consequence, the accused was arrested. Thus, we are disposed to think that the order of remand cannot be regarded as untenable in law. It is well accepted principle that a writ of habeas corpus is not to be entertained when a person is committed to judicial custody or police custody by the competent court by an order which prima facie does not appear to be without jurisdiction or passed in an absolutely mechanical manner or wholly illegal. As has been stated in the cases of *B.R. Rao* (supra) and *Kanu Sanyal* (supra), the court is required to scrutinize the legality or otherwise of the order of detention which has been passed. Unless the court is satisfied that a person has been committed to jail custody by virtue of an order that suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted. It is apposite to note that the investigation, as has been dealt with in various authorities of this Court, is neither an inquiry nor trial. It is within the exclusive domain of the police to investigate and is independent of any control by the Magistrate. The sphere of activity is clear cut and well demarcated. Thus viewed, we do not perceive any error in the order passed by the High Court refusing to grant a writ of habeas corpus as the detention by virtue of the judicial order passed by the Magistrate remanding the accused to custody is valid in law.

33. Though we have not interfered with the order passed by the High Court, yet we would request the High Court to dispose of the Criminal Miscellaneous Application No. 10303 of 2012 within a period of six weeks. Liberty is granted to the appellant to move the appropriate court for grant of bail, if so advised.

34. Consequently, with the aforesaid observations mentioned hereinabove, the appeal, being sans merit, stands dismissed.

R.P. Appeal dismissed.



IQBAL ABDUL SAMIYA MALEK

*v.*

STATE OF GUJARAT

(Criminal Appeal No. 1584 of 2012)

OCTOBER 1, 2012

**[P. SATHASIVAM AND RANJAN GOGOI, JJ.]**

*Code of Criminal Procedure, 1973 – s. 386 – Criminal appeal – Disposal of – Procedure for – High Court disposing of the criminal appeal without adverting to all the materials – On appeal, held: The procedure followed by High Court in disposal of the appeal not acceptable – The procedure prescribed u/s. 386 is required to be followed – It is the duty of the appellate court to look into the evidence adduced to arrive at an independent conclusion – Appeal – Criminal Appeal.*

*Padam Singh vs. State of U.P.* **AIR 2000 SC 361: 1999 (5) Suppl.SCR 59;** *Bani Singh and Ors. vs. State of U.P.* **1996 (4) SCC 720: 1996 (3) Suppl. SCR 247 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1999 (5) Suppl. SCR 59** | **Relied on** | **Para 3** |
| **1996 (3) Suppl. SCR 247** | **Relied on** | **Para 3** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1584 of 2012.

From the Judgment & Order dated 18.3.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 207 of 2003.

WITH

Crl. A. No. 1585 of 2012.

Manoj K. Mishra, Deepak Mishra, V.K. Mishra, Shivpati B. Pandey for the Appellant.

K. Enatoli Sema, S. Panclu, Hemantika Wahi for the Respondent.

The following Order of the Court was delivered

**O R D E R**

1. Heard both sides.

2. Leave granted.

3. It is the grievance of the appellants/accused that when they filed regular appeal before the High Court challenging the conviction under Section 302 IPC and sentence of life imprisonment, the High Court without going into all the materials including oral and documentary evidence disposed of their appeal affirming the judgment of the Trial Court.

4. In view of the above contention, we have gone through the impugned judgment of the High Court. As rightly pointed out by the learned counsel appearing on behalf of the appellants, after narrating the case of the prosecution and the defence as well as the order of the Sessions Judge convicting the appellants, without adverting to all the materials, the High Court has merely disposed of the appeal. The procedure followed by the High Court in a matter of this nature is not acceptable. Elaborate procedures have been prescribed under Section 386 of Crl.P.C. for disposal of the appeal by the Appellate Court.

5. It is the duty of an Appellate Court to look into the evidence adduced in the case arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even it can be relied upon then whether the prosecution can be said to have proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by Appellate Court in drawing inference from



proved and admitted facts. Further appeal cannot be disposed of without examining records/merits (*Vide Padam Singh Vs. State of U.P., AIR 2000 SC 361 and Bani Singh & Others Vs. State of U.P. 1996 (4) SCC, 720*. The said recourse has not been followed by the High Court.

6. In view of the same, without expressing anything on the merits of the claim of either party, we set aside the impugned judgment of the High Court and remit it to the High Court. We request the High Court to restore the appeal on its file and dispose of the same as early as possible preferably within a period of six months.

7. Learned counsel for the appellants has brought to our attention to the fact that the appellants are in jail for a period of more than 11 years and seek for an order of bail from this Court.Since we are now remitting the matters to the High Court, the appellants are free to make such claim before the High Court.

8. With the above observation, the appeals are disposed of.

K.K.T. Appeals disposed of.

MANHARIBHAI MULJIBHAI KAKADIA & ANR.
*v.*
SHAILESHBHAI MOHANBHAI PATEL & ORS.
(Criminal Appeal No. 1577 of 2012)

OCTOBER 1, 2012

**[R.M. LODHA, CHANDRAMAULI KR. PRASAD AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]**

*CODE OF CRIMINAL PROCEDURE, 1973:*

*ss. 397and 401(2) read with ss. 202 and 203 – Revision against order u/s 203 dismissing the complaint – Right of the person accused / suspect to be heard – Held: In the proceedings u/s. 202 the person accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not – However, in a revision petition preferred by complainant before High Court or Sessions Judge challenging an order of the Magistrate dismissing the complaint u/s. 203 at the stage u/s. 200 or after following the process contemplated u/s.202 of the Code, the person accused/suspect is entitled to hearing by the revisional court – The stage is not important whether it is pre-process stage or post-process stage – If the revisional court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process.*

*ss. 200, 202 and 203 – Criminal complaint – Expression 'taking cognizance of an offence' – Connotation of – Explained – Held: In the context of ss. 200, 202 and 203, the*





*expression `taking cognizance' embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the complaint or the first information report or the information that offence has been committed, on application of judicial mind – It does not necessarily mean issuance of process – In the instant case, from the order of the Chief Judicial Magistrate directing an inquiry to be made by police, it becomes apparent that he had applied judicial mind on the complaint and had taken cognizance that day although he postponed issue of process by directing an investigation to be made by Police Officer – Therefore, it cannot be said that the CJM had not taken cognizance in the matter and the complaint was dismissed u/s. 203 at the pre-cognizance stage.*

*Words and Phrases:*

*Expression 'prejudice', 'other person' and 'in his own defence' occurring in s.401(2) CrPC – Connotation of.*

**A complaint was filed against the appellants for offences punishable u/ss 420, 467, 468, 471 and 120-B IPC. The Chief Judicial Magistrate, on 18.6.2004, in exercise of his powers u/s 202 CrPC, directed the inquiry to made by the police. The Investigating Officer, after investigating into the matter submitted 'C' Summary Report stating that the dispute between the parties was of a civil nature and no offence was made out. The said report was accepted. The complainant filed a revision petition u/s 397 read with s. 401 CrPC before the High Court. The appellants filed an application for being impleaded as respondents in the revision so that they could be heard in the matter. The High Court rejected the application.**

**Allowing the appeal, the Court**

**HELD: 1.1. Section 202 of the Code of Criminal**

**Procedure, 1973 has twin objects: one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint, and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out this, the Magistrate himself may hold an inquiry u/s 202 or direct an investigation to be made by a police officer. In that event, the Magistrate in fact postpones the issue of process. On conclusion of the inquiry by himself or on receipt of report from the police officer or from such other person who has been directed to investigate into the allegations, if, in the opinion of Magistrate taking cognizance of an offence there is no sufficient ground for proceeding, the complaint is dismissed u/s. 203 or where the Magistrate is of the opinion that there is sufficient ground for proceeding, then a process is issued. The dismissal of the complaint u/s. 203 is without doubt a pre-issuance of process stage. [Para 23 and 27] [1034-C-F; 1038-G-H]**

*Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker and another* **(1961) 1 SCR 1;** *Chandra Deo Singh v. Prokash Chandra Bose and another* **1964 (1) SCR 639;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others* **1976 Suppl. SCR 123 = (1976) 3 SCC 736;** *Adalat Prasad v. Rooplal Jindal and others* **(2004) 7 SCC 338;** *Mohd. Yousuf* v. *Afaq Jahan (Smt.) and another* **(2006) 1 SCC 627 – relied on.**

*Parmanand Brahmachari v. Emperor* **AIR (1930) Patna 30;** *Radha Kishun Sao v. S.K. Misra and Anr.* **AIR (1949) Patna 36;** *Ramkisto Sahu v. The State of Bihar* **AIR (1952) Patna 125;** *Emperor v. J.A. Finan* **AIR (1931) Bom 524;** *Baidya Nath Singh v. Muspratt and others* **ILR (1886) XIV Cal 141 – referred to**



**1.2. Pertinently, Chapter XV uses the expression, "*taking cognizance of an offence*" at various places. Although the expression is not defined in the Code, but it has acquired definite meaning for the purposes of the Code. The word, "cognizance" occurring in various Sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that the offence has been committed. In the context of ss. 200, 202 and 203, the expression `*taking cognizance*' has been used in the sense of taking notice of the complaint or the first information report or the information that offence has been committed, on application of judicial mind. It does not necessarily mean issuance of process. Thus, from the order of the CJM passed on 18.6.2004, it becomes apparent that he had applied judicial mind on the complaint and had taken cognizance that day although he postponed issue of process by directing an investigation to be made by Police Officer. Therefore, it cannot be said that the CJM had not taken cognizance in the matter and the complaint was dismissed u/s. 203 at the pre-cognizance stage. [Paras 28, 37-39] [1039-B; 1042-B-D; 1043-A]**

*R.R. Chari v. The State of Uttar Pradesh* **(1951) SCR 312;** *Narayandas Bhagwandas Madhavdas v. The State of West Bengal* **1960 SCR 93 = AIR (1959) SC 1118 ;** *Darshan Singh Ram Kishan v. State of Maharashtra* **1972 (1) SCR 571 = (1971) 2 SCC 654;** *Jamuna Singh and others v. Bhadai Sah* **(1964) 5 SCR 37;** *Kishun Singh and others v. State of Bihar* **1993 (1) SCR 31 = (1993) 2 SCC 16;** *State*

*of Karnataka and another v. Pastor P. Raju* **2006 (4) Suppl. SCR 269 = (2006) 6 SCC 728;** *State of West Bengal and another v. Mohd. Khalid and others* **1994 (6) Suppl. SCR 16 = (1995) 1 SCC 684 – relied on**

**2.1. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate u/s. 202. The legal position is fairly well-settled that in the proceedings u/s. 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. [Paras 23 and 48] [1032-F; 1051-C-D]**

**2.2. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process u/s. 204, yet in s. 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence. Three expressions, "prejudice", "other person" and "in his own defence" in s. 401(2) are significant for understanding their true scope, ambit and width. "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone". It also means injury or loss. The expression "other person" in the context of s.401(2)**



**means a person other than accused. It includes suspects or the persons alleged in the complaint to have been involved in an offence although they may not be termed as accused at a stage before issuance of process. The expression "in his own defence" comprehends, inter alia, for the purposes of s.401(2), in defence of the order which is under challenge in revision before the Sessions Judge or the High Court. [Paras 48, 51-53] [1051-E-H; 1052-E-G]**

*Black's Law Dictionary [Eighth Edition]; English Dictionary [Tenth Edition, Revised]; Webster Comprehensive Dictionary [International Edition] and P. Ramanatha Aiyer; the Law Lexicon [The Encyclopaedic Law Dictionary]* **– referred to**

**2.3. The dismissal of complaint by the Magistrate u/s. 203 – although it is at preliminary stage – nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. On a plain reading of sub-s. (2) of s.401, it cannot be said that the person against whom the allegations of having committed offence have been made in the complaint and the complaint has been dismissed by the Magistrate u/s 203, has no right to be heard because no process has been issued. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of s. 401(2), the suspects get right of hearing before revisional court although such order was passed without their participation. [Para 54] [1052-H; 1053-A-D]**

**2.4. The right given to "accused" or "the other person" u/s. 401(2) of being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate u/ss. 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of**

**dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in s. 401(2) of the Code. The stage is not important whether it is pre-process stage or post-process stage. [Para 54] [1054-E-G]**

**2.5. This Court, therefore, holds that in a revision petition preferred by complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint u/s. 203 of the Code at the stage u/s. 200 or after following the process contemplated u/s.202 of the Code, the accused or a person who is suspected to have committed the crime is entitled to hearing by the revisional court. Where complaint has been dismissed by the Magistrate u/s. 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of s. 401(2) of the Code. If the revisional court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. The judgments of the High Courts to the contrary are overruled. [Para 58] [1057-A-F]**

*P. Sundarrajan and others v. R. Vidhya Sekar* **(2004) 13 SCC 472;** *Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited and another* **2008 (17) SCR 833 = (2009) 2 SCC 363;** *A. N. Santhanam v. K. Elangovan* **2011 (2) JCC 720 (SC) – upheld.**



*Gurdeep Singh v. State of Haryana* **ILR 2001 (2) P & H 388,** *Panatar Arvindbhai Ratilal v. State of Gujarat and others* **1991 (1) Vol. 32 GLR 451,** *Ratanlal Soni v. Kailash Narayan Arjariya***1998 (2) MPLJ 321;** *Tata Motors Limited v. State* **Criminal Revision Petition No. 16/2008 and Criminal LPA 4301/2008) decided by Delhi High Court on 12.2.2009;** *Prakash Devi and others v. State of Delhi and another* **Criminal Miscellaneous Case No. 2626/2009 decided by Delhi High Court on February 5, 2010 – overruled.**

*A.S. Puri v. K.L. Ahuja* **AIR 1970 Delhi 214 – referred to**

**2.6. Therefore, the impugned order dated 5.8.2005 cannot be sustained and, is set aside. The appellants' application for impleadment in the criminal revision petition stands allowed. The High Court shall hear the matter and dispose of the criminal revision petition in acc ordance with law. [Para 59] [1057-G]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2004) 13 SCC 472** | **upheld** | **Para 10** |
| **2008 (17) SCR 833 =** | **upheld** | **Para 10** |
| **2011 (2) JCC 720 (SC)** | **upheld** | **Para 10** |
| **(1964) 5 SCR 37** | **relied on** | **para 12** |
| **1993 (1) SCR 31** | **relied on** | **Para 12** |
| **2006 (4) Suppl. SCR 269** | **relied on** | **Para 12** |
| **1964 (1) SCR 639** | **relied on** | **Para 13** |
| **1976 Suppl. SCR 123** | **relied on** | **Para 13** |
| **(2004) 7 SCC 338** | **relied on** | **Para 13** |

| | | |
|---|---|---|
| **(2006) 1 SCC 627** | **relied on** | **Para 13** |
| **ILR 2001 (2) P & H 388** | **overruled** | **para 14** |
| **1991 (1) Vol. 32 GLR 451** | **overruled** | **para 14** |
| **1998 (2) MPLJ 321** | **overruled** | **para 14** |
| **Criminal Revision Petition No. 16/2008 and Criminal LPA 4301/2008) decided by Delhi High Court on 12.2.2009** | **overruled** | **para 14** |
| **Criminal Miscellaneous Case No. 2626/2009 decided by Delhi High Court on 5.2.2010** | **overruled** | **para 14** |
| **AIR 1970 Delhi 214 – referred to** | | |
| **(1961) 1 SCR 1** | **relied on** | **Para 23** |
| **AIR (1930) Patna 30** | **referred to** | **Para 24** |
| **AIR (1949) Patna 36** | **referred to** | **Para 24** |
| **AIR (1952) Patna 125** | **referred to** | **Para 24** |
| **AIR (1931) Bom 524** | **referred to** | **Para 24** |
| **ILR (1886) XIV Cal 141** | **referred to** | **Para 24** |
| **(1951) SCR 312** | **relied on** | **Para 29** |
| **1960 SCR 93** | **relied on** | **Para 30** |
| **1972 (1) SCR 571** | **relied on** | **Para 31** |
| **1994 (6) Suppl. SCR 16** | **relied on** | **Para 33** |
| **AIR 1970 Delhi 214** | **referred to** | **para 47** |



CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1577 of 2012.

From the Judgment & Order dated 5.8.2005 of the High Court of Gujarat at Ahmedabad in Misc. Criminal Application No. 8210 of 2005 in Criminal Revision Application No. 482 of 2005.

Shyam Divan, Shamik Sanjanwala, Bina Madhavan, Karan Kanwal (for Lawyer's Knit & Co.) for the Appellants.

Hemantika Wahi, Jesal, Nandini Gupta, Meenakshi Arora for the Respondents.

The Judgment of the Court was delivered by

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

2. The sole question for consideration is, whether a suspect is entitled to hearing by the revisional court in a revision preferred by the complainant challenging an order of the Magistrate dismissing the complaint under Section 203 of the Criminal Procedure Code, 1973 (for short 'Code').

3. It is not necessary to set out the facts in detail. Suffice it to say that Shaileshbhai Mohanbhai Patel, respondent no. 1, filed a criminal complaint on 15.5.2004 in the Court of Chief Judicial Magistrate, Surat (for short 'CJM') against Manharibhai Muljibhai Kakadia and Paresh Lavjibhai Patel, appellants, alleging that they had pre-planned a conspiracy; created forged documents bearing signatures of the complainant, his father and uncle, two sons of his uncle and his elder brother and have used the said documents as true and genuine by producing the same before the District Registrar, Cooperative Society, Nanpura, and by making false representation obtained registration of Indoregency Cooperative Housing Society Limited and by doing so the accused (appellants) have caused financial loss and physical and mental agony to the complainant and his family members and have deceived the complainant

and his family members by obtaining huge financial advantage by taking possession of the complainant's property. It was, thus, alleged that the appellants have committed offences punishable under Sections 420, 467, 468, 471 and 120-B, IPC.

4. The CJM in exercise of his power under Section 202 of the Code by his order dated 18.6.2004 directed the enquiry to be made by the Police Inspector, Umra Police Station, into the allegations made in the complaint and submit his report within thirty days therefrom.

5. The Investigating Officer investigated into the matter and submitted 'C' Summary Report. In the opinion of the Investigating Officer, the disputes between the parties were of civil nature and no offence was made out.

6. The CJM on 16.4.2005 accepted the 'C' Summary Report submitted by the Investigating Officer. That order has been challenged by the Complainant in a criminal revision application filed under Section 397 read with Section 401 of the Code in the Gujarat High Court.

7. The appellants having come to know of the above criminal revision application made an application for joining them as party respondents so that they can be heard in the matter.

8. On 5.8.2005, the Single Judge of the Gujarat High Court dismissed the application made by the appellants. It is from this order that present appeal has arisen.

9. We have heard Mr. Shyam Divan, learned senior counsel for the appellants and Ms. Meenakshi Arora, learned counsel for respondent no. 1.

10. Mr. Shyam Divan, learned senior counsel for the appellants argued that the plain language of Section 401(2) of the Code entitles the appellants to be heard in the criminal revision application filed by the respondent no. 1 challenging



the order of the CJM. According to learned senior counsel, appellants have a right to be heard in the revision application filed by the complainant as no order could be made to the prejudice of the accused or the other person unless he has had an opportunity of being heard under Section 401(2) of the Code. It was argued on behalf of the appellants that the result of acceptance of the 'C' Summary Report is that criminal proceedings launched by the complainant have come to an end and if the revision application preferred by the complainant is accepted, that would have the effect of revival of the complaint and setting the criminal process back in motion which would be definitely prejudicial to the appellants and before any such prejudicial order is passed, the appellants ought to be heard. In support of the above contentions, learned senior counsel relied upon decisions of this Court in *P. Sundarrajan and others v. R. Vidhya Sekar*[1], *Raghu Raj Singh Rousha v. Shivam Sundaram Promoters Private Limited and another*[2] and *A. N. Santhanam v. K. Elangovan*[3].

11. Mr. Shyam Divan, learned senior counsel would also argue that expression, "in his own defence" in Section 401 (2) is a comprehensive expression which also means 'in defence of the order' under challenge in revisional jurisdiction. Learned senior counsel submitted that "prejudice" may cover wide range of situations and must be considered in wider sense. Section 401 does not make any distinction between pre-process stage and post-process stage. Sub-section (2) of Section 401 is applicable regardless and whether or not process has been issued under Section 204 of the Code.

12. It was also submitted on behalf of the appellants that cognizance had been taken by the CJM. Cognizance is not equivalent to issuance of process; it is taken prior to issuance of process. Cognizance is taken at the initial stage when the

1. (2004) 13 SCC 472.
2. (2009) 2 SCC 363.
3. 2011 (2) JCC 720 (SC)

Magistrate applies his judicial mind to the facts mentioned in the complaint or to the police report or upon information received from any other person that an offence has been committed. In this regard, reliance was placed on *Jamuna Singh and others v. Bhadai Sah*[4], *Kishun Singh and others v. State of Bihar*[5] and *State of Karnataka and another v. Pastor P. Raju*[6].

13. Ms. Meenakshi Arora, learned counsel for the respondent no. 1, on the other hand, stoutly defended the order of the High Court. She would argue that since CJM had not taken cognizance of the offence, the appellants have no role to play at any stage prior to issuance of process. She referred to certain provisions, including Chapters XIV, XV and XVI, and also Sections 156, 173, 190 and 202 of the Code. Learned counsel for the respondent no. 1 argued that since the subject revision petition had been filed by the respondent no. 1 against the dismissal of the complaint at a pre-cognizance stage, the appellants do not have any right of hearing under the provisions of Section 401(2) of the Code. In this regard, the learned counsel placed reliance on Chandra *Deo Singh v. Prokash Chandra Bose and another*[7], *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others*[8], *Adalat Prasad v. Rooplal Jindal and others*[9] and *Mohd. Yousuf v. Afaq Jahan (Smt.) and another*[10].

14. Learned counsel for the respondent no.1 also relied upon decisions of Punjab and Haryana High Court, Madhya Pradesh High Court and Gujarat High Court in support of her submission that accused has no right of hearing under Section

4. (1964) 5 SCR 37.
5. (1993) 2 SCC 16.
6. (2006) 6 SCC 728.
7. 1964 (1) SCR 639.
8. (1976) 3 SCC 736.
9. (2004) 7 SCC 338.
10. (2006) 1 SCC 627.



401(2) in a revision against an order by which a complaint has been dismissed by the Magistrate under Section 203 of the Code. She relied upon *Gurdeep Singh v. State of Haryana*[11], *Panatar Arvindbhai Ratilal v. State of Gujarat and others*[12], *Ratanlal Soni v. Kailash Narayan Arjariya*[13]. She also relied upon a decision of Delhi High Court in *Tata Motors Limited v. State* (Criminal Revision Petition No. 16/2008 and Criminal LPA 4301/2008) decided on 12.2.2009 wherein decision of this Court in *Raghu Raj Singh Rousha*[2] has been distinguished.

15. Learned counsel for the respondent no. 1 would submit that decision of this Court in *P. Sundarrajan*[1] was not applicable to the fact situation of the present case inasmuch as in that case, the accused were party in the revision petition whereas in the subject revision the appellants have not been allowed to be impleaded as party respondents and the impugned order has been passed on the application for impleadment. While referring to *A.N. Santhanam*[3], learned counsel for the respondent no. 1 submitted that this case too was not applicable to the facts of the present case as in that case the complainants were examined under Section 200 of the Code whereas in the present case the CJM has accepted the 'C' Summary Report under Section 173 after the investigation was done by the police.

16. In order to appreciate the rival submissions, some of the provisions of the Code need to be referred to. Section 156 deals with Police Officer's power to investigate cognizable case. It reads as follows:

> "S. 156. Police Officer's power to investigate cognizable case. – (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any

11. ILR 2001 (2) P & H 388.
12. 1991 (1) Vol. 32 GLR 451.
13. 1998 (2) MPLJ 321.

cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

17. Section 190 falls in Chapter XIV and reads as under:

"S. 190. Cognizance of offences by Magistrates. - (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

18. Chapter XV of the Code deals with the complaints to Magistrates. It has four Sections, 200 to 203, which read as under :



"S. - 200. Examination of Complainant.— A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

S. 201. Procedure by Magistrate not competent to take cognizance of the case.- If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall, -

(a) If the complaint is in writing, return it for presentation to the proper court with an endorsement to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper court.

S. 202. Postponement of issue of process.— (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he

thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made—

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) Where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

S. 203. Dismissal of complaint.—If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall



dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

19. Chapter XVI of the Code has Sections 204 to 210. Section 204 deals with the issuance of process by the Magistrate. The process is issued by the Magistrate if in his opinion there is sufficient ground for proceeding.

20. Section 210 provides for procedure to be followed when there is complaint case and police investigation in respect of the same offence. It reads as under:

"S. 210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.—(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

21. Section 397 of the Code empowers the High Court or the Sessions Judge to call for and examine the record of any proceeding before any inferior court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety, inter alia, of any order passed by such inferior court. The powers of revision are concurrent with the High Court and the Sessions Judge. By virtue of Section 399, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401 and while doing so the provisions of sub-sections (2),(3),(4) and (5) of Section 401 apply to such power as far as possible. Section 401 deals with High Court's power of revision and it reads as follows :

> "S. 401. High Court's powers of revision.—(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.
>
> (2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.
>
> (4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.



> (5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

22. In light of the above provisions, the question for consideration before us is to be examined.

23. Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a pre-issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202. The legal position is no more *res integra* in this regard. More than five decades back, this Court in *Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker and another*[14] with reference to Section 202 of the Criminal Procedure Code, 1898 (corresponding to Section 202 of the present Code) held that the inquiry under Section 202 was for the purpose of ascertaining the truth or falsehood of the complaint, i.e., for ascertaining whether there was evidence in support of the complaint so as to justify the

14. (1961) 1 SCR 1.

issuance of process and commencement of proceedings against the person concerned.

24. In Chandra *Deo Singh*[7], a four-Judge Bench of this Court had an occasion to consider Section 202 of the old Code. The Court referred to the earlier decision of this Court in *Vadilal Panchal*[14] and few previous decisions, namely, *Parmanand Brahmachari v. Emperor*[15], *Radha Kishun Sao v. S.K. Misra and Anr.*[16], *Ramkisto Sahu v. The State of Bihar*[17], *Emperor v. J.A. Finan*[18], *Baidya Nath Singh v. Muspratt and others*[19] and it was held that the object of provisions of Section 202 (corresponding to present Section 202 of the Code) was to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. It was further held that an accused person does not come into the picture at all till process is issued.

25. In *Smt. Nagawwa*[8], this Court had an occasion to consider the scope of the inquiry by the Magistrate under Section 202 of the old Code. This Court referred to the earlier two decisions in *Vadilal Panchal*[14] and Chandra *Deo Singh*[7] and in para 4 of the Report held as under:

> "4. It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited — limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint— (*i*) on the materials placed by the complainant before the court; (*ii*) for the limited purpose of finding out whether a prima facie

15. AIR (1930) Patna 30.

16. AIR (1949) Patna 36.

17. AIR (1952) Patna 125.

18. AIR (1931) Bom 524.

19. ILR (1886) XIV Cal 141.



> case for issue of process has been made out; and (*iii*) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

26. In *Adalat Prasad*[9], a three-Judge Bench of this Court had an occasion to consider Sections 200, 202 and 204 of the Code. The scheme of the above provisions was explained in the following manner:

> "12. Section 200 contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present, if any. If on such examination of the complaint and the witnesses, if any, the Magistrate if he does not want to postpone the issuance of process has to dismiss the complaint under Section 203 if he comes to the conclusion that the complaint, the statement of the complainant and the witnesses have not made out sufficient ground for proceeding. Per contra, if he is satisfied that there is no need for further inquiry and the complaint, the evidence adduced at that stage have materials to proceed, he can proceed to issue process under Section 204 of the Code.
>
> 13. Section 202 contemplates "postponement of issue of process". It provides that if the Magistrate on receipt of a complaint, if he thinks fit, to postpone the issuance of process against the accused and desires further inquiry into the case either by himself or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding, he may do so. In that process if he thinks it fit he may even take evidence

of witnesses on oath, and after such investigation, inquiry and the report of the police if sought for by the Magistrate and if he finds no sufficient ground for proceeding he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 of the Code.

14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in *Mathew case [(1992) 1 SCC 217]* that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.



15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code."

27. The procedural scheme in respect of the complaints made to Magistrates is provided in Chapter XV of the Code. On a complaint being made to a Magistrate taking cognizance of an offence, he is required to examine the complainant on oath and the witnesses, if any, and then on considering the complaint and the statements on oath, if he is of the opinion that there is no sufficient ground for proceeding, the complaint shall be dismissed after recording brief reasons. The Magistrate may also on receipt of a complaint of which he is authorised to take cognizance proceed with further inquiry into the allegations made in the complaint either himself or direct an investigation into the allegations in the complaint to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. In that event, the Magistrate in fact postpones the issue of process. On conclusion of the inquiry by himself or on receipt of report from the police officer or from such other person who has been directed to investigate into the allegations, if, in the opinion of Magistrate taking cognizance of an offence there is no sufficient ground for proceeding, complaint is dismissed under Section 203 or where the Magistrate is of the opinion that there is sufficient ground for proceeding, then a process is issued. In a summons case, summons for the attendance of the accused is issued and in a

warrant case the Magistrate may either issue a warrant or a summons for causing the accused to be brought or to appear before him.

28. Pertinently, Chapter XV uses the expression, "taking cognizance of an offence" at various places. Although the expression is not defined in the Code, but it has acquired definite meaning for the purposes of the Code.

29. In *R.R. Chari v. The State of Uttar Pradesh*[20], this Court stated that taking cognizance did not involve any formal action or indeed action of any kind but it takes place no sooner a Magistrate applies his mind to the suspected commission of an offence.

30. In *Narayandas Bhagwandas Madhavdas v. The State of West Bengal*[21], this Court considered the expression, "take cognizance of offence" with reference to Sections 190(1)(a), 200 and 202 and held as under :

> "……As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under S. 200 and subsequent sections of Ch. XVI of the Code of Criminal Procedure or under S. 204 of Ch. XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."

31. In *Darshan Singh Ram Kishan v. State of*

20. (1951) SCR 312.

21. AIR (1959) SC 1118.



*Maharashtra*[22], the Court reiterated what was stated in *R.R. Chari*[20]. It was further explained that cognizance takes place at a point when a Magistrate first takes judicial notice of an offence on a complaint, or a police report, or upon information of a person other than a police officer.

32. In *Kishun Singh*[5], while dealing with the expression "taking cognizance of an offence" the Court said that cognizance can be said to be taken by a Magistrate when he takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender.

33. In *State of West Bengal and another v. Mohd. Khalid and others*[23], the expression, "taking cognizance of an offence" has been explained in paragraph 43 of the Report which reads as follows:

> "43. Similarly, when Section 20-A(2) of TADA makes sanction necessary for taking cognizance — it is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20-A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is

22. (1971) 2 SCC 654.

23. (1995) 1 SCC 684

entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

34. The above cases where the expression, "taking cognizance of an offence" for the purposes of the Code (old as well as new) has been explained have been noted by a two-Judge Bench of this Court in *Pastor P. Raju*[6]. The Court in para 13 of the Report referred to the distinction between "taking cognizance of an offence" and "issuance of process" and observed as under:

"13. ……..Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out."

35. On behalf of the appellants, it was submitted that the direction by the CJM to the Police Officer to investigate into the allegations made in the complaint amounts to taking cognizance of an offence and the dismissal of the complaint by the CJM under Section 203 of the Code was after he had taken cognizance of the offence. On the other hand, on behalf of the respondent no. 1, it was vehemently contended that dismissal of complaint by the CJM under Section 203 of the Code was at a pre-cognizance stage. The submission on behalf of the respondent no. 1 is that no cognizance has been taken by the CJM while directing the Police Officer to investigate into the allegations of the complaint.

36. We shall immediately advert to the aspect whether or not CJM had taken cognizance of the offence and whether the



dismissal of the complaint under Section 203 in the matter was post-taking cognizance.

37. The word, "cognizance" occurring in various Sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of the allegations made in the complaint or a police report or any information received that offence has been committed. In the context of Sections 200, 202 and 203, the expression `taking cognizance' has been used in the sense of taking notice of the complaint or the first information report or the information that offence has been committed on application of judicial mind. It does not necessarily mean issuance of process.

38. Having regard to the above legal position, if the order of the CJM passed on 18.6.2004 is seen, it becomes apparent that he had applied judicial mind on the complaint that day. The order records, "on perusing the complaint and the accompanying documents, in the said matter it is necessary to take into custody the documents mentioned in the complaint. It is necessary to find out the persons who have forged signatures on such documents, and record their statements, and to compare the said signatures with the signatures of the family members of the complainant, and in this regard obtain the opinion from the Handwriting Expert, in view of all this such investigations cannot be done by the Court, in view of this fact below Section 156(3) of Cr.P.C. in the matter of the said complaint for police investigations it is hereby ordered to send the said inquiry to the P.I., Umra, Police Station. And, he is ordered to investigate thoroughly in this matter and within 30 days present the report before this Court".

39. From the above order passed by the CJM, there remains no doubt that on 18.06.2004, he had taken cognizance although he postponed issue of process by directing an investigation to be made by Police Officer. The submission of the learned counsel for the respondent no.1 that the CJM had

not taken cognizance in the matter and the complaint was dismissed under Section 203 at the pre-cognizance stage has no substance and is rejected.

40. The question now is, in a matter of this nature where complaint has been dismissed by the Magistrate under Section 203 post-cognizance stage and pre-issuance of process, whether on challenge to the legality of the order of dismissal of complaint being laid by the complainant in a revision application before the High Court, the persons who are arraigned as accused in the complaint have a right to be heard.

41. Before we deal with the above question further, some of the decisions of the High Courts upon which heavy reliance was placed by the counsel for the respondent no. 1 may be noticed. In *Panatar Arvindbhai Ratilal*[12], a Single Judge of the Gujarat High Court had an occasion to consider *locus standi* of the suspects at the stage of grant of 'C' Summary. That was a case where the police did not initiate any investigation for quite some time in respect of an offence registered with the police station. The complainant approached the CJM wherein direction for investigation by the police was made. The police after investigation submitted report and sought 'C' Summary. The complainant objected to the report submitted by the police as to 'C' Summary. The Magistrate allowed the suspects to be heard against which the complainant filed the criminal revision before the Sessions Judge. The Sessions Judge agreed with the complainant and overruled the order of the Magistrate allowing the accused to make submission. There were seven accused in the complaint and two of them approached the High Court against the order of the Sessions Judge. The Single Judge of the High Court confirmed the order of Sessions Judge. The Magistrate thereafter heard the complainant and granted 'C' Summary. Against that order, the complainant filed a revision before the Sessions Judge. Two accused who had earlier challenged the order of the Sessions Judge before the High Court applied to the Sessions Judge for permission to



make submission in support of the order of the Magistrate. The Sessions Judge allowed the application made by the accused against which order the complainant filed criminal revision before the High Court. The High Court noted the provisions contained in Sections 397(2) and 403 of the Code and then held that allowing the suspects to be heard at this stage would amount to permitting them to have their say at the stage which is not contemplated by the Code and it would be giving a premature hearing to the accused. The High Court was persuaded by the submission of the complainant that an accused cannot be given pre-trial hearing. The High Court observed as follows :

> "6. The views consistently expressed by this Court as well as by the Supreme Court about the hearing of the suspects at the stage of granting of 'C' summary or not is clearly to the effect that they have no locus standi.
>
> 7. In this background we turn to the submission made under Section 403 of the Code of Criminal Procedure, by learned Advocate Shri J.R. Nanavati. There again at first sight it might appear that party referred to in the said section could be a party other than one arrayed before the Court on either side, but when we realise that the matter to be dealt with under Chapter 30 of the Code of Criminal Procedure wherein occurs Section 403 power is that of a Revision and it being the power exercised by the Court, a party may or may not be heard as the Court may decide and this alone would explain the inclusion of Section 403 in that Chapter.
>
> 8. Otherwise all the procedural laws have as its foundation the maxim Audi Alterem Partem and at all stages wherever the need be there are provision for issuance of notice and making sure that the party against whom the orders are being sought is heard. Therefore, there was no need of inclusion of Section 403 at the place where we find it and we can appreciate it only and only if bearing in mind the

fact that it being a chapter dealing with revisional jurisdiction which is expressly privilege of the Court realising the order of subordinate Court that there might be an occasion, the party need not be or may not be heard, and therefore, there is a specific provision in that behalf.

9. Once we appreciate the aforesaid section in this light of submissions made by learned Advocate Shri Nanavati pertaining to the aforesaid decision of the Gujarat High Court as well as that of the Supreme Court on hearing of the suspects at the stage of granting of 'C' summary, can also be understood because the same principle will apply whether the accused are being dealt with under Chapter 13 or 17 of the Code of Criminal Procedure or under Chapter 30 of the Code of Criminal Procedure, as the case may be, the principle will not alter and more so when we appreciate the inclusion of Section 403 of the Code of Criminal Procedure, it becomes quite clear that the principle on the contrary would be reinforced."

42. The Madhya Pradesh High Court in *Ratanlal Soni*[13] was concerned with the legality of an order passed by Additional Sessions Judge without notice to the accused persons who were arrayed as non-applicants therein. The Single Judge of that Court referred to two decisions of this Court in *Chandra Deo Singh*[7] and *Smt. Nagawwa*[8] and couple of decisions of the High Court and stated in paragraph 6 of the Report as under :

"6. In view of the aforesaid enunciation of law it is luminously clear that the accused-has no locus standi to appear and participate before the process is issued. This being the accepted position of law it can safely be concluded that when a revision is filed challenging the order refusing to take cognizance the accused has no locus standi to contest. He is not a necessary party. The determination is to be made by the Court to find out the approach of the Court below and to scrutinise the justifiability of the order refusing to take cognizance. This being the position of law



disposal of revision by the revisional Court without issuing notice to the non-applicant is not infirm or pregnable. Once it has been held that the accused persons have no role to play before process is issued the revision at their instance challenging the order of the revisional Court directing the Magistrate to reconsider the matter is not tenable as they cannot raise grievance in regard to the same as yet there is no direction for issuance of process."

43. A Single Judge of Punjab and Haryana High Court in *Gurdeep Singh*[11] was concerned with a petition under Section 482 of the Code filed by the accused seeking quashment of the order passed by the Sessions Judge setting aside the order of the CJM whereby the complaint was dismissed for want of prosecution. The dismissal of complaint by the CJM for want of prosecution was at the initial stage. The challenge to the order of the Sessions Judge by the accused was on the ground that the Sessions Judge while allowing the revision application had infringed the provisions of Section 401(2) of the Code inasmuch as no opportunity of being heard was given to the accused although the complaint was dismissed for want of prosecution. The Single Judge of that Court took the view as follows :

"14. …….By no stretch of imagination, in my opinion, the accused can seek the setting aside of the order passed by the Sessions Judge on the ground that the said order was passed by the Sessions Judge without issuing notice to the accused. As referred to above, the accused petitioner cannot take benefit of provisions of Section 401(2) Cr.P.C. as it could not be said that any order to the prejudice or against the petitioner had been passed by the learned Sessions Judge. On the other hand, the order, - vide which the complaint was dismissed for want of prosecution was set aside by the learned Sessions Judge. If the case of the accused petitioner was not covered under Section 401(2) Cr.P.C., it was not at all necessary for the

learned Sessions Judge to have heard the accused petitioner while setting aside the order of the learned Magistrate in view of the provisions of Section 403 Cr.P.C. Even otherwise in view of the proviso to Section 398 Cr.P.C. only the person who was discharged had a right to be heard before the order of discharge could be set aside in revision by the Court of Sessions in exercise of its revisional jurisdiction. In this view of the matter, in my opinion, the contention of the learned counsel for the accused petitioner that the order passed by the learned Sessions Judge was liable to be set aside only on the ground that the accused petitioner was not heard, could not be sustained."

44. In *Tata Motors Limited,* Single Judge of the High Court was concerned with controversy arising out of complaint which was dismissed by the Metropolitan Magistrate under Section 203 of the Code in *limine.* In the revision petition filed under Section 397 read with Section 401 and Section 482 of the Code, it was contended on behalf of the complainant that the Metropolitan Magistrate erred in taking into consideration possible defence of the accused instead of ascertaining whether on a consideration of the complaint and the pre-summoning evidence, a prima facie case had been made out for summoning the accused for the offence mentioned in the complaint. It was also argued on behalf of the complainant before the High Court that the accused persons have not yet been summoned and even cognizance of the case has not been taken by the Metropolitan Magistrate and, therefore, there was no occasion at all for the accused persons to be heard. It was also argued on behalf of the complainant that at the pre-cognizance stage, there was no question of the accused being given an opportunity even in a revision petition filed by the complainant against the order of dismissal of complaint. On the contrary, on behalf of the accused persons it was argued that under Section 401(2) of the Code, if adverse order is going to be passed in revision petition which might prejudice either the



accused or any other person then such a person has to be mandatorily given an opportunity of being heard either personally or by pleader in defence. The Single Judge of that Court on consideration of the submissions of the parties and the decisions cited before him culled out the legal position as follows :

"20. xxx xxx xxx

(1) There is a distinction to be drawn between the criminal complaint cases which are at the pre-cognizance stage and those at the post-cognizance stage. There is a further distinction to be drawn between the cases at the post-cognizance but pre-summoning stage and those at the post-summoning stage.

(2) It is only at the post-summoning stage that the respondents in a criminal complaint would answer the description of an 'accused'. Till then they are like any other member of the public. Therefore at the pre-summoning stage the question of their right to be heard in a revision petition by the complainant in their capacity as "accused" in terms of Section 401(2) CrPC does not arise.

(3) At the post-cognizance but pre-summoning stage, a person against whom the complaint is filed might have a right to be heard under the rubric of 'other person' under Section 401(2) CrPC. If the learned MM has not taken the cognizance of the offence then no right whatsoever accrues to such "other person" to be heard in a revision petition.

(4) Further, it is not that in every revision petition filed by the complainant under Section 401(2) CrPC, a right of hearing has to be given to such "other person" or the accused against whom the criminal complaint has been filed. The right accrues only if the order to be passed in the revision petition is prejudicial to such person or the accused. An order giving a specific direction to the learned

MM to either proceed with the case either at the post-cognizance or post-summoning stage or a direction to register an FIR with a direction to the learned MM to proceed thereafter might be orders prejudicial to the respondents in a criminal complaint which would therefore require them to be heard prior, to the passing of such order."

45. On facts obtaining in the case, the Single Judge observed that the Metropolitan Magistrate had not even taken cognizance of the offences and, therefore, there was no question of the applicants being heard at the stage of revision application.

46. The above decision of the Delhi High Court in *Tata Motors Limited* came up for consideration of that Court in *Prakash Devi and others v. State of Delhi and another* [Criminal Miscellaneous Case No. 2626/2009 decided on February 5, 2010]. The Single Judge, on facts of the case which were under consideration before him, observed that the Magistrate had dismissed the complaint filed by the complainant after taking into consideration the status report filed by the police. The Magistrate had not examined the complainant and other witnesses under Section 202 of the Code and in the revision filed by the complainant the revisional court had remanded the matter to the Magistrate to grant another opportunity to the complainant to lead pre-summoning evidence and to proceed in the matter in accordance with law and, therefore, there was no occasion for the Sessions Judge to accord hearing to the accused persons. The High Court held as under:

"16. …….As already discussed above, the character of the petitioner was still not that of an accused as the complaint filed by the respondent was dismissed under Section 203 Cr.P.C. and since the matter was remanded back to the Magistrate to grant opportunity to the complainant to lead pre-summoning evidence, therefore, the said order does



not cause any prejudice to the rights of the petitioner. Even after the said remand, the fate of the complaint case could either be dismissal under Section 203 or under 204 Cr.P.C., if the Court with the fresh material before it, comes to the conclusion to proceed against the respondent. Since in the present case the process was not yet issued against the petitioner and the complaint was dismissed under S. 203 of Cr.P.C., therefore, preceding the said stage, the petitioner had no right to seek opportunity of hearing before the Revisional Court in the light of the legal position discussed above."

47. It may not be out of place to refer to an earlier decision of the Delhi High Court in *A.S. Puri v. K.L. Ahuja*[24]. In that case, inter alia, the question before the High Court was whether Additional Sessions Judge had committed an error in hearing the arguments of the accused's counsel to whom he had not ordered notice of the revision petition filed before him by the complainant. The Single Judge of that Court dealt with the question as under :

"25. …..This question need not detain us because the learned Additional Sessions Judge had invited the counsel for Mr. Puri to address arguments, when he was present in Court at the time of the hearing of the revision petition. It appears that notice of the revision petition did go to Mr. Puri but as it appears from the docket the learned Additional Sessions Judge had only ordered notice to the respondent, which was the State. If even by any error committed by the Officer of the learned Magistrate, notice had also gone to Mr. Puri nothing prevented the learned Additional Sessions Judge from hearing Mr. Puri for it was his discretion to hear him. A Full Bench of the Calcutta High Court, consisting of eight Judges, pointed out in *Hari Dass Sanyal v. Saritulla,* (1888) ILR 15 Cal 608 (FB), that while no notice to an accused person was necessary in

24. AIR 1970 Delhi 214.

point of law before disposing of a revision petition directed against the order of dismissal under Section 203, Criminal Procedure Code and ordering a further enquiry as a matter of discretion it was proper that such a notice was given. In spite of that the learned Additional Sessions Judge had set aside the order of dismissal. In this situation the complainant cannot make any further grievance of this."

48. The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/ suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, upto the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a Police Officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. The Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence. Three expressions, "prejudice", "other person" and "in his own defence" in Section 401(2) are significant for understanding their true scope, ambit and width. Black's Law Dictionary [Eighth Edition] explains



"prejudice" to mean damage or detriment to one's legal rights or claims. Concise Oxford English Dictionary [Tenth Edition, Revised] defines "prejudice" as under :

> "1. Preconceived opinion that is not based on reason or actual experience. > unjust behaviour formed on such a basis. 2. harm or injury that results or may result from some action or judgment. v.1 give rise to prejudice in (someone); make biased. 2. cause harm to (a state of affairs)".

49. Webster Comprehensive Dictionary [International Edition] explains "prejudice" to mean (i) a judgment or opinion, favourable or unfavourable, formed beforehand or without due examination …….; detriment arising from a hasty and unfair judgment; injury; harm.

50. P. Ramanatha Aiyar; the Law Lexicon [The Encyclopaedic Law Dictionary] explains "prejudice" to mean injurious effect, injury to or impairment of a right, claim, statement etc.

51. "Prejudice" is generally defined as meaning "to the harm, to the injury, to the disadvantage of someone". It also means injury or loss.

52. The expression "other person" in the context of Section 401(2) means a person other than accused. It includes suspects or the persons alleged in the complaint to have been involved in an offence although they may not be termed as accused at a stage before issuance of process.

53. The expression "in his own defence" comprehends, inter alia, for the purposes of Section 401(2), in defence of the order which is under challenge in revision before the Sessions Judge or the High Court.

54. In a case where the complaint has been dismissed by the Magistrate under Section 203 of the Code either at the stage of Section 200 itself or on completion of inquiry by the

Magistrate under Section 202 or on receipt of the report from the police or from any person to whom the direction was issued by the Magistrate to investigate into the allegations in the complaint, the effect of such dismissal is termination of complaint proceedings. On a plain reading of sub-section (2) of Section 401, it cannot be said that the person against whom the allegations of having committed offence have been made in the complaint and the complaint has been dismissed by the Magistrate under Section 203, has no right to be heard because no process has been issued. The dismissal of complaint by the Magistrate under Section 203 – although it is at preliminary stage – nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get right of hearing before revisional court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the revisional court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

55. In *P. Sundarrajan*[1], a two-Judge Bench of this Court was concerned with a case where a complaint under Section 420 IPC came to be dismissed by the Judicial Magistrate. Against the order of dismissal of the complaint, the complainant



preferred revision petition before the High Court. The High Court was of the view that no notice was necessary to the suspects for disposal of the revision and set aside the order of the Magistrate and directed the Magistrate to proceed with the complaint afresh in accordance with law. Against the order of the High Court, the suspects approached this Court under Article 136. The Court granted leave and allowed the appeal, set aside the order of the High Court and sent the matter back to the High Court with a direction to issue proper notice to the persons accused of the crime in the complaint and proceed with the revision petition after affording them a reasonable opportunity of hearing. This Court in paragraphs 5 and 6 of the Report (Pg. 472 and 473) held as under:

> **"**5. In our opinion, this order of the High Court is ex facie unsustainable in law by not giving an opportunity to the appellant herein to defend his case that the learned Judge violated all principles of natural justice as also the requirement of law of hearing a party before passing an adverse order.
>
> 6. We have, therefore, no hesitation in allowing this appeal, setting aside the impugned judgment and remanding the matter to the High Court to issue proper notice to the appellant herein who is the respondent in the criminal revision petition before it and afford him a reasonable opportunity of hearing and to pass appropriate orders. The appeal is allowed."

56. In *Raghu Raj Singh Rousha*[2], a two-Judge Bench of this Court was faced with a question whether, in the facts and circumstances of the case, the High Court in exercise of its jurisdiction under Sections 397 and 401 of the Code was justified in passing an order in the absence of the accused persons. That was a case where a complaint was filed under Section 200 of the Code in respect of offences punishable under Sections 323, 382, 420, 465, 468, 471, 120-B, 506 and 34 of IPC. Along with the complaint, an application under

Section 156(3) was also made. The Metropolitan Magistrate passed an order refusing to direct investigation under Section 156(3) and the complainant was asked to lead pre-summoning evidence. The complainant aggrieved by the order of the Metropolitan Magistrate filed a revision petition before the High Court. The High Court with the consent of the APP appearing for the State set aside the order of the Metropolitan Magistrate with a direction to him to examine the matter afresh after calling for a report from the police authorities. It is from this order that the matter reached this Court at the instance of the suspect/ accused. The Court observed that if the Metropolitan Magistrate had taken cognizance of the offence and issuance of summons upon the accused persons had been merely postponed, in a criminal revision filed on behalf of complainant, the accused was entitled to be heard before the High Court. Sections 397, 399 and 401 were noticed by this Court and so also few earlier decisions including *Chandra Deo Singh*[7], *Vadilal Panchal*[14], *P. Sundarrajan*[1] and then in paragraphs 22 and 23 (Pg. 369) of the Report, the Court held as under :

> "22. Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under Section 156(3) of the Code. He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code.
>
> 23. We, therefore, are of the opinion that the impugned judgment cannot be sustained and is set aside accordingly. The High Court shall implead the appellant as a party in the criminal revision application, hear the matter afresh and pass an appropriate order."

57. In a comparatively recent order in *A. N. Santhanam*[3], a two-Judge Bench of this Court was concerned with a



question, whether the High Court committed an error in disposing of the criminal revision petition filed by the complainant without any notice to the accused. On behalf of the accused/suspect, it was argued that the High Court committed the error in disposing of the criminal revision without any notice to him. On the other hand, on behalf of the complainant it was argued that no notice as such was required to be issued to the accused as it was at the stage of taking cognizance. The Court considered Section 401, particularly, sub-section (2) thereof and held as under :

> "A plain reading of Clause (2) of the said provision makes it abundantly clear that the High Court in exercise of its revisional power cannot pass any order which may cause prejudice to the accused or other persons unless he has an opportunity of being heard either personally or by pleader in his own defence.
>
> In the instant case it cannot be said that the rights of the appellant have not been affected by the order of revision. The complaint filed by the respondent which was rejected for whatsoever reasons has been resurrected with a direction to the Magistrate to proceed with the complaint. Undoubtedly, whether the appellant herein was an accused or not but his right has been affected and the impugned order has resulted in causing prejudice to him.
>
> In the circumstances, we are of the view that the decision cited by the learned counsel for the respondent has no application whatsoever to the facts situation. In fact the decision of this Court was in a case where the complaint was taken cognizance and not a case where the compliant was rejected. In the circumstances, we hold that the High Court committed an error in allowing the revision filed by the respondent herein without any notice to the appellant.
>
> For the aforesaid reasons, the impugned order is set aside and the Criminal Revision Case No. 1045 of 2003

shall stand restored to its file for hearing and disposal on merits after notice to the appellant herein."

58. We are in complete agreement with the view expressed by this Court in *P. Sundarrajan*[1], *Raghu Raj Singh Rousha*[2] and *A. N. Santhanam*[3]. We hold, as it must be, that in a revision petition preferred by complainant before the High Court or the Sessions Judge challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code at the stage under Section 200 or after following the process contemplated under Section 202 of the Code, the accused or a person who is suspected to have committed crime is entitled to hearing by the revisional court. In other words, where complaint has been dismissed by the Magistrate under Section 203 of the Code, upon challenge to the legality of the said order being laid by the complainant in a revision petition before the High Court or the Sessions Judge, the persons who are arraigned as accused in the complaint have a right to be heard in such revision petition. This is a plain requirement of Section 401(2) of the Code. If the revisional court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed crime have, however, no right to participate in the proceedings nor they are entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process. We answer the question accordingly. The judgments of the High Courts to the contrary are overruled.

59. In view of the above position, the impugned order dated 5.8.2005 cannot be sustained and is liable to be set aside and, is set aside. The appellants' application for impleadment in the criminal revision petition stands allowed. High Court shall now hear the matter and dispose of the criminal revision petition in accordance with law. The appeal is allowed as above.

R.P. Appeal allowed.



ARVIND GUPTA

*v.*

UNION OF INDIA AND ORS.

(Writ Peition (Civil) No. 393 of 2012)

OCTOBER 1, 2012

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

*Comptroller & Auditor General's (Duties, Powers and Conditions of Services) Act, 1971 – s.16 – Regulations on Audit and Accounts, 2007 framed under the 1971 Act – Power of the Comptroller and Auditor General of India (CAG) to give performance audit report – Regulations framed under the 1971 Act empowering the CAG to conduct performance audit – If violative of the Constitution – Held: CAG's function to carry out examinations into economy, efficiency and effectiveness with which Government has used its resources is inbuilt in the 1971 Act – Performance audit reports prepared under the Regulations have to be viewed accordingly – No unconstitutionality in the Regulations – More-over, Audit reports submitted by CAG are subject to scrutiny by the Parliament or the Legislature of the State, as the case may be – Constitution of India, 1950 – Articles 149 and 151.*

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 393 of 2012.

Under Article 32 of the Constitution of India.

Santosh Pual, Mohita Bagai (for Harish Pandey) for the Petitioner.

The following Order of the Court was delivered by

**O R D E R**

1. We have heard Mr. Santosh Paul, learned counsel for the petitioner.

2. Learned counsel for the petitioner submits that the Comptroller and Auditor General of India (CAG) has no power to give performance audit report and the Regulations on Audit

and Accounts, 2007 (for short "Regulations") framed under the Comptroller & Auditor General's (Duties, Powers and Conditions of Services) Act, 1971 (for short "1971 Act") empowering the CAG to conduct performance audit are violative of the Constitution.

3. Article 149 of the Constitution of India provides that CAG shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament. In pursuance of Article 149 of the Constitution, 1971 Act has been enacted. Amongst other provisions in 1971 Act, Section 16 provides that it shall be the duty of the CAG to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union Territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and for this purpose make such examination of the accounts as he thinks fit and report thereon.

4. CAG's function to carry out examinations into economy, efficiency and effectiveness with which Government has used its resources is inbuilt in the 1971 Act. Performance audit reports prepared under the Regulations have to be viewed accordingly. We find no unconstitutionality in the Regulations. More-over Article 151 of the Constitution provides that the reports of CAG relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament and the reports relating to the accounts of a State shall be submitted to the Governor of the State who shall cause them to be laid before the Legislature of the State. The audit reports, which are submitted by CAG are, thus, subject to scrutiny by the Parliament or the Legislature of the State, as the case may be.

5. Writ Petition is wholly misconceived and is dismissed accordingly.

B.B.B. Writ Petition dismissed.



ENVIRONMENT & CONSUMER PROTECTION FOUNDATION

*v.*

DELHI ADMINISTRATION & ORS.

(Writ Petition (Civil) No. 631 of 2004)

OCTOBER 3, 2012

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

*EDUCATION:*

*Schools - Infrastructure facilities - Held: States directed to give effect to various directions already issued by the Court for providing toilet facilities for boys and girls, drinking water facilities, sufficient classrooms, appointment of teaching and non-teaching staff etc. - The directions are applicable to all schools: i.e. Government, aided, unaided, minority and non minority schools - Further, the statutory authorities u/s. 31 of RTE Act will examine and review the safeguards for the child's right and recommend measures for their effective implementation - Right of Children to Free and Compulsory Education Act, 2009 - s.31 - Constitution of India, 1950 - Arts.21A and 32.*

**The petitioner, a registered Charitable Society, filed the instant writ petition seeking various directions to improve the conditions of Government and aided schools and schools run by local bodies. The Court by several interim orders directed the States and the Union Territories to provide in the schools basic infrastructure facilities like toilet facility, drinking water, classrooms, appointment of teachers etc. During the pendency of the writ petition the Right of Children, to Free and Compulsory Education Act, 2009 was enacted by Parliament. In the case of** *Society for Unaided Private Schools, Rajasthan*[1]**, the Supreme Court while upholding**

1. (2012) 2 SCR 715.

**the constitutional validity of the RTE Act gave various directions to take steps for full implementation of the Act. In compliance with the said directions, some of the States responded by furnishing the details of infrastructure facilities available in the schools in the respective States. The Court gave further directions to provide proper toilet facilities for boys and girls and drinking water in all the schools. In the subsequent proceedings the Court noticed that some of the States did not fully implement the directions issued in the case of Society for Unaided Private Schools, Rajasthan as well as the provisions of the RTE Act.**

**Disposing of the writ petition, the Court**

**HELD: 1.1. Section 31 of the Right of Children to Free and Compulsory Education Act, 2009 has also conferred certain functions on the National Commission for Protection of Child Rights and also on the State Commissions These statutory authorities will also examine and review the safeguards for the child's rights and recommend measures for their effective implementation. [Para 8] [1070-A-D]**

**1.2. All the States are directed to give effect to the various directions already given by this Court* like providing toilet facilities for boys and girls, drinking water facilities, sufficient class rooms, appointment of teaching and non-teaching staff etc., if not already provided, within six months. It is made clear that these directions are applicable to all the schools, whether State owned or privately owned, aided or unaided, minority or non-minority. [para 9] [1071-B-C]**

**Society for Unaided Private Schools of Rajasthan vs. Union of India and Anr.* **(2012) 2 SCR 715 = (2012) 6 SCC 1 - referred to**



**Case Law Reference:**

**(2012) 2 SCR 715 referred to para 2**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 631 of 2004.

Under Article 32 of the Constitution of India.

Ravindra Bana, Rono Mohanty for the Appellant.

A. Mariarputham, AG, Ashok Bhan, T.S. Doabia, Manjit Singh, Dr. Manish Singhvi, Anil Grover, AAGs, Sunita Sharma, Sudarshan Singh Rawat, Sushma Suri, W.A. Qadri, A. Deb Kumar, Purnima Bhatt, Zaid Ali, B.V. Balramdas, D.S. Mahra, Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Anil Shrivastav, Ritu Raj Biswas, K.N. Madhusoodhanan, M.T. George, Vivekta Singh, Tarjit Singh, Kamal Mohan Gupta, Hemantika Wahi, Nandini Gupta, Genefer B., G.N. Reddy, M. Rambabu, S. Nagarajan, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, Sanjay Kharde, Asha Gopalan Nair, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Irshad Ahmad, C.D. Singh, Abhimanyu Singh, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Sunil Fernandes, Vernika Tomar, Astha Sharma, R. Sharma (for Corporate Law Group), Abhishek Atrey, Amitesh Kumar, Prerna Mehta, Ravi Kant, Aruna Mathur, Yusuf Khan, Movita (for Arputham Aruna & Co.) Noopur Singhal, Sunil Satyarthi, Sanjiv Sen, P. Parmeswaran, Bina Madhavan, Praseena E. Joseph, A.V. Rangam, A. Subhashini, Raja Chatterjee, Abhijit Sengupta, B. Balaji, P. Krishnamoorthy, K. Enatoli Sema, Amit Kr. Singh, Manpreet Singh Doabia, G. Prakash, Gopal Singh, Naresh K. Sharma, Pratibha Jain, Surya Kant, Shrish Kumar Misra, Tara Chandra Sharma, S. Rajappa, Krishanand Pandeya, Ramesh Babu M.R., Radha Shyam Jena, Jagjit Singh Chhabra, Vibha Datta Makhija, Kuldip Singh, S. Thananjayam (for Bhaita & Co.) for the Respondents.

The Judgment of the Court was delivered by

**K.S. RADHAKRISHNAN, J.** 1. This Court's jurisdiction under Article 32 of the Constitution of India has been invoked by the petitioner, a registered charitable society, seeking various directions to improve the conditions of Government and aided schools and also school run by the local authorities so that the constitutional objective of providing free and compulsory education under Article 21A of the Constitution of India would be a reality.

2. The Writ Petition was filed in the year 2004 and since then, several interim orders have been passed giving directions to the States and the Union Territories to provide the basic infrastructure facilities like toilet facility, drinking water, class rooms, appointment of teachers and all other facilities so that children can study in a clean and healthy environment. While the matter was pending before this Court, the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (in short 'the RTE Act'). The constitutional validity of the RTE Act was challenged before this Court and this Court, vide its Judgment dated 12.4.2012 in *Society for Unaided Private Schools of Rajasthan v. Union of India and Another* (2012)6 SCC 1, *upheld its validity and gave various directions, some of which are as follows:*

(a) In exercise of the powers conferred upon the appropriate Government under Section 38 of the RTE Act, the Government shall frame rules for carrying out the purposes of this Act and in particular, the matters stated under sub-Section (2) of Section 38 of the RTE Act.

(b) The directions, guidelines and rules shall be framed by the Central Government, appropriate Government and/or such other competent authority under the provisions of the RTE Act, as expeditiously as possible and, in any case, not later than six months from the date of pronouncement of this judgment.



(c) All the State Governments which have not constituted the State Advisory Council in terms of Section 34 of the RTE Act shall so constitute the Council within three months from today. The Council so constituted shall undertake its requisite functions in accordance with the provisions of Section 34 of the Act and advise the Government in terms of clauses (6), (7) and (8) of this order immediately thereafter.

(d) Central Government and State Governments may set up a proper Regulatory Authority for supervision and effective functioning of the Act and its implementation.

3. This Court, therefore, directed the Central Government, appropriate Government and other competent authorities functioning under the RTE Act to issue proper directions/ guidelines for its full implementation within a period of six months from the date of the pronouncement of that judgment. This Court also directed all the State Governments to constitute State Advisory Council within three months from the date of that judgment. Advisory Councils so constituted were directed to discharge their functions in accordance with the provision of Section 34 of the RTE Act and advise the Government in terms of Clauses (6), (7) and (8) of this Court's order. The necessity of constituting a proper Regulatory Authority for effective functioning of the RTE Act and its implementation was also highlighted. The Central Government was also directed to frame rules, in exercise of its powers under Section 38 of the RTE Act, for proper implementation of the RTE Act.

4. On the basis of directions issued by this Court in this Writ Petition, some of the States have responded by furnishing the details of infrastructure facilities available in the schools situated in their respective States. This Court noticed that some of the schools have not provided proper toilet facilities for boys and girls and in some of the schools, it was noticed, that there

is no provision for drinking water as well. Detailed interim orders were passed by this Court on 29.4.2011 and 22.9.2011. On 18.10.2011, this Court passed the following order:

> "We have heard the learned counsel for the parties. It is imperative that all the schools must provide toilet facilities. Empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to free and compulsory education of children guaranteed under Article 21-A of the Constitution.
>
> We direct all the States and the Union Territories to ensure that toilet facilities are made available in all the schools on or before 30th November, 2011. In case it is not possible to have permanent construction of toilets, at least temporary toilets be provided in the schools on or before 30th November, 2011 and permanent toilets be made available by 31st December, 2011.
>
> We direct the Chief Secretaries/Administrators of all the States/Union Territories to file their affidavits on or before 30th November, 2011."

5. Again, on 5.12.2011, this Court reiterated the directions as follows:

> "In our previous order dated 18.10.2011, we clearly indicated that it is imperative that all the schools must provide toilet facilities; empirical researches have indicated that wherever toilet facilities are not provided in the schools, parents do not send their children (particularly girls) to schools. It clearly violates the right to free and compulsory education of children guaranteed under Article 21-A of the Constitution. Office Report dated 3rd day of December, 2011 indicates that despite opportunity granted, the States of Tamil Nadu, Gujarat, Chhattisgarh, Meghalaya, West Bengal, Arunachal Pradesh, Punjab, Goa, Tripura and Union Territory of Lakshdweep have not filed their affidavits. One more opportunity is granted to these States/Union Territory to file their affidavits. Let the affidavits be filed within two weeks from today. No further time shall be granted for this purpose.
>
> We are told that the Ministry of Drinking Water and Sanitation is the concerned ministry. We request the learned additional Solicitor General appearing on behalf of the Union of India to take instructions from the Ministry of Drinking Water and Sanitation and file an affidavit within four weeks from today, indicating therein the latest position about the problem of drinking water in the country."

6. The situation that we get in few States has been elaborately dealt with by this Court in its interim order dated 13.1.2012. Some of the States have taken some positive steps, but some the States still lag behind. Taking note of all those aspects, this Court passed an order on 12.3.2012, the operative portion of which reads as follows:

> "The Chief Secretaries of various States were directed to ensure that separate permanent toilets for boys and girls are constructed in all the schools in their respective States on or before 31st March, 2012 and in case it was not possible to construct permanent toilets, then at least emporary toilet facilities were directed tobe made available on or before 28th February, 2012 and it was directed than an affidavit to that effect shall be filed by the Chief Secretaries on or before 28th February, 2012.
>
> In pursuance of the aforesaid directions of this Court, affidavits have been filed by the States of Uttar Pradesh, Assam, Meghalaya, Mizoram, Chhattisgarh, Punjab, Nagaland, West Bengal, Andhra Pradesh, Maharashtra, Uttarakhand, Odhisha, Karnataka, Jharkhand, Himachal

Pradesh, Goa, Municiapl Corporation of Delhi and the Union Territory of Lakshadweep. These States/union Territories in their respective affidavits have indicated that they have either constructed the toilets for boys and girls or they would complete it before the stipulated date that is before 31st March, 2012.

According to the Office Report dated 3rd day of March, 2012, following States have not filed their affidavits:

1. Tripura
2. Tamil Nadu
3. Sikkim
4. Gujarat
5. Bihar
6. Rajasthan
7. Jammu and Kashmir
8. Madhya Pradesh
9. Kerala

In the interest of justice, we grant one more opportunity to these States to file their respective affidavits within two weeks from today, failing which the Chief Secretary of the State concerned shall remain present in this Court on the next date of hearing. No further time shall be granted.

Learned counsel appearing on behalf of the Ministry of Drinking Water and Sanitation has handed over an affidavit of Sujoy Mojumdar, Director (Water), Ministry of Drinking Water and Sanitation, Government of India. In the affidavit it is mentioned that under the "Total Sanitation Campaign" (TSC), the Central Government supplements



the efforts of the States in providing sanitation facilities in the rural areas, including identified existing rural Government schools and Anganwadis by providing them with financial assistance and technical support. It is further submitted in the affidavit that under the TSC, at present, School Sanitation Hygiene Education Programme is operational in 607 districts spread across 30 States and Union Territories and a total of 11,99,117 school toilets have been financially assisted under the TSC. The cumulative progress of school toilets unit blocks financially assisted under the TSC in the entire country till 29.2.2012 are as follows:

| | | |
|---|---|---|
| Project Objectives | - | 13,14,636 |
| Project Performance | - | 11,99,117 |
| Percentage-wise progress | - | 91.21% |

In paragraph 9 of the said affidavit it is stated that provision of sanitation facility in Government schools is made by States within their TSC allocation. Out of the total of Rs.3068.51 crore approved for School Sanitation under TSC, s.2268.28 crore (cumulative) has been reported as expenditure and utilized by the States. The State-wise details of financial progress and utilization under TSC till 29.2.2012 are tabulated and enclosed along with the affidavit.

In paragraph 10 of the affidavit it is mentioned that as per information provided by the Department of School Education and Literacy, Ministry of Human Resource Development, the number of Government schools with sanitation facility available, as per their District Information System for Education (DISE) 2010-11 is as under:

| | | |
|---|---|---|
| Total Number of Govt. Schools | - | 10,96,064 |

Government Schools with Girls Toilet - 6,24,074

Government Schools with Boys/Common Toilet - 8,24,605

Let copies of this affidavit be supplied by the Registry to the learned counsel appearing for the States/Union Territories within one week from today.

Mr. Ravindra Bana, learned counsel appearing on behalf of the petitioner submits that after this Court has dealt with the problem of electricity, potable drinking water and toilets for boys and girls in the Government schools, the other main problem which is still persistent in most of the schools is regarding teachers and infrastructure. In order to ensure compliance of Article 21A of the Constitution, it is imperative that schools must have qualified teachers and basic infrastructure.

Learned counsel appearing on behalf of the National University for Educational Planning and Education undertakes to file a comprehensive affidavit giving therein up-to-date position about the availability of teachers and infrastructure in schools.

Let a comprehensive affidavit be filed by all the States/Union Territories regarding teachers and infrastructure in schools within three weeks from today, with an advance copy to the learned counsel for the petitioner and the counsel for the States/Union Territories."

7. We notice that some of the States have not fully implemented the directions issued by this Court in *Society for Unaided Private Schools of Rajasthan* (supra) as well as the provisions contained in the RTE Act. Considering the facts that this Court has already issued various directions for proper implementation of the RTE Act and to frame rules, there is no reason to keep this Writ Petition pending.



8. We also notice that Section 31 of the RTE Act has also conferred certain functions on the National Commission for Protection of Child Rights and also on the State Commissions. Section 31 reads as follows:

*"31. Monitoring of child's right to education.-* (1) The National Commission for Protection of Child Rights constituted under section 3, or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005, shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely:—

(a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;

(b) inquire into complaints relating to child's right to free and compulsory education; and

(c) take necessary steps as provided under sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

(2) The said Commissions shall, while inquiring into any matters relating to child's right to free and compulsory education under clause (c) of sub-section (1), have the same powers as assigned to them respectively under sections 14 and 24 of the said Commissions for Protection of Child Rights Act.

(3) Where the State Commission for Protection of Child Rights has not been constituted in a State, the appropriate Government may, for the purpose of performing the functions specified in Clauses (a) to (c) of sub-section (1), constitute such authority, in such manner and subject to such terms and conditions, as may be prescribed."

We are confident that those statutory authorities will also examine and review the safeguards for the child's rights and recommend measures for their effective implementation.

9. We are, inclined to dispose of this Writ Petition with a direction to all the States to give effect to the various directions already given by this Court like providing toilet facilities for boys and girls, drinking water facilities, sufficient class rooms, appointment of teaching and non-teaching staff etc., if not already provided, within six months from today. We make it clear that these directions are applicable to all the schools, whether State owned or privately owned, aided or unaided, minority or non-minority. As the writ petition is disposed of, no orders are required to be passed on applications for intervention and impleadment and the same are disposed of.

10. We make it clear that if the directions are not fully implemented, it is open to the aggrieved parties to move this Court for appropriate orders.

R.P. Writ Petition disposed of.



M.R. PRABHAKAR AND OTHERS
*v.*
CANARA BANK AND OTHERS
(Civil Appeal Nos. 7188-7191 of 2012 etc.)

OCTOBER 3, 2012

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

*Service Law:*

*Pension – In lieu of Contributory Provident Fund – Introduced by Banks, pursuant to Statutory Settlement, Joint Note and Pension Regulations, 1995 – Entitlement to pension to the employees resigning prior to the Settlement and Regulations – Held: Not entitled as they were not covered by the Scheme of pension under the Settlement and the Regulations – They could not establish any pre-existing legal, statutory or fundamental rights to claim the benefits of the Regulations – Canara Bank (Employees') Pension Regulations, 1995 – Regulations 22 and 29.*

**Indian Banks Association, representing 58 banks and their workmen entered into a Memorandum of Settlement on 29.10.1993 under Industrial Disputes Act read with Industrial Disputes (Central) Rules, 1957. The Association agreed to introduce a pension Scheme in banks in lieu of Contributory Provident Fund (CPF). A Joint Note was also made with regard to the introduction of pension as a second retiral benefit in lieu of CPF. Thereafter, the respondent-Bank made Canara Bank (Employees') Pension Regulations, 1995.**

**The appellants were the officers of the respondent-Bank who had resigned and stood relieved from their respective posts prior to 3.6.1993 i.e. prior to signing of the Statutory Settlement dated 29.10.1993, the Joint Note**

**dated 29.10.1993 followed by the Regulations. They filed writ petition claiming pension in lieu of CPF. Single Judge of High Court allowed their claim. In writ appeal, Division Bench of High Court declined their claim. Hence the present appeals.**

**Dismissing the appeals, the Court**

**HELD: 1. The appellants, when tendered their letters of resignation, were governed by the Canara Bank (Officers) Service Regulations, 1979. Regulation 20(2) of Regulations 1979 dealt with resignation from service and they tendered their resignation in the light of that provision. The appellants have failed to show any pre-existing rights in their favour either in the Statutory Settlement/Joint Note dated 29.10.1993 or under the Canara Bank (Employees') Pension Regulations, 1995. Appellants had resigned from service prior to 1.11.1993 and, therefore, were not covered by the statutory settlement, Joint Note dated 29.10.1993 and the Regulations 1995. They could not establish any pre-existing legal, statutory or fundamental rights in their favour to claim the benefit of Regulations 1995. [Para 20] [1088-B-D]**

*UCO Bank and Others v. Sanwar Mal* **(2004) 4 SCC 412: 2004 (2) SCR 1125 – relied on.**

*Sheelkumar Jain v. New India Assurance Company Limited and Ors.***(2011) 12 SCC 197: 2011 (9) SCR 574 – distinguished.**

*Madan Singh Shekhawat v. Union of India and Ors.* **(1996) 6 SCC 459 – referred to.**

**2. It is not correct to say that in absence of a legal definition of 'voluntary retirement' or in the absence of legally prescribed consequences of 'resignation', it must be understood in the sense of voluntary relinquishment of service; and that there can be no distinction between**



**'voluntary retirement' and 'resignation'. There is no ambiguity in the definition clause under Regulation 2(y) which has statutorily brought in the 'voluntarily retirement' as 'retirement'. Though the concept of 'resignation' is well known in Service Jurisprudence, the same has not been brought within the definition of 'retirement' under Regulation 2(y). Further, the words 'retired' and 'retirement' have some resemblance in their meanings, but not 'resignation'. Regulation 3(1)(a) specifically used the expression 'retirement' and the expression 'resignation' has not been incorporated either in the definition clause or in Regulation 3(1)(a). [Paras 14 and 15] [1084-E-H; 1085-A-B]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(1996) 6 SCC 459** | **Referred to** | **Para 6** |
| **2004 (2) SCR 1125** | **Relied on** | **Para 15** |
| **2011 (9) SCR 574** | **Distinguished** | **Para 19** |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7188-7191 of 2012.

From the Judgment & Order dated 18.11.2006 of the High Court of Karnataka at Bangalore in Writ Appeal Nos. 1037, 1934, 1941, 1969 of 2002.

WITH

Civil Appeal Nos. 7185-7186, 7192-7193 and 7194-7195 of 2012.

A.B. Dial, V.K. Rao, Raju Ramchandran, Naveen R. Nath, Lalit Mohini Bhat, Darpan K. M., Amita Sharma, Sanjay Sharawat, Ananya, Rajiv Nanda, Ayusha Kumar, Madhu Sikri, Rajesh Kumar, Yashraj Deora, Prashant Narang, Sarv Mitter (for Mitter & Mitter Co.) Ram Lal Roy, R.N. Keshwani, O.P. Gaggar for the Appearing Parties.

The Judgment of the Court was delivered by

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

2. We may, for the disposal of these appeals, deal with the facts in Civil Appeals arising out of SLP (C) Nos. 30983-30986 of 2008, since common questions arise for consideration in all these appeals.

3. We are, in these appeals, concerned with the legality of the claim for pension in lieu of Contributory Provident Fund (for short 'CPF') of some officers of the Canara Bank who had resigned and stood relieved from their respective posts prior to 3.6.1993, i.e. prior to signing of the Statutory Settlement dated 29.10.1993 under the Industrial Disputes Act, 1947, the Joint Note dated 29.10.1993, followed by the Canara Bank Pension Regulations, 1995 (for short 'Regulations 1995'), which was notified in the Gazette of India on 29.9.1995.

4. The learned single Judge of the High Court held in favour of the appellants but the Division Bench of the High Court held otherwise. Hence, these appeals.

5. We may, as already indicated, refer to the facts of the case in civil appeals arising out of SLP (C) Nos. 30983-30986 of 2008. The appellants' date of appointment and their resignation are as under:

| Position of the Petitioner as per Cause List | Date of Appointment | Date of Resignation |
|---|---|---|
| 1. M.R. Prabhakar | 27-05-1970 | 04-06-1991 |
| 2. S. Ananda Rao | 09-09-1970 | 22-09-1990 |
| 3. N. Anand | 17-12-1969 | 19-04-1993 |
| 4. S. K. Mehta | 15-12-1965 | 01-05-1991 |



| | | |
|---|---|---|
| 5. N.V. Rangaswamy | 24-07-1968 | 09-01-1991 |
| 6. S. Sathyanarayan | 07-0701970 | 03-06-1993 |
| 7. K. S. Seshadri (since deceased) | 18-02-1970 | 20-07-1992 |
| 8. K. Suresh Rao | 02-05-1970 | 30-06-1990 |
| 9. P. Govinda Pai | 03-04-1968 | 30-03-1988 |
| 10. K. V. Puranik | 01-02-1963 | 24-07-1986 |

The above mentioned appellants had submitted their resignations between 24.7.1986 and 3.6.1993 prior to the signing of the Statutory Settlement dated 29.10.1993 under the Industrial Disputes Act, 1947 and the Joint Note dated 29.10.1993, with regard to the introduction of 'pension' as a second retiral benefit in lieu of CPF. Appellants, placing reliance on the various provisions of Regulations 1995, submitted that the pension regulations were introduced as an additional benefit to the serving and retired employees. It was pointed out that an employee who had resigned from the bank was not disentitled to pension except by operation of Regulation 22. If this regulation was held operative against the appellants, it would result in absurd consequences since by forfeiture of entire past service, such employees would not be entitled to any pensionary benefits including gratuity and provident fund. Further, it was pointed out that Regulation 22 admittedly never existed when the appellants had submitted their resignation letters and, therefore, the said regulation could not operate to disentitle the appellants from any pensionary benefits. Further, it was also pointed out when appellants had submitted their letters of resignation prior to 1.1.1993 the concept of 'voluntary retirement' did not exist under the Bank Officers Regulations, 1979 (for short 'Regulations 1979'). Regulation 1979, it was pointed out, neither defined the expression 'resignation' legally nor the expression 'voluntary retirement'. In other words, the

concept of 'voluntary retirement' was required to be defined only because of the introduction of pension as a retiral benefit with effect from 29.9.1995.

6. Learned counsel appearing for the appellants submitted that, in the absence of legal definition of 'voluntary retirement' or in the absence of any legally prescribed consequence of 'resignation', it may be understood in the sense of 'voluntary retirement' of service. Further, it was also urged that the conceptual difference between 'resignation' and 'voluntary retirement' comes in only if it is made by legal prescription and not in the ordinary sense as perceived in the realm of appointment. Learned counsel also pointed out that pension regulations must be read and interpreted keeping in mind its intended object and cannot be applied to deprive those employees who left services honourably either on the grounds of superannuation, resignation or even pre-mature retirement. Considerable reliance was placed on a recent judgment of this Court in *Sheelkumar Jain v. New India Assurance Company Limited and Others* (2011) 12 SCC 197 and submitted that the principle laid down in that judgment would squarely be applicable to the facts of the present case. Further, it was also pointed out that the beneficial construction placed by this Court in *Madan Singh Shekhawat v. Union of India and Others* (1996) 6 SCC 459 is also applicable by way of extending the pensionary benefits to the appellants.

7. Learned senior counsel appearing for the respondents banks submitted that the High Court had rightly denied the claim of pension to the appellants who had resigned from their respective service before the settlement reached between All India Bank Officers Federation and Indian Bank Association (for short 'IBA') and that Regulations 1995 would not apply to the appellants. Further, it was pointed out that the appellants had resigned prior to 1.1.1993 and were not covered by the Statutory Settlement or the Joint Note dated 29.10.1993 and the Regulations 1995. It was pointed out that the reliance placed by the appellants either on Regulation 29 or Regulation 22 in



support of their contentions was completely misplaced since the appellants were not covered by the scheme of pension introduced by the respective banks with effect from 1.11.1993. Learned counsel appearing for the banks submitted that the judgment of this Court in *UCO Bank and Others v. Sanwar Mal* (2004) 4 SCC 412 squarely applies to the facts of the present case. In that case, the very same regulation came up for interpretation and the identical reliefs sought for, which were rejected by the Court. Further, it was also pointed out that *Sheelkumar Jain's case (supra)* was interpreting an insurance scheme which is, not comparable with the Regulations 1995 applicable to the banks.

8. The appellants, in these two main appeals were officers of the Canara Bank, who had resigned and stood relieved from their respective service between 24.7.1986 and 3.6.1993. IBA, representing 58 banks and their workmen had entered into a Memorandum of Settlement on 29.10.1993 under Section 2(p) and Section 18(1) of the Industrial Disputes Act, 1947 read with Rule 58 of the Industrial Disputes (Central) Rules, 1957. During the course of negotiations of service conditions of the workmen employees in February 1990, IBA agreed to introduce a pension scheme in banks for the workmen employees in lieu of employers' contribution to the provident fund. The pension scheme agreed to by IBA was to be broadly based on Central Government/Reserve Bank of India pattern, details of the scheme were worked out later. A Joint Note was also made with regard to the introduction of pension as a second retiral benefit in lieu of CPF. Clause (4) of the Joint Note reads as follows:

> "(iv) The Pension Scheme will also be extended to retired Officers' who retired on or after 1.1.1986. They will be entitled for monthly pension as well as commutation facility as from 1.1.1993. Those officers who avail of the Pension Scheme will be required to refund Bank's contribution to the Provident Fund with interest thereon

drawn by them together with simple interest at 6% from the date of withdrawal of the Provident Fund to the date of refund."

9. In furtherance of the Statutory Settlement and Joint Note dated 29.10.1993, draft of the Pension Regulations was negotiated and settled. Clause 17(1), so far as it is relevant for the present purpose, is extracted hereunder:

"17(1) Notwithstanding anything contained in the Service Regulations/Service Rules an employee may be permitted to voluntarily retire after he has completed 20 years of qualifying service, after given three months' notice in writing to the competent authority."

10. Later, in exercise of the powers conferred by Clause (f) of sub-section (2) of Section 19 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, the Board of Directors of the Canara bank, after consultation with the RBI and with the previous sanction of the Central Government, made the regulations called Canara Bank (Employees') Pension Regulations, 1995. The same were made applicable to the employees'/officers and were notified in the Gazette of India on 29.9.1995. Chapter II of the Regulations deals with the application and eligibility, the operative portion of Regulation 3(1)(a) to 3(1)(c)reads as under:

"3. Application: These regulations shall apply to employees who,-

(1) (a) were in the service of the Bank on or after the 1st day of January 1986 but had retired before the 1st day of November, 1993; and

(b) exercise an option in writing within one hundred and twenty days from the notified date to become member of the Fund; and

(c) refund within sixty days after the expiry of the said



period of one hundred and twenty days specified in clause (b) the entire amount of the Bank's contribution to the Provident Fund including interest accrued thereon together with a further simple interest at the rate of six percent per annum on the said amount from the date of settlement of the Provident Fund account till the date of refund of the aforesaid amount to the Bank; or

XXXXXX XXX

XXXXXX XXX"

11. Regulation 22, which finds a place in Chapter IV of the Regulations, reads as follows:

*"22 Forfeiture of service –*

(1). Resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past service and consequently shall not qualify for pensionary benefits;

(2) An interruption in the service of a Bank employee entails forfeiture of his past service, expect in the following cases, namely :-

(a) authorised leave of absence;

(b) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the bank employee dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension;

(c) transfer to non-qualifying service in an establishment under the control of the Government or Bank if such transfer has been ordered by a

competent authority in the public interest;

(d) joining time while on transfer from one post to another.

(3) Notwithstanding anything contained in sub-regulation (2), the appointing authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave.

(4) (a) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of service rendered by a bank employee shall be treated as automatically condoned and the pre-interruption service treated as qualifying service;

(b) Nothing in clause (a) shall apply to interruption caused by resignation, dismissal or Removal from the service or for participation in a strike:

Provided that before making an entry in the service record of the Bank employee regarding forfeiture of past service because of his participation in strike, an opportunity of representation may be given to such bank employees."

12. Classes of Pension are dealt with in Chapter V of the Regulations. Regulation 28 deals with superannuation pension and the same reads as follows:

*"28. Superannuation Pension:-* Superannuation pension shall be granted to an employee who has retired on his attaining the age of superannuation specified in the Service Regulations or Settlement."

29 Pension on Voluntary Retirement –

**(1)** On or after the 1st day of November 1993, at any time after the an employee has completed twenty



years of qualifying service he may, by giving notice of not less than three months in writing to the appointing authority, retire from service :

Provided that this sub – regulation shall not apply to an employee who is on deputation or on study leave abroad unless after having been transferred or having returned to India he has resumed charge of the post in India and has served for a period of not less than one year :

Provided further that this sub – regulation shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or public sector undertaking or company or institution or body, whether incorporated or not to which he is on deputation at the time of seeking voluntary retirement :

Provided that this sub – regulation shall not apply to an employee who is deemed to have retired in accordance with clause (1) of regulation 2.

2. The notice of voluntary retirement given under sub – regulation (1) shall require acceptance by the appointing authority:

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

3. (a) An employee referred to in sub regulation (1) may make a request in writing to the writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefore :

(b) On receipt of a request under clause (a), the appointing authority may, subject to the provisions of sub – regulation (2), consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the employee shall not apply for commutation of a part of his pension before the expiry of the notice of three months.

4. An employee, who has elected to retire under this regulation and has given necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:

Provided that the request for such withdrawal shall be made before the intended date of his retirement.

5. The qualifying service of an employee retiring voluntarily under this regulation shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by such employee shall not in any case exceed thirty three years and it does not take him beyond the date of superannuation.

6. The pension of an employee retiring under this regulation shall be based on the average emoluments as defined under clause (d) of regulation 2 of these Regulations and the increase not exceeding five years in his qualifying service, shall not entitle him any notional fixation of pay for the purpose of calculating his pension."



13. In order to appreciate the scope of the above mentioned Regulations, it is necessary to refer to some of the definition clauses. The word 'retired' is defined in Regulation 2(x) of the Regulations 1995, which reads as under:

"2(x) "retired" includes deemed to have retired under clause(l)."

The word 'retirement' is defined under Regulation 2(y) of the Regulations 1995, which reads as follows:

"2(y) "retirement" means cessation from bank's service,-

(a) On attaining the age of superannuation specified in Service Regulations or Settlements;

(b) On voluntary retirement in accordance with provisions contained in regulation 29 of these regulations;

(c) On premature retirement by the Bank before attaining the age of superannuation specified in Service Regulations or Settlement."

14. The appellants, in our view, did not retire from the service, but resigned from the service. Appellants tried to build up a case that in the absence of a legal definition of 'voluntary retirement' or in the absence of legally prescribed consequences of 'resignation', it must be understood in the sense of voluntary relinquishment of service. It was pointed out that there can be no distinction between 'voluntary retirement' and 'resignation' and those expressions are to be understood in their ordinary literal sense.

15. We find it difficult to accept the contentions raised by the appellants. There is no ambiguity in the definition clause under Regulation 2(y) which has statutorily brought in the 'voluntarily retirement' as 'retirement'. Though the concept of 'resignation' is well known in Service Jurisprudence, the same

has not been brought within the definition of 'retirement' under Regulation 2(y). Further, the words 'retired' and 'retirement' have some resemblance in their meanings, but not 'resignation'. Regulation 3(1)(a) specifically used the expression 'retirement' and the expression 'resignation' has not been incorporated either in the definition clause or in Regulation 3(1)(a). We need not labour much on this issue, since the difference between these two concepts 'resignation' and 'retirement', in the context of the same Banking Regulations 1995, came up for consideration before this Court in *Sanwar Mal* (supra), wherein this Court has distinguished the words 'resignation' and 'retirement' and held as follows:

> "9. ……. The words "resignation" and "retirement" carry different meanings in common parlance. An employee can resign at any point of time, even on the second day of his appointment but in the case of retirement he retires only after attaining the age of superannuation or in the case of voluntary retirement on completion of qualifying service. The effect of resignation and retirement to the extent that there is severance of employment but in service jurisprudence both the expressions are understood differently. Under the Regulations, the expressions "resignation" and "retirement" have been employed for different purpose and carry different meanings. The pension scheme herein is based on actuarial calculation; it is a self-financing scheme, which does not depend upon budgetary support and consequently it constitutes a complete code by itself. The scheme essentially covers retirees as the credit balance to their provident fund account is larger as compared to employees who resigned from service. *Moreover, resignation brings about complete cessation of master and servant relationship whereas voluntary retirement maintains the relationship for the purposes of grant of retiral benefits, in view of the past service. Similarly, acceptance of resignation is dependent upon discretion of the employer whereas retirement is completion of service in terms of regulations/rules framed by the bank. Resignation can be tendered irrespective of the length of service whereas in the case of voluntary retirement, the employee has to complete qualifying service for retiral benefits. ……"*
>
> (emphasis added)



In the above mentioned judgment, this Court has also held that there are different yardsticks and criteria for submitting the resignation, vis-à-vis voluntary retirement and exceptions thereof. In that context, the scope of Regulation 22 of Regulations 1995 was also considered and the Court held as follows:

> 9. ……In our view, Regulation 22 provides for disqualification of employees who have resigned from service and for those who have been dismissed or removed from service. Hence, we do not find any merit in the arguments advanced on behalf of the respondent that Regulation 22 makes an arbitrary and unreasonable classification repugnant to Article 14 of the Constitution by keeping out such class of employees. The view we have taken is supported by the judgment of this Court in the case of *Reserve Bank of India v. Cecil Dennis Solomon* (2004) 9 SCC 461. Before concluding we may state that Clause 22 is not in the nature of penalty as alleged. It only disentitles an employee who has resigned from service from becoming a member of the Fund. Such employees have received their retiral benefits earlier. The pension scheme, as stated above, only provides for a second retiral benefit. Hence there is no question of penalty being imposed on such employees as alleged. The pension scheme only provides for an avenue for investment to retirees. They are provided avenue to put in their savings and as a term or condition which is more in the nature of an eligibility criteria the scheme disentitles such category of employees out of it."

16. We may indicate that in *Sanwar Mal* (supra), the employee, who was working on Class III post, resigned from the service of UCO Bank on 25.2.1988 after giving one month's notice and also accepted his provident fund without protest. On coming into force of the Regulations 1995, Sanwar Mal opted for pension scheme. Since Sanwar Mal had resigned in the year 1988, UCO Bank declined its option for admitting him as a member of the fund.

17. This Court, as already indicated, after referring to the various provisions of the Regulations 1995 and after examining the meaning of the expressions 'resignation' and 'retirement', held that since Regulation 22 provided for disqualification of employees who had resigned, such employees could not claim membership of the fund.

18. Learned counsel appearing for the appellants have placed heavy reliance on *Sheelkumar Jain* (supra) and submitted that in the light of that judgment, the decision rendered in *Sanwar Mal* (supra) requires reconsideration. We find it difficult to accept the contention raised by the learned counsel appearing for the appellants.

19. We may point out in *Sheelkumar Jain* (supra) that this Court was dealing with an insurance scheme and not the pension scheme, which is applicable in the banking sector. The provisions of both the scheme and the Regulation are not pari material. In *Sheelkumar Jain* case (supra), while referring to Para 5, this Court came to the conclusion that the same does not make distinction between 'resignation' and 'voluntary retirement' and it only provides that an employee who wants to leave or discontinue his service amounts to 'resignation' or 'voluntary retirement'. Whereas, Regulation 20(2) of the Canara Bank (Officers) Service Regulations 1979 applicable to banks, had specifically referred to the words 'resignation', unlike Para 5 of the Insurance Rules. Further, it is also to be noted that, in that judgment, this Court in Para 30 held that the Court will have to construe the statutory provisions in each case to find out



whether the termination of service of an employee was a termination by way of resignation or a termination by way of voluntary retirement.

20. The appellants, when tendered their letters of resignation, were governed by the Regulations 1979. Regulation 20(2) of Regulations 1979 dealt with resignation from service and they tendered their resignation in the light of that provision. We are of the view that the appellants have failed to show any pre-existing rights in their favour either in the Statutory Settlement/Joint Note dated 29.10.1993 or under the Regulations 1995. Appellants had resigned from service prior to 1.11.1993 and, therefore, were not covered by the statutory settlement, Joint Note dated 29.10.1993 and the Regulations 1995. They could not establish any pre-existing legal, statutory or fundamental rights in their favour to claim the benefit of Regulations 1995. Consequently, the reliance placed by the appellants either on Regulation 29 or Regulation 22 in support of their contentions, cannot be accepted, since they are not covered by the scheme of pension introduced by the banks with effect from 1.11.1993.

21. We, therefore, find no merit in these appeals and the same are dismissed, with no order as to costs.

K.K.T. Appeals dismissed.

VINOD KAPOOR

*v.*

STATE OF GOA & ORS.

(Civil Appeal Nos. 8643-8644 of 2003)

OCTOBER 03, 2012

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

*Constitution of India, 1950 – Article 136 – Maintainability of appeal by way of Special Leave under Article 136 against an order of the High Court after an earlier Special Leave Petition against the same order had been withdrawn without any liberty to file a fresh Special Leave Petition – Held: Not maintainable – As the appellant had withdrawn the Special Leave to Appeal against the order dated 29.01.2000 of the High Court with permission to pursue his remedy by way of review instead and had not taken the liberty from the Supreme Court to challenge the order dated 29.01.2000 afresh by way of special leave in case he did not get relief in the review application, he was precluded from challenging the order dated 29.01.2000 of the High Court by way of fresh Special Leave to Appeal under Article 136.*

*Abhishek Malviya v. Additional Welfare Commissioner and Another* **(2008) 3 SCC 108 – relied on.**

*Board of Control for Cricket in India and Another v. Netaji Cricket Club and Others* **(2005) 4 SCC 741: 2005 (1) SCR 173;** *Kunhayammed and Others v. State of Kerala and Another* **(2000) 6 SCC 359: 2000 (1) Suppl. SCR 538 and** *Gangadhara Palo v. Revenue Divisional Officer and Another* **(2011) 4 SCC 602: 2011 (3) SCR 746– cited.**

*Constitution of India, 1950 – Article 136 – Maintainability of appeal by way of Special Leave under Article 136 against the order of the High Court rejecting an application for review*





*of the appellant – Held: Not maintainable – The order rejecting the application for review is not appealable by virtue of the principle in Order XLVII, Rule 7 CPC – Code of Civil Procedure, 1908 – Order XLVII, r.7.*

*Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* **(1994) 2 SCC 753;** *Suseel Finance & Leasing Co. v. M. Lata and Others* **(2004) 13 SCC 675 and** *M.N. Haider and Others v. Kendriya Vidyalaya Sangathan and Others* **(2004) 13 SCC 677 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2008) 3 SCC 108** | **relied on** | **Para 5, 9, 11** |
| **(1994) 2 SCC 753** | **relied on** | **Para 5, 10** |
| **(2004) 13 SCC 675** | **relied on** | **Para 5** |
| **(2004) 13 SCC 677** | **relied on** | **Para 5** |
| **2005 (1) SCR 173** | **cited** | **Para 6** |
| **2000 (1) Suppl. SCR 538** | **cited** | **Para 6** |
| **2011 (3) SCR 746** | **cited** | **Para 6** |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8643-8644 of 2003.

From the Judgment & Order dated 6.12.2000 and 29.1.2000 of the High Court of Bombay at Panaji-Goa in Civil Review Petition No. 17/2000 and Civil Writ Petition No. 253/1999.

Vinod Kapoor (In-Person).

Mukul Rohatgi, A.V. Rangam, A. Subhashini, Kiran Bhardwaj, B.K. Prasad. Shreekant N. Terdal, Hari Shankar K, Ninad Laud, Vikas Singh Jangra, Swati Mantri for the Respondents.

The Order of the Court was delivered by

**A.K. PATNAIK, J.** 1. These are appeals by way of special leave under Article 136 of the Constitution against the orders of the Bombay High Court at Goa dismissing Civil Writ Petition No. 253 of 1999 and Civil Review Petition No. 17 of 2000.

2. The facts very briefly are that the respondent no. 8 was served with a show-cause notice dated 26.11.1996 by the North Goa Planning and Development Authority (for short 'the Authority'). In the show-cause notice, it was alleged that the respondent no. 8 had constructed a residential bungalow on a land in Survey No.250/12 without the prior permission of the Authority as required under Section 44 of the Town and Country Planning Act, 1974 (for short 'the Act'). It was also alleged in the show-cause notice that there was no proper access road to the property as required under the Act and that the construction was within a distance of 100 Mtrs. from Zuari river and was in breach of the Coastal Regulation Zone notification issued under the Environment (Protection) Act, 1986. By the show-cause notice, the respondent no.8 was asked to show-cause why action should not be initiated under Section 52 of the Act for demolition of the construction. By a communication dated 10.12.1996, the Town Planner of the Authority also informed the Chief Officer, Panaji Municipal Council, that the respondent no. 8 had obtained permission from the Municipal Council to make the construction on the land in Survey No. 250/12, Village Taleigao, by misrepresenting the facts and, therefore, the permission may be revoked. Thereafter, a notice dated 18.11.1997 was issued by the Municipal Council to the respondent no. 8 directing him to stop the construction work immediately and to show-cause why the licence granted to him for the construction of the building on the land in Survey. No. 250/12 of Taleigao Village should not be revoked.

3. The appellant also filed Writ Petition No. 253 of 1999 before the Bombay High Court at Goa alleging that the structure



made by the respondent no. 8 on the land in Survey No.250/12 in Village Taleigao contravenes the provisions of the Coastal Regulation Zone Notification dated 19.02.1991 inasmuch as it was within 100 Mtrs. from the river Zuari in Costal Regulation Zone (CRZ) III area. The High Court called for a report from the Director of National Institute of Oceanography after inspection of the property of the respondent no.8 and a Senior Technical Officer of the National Institute of Oceanography submitted a report dated 24.01.2000 saying that the structure in question was not within 100 Mtrs. of the High Tide Line (HTL). After perusing the report, the High Court dismissed the writ petition by order dated 29.01.2000

4. Aggrieved, the appellant filed Special Leave Petition under Article 136 of the Constitution against the order dated 29.01.2000 of the Bombay High Court at Goa dismissing the writ petition. When the Special Leave Petition was taken up for hearing by a three-Judge Bench on 22.11.2000, a submission was made on behalf of the appellant before the Court that the appellant had filed a Review Petition before the High Court and that the learned counsel for the appellant had instructions to withdraw the Special Leave Petition and the Court dismissed the Special Leave Petition as withdrawn. Thereafter, the High Court took up the hearing of the Review Petition and rejected the Review Petition by order dated 06.12.2000.

5. When the appeals were taken up for hearing, a preliminary issue was raised on behalf of the respondent no.8 that the Civil Appeals by way of Special Leave Petition were not maintainable. According to the learned counsel for the respondent no.8, the appeal against the order dated 29.01.2000 of the High Court in Writ Petition No. 253 of 1999 is not maintainable as the appellant had earlier challenged the said order before this Court in a Special Leave Petition, but had withdrawn the same and, therefore, the order dated 29.01.2000 of the High Court dismissing Writ Petition No. 253

of 1999 filed by the appellant had become final and could not be challenged again. In support of this submission, he relied on the decision of this Court in *Abhishek Malviya v. Additional Welfare Commissioner and Another* [(2008) 3 SCC 108]. He submitted that the appeal against the order dated 06.12.2000 of the High Court rejecting Civil Review Application No. 17 of 2000 of the applicant was also not maintainable in view of Order XLVII Rule 7 of the Code of Civil Procedure, 1908 (for short 'the CPC'), which provides that an order of the Court rejecting an application for review is not appealable. He submitted that this Court has held that the principle of Order XLVII, Rule 7 is applicable to appeals by way of Special Leave under Article 136 of the Constitution in *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput* [(1994) 2 SCC 753], *Suseel Finance & Leasing Co. v. M. Lata and Others* [(2004) 13 SCC 675] and *M.N. Haider and Others v. Kendriya Vidyalaya Sangathan and Others* [(2004) 13 SCC 677].

6. The appellant, on the other hand, submitted that the appeals against the order dated 29.01.2000 of the High Court in the Writ Petition and the order dated 06.12.2000 of the High Court in the Review Petition were maintainable under Article 136 of the Constitution. In support of this submission, he relied on the decisions of this Court in *Board of Control for Cricket in India and Another v. Netaji Cricket Club and Others* [(2005) 4 SCC 741], *Kunhayammed and Others v. State of Kerala and Another* [(2000) 6 SCC 359] and *Gangadhara Palo v. Revenue Divisional Officer and Another* [(2011) 4 SCC 602].

7. We have considered the submissions of the learned counsel for respondent no.8 and the appellant and we find that the earlier Special Leave Petition filed by the appellant against the order dated 29.01.2000 of the High Court dismissing Writ Petition No. 253 of 1999 was dismissed as withdrawn by order dated 22.11.2000, which is quoted hereinbelow:

> "It is submitted that the petitioner has filed a review petition in the High Court and, therefore, learned counsel has instructions to withdraw the petition. The Special Leave Petition is, accordingly, dismissed as withdrawn."



The order dated 22.11.2000 of this Court quoted above would show that no liberty was taken by the appellant to file a fresh Special Leave Petition under Article 136 of the Constitution against the order dated 29.01.2000 of the High Court and the Special Leave Petition was withdrawn by the appellant saying that he had filed a review petition before the High Court. Hence, this Court appears to have permitted the appellant to pursue his remedy by way of review before the High Court.

8. The question that we have to decide is whether the appeal will lie against the order dated 29.01.2000 of the High Court dismissing Writ Petition No.253 of 1999 when an earlier Special Leave Petition against the said order dated 29.01.2000 of the High Court was filed by the appellant but was withdrawn with the permission of this Court to pursue his remedy by way of review against the said order dated 29.01.2000 of the High Court. As the appellant has withdrawn the Special Leave to Appeal against the order dated 29.01.2000 of the High Court with permission to pursue his remedy by way of review instead and had not taken the liberty from this Court to challenge the order dated 29.01.2000 afresh by way of special leave in case he did not get relief in the review application, he is precluded from challenging the order dated 29.01.2000 of the High Court by way of Special Leave to Appeal under Article 136 of the Constitution.

9. In *Abhishek Malviya v. Additional Welfare Commissioner and Another* (supra), cited by the counsel for respondent No.8, the order dated 13.03.1997 of the Madhya Pradesh High Court sustaining the order of compensation passed by the Additional Welfare Commissioner was challenged before this Court in a Special Leave Petition and by order dated 04.05.1999 this Court dismissed the Special Leave Petition as withdrawn and when the fresh appeal by way of special leave under Article 136 of the Constitution was filed,

this Court held that the fresh appeal is liable to be dismissed as not maintainable. Para 8 of this Court's order in the aforesaid case of *Abhishek Malviya v. Additional Welfare Commissioner and Another* (supra) is quoted hereinbelow:

> "8. We find no merit in appellant's contention. The order dated 4-5-1999 of this Court specifically refers to the error in the order describing the appellant as "deceased" and dismissed the SLP as withdrawn with the following observation: "He wants to apply to the Additional Welfare Commissioner for correction. We express no opinion in that behalf". No liberty was reserved to file a fresh appeal or seek review of the order dated 13-3-1997 on merits. The order dated 13-3-1997 having attained finality, his efforts to reagitate the issue again and again is an exercise in futility. We are therefore of the view that appeal is liable to be dismissed.

10. Moreover, on the High Court rejecting the application for review of the appellant, the order rejecting the application for review is not appealable by virtue of the principle in Order XLVII, Rule 7 of the CPC. In *Shanker Motiram Nale v. Shiolalsing Gannusing Rajput; Suseel Finance & Leasing Co. v. M. Lata and Others* and *M.N. Haider and Others v. Kendriya Vidyalaya Sangathan and Others* (supra) cited by the learned counsel for respondent No.8, this Court has consistently held that an appeal by way of Special Leave Petition under Article 136 of the Constitution is not maintainable against the order rejecting an application for review in view of the provisions of Order XLVII, Rule 7 of the CPC.

11. There is nothing in the decisions cited by the appellant to show that this Court has taken a view different from the view taken in *Abhishek Malviya v. Additional Welfare Commissioner and Another* (supra) with regard to maintainability of an appeal by way of Special Leave under Article 136 of the Constitution against an order of the High Court after an earlier Special Leave Petition against the same



order had been withdrawn without any liberty to file a fresh Special Leave Petition. Similarly, there is nothing in the decisions cited by the appellant to show that this Court has taken a view that against the order of the High Court rejecting an application for review, an appeal by way of Special Leave under Article 136 of the Constitution is maintainable.

12. In the result, we hold that the Civil Appeals are not maintainable and we accordingly dismiss the same. We, however, make it clear that we have not expressed any opinion on the merits of the case of the appellant or on whether the Authority or the Municipal Council could under law issue the notices to the respondent no. 8 or take any action in respect of the construction made by him on the land in Survey No.250/12 in Village Taleigao.

B.B.B. Appeals dismissed.

GIRISH RAMCHANDRA DESHPANDE
*v.*
CEN. INFORMATION COMMR. & ORS.
(Special Leave Petition (C) No. 27734 of 2012)

OCTOBER 3, 2012

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

*Right to Information Act, 2005 – s.8(1) – 'Personal information" as defined in clause (j) of s.8(1) – Scope and interpretation – Petitioner submitted application before the Regional Provident Fund Commissioner (Ministry of Labour, Government of India) calling for various details relating to third respondent, who was employed as Enforcement Officer in a Sub-Regional Office – The petitioner sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer; details of his movable and immovable properties, investments, lending and borrowing from Banks and other financial institutions and also details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son – Most details sought by the petitioner were contained in the income tax returns of third respondent – Whether the information sought for by the petitioner qualified to be personal information as defined in clause (j) of s.8(1) and were thus exempted from disclosure – Held: The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest – On the other hand, such disclosure would cause unwarranted invasion of privacy of that individual – Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate*





*Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right – The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of s.8(1), unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information – In the instant case, the petitioner did not make a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual u/s.8(1)(j) – Details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. qualified to be personal information as defined in clause (j) of s.8(1) – Petition accordingly dismissed.*

*Central Board of Secondary Education and another v. AdityaBandopadhyay and others* **(2011) 8 SCC 497: 2011 (11) SCR 1028 – referred to.**

**Case Law Reference:**

**2011 (11) SCR 1028 referred to Para 10**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 27734 of 2012.

From the Judgment & Order dated 21.12.2011 of the High Court of Judicature of Bombay Bench at Nagpur in Letters Patent Appeal No. 358 of 2011.

A.P. Wachasunder, Jatin Zaveri, Neel Kamal Mishra for the Petitioner.

The following Order of the Court was delivered

**O R D E R**

1. Delay condoned.

2. We are, in this case, concerned with the question whether the Central Information Commissioner (for short 'the CIC') acting under the Right to Information Act, 2005 (for short 'the RTI Act') was right in denying information regarding the third respondent's personal matters pertaining to his service career and also denying the details of his assets and liabilities, movable and immovable properties on the ground that the information sought for was qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act.

3. The petitioner herein had submitted an application on 27.8.2008 before the Regional Provident Fund Commissioner (Ministry of Labour, Government of India) calling for various details relating to third respondent, who was employed as an Enforcement Officer in Sub-Regional Office, Akola, now working in the State of Madhya Pradesh. As many as 15 queries were made to which the Regional Provident Fund Commissioner, Nagpur gave the following reply on 15.9.2008:

"As to Point No.1: Copy of appointment order of Shri A.B. Lute, is in 3 pages. You have sought the details of salary in respect of Shri A.B. Lute, which relates to personal information the disclosures of which has no relationship to any public activity or interest, it would cause unwarranted invasion of the privacy of individual hence denied as per the RTI provision under Section 8(1)(j) of the Act.

As to Point No.2: Copy of order of granting Enforcement Officer Promotion to Shri A.B. Lute, is in 3 Number. Details of salary to the post



along with statutory and other deductions of Mr. Lute is denied to provide as per RTI provisions under Section 8(1)(j) for the reasons mentioned above.

As to Point NO.3: All the transfer orders of Shri A.B. Lute, are in 13 Numbers. Salary details is rejected as per the provision under Section 8(1)(j) for the reason mentioned above.

As to Point No.4: The copies of memo, show cause notice, censure issued to Mr. Lute, are not being provided on the ground that it would cause unwarranted invasion of the privacy of the individual and has no relationship to any public activity or interest. Please see RTI provision under Section 8(1)(j).

As to Point No.5: Copy of EPF (Staff & Conditions) Rules 1962 is in 60 pages.

As to Point No.6: Copy of return of assets and liabilities in respect of Mr. Lute cannot be provided as per the provision of RTI Act under Section 8(1)(j) as per the reason explained above at point No.1.

As to Point No.7: Details of investment and other related details are rejected as per the provision of RTI Act under Section 8(1)(j) as per the reason explained above at point No.1.

As to Point No.8: Copy of report of item wise and value wise details of gifts accepted by Mr. Lute, is rejected as per the provisions of

RTI Act under Section 8(1)(j) as per the reason explained above at point No.1.

As to Point No.9: Copy of details of movable, immovable properties of Mr. Lute, the request to provide the same is rejected as per the RTI Provisions under Section 8(1)(j).

As to Point No.10: Mr. Lute is not claiming for TA/DA for attending the criminal case pending at JMFC, Akola.

As to Point No.11: Copy of Notification is in 2 numbers.

As to Point No.12: Copy of certified true copy of charge sheet issued to Mr. Lute – The matter pertains with head Office, Mumbai. Your application is being forwarded to Head Office, Mumbai as per Section 6(3) of the RTI Act, 2005.

As to Point No.13: Certified True copy of complete enquiry proceedings initiated against Mr. Lute – It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest. Please see RTI provisions under Section 8(1)(j).

As to Point No.14: It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest, hence denied to provide.

As to Point No.15: Certified true copy of second show cause notice – It would cause unwarranted invasion of privacy of individuals and has no relationship to



any public activity or interest, hence denied to provide."

4. Aggrieved by the said order, the petitioner approached the CIC. The CIC passed the order on 18.6.2009, the operative portion of the order reads as under:

"The question for consideration is whether the aforesaid information sought by the Appellant can be treated as 'personal information' as defined in clause (j) of Section 8(1) of the RTI Act. It may be pertinent to mention that this issue came up before the Full Bench of the Commission in Appeal No.CIC/AT/A/2008/000628 (*Milap Choraria v. Central Board of Direct Taxes*) and the Commission vide its decision dated 15.6.2009 held that "the Income Tax return have been rightly held to be personal information exempted from disclosure under clause (j) of Section 8(1) of the RTI Act by the CPIO and the Appellate Authority, and the appellant herein has not been able to establish that a larger public interest would be served by disclosure of this information. This logic would hold good as far as the ITRs of Shri Lute are concerned. I would like to further observe that the information which has been denied to the appellant essentially falls in two parts – (i) relating to the personal matters pertaining to his services career; and (ii) Shri Lute's assets & liabilities, movable and immovable properties and other financial aspects. I have no hesitation in holding that this information also qualifies to be the 'personal information' as defined in clause (j) of Section 8(1) of the RTI Act and the appellant has not been able to convince the Commission that disclosure thereof is in larger public interest."

5. The CIC, after holding so directed the second respondent to disclose the information at paragraphs 1, 2, 3 (only posting details), 5, 10, 11, 12,13 (only copies of the posting orders) to the appellant within a period of four weeks

from the date of the order. Further, it was held that the information sought for with regard to the other queries did not qualify for disclosure.

6. Aggrieved by the said order, the petitioner filed a writ petition No.4221 of 2009 which came up for hearing before a learned Single Judge and the court dismissed the same vide order dated 16.2.2010. The matter was taken up by way of Letters Patent Appeal No.358 of 2011 before the Division Bench and the same was dismissed vide order dated 21.12.2011. Against the said order this special leave petition has been filed.

7. Shri A.P. Wachasunder, learned counsel appearing for the petitioner submitted that the documents sought for vide Sl. Nos.1, 2 and 3 were pertaining to appointment and promotion and Sl. No.4 and 12 to 15 were related to disciplinary action and documents at Sl. Nos.6 to 9 pertained to assets and liabilities and gifts received by the third respondent and the disclosure of those details, according to the learned counsel, would not cause unwarranted invasion of privacy.

8. Learned counsel also submitted that the privacy appended to Section 8(1)(j) of the RTI Act widens the scope of documents warranting disclosure and if those provisions are properly interpreted, it could not be said that documents pertaining to employment of a person holding the post of enforcement officer could be treated as documents having no relationship to any public activity or interest.

9. Learned counsel also pointed out that in view of Section 6(2) of the RTI Act, the applicant making request for information is not obliged to give any reason for the requisition and the CIC was not justified in dismissing his appeal.

10. This Court in *Central Board of Secondary Education and another v. Aditya Bandopadhyay and others* (2011) 8 SCC 497 while dealing with the right of examinees to inspect



evaluated answer books in connection with the examination conducted by the CBSE Board had an occasion to consider in detail the aims and object of the RTI Act as well as the reasons for the introduction of the exemption clause in the RTI Act, hence, it is unnecessary, for the purpose of this case to further examine the meaning and contents of Section 8 as a whole.

11. We are, however, in this case primarily concerned with the scope and interpretation to clauses (e), (g) and (j) of Section 8(1) of the RTI Act which are extracted herein below:

> *"8. Exemption from disclosure of information.-* (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
>
> **(e)** information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
>
> **(g)** information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
>
> **(j)** information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information."

12. The petitioner herein sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer and also details viz.

movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he has also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income tax returns of the third respondent. The question that has come up for consideration is whether the above-mentioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1) of the RTI Act.

13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.

14. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.



15. The petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

16. We are, therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed.

B.B.B. SLP dismissed

WINSTON TAN & ANR.
*v.*
UNION OF INDIA & ANR.
(Civil Appeal No. 7207 of 2012)

OCTOBER 04, 2012

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

*SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976:*

*ss.2(2)(b), 2(2)(c), 2(2)(e), 6,7,10 and 11 – Certain transfers to be null and void – Forfeiture of property illegally acquired by detenu and his wife – Challenged by purchasers claiming as transferees in good faith and for adequate consideration – Held: Any transfer of the property referred to in s.6(1) is prohibited – In respect of the transfer of the property after issuance of notice u/s.6, the holder cannot set up a plea that he is a transferee in good faith or a bona fide purchaser for adequate consideration – Such plea is not available to a transferee who has purchased the property during pendency of forfeiture proceedings – In the instant case, the transaction of sale in favour of the purchasers has to be ignored by virtue of s.11 and on passing of the order of forfeiture u/s.7, the sale in their favour has become null and void – The title in the subject flat is deemed to have vested in the Central Government when the first notice u/s.6(1) was issued and served on one of the vendors and they ceased to have any title in the subject flat on the date of transfer – In the circumstances, question of according any opportunity to the holders to prove that they are transferee in good faith with adequate consideration does not arise – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.*





**One 'MI' was detained on 02.05.2003 under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Notices u/s.6(1) of the Smuggling and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 in respect of the subject property were issued to the detenu and his wife in 2003 and 2004, respectively, as both owned the subject property. On 10.02.2005, both the noticees sold the subject property to the appellants. The appellants by their communication dated 20.05.2005, informed the Competent Authority that they purchased the subject property under a registered sale deed after availing loan from the Bank. The Competent Authority on 23.06.2005 passed an order u/ss.7(1) and (3) of SAFEMA forfeiting the subject property and declaring that the said property stood vested in the Central Government, and holding that the transfer in favour of the appellants was null and void in view of s.11 of SAFEMA. The appellants filed a writ petition before the High Court contending that they were bonafide purchasers for adequate consideration. The Single Judge of the High Court quashed the order dated 23.06.2005 as violative of principles of natural justice and remitted the matter to the Competent Authority for consideration afresh. However, on appeal, the Division Bench of the High Court held that the appellants were not entitled to any notice and as the sale in their favour was subsequent to the issuance of the notice u/s.6 of SAFEMA, the transaction was null and void u/s. 11 thereof.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The provisions of SAFEMA are stringent and drastic in nature. They are designed to discourage law breaking and directed towards forfeiture of illegally acquired properties. One of the concepts that centres around the provisions of SAFEMA is to reach the**

**properties acquired illegally by the persons who are covered by Clauses (a) to (e) of s.2(2). The provisions of SAFEMA are intended to apply to any property acquired by persons covered by Clauses (a) to (e) of s.2(2), whether before or after the commencement, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force. [Para 22] [1122-D-G]**

**1.2. However, SAFEMA is not applicable to holder of any property u/s. 2(2)(e) who proves that he is a transferee in good faith for adequate consideration. Section 2(2)(e) refers to any holder of any property, which was at any time previously held by a person referred to in clause (a) or clause (b) unless such holder proves that he is a transferee in good faith for adequate consideration. The holder talked of in s.2(2)(e) does not cover a holder who is a transferee of the property after issuance of notice u/s.6. On issuance of notice u/s.6, a moratorium is placed on transfer of property referred to in the notice. Any transfer of the property referred to in s.6 notice is prohibited. [Para 22-23] [1222-G-H; 1124-C-E]**

*Aamenabai Tayebaly and Others v. Competent Authority* **1997 ( 5 ) Suppl. SCR 246 = (1998) 1 SCC 703 – relied on**

*Competent Authority v. Parvathi Bai* **(2011) 6 MLJ 537 – approved**

*Attorney General for India and others v. Amratlal Prajivandas and Others* **1994 (1) Suppl. SCR 1 = (1994) 5 SCC 54 – held inapplicable**

**1.3. Admittedly, SAFEMA was applicable to both vendors. They were served with notices u/s.6(1) before**



**transaction of sale in favour of the appellants. After the issuance of notices u/s.6(1) of SAFEMA to the vendors, the transaction of sale in favour of the appellants has to be ignored by virtue of s.11 and on passing of the order of forfeiture u/s.7, the sale in their favour has become null and void. The order of forfeiture dated 23.06.2005 u/s.7 of SAFEMA relates back to the issuance of first notice u/s.6(1) to one of the vendors. [Para 25] [1126-E-G]**

**1.4. Section 11 is unequivocal and its object is clear. It intends to avoid transfer of property by the persons who are covered by clauses (a) to (e) of sub-s.(2) of s.2 during the pendency of forfeiture proceedings. The provision says that for the purposes of proceedings under the Act, transfer of any property referred to in the notice u/s.6 or u/s.10 shall be ignored. In respect of the transfer of the property after issuance of notice u/s.6, the holder cannot set up a plea that he is a transferee in good faith or a bona fide purchaser for adequate consideration. Such plea is not available to a transferee who has purchased the property during pendency of forfeiture proceedings. [Para 26] [1126-H; 1127-A-B]**

**1.5. It is true that the appellants had obtained encumbrances certificates from the Sub-Registrar prior to purchase which show that there were no encumbrances to the subject flat. It is also true that the appellants had obtained loan from the Bank, for purchase of the said flat. It is a fact that sale consideration to the tune of Rs. 26 lakhs was paid directly by the Bank to the vendors after the Bank was satisfied about the title of the vendors. The appellants had also mortgaged the flat with the Bank as a security towards loan. But these facts are of no help to the appellants as the sale in their favour was effected after notices u/s.6(1) were issued to the vendors. Such sale has no legal sanction. The sale is null and void on the face of s.11; it is not protected so as to enable the purchaser to prove that he is transferee in good faith for**

**adequate consideration. As a matter of law, no title came to be vested in the appellants by virtue of sale-deed dated 10.02.2005 as the vendors could not have transferred the property after service of the notice u/s.6(1) and during pendency of forfeiture proceedings under SAFEMA. The title in the subject flat is deemed to have vested in the Central Government on or about 08.12.2003 when the first notice u/s.6(1) was issued and served on one of the vendors. The vendors ceased to have any title in the subject flat on the date of transfer i.e. 10.12.2005. They had no transferable right. The appellants cannot claim any right in the flat. In the circumstances, question of according any opportunity to the appellants to prove that they are transferees in good faith with adequate consideration does not arise. [Para 28] [1127-E-H; 1128-A-C]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1994 (1) Suppl. SCR 1** | **held inapplicable** | **Para 6** |
| **(2011) 6 MLJ 537** | **approved** | **Para 14** |
| **1997 (5) Suppl. SCR 246** | **relied on** | **Para 14** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7207 of 2012.

From the Judgment & Order dated 16.3.2009 of the High Court of Karnataka at Bangalore in Writ Appeal No. 2181 of 2007.

S.B. Sanyal, K. Maruthi Rao, Anjani Aiyagari for the Appellants.

A.S. Chandhiok, ASG, S.K. Sahijpal, Ritesh Kumar, Piyush Sanghi, Shweta Gupta, Sidharth Tyagi, Arjun Pal, Vidit Gupta, Sonam Anand, Meenakshi Chauhan, B.K. Prasad, Shreekant N. Terdal for the Respondents.

The Judgment of the Court was delivered by



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

2. The forfeiture of Flat No. 4, Kamala Mansion, Ground Floor, Promenade Place, No. 45/2, Promenade Road, Bangalore – 560 042 under Section 7 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, to be referred as 'SAFEMA', is the subject matter in this Appeal. Col. K. M. Somana (Retd.) was the original owner of that flat. On 20.3.1997, he sold the flat to Mohd. Ismail Shabandari and his wife Fathima Kauser Ismail by a sale deed which was registered in the office of the Sub-Registrar, Bangalore.

3. Mohd. Ismail Shabandari was detained under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'COFEPOSA') on 2.5.2003. The detention order came to be passed at the instance of the Enforcement Directorate, Bangalore; his premises were searched on 31.7.2002. In that search Indian Currency of Rs. 13,50,000/- along with incriminating materials showing illegal transfer of money from abroad was seized. The documents seized from the residence of Mohd. Ismail Shabandari on 31.7.2002 by the Enforcement Directorate also indicated that he had received Rs. 92,09,480/- from different persons as instructed by one Hussain Sherrif of Dubai and he had made payments in India to various persons to the tune of Rs. 78,59,480/- leaving a balance of Rs. 13,50,000/- which was seized at the time of search. It was in this backdrop that the order dated 2.5.2003 for detention of Mohd. Ismail Shabandari came to be passed by the Competent Authority.

4. On 8.12.2003, a notice under Section 6(1) of SAFEMA in respect of subject flat was issued to Mohd. Ismail Shabandari. SAFEMA was applicable to him as he was a 'person' within the meaning of Section 2(2)(b) of SAFEMA. The Competent Authority having come to know that his wife, Fathima Kauser Ismail, was having 50 per cent share in the

subject property, a notice under Section 6(1) was also issued to her as she happened to be 'relative' within the meaning of Section 2(2)(c) of SAFEMA. The above notices were served on them.

5. In response to the notice issued to him under Section 6(1), Mohd. Ismail Shabandari sent a letter to the Competent Authority on 26.5.2004 stating therein that the subject flat was purchased through legal earnings. By a subsequent letter, he stated that he had explained the sources of acquisition before the income tax authorities. He filed copies of the income tax returns and also stated that his wife Fathima Kauser Ismail received remittances from her brother in 1994. Mohd. Ismail Shabandari was asked by the Competent Authority to substantiate his claim in respect of sources from which he and his wife purchased the property. He and his wife were asked to appear personally but they did not appear and it transpired that the subject property has been sold by them for Rs. 26,00,000/- on 10.2.2005 to the present appellants.

6. On 17.5.2005, a notice was again issued to Mohd. Ismail Shabandari by the Competent Authority to explain the sources of his income and earnings relating to Savings Bank A/c No. 15802, Vijaya Bank, Brigade Road Branch, Bangalore. A copy of the said notice was also sent to the Branch Manager, Vijaya Bank, Brigade Road Branch, Bangalore. The appellants claim that they came to know of Section 6(1) notice issued to their vendors from Vijaya Bank, Brigade Road Branch, Bangalore and consequently sent their reply to the Competent Authority through their Advocate on 20.5.2005. In their reply, the appellants intimated to the Competent Authority that they had purchased the subject flat by a registered sale deed. As they were having insufficient funds to purchase the subject flat, they availed of loan from Vijaya Bank, Brigade Road Branch, Bangalore. The Bank sanctioned loan after proper examination and scrutiny of the documents and after obtaining legal opinion. The appellants claimed that they were in actual possession and



enjoyment of the subject flat and they have also applied to the authorities of Bangalore Mahanagar Palika for mutation of their names in the records and for obtaining Khatha Certificate and assessment of taxes.

7. The Competent Authority, on 23.6.2005 passed an order under Sections 7(1) and (3) of SAFEMA forfeiting the subject flat and declaring that forfeited property stands vested in the Central Government free from all encumbrances. It was held in the order that the subject flat was not acquired by Mohd. Ismail Shabandari and Fathima Kauser Ismail out of any legal earnings. The said flat had been sold stealthily after the commencement of the proceedings under SAFEMA and the said transfer in favour of the appellants on 10.2.2005 was null and void by virtue of the provisions of Section 11 of SAFEMA.

8. Subsequent to the passing of the above order, a further order under Section 19(1) of SAFEMA was passed by the Competent Auhority on 23.12.2005 directing Mohd. Ismail Shabandari and Fathima Kauser Ismail to surrender/deliver possession of the forfeited flat within 30 days of the receipt of order. In that order, it was reiterated that transfer/sale effected by them subsequent to the notice under Section 6(1) was null and void in view of Section 11 of SAFEMA. A copy of this order was sent by the Competent Auhority to the present appellants.

9. It was then that the appellants filed a writ petition before the Karnataka High Court for quashing the order dated 23.6.2005 forfeiting the subject flat and for writ of mandamus to the Competent Authority not to interfere with their peaceful possession and enjoyment in respect of the subject flat. The above reliefs were sought on diverse grounds, including that they had purchased the subject flat after thorough verification and after obtaining encumbrance certificates for the period from 1.4.1990 to 4.1.2005 and after satisfying with the title of the vendors and also that there was no charge or encumbrance created over the subject flat. They claimed that they were bona fide purchasers for adequate consideration.

10. A counter affidavit was filed by the Competent Authority in opposition to the writ petition. The appellants filed rejoinder to the counter affidavit.

11. The learned Single Judge of the High Court heard the parties and considered the question that was raised before him as to whether the appellants (petitioners therein) were entitled to a notice from the Competent Authority before order of confiscation/forfeiture was passed under SAFEMA. The Single Judge in his order dated 12.9.2007 held that the sale in favour of the appellants had taken place on 10.2.2005, i.e., before the order of forfeiture was passed by the Competent Authority. Although it was a fact that the first notice was issued under SAFEMA to the transferors much before the sale had taken place, but in the opinion of the Single Judge, the order dated 23.6.2005 was violative of the principles of natural justice and, consequently, he quashed the same and remitted the matter to the Competent Authority for fresh consideration.

12. A writ appeal was preferred by the Union of India and the Competent Authority against the order of the Single Judge. The Division Bench of the High Court held that the sale transaction in favour of the appellants was subsequent to the issuance of notice under Section 6 and, accordingly, the transaction was null and void under Section 11 of SAFEMA. In the opinion of the Division Bench, the appellants were not entitled to any notice and non-issuance of notice to them had not vitiated the action taken by the Competent Authority.

13. Mr. S.B. Sanyal, learned senior counsel for the appellants, heavily relied upon the excepted clause of Section 2(2)(e) that protects a transferee in good faith for adequate consideration and the observations made by a 9-Judge Bench of this Court in *Attorney General for India and others v. Amratlal Prajivandas and Others*[1] in para 44 (Pg. 92) of the Report observing, 'So far as the holders (not being relatives

1. (1994) 5 SCC 54.



and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such person proves that he is a transferee in good faith for consideration, his property – even though purchased from a convict/detenu – is not liable to be forfeited'. He referred to diverse documents to show that the appellants had purchased the property after due diligence and after obtaining certificates from Sub-Registrar, Bangalore, that the subject flat was not encumbranced in any manner whatsoever. Learned senior counsel would submit that the appellants had obtained loan from the Vijaya Bank, Brigade Road Branch, Bangalore and the title of the property was fully scrutinized by the Bank and its Panel Advocate. The adequate consideration of Rs. 26,00,000/- was paid by the Bank to the transferors which prima facie establishes that the appellants are transferees in good faith for adequate consideration. Learned senior counsel contended that the appellants were seeking an opportunity to be given to them to prove before the Competent Authority that they were transferees in good faith for adequate consideration and that is what was done by the Single Judge and there was no justification for the Division Bench to upset such a just order.

14. On the other hand, Mr. A.S. Chandhiok, Additional Solicitor General, would submit that the purchase of the subject flat by the appellants was after the issuance of notice under Section 6(1) to the vendors by the Competent Authority. SAFEMA is applicable to one of the vendors by virtue of Section 2(2)(b) and to the other vendor by virtue of Section 2(2)(c). He argued that transaction of sale was null and void under Section 11 and the appellants are not covered by the excepted category of the 'holder' under Section 2(2)(e). He placed reliance upon a decision of this Court in *Aamenabai Tayebaly and Others v. Competent Authority under SAFEMA and others*[2] and a decision of Madras High Court in *Competent Authority v. Parvathi Bai*[3].

2. (1998) 1 SCC 703.
3. (2011) 6 MLJ 537.

15. SAFEMA came into effect from 05.11.1975. It, inter alia, provides for forfeiture of illegally acquired properties of smugglers and foreign exchange manipulators. Its applicability is provided in Section 2. Sub-section (1) of Section 2 provides that the provisions of SAFEMA shall only apply to persons specified in sub-section (2). Clause (b), amongst others, covers the persons in respect of whom an order of detention has been made under COFEPOSA and such order has not been revoked or set aside in any of the situations set out in the four sub-clauses of the proviso. Clause (c) of sub-section (2) of Section 2 applies to the relatives of persons referred to in clauses (a) or (b) while clause (d) applies to the associates of persons referred to in clauses (a) or (b). Clause (e) of sub-section (2) of Section 2 refers to a holder of property. It reads as under :

"S. 2. Application.—(1) xxx xxx xxx

(2). The persons referred to in sub-section (1) are the following, namely: -

(e) any holder (hereinafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration."

16. Section 3 defines various expressions. Section 3 (1) © defines 'illegally acquired property' which reads as follows:

"S. 3(1). In this Act, unless the context otherwise requires,—

(c) "illegally acquired property", in relation to any person to whom this Act applies, means-

(i) any property acquired by such person, whether before or after the commencement of this Act,



wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

(iv) any property acquired by such person, whether before or after commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub-clauses (i) to (iii) or the income or earnings from such property ; and includes-

(A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;

(B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom;"

17. Section 4 prohibits holding of illegally acquired property which reads as follows :

"S. 4. Prohibition of holding illegally acquired property.—(1) As from the commencement of this Act, it shall not be lawful for any person to whom this Act applies to hold any illegally acquired property either by himself or through any other person on his behalf.

(2) Where any person holds any illegally acquired property in contravention of the provision of sub-section (1), such property shall be liable to be forfeited to the Central Government in accordance with the provisions of this Act."

18. Section 6 provides for issuance of show cause notice before forfeiture of illegally acquired property while Section 7 provides for passing of final orders in that behalf. These provisions read as under:-

"S.6. - Notice of forfeiture.—(1) If, having regard to the value of the properties held by any person to whom this Act applies, either by himself or through any other person on his behalf, his known sources of income, earnings or assets, any other information or material available to it as a result of action taken under section 18 or otherwise, the competent authority has reason to believe (the reasons for such belief to be recorded in writing ) that all or any of such properties are illegally acquired properties, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within such time as may be specified in the notice, which shall not be ordinarily less than thirty days, to indicate the sources of his income,



earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

(2) Where a notice under sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person."

"S.7.- Forfeiture of property in certain cases.—(1) The competent authority may, after considering the explanation, if any, to the show-cause notice issued under section 6, and the materials available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.

(2) Where the competent authority is satisfied that some of the properties referred to in the show-cause notice are illegally acquired properties but is not able to identity specifically such properties, then, it shall be lawful for the competent authority to specify the properties which, to the best of its judgment, are illegally acquired properties and record a finding accordingly under sub-section(1).

(3) Where the competent authority records a finding under this section to the effect that any property is illegally acquired property, it shall declare that such property shall, subject to the provisions of this Act, stand forfeited to the Central Government free from all encumbrances.

(4) Where any shares in a company stand forfeited to the Central Government under this Act, then the company shall, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the articles of association of the company, forthwith register the Central Government as the transferee of such shares."

19. Section 8 provides that burden of proving that property specified in the notice served under Section 6 is not illegally acquired property shall be on the person affected.

20. Section 11 declares transfers of properties specified in the notice issued under Section 6 null and void when such transfers are effected after the issuance of notice. Section 11 reads as follows :

"11. Certain transfers to be null and void.—Whereafter the issue of a notice under section 6 or under section 10, any property referred to in the said notice is transferred by any mode whatsoever such transfer shall, for the purpose of the proceedings under this Act, be ignored and if such property is subsequently forfeited to the Central Government under Section 7, then, the transfer of such property shall be deemed to be null and void."

21. Section 19 makes a provision for taking possession of the property which has been declared to be forfeited to the Central Government and where the person affected as well as any other person who may be in possession of the property fails to surrender or deliver possession. Section 19 reads as under :

"S. 19. Power to take possession.—(1) Where any property has been declared to be forfeited to the Central Government under this Act, or where the person affected has failed to pay the fine due under sub-section (1) of section 9 within the time allowed therefor under sub-section (3) of that section, the competent authority may order the



person affected as well as any other person who may be in possession of the property to surrender or deliver possession thereof to the competent authority or to any person duly authorised by it in this behalf within thirty days of the service of the order.

(2) If any person refuses or fails to comply with an order made under sub-section (1), the competent authority may take possession of the property and may for that purpose use such force as may be necessary.

(3) Notwithstanding anything contained in sub-section (2), the competent authority may, for the purpose of taking possession of any property referred to in sub-section (1), requisition the service of any police officer to assist the competent authority and it shall be the duty of such officer to comply with such requisition."

22. The provisions of SAFEMA are stringent and drastic in nature. They are designed to discourage law breaking and directed towards forfeiture of illegally acquired properties. One of the concepts that centres around the provisions of SAFEMA is to reach properties acquired illegally by the persons who are covered by Clauses (a) to (e) of Section 2(2). The provisions of SAFEMA are intended to apply to any property acquired by persons covered by Clauses (a) to (e) of Section 2(2), whether before or after the commencement, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force. However, SAFEMA is not applicable to holder of any property under Section 2(2)(e) who proves that he is a transferee in good faith for adequate consideration. The question that arises for consideration in this appeal is, whether appellants who purchased the subject flat during pendency of forfeiture proceedings are entitled to an opportunity to prove that they are transferees in good faith for adequate consideration.

23. In *Amratlal Prajivandas*[1], a 9-Judge Bench of this Court extensively considered the scheme and the provisions of SAFEMA and the Act has been held to be constitutional. The observations in para 44 of the Report in *Amratlal Prajivandas*[1], upon which heavy reliance has been placed by the learned senior counsel for the appellants, were made by this Court while dealing with the question, whether the application of SAFEMA to the relatives and associates of detenus was violative of Articles 14,19 and 21? It was submitted on behalf of the petitioners therein that the relatives or associates of a person falling under Clause (a) or Clause (b) of Section 2(2) of SAFEMA might have acquired properties of their own, could be by illegal means, but there was no reason why those properties be forfeited under SAFEMA just because they were related to or were associates of the detenu or convict. This Court held that the relatives or associates were brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of SAFEMA. It was further observed that it was not unknown that persons indulging in illegal activities screen the properties acquired from such illegal activities in the names of their relatives and associates, sometimes they transfer such properties to them with an intent to transfer the ownership and title and it was immaterial how such relative or associate held the properties of convict/detenu, whether as a benami or a mere name-lender or as a bona fide transferee for value or in any other manner. Where a person is relative or associate as defined under SAFEMA, he or she cannot put forward any defence on proof of the fact that the property was acquired by the detenu, whether in his own name or in the name of his relatives or associates. The Court allayed the apprehension that the independently acquired properties of such relatives or associates could be forfeited even if they were in no way connected with the convict/detenu. This Court then made the observations, 'So far as the holders (not being relatives and associates) mentioned in Section 2(2)(e) are concerned, they are dealt with on a separate footing. If such



person proves that he is a transferee in good faith for consideration, his property – even though purchased from a convict/detenu – is not liable to be forfeited". We are afraid these observations have no application to a transferee who has purchased illegally acquired property defined under Section 3 from a detenu/convict and/or his relative or associate after issuance of notice under Section 6 of SAFEMA. Section 2(2)(e) refers to any holder of any property, which was at any time previously held by a person referred to in clause (a) or clause (b) unless such holder proves that he is a transferee in good faith for adequate consideration. The holder talked of in Section 2(2)(e) does not cover a holder who is a transferee of the property after issuance of notice under Section 6. It is so because Section 11 makes it manifest that if any property referred to in the notice under Section 6 or under Section 10 is transferred by any mode whatsoever, such transfer shall be ignored for the purposes of proceedings under SAFEMA and if such property is subsequently forfeited under Section 7 then the transfer of such property shall be deemed to be null and void. On issuance of notice under Section 6, a moratorium is placed on transfer of property referred to in the notice. Any transfer of such property (the property referred to in Section 6 notice) is prohibited.

24. In *Aamenabai Tayebaly*[2], this Court had expressly held that the transaction of transfer effected after the issuance of notice under Section 6 is of no legal consequence and such transfer does not confer any title on the transferee. *Aamenabai Tayebaly*[2] was a case where one Talab Haji Hussein Sumbhania was detained under Section 3(1) of COFEPOSA by an order dated 2.4.1976. Before the detention order, in February, 1975, Tahira Sultana, second wife of Talab Haji Hussein Sumbhania purchased a flat in Mumbai. On 15.2.1977, a notice was issued by the Competent Authority under Section 6(1) of SAFEMA to Tahira Sultana calling upon her to show cause why the said flat should not be forfeited as the illegally acquired property of the COFEPOSA detenu, her

husband. On 12.10.1977, a forfeiture order relating to that flat was passed under Section 7. The said order was challenged by her in the Bombay High Court. She undertook before the High Court not to alienate the said flat. However, on 30.7.1981, Tahira Sultana sold the said flat to Tayab Ali in breach of the undertaking given to the High Court. Tayab Ali received an information on 5.11.1982 that the flat purchased by him was already forfeited by the Central Government and based on that information he filed a writ petition before Bombay High Court on 13.12.1982. Tayab Ali raised the plea that he was a bona fide purchaser for value without notice. The High Court dismissed the writ petition filed by Tayab Ali and consequently the order of the Competent Authority forfeiting the flat was confirmed. The matter reached this Court at the instance of successor in interest of Tayab Ali. In the backdrop of these facts, this Court referred to Section 11 of SAFEMA (Pgs. 713-714) and then proceeded to hold as under:

> "It is no doubt true that on the express language of the said section transfer of any property pending the proceedings under Section 6 or 10 of the said Act and prior to the order of forfeiture shall be treated to be null and void. The purchaser's transaction is after the order of forfeiture of the said property. Still the consequence of the said transaction being null and void could not be avoided by the purchaser on the plea that this transaction was subsequent to the original order of forfeiture. The original order of forfeiture was stayed at the time of the purchase. It got confirmed by the Bombay High Court ultimately when the Miscellaneous Petition No. 1680 of 1977 moved by Tahira Sultana was disposed of and the subsequent Writ Petition No. 1527 of 1995 was dismissed by the High Court and the SLP filed by her in this Court was also dismissed. We may also note that as the Miscellaneous Petition No. 1680 of 1977 was withdrawn on 19-6-1995 and ultimately the forfeiture order came to be confirmed in the subsequent Writ Petition No. 1527 of 1995 on 21-8-1995, the



> transaction of transfer in favour of Tayab Ali would be said to have been effected after the notice under Section 6, issued to Tahira Sultana, and before the order of forfeiture ultimately got confirmed by the High Court and by this Court and which had back effect of confirming the same from 1977. *It must, therefore, be held that the transaction of purchase by the appellants' predecessor Tayab Ali was also hit by Section 11 of SAFEMA. Consequently in 1981 when the purchaser purchased this property from Tahira Sultana she had no interest in the said flat which she could convey to the appellants' predecessor. In substance it amounted to selling of Central Government's property by a total stranger in favour of the purchaser. No title, therefore, in the said property passed to the appellants' predecessor....."*
>
> (Emphasis Supplied)

25. The above position wholly and squarely applies to the present case. Admittedly, SAFEMA was applicable to both vendors here. One of the vendors, a detenu, who was covered by Section 2(2)(b), was issued notice way back on 8.12.2003 under Section 6(1) of SAFEMA. The other vendor, wife of the detenu, was also issued notice under Section 6(1) in 2004 once it transpired that she held 50% share in the said flat. Both vendors were served with notices under Section 6(1) before transaction of sale in favour of the appellants. After the issuance of notices under Section 6(1) of SAFEMA to the vendors, the transaction of sale in favour of the appellants has to be ignored by virtue of Section 11 and on passing of the order of forfeiture under Section 7, the sale in favour of the appellants had become null and void. The order of forfeiture dated 23.06.2005 under Section 7 of SAFEMA relates back to the issuance of first notice under Section 6(1) to one of the vendors.

26. Section 11 is unequivocal and its object is clear. It intends to avoid transfer of property by the persons who are covered by clauses (a) to (e) of sub-section (2) of Section 2

during the pendency of forfeiture proceedings. The provision says that for the purposes of proceedings under the Act, transfer of any property referred to in the notice under Section 6 or under Section 10 shall be ignored. In respect of a transfer after issuance of notice under Section 6, the property referred to therein, the holder cannot set up plea that he is a transferee in good faith or a bona fide purchaser for adequate consideration. Such plea is not available to a transferee who has purchased the property during pendency of forfeiture proceedings.

27. Learned Additional Solicitor General referred to a decision of Madras High Court in the case of *Parvathi Bai*[3]. The Division Bench of Madras High Court referred to the two decisions of this Court in *Amratlal Prajivandas*[1] and *Aamenabai Tayebaly*[2] and after noticing the relevant provisions of SAFEMA held that the protection given to a bona fide sale under Section 2(2)(e) would not extend to a sale made subsequent to the issuance of notice under Section 6 and in violation of Section 11 of SAFEMA. We are in complete agreement with the view of the Madras High Court in *Parvathi Bai*3.

28. It is true that the appellants had obtained encumbrances certificates from the Sub-Registrar prior to purchase which show that there were no encumbrances to the subject flat. It is also true that the appellants had obtained loan from Vijaya Bank, Brigade Road Branch, Bangalore for purchase of the said flat. It is a fact that sale consideration to the tune of Rs. 26 lakhs was paid directly by the Bank to the vendors after the Bank was satisfied about the title of the vendors. The appellants had also mortgaged the flat with the Vijaya Bank as a security towards loan. But unfortunately these facts are of no help to the appellants as the sale in their favour was effected after notices under Section 6(1) were issued to the vendors. Such sale has no legal sanction. The sale is null and void on the face of Section 11; it is not protected so as to



enable the purchaser to prove that he is transferee in good faith for adequate consideration. As a matter of law, no title came to be vested in the appellants by virtue of sale-deed dated 10.02.2005 as the vendors could not have transferred the property after service of the notice under Section 6(1) and during pendency of forfeiture proceedings under SAFEMA. The title in the subject flat is deemed to have vested in the Central Government on or about 08.12.2003 when the first notice under Section 6(1) was issued and served on one of the vendors. The vendors ceased to have any title in the subject flat on the date of transfer i.e. 10.02.2005. They had no transferable right. The appellants cannot claim any right in the flat. In the circumstances, question of according any opportunity to the appellants to prove that they are transferees in good faith with adequate consideration does not arise.

29. In view of the above, we find no merit in the appeal. The impugned order does not call for any interference. Civil Appeal is dismissed with no order as to costs.

R.P. Appeal dismissed.

PRAVEEN PRADHAN
*v.*
STATE OF UTTRANCHAL & ANR.
(Criminal Appeal No. 1589 of 2012)

OCTOBER 4, 2012

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

*Code of Criminal Procedure, 1973 – s. 482 – Charge u/s. 306 IPC – Alleging constant humiliation and insult to the deceased, driving him to commit suicide – Petition for quashing the criminal proceedings – Dismissed by High Court – On appeal, held: The allegations in FIR supported by the suicide note and police statement of family members of the deceased – In view of the facts and circumstances of the case, criminal proceedings cannot be quashed.*

*ss. 482 and 228 – Application for quashing of proceedings – Held: While dealing with such application, court cannot form a firm opinion, but a tentative view evoking presumption u/s. 228 Cr.P.C.*

*Penal Code, 1860 – s. 306 – Abetment of suicide – Offence of abetment by instigation depends upon the intention of the abettor and not on his act – Instigation has to be gathered from the circumstances of the case – In absence of direct evidence as regards instigation, it is to be inferred from the circumstances.*

*Words and Phrases – 'Instigation' – Meaning of, in the context of s. 306 IPC.*

**FIR was lodged against the appellant-accused alleging that he consistently humiliated and ill-treated the deceased which resulted in suicide committed by the**





**deceased. During investigation, suicide note was found which also made same allegations against the accused. The appellant-accused was charged u/s. 306 IPC. He filed an application u/s. 482 for quashing of the charge-sheet, but the same was dismissed by High Court. Hence the present appeal.**

**Dismissing the appeal, the Court**

**HELD: 1. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is done by the person who has abetted. The abetment may be by instigation, conspiracy or intentional aid as provided under Section 107 IPC. However, the words uttered in a fit of anger or omission without any intention, cannot be termed as instigation. Instigation has to be gathered from the circumstances of a particular case. No straight-jacket formula can be laid down to find out as to whether in a particular case there has been instigation which forces the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to under Section 228 Cr.P.C. [Paras 14 and 15] [1140-C-D, E-G]**

*Chitresh Kumar Chopra v. State (Government of NCT of Delhi)* **AIR 2010 SC 1446: 2009 (13) SCR 230;** *Ramesh Kumar v. State of Chhattisgarh* **AIR 2001 SC 3837: 2001 (4) Suppl. SCR 247;** *State of Punjab v. Iqbal Singh* **AIR 1991 SC 1532: 1991 (2) SCR 790 ;** *Surender v. State of Haryana*

**(2006) 12 SCC 375: 2006 (9) Suppl. SCR 296;** *Kishori Lal v. State of M.P.* **AIR 2007 SC 2457: 2007 (7) SCR 1051;** *Sonti Rama Krishna v. Sonti Shanti Sree* **AIR 2009 SC 923: 2008 (16) SCR 743 – relied on.**

**2.1. In the FIR, the complainant, the brother of the deceased, made several allegations against the appellant, all of which, have also been mirrored in the suicide note left behind by the deceased, and it is also evident from the FIR that the deceased had intimated his family members regarding the ill-treatment and harassment constantly meted out to him, by the appellant. A plain and simple reading of this suicide note makes it crystal clear that the appellant had not just humiliated and insulted the deceased on one occasion. In fact, it is evident that the appellant perpetually humiliated, exploited and de-moralised the deceased, which hurt his self-respect tremendously. The words used are, to the effect that the appellant always hurt the self-respect of the deceased and he was always scolding him. The appellant always made attempts to force him to resign. The statements under Section 161 Cr.PC., particularly, one made by the widow of the deceased and also those of various other family members, corroborate the version of events, as given in his suicide note. [Paras 7 and 8] [1135-G-H; 1136-A, G-H, 1137-A]**

**2.2. In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. The deceased was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant, upon non-fulfillment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for long durations in the factory, vis-à-vis**



**other employees which often even extended to 16-17 hours at a stretch. Considering the facts and circumstances of the present case, it is not a case which requires any interference by this court as regards the impugned judgment and order of the High Court. [Para 16] [1140-H; 1141-A-E]**

*Swamy Prahaladdas v. State of M.P. and Anr.* **(1995) Supp (3) SCC 438;** *Sanju @ Sanjay Singh Sengar v. State of M.P.* **AIR 2002 SC 1998: 2002 (3) SCR 668;** *Madan Mohan Singh v. State of Gujarat and Anr.* **(2010) 8 SCC 628: 2010 (10) SCR 351 – distinguished.**

**Case Law Reference:**

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|---|---|---|
| **(1995) Supp (3) SCC 438** | **Distinguished** | **Para 9** |
| **2002 (3) SCR 668** | **Distinguished** | **Para 10** |
| **2010 (10) SCR 351** | **Distinguished** | **Para 11** |
| **2009 (13) SCR 230** | **Relied on** | **Para 12** |
| **2001 (4) Suppl. SCR 247** | **Relied on** | **Para 13** |
| **1991 (2) SCR 790** | **Relied on.** | **Para 14** |
| **2006 (9) Suppl. SCR 296** | **Relied on** | **Para 14** |
| **2007 (7) SCR 1051** | **Relied on** | **Para 14** |
| **2008 (16) SCR 743** | **Relied on** | **Para 14** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1589 of 2012.

From the Judgment & Order dated 5.01.2012 of the High Court of Uttarakhand at Nainital in Criminal Misc. Application No. 420 of 2006.

U.U. Lalit, K.V. Vishwanathan, Raunak Dhillon, Ishan Gaur, Mehul M. Gupta (For Karanjawala & Co.) for the Appellant.

Rahul Verma, Saurabh Trivedi for the Respondents.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. Leave granted.

2. This appeal has been preferred against the impugned judgment and order dated 5.1.2012 passed by the High Court of Uttarakhand at Nainital in Criminal Misc. Application No. 420 of 2006, by way of which the High Court dismissed the application under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), filed by the appellant for the purpose of quashing the criminal proceedings, i.e. chargesheet No. 208/2005 and order of cognizance dated 28.4.2006 passed by the Chief Judicial Magistrate, Haridwar, filed upon an investigation conducted on the basis of FIR No.285 of 2005 (Crime No.258/2005) pertaining to P.S.: Ranipur, Haridwar.

3. The facts and circumstances giving rise to this appeal are as follows :

A. That, a First Information Report (hereinafter referred to as 'FIR') was lodged by one Ambreesh Singh, who is the brother of Anurag Singh, the deceased, alleging that the appellant had long been attempting to compel the deceased to indulge in several wrongful practices at the work place. The deceased was not comfortable with complying with such orders and as a consequence, the appellant started making illegal demands and as the same were not fulfilled, he began to harass and insult the deceased at the regular intervals. The appellant, in fact, on one occasion, disgraced the deceased in front of the staff of the entire factory, and told him that "had there been any other person in his place, he would have died by hanging himself".

B. Anurag Singh talked to several of his family members on 6.10.2005 over the phone. They stated that he came across as highly perturbed and, hence, they tried to pacify him.



However, owing to the constant humiliation and ill-treatment meted out to him by the appellant, Anurag Singh committed suicide on 7.10.2005.

C. On the basis of the said FIR, criminal proceedings were initiated and in the course of the investigation, the Investigating Officer found a suicide note which had been written by the deceased and upon reading this, it seems evident that he held the appellant responsible for his death, by way of committing suicide.

D. During the said investigation, the statement of various persons including that of the widow of the deceased, and also those of his other family members, were recorded and they all supported the version of events, as was given by the deceased in his suicide note which made it amply clear that according to him, the appellant was solely responsible for his death. Upon conclusion of the investigation, the police filed charge-sheet No.208/2005 on 5.11.2005 against the appellant under Section 306 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').

E. Aggrieved, the appellant filed a Criminal Misc. Application No. 420 of 2006 under Section 482 Cr.PC. on 13.6.2006 for the purpose of quashing the said chargesheet, and also the other proceedings incidental thereto. The High Court granted stay of such proceedings, initiated on the basis of the said charge-sheet, as an interim measure. However, vide impugned judgment and order dated 5.1.2012, the said application was then dismissed.

Hence, the present appeal.

4. Shri U.U. Lalit and Shri K.V. Vishwanathan, learned senior counsel appearing on behalf of the appellant, have submitted that the facts and circumstances of the present case do not actually make out any offence against the appellant as far as Section 306 IPC is concerned. They have submitted that,

even if the allegations made out in the FIR/charge-sheet, are taken on their face value, and accepted in entirety, the same do not prima facie, constitute any offence against the appellant. In a case under Section 306/107 IPC, establishment and attribution of *mens rea,* on the part of the accused which caused him to incite the deceased to commit suicide is of great importance. The cruelty shown towards the deceased in such cases, must be of such magnitude, that it would in all likelihood, drive the deceased to commit suicide. The utterances of a few harsh words on one occasion, for that matter a suggestion being made with the intention of improving work, does not amount to harassment/cruelty of such intensity, that it may be termed as abetment to commit suicide. Hence, the appeal deserves to be allowed.

5. Per contra, Shri Rahul Verma, learned counsel appearing for the respondent-State, has vehemently opposed the appeal, contending that the appellant would persistently and consistently harass the deceased to compel him to do various illegal things and that it was not an isolated instance of harassment, or an occasional off hand remark that was made by the appellant in relation to the deceased. As the deceased had refused to fulfil the illegal demands of the appellant, the appellant made his life extremely difficult, by humiliating him constantly which eventually drove him to commit suicide. Therefore, the facts of the case being as explained above, do not warrant any interference with the impugned judgment and order of the High Court. The appeal is, hence, liable to be dismissed.

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

7. In the FIR, the complainant, who is the brother of the deceased, made several allegations against the appellant, all of which, have also been mirrored in the suicide note left behind by the deceased, and it is also evident from the FIR that the deceased had intimated his family members regarding the ill-



treatment and harassment constantly meted out to him, by the appellant. The deceased was very perturbed and the same is evident from the suicide note which reads as under:

> *"I am dying due to Praveen Pradhan. He has done too much atrocities. He is very cunning man. He* ***always humiliated-exploited me all the time****. He made me demoralised and made my self respect hurt too much.*
>
> He has hurted Mr. O.P. Agaral (KPGI) and Mr. CRK Gaur (Project Consultant). These persons also had to go before time due to him. He **always** hurts other's feelings as he is a egoistic and cruel man.
>
> I have been **daily hurted** my self respect. He is always scolding me. I have to die solely due to him.
>
> I have told my feelings to Mr. Pavan and Mr. Raghu earlier. But his attitude do not change. He **always** scolded and demoralised me. Even in front of Amit (Jaymit) he insulted me. He said Anurag is a "chutiya" as he is working for him and he doubted my dignity. I can't tolerate any way to my dignity.
>
> He **always** forced me to resign. This can be verified from Mr. Minesh Dakwe (who is in Mahindra) that he forced me to resign. His attitude can be verified from other officers of factory. He is proving me faulty and incompetent after completing entire project work successfully."
>
> (Emphasis added)

A plain and simple reading of this suicide note makes it crystal clear that the appellant had not just humiliated and insulted the deceased on one occasion. In fact, it is evident that the appellant perpetually humiliated, exploited and de-moralised the deceased, which hurt his self-respect tremendously. The words used are, to the effect that the appellant **always** hurt the

self-respect of the deceased and he was **always** scolding him. The appellant **always** made attempts to force him to resign.

8. The statements recorded by the police under Section 161 Cr.PC., particularly, one made by Smt. Kavita Singh, widow of the deceased and also those of various other family members, corroborate the version of events, as given in his suicide note. Therefore, the question that arises is whether the court would be justified in quashing the chargesheet filed against the accused, in the instant case.

9. In *Swamy Prahaladdas v. State of M.P. & Anr.,* (1995) Supp (3) SCC 438, a similar question arose before this Court wherein one Sushila Bai, a married woman allegedly had two paramours. There was sexual jealousy between the two. Sushila had managed to completely bewitch one of them. In one fine morning, while Sushila Bai was having her morning tea with both her paramours, they began to quarrel. During the course of such quarrelling, one of them made a remark asking the other "to go and die". The other person to whom such remark was made, went home very dejected and thereafter, committed suicide. This Court held as under:

> "In the first place, it is difficult in the facts and circumstances, to come to even a prima facie view that what was uttered by the appellant was enough to instigate the deceased to commit suicide. Those words are casual in nature which are often employed in the heat of the moment between quarrelling people. Nothing serious is expected to follow thereafter. The said act does not reflect the requisite mens rea on the assumption that these words would be carried out in all events. Besides, the deceased had plenty of time to weigh the pros and cons of the act by which he ultimately ended his life. It cannot be said that the suicide by the deceased was the direct result of the words uttered by the appellant."

10. In *Sanju @ Sanjay Singh Sengar v. State of M.P.,* AIR



2002 SC 1998, a quarrel had taken place between the accused and the deceased during which, the accused asked the deceased "to go and die". A chargesheet was filed against the accused under Section 306 r/w Section 107 IPC when the said person actually committed suicide. This Court dealt with the issue elaborately, taking into consideration the fact that the accused had also specifically been named in the suicide note left behind by the deceased, and held that merely asking a person "to go and die" does not in itself amount to instigation and also does not reflect *mens rea*, which is a necessary concomitant of instigation. The deceased was anyway in great distress and depression. The other evidence on record showed him to be a frustrated man who was in the habit of drinking. Thus, considering the said circumstances, this Court quashed the proceedings against the accused, holding that ingredients of abetment were not fulfilled therein.

11. In *Madan Mohan Singh v. State of Gujarat & Anr.,* (2010) 8 SCC 628, this Court re-examined this question, in a similar case, involving Sections 306/107 IPC, wherein the deceased left a suicide note stating that the accused was solely responsible for his death. The deceased in this case, was a driver in the Microwave Project Department. He had undergone a bypass surgery for his heart, just before the occurrence of such incident and his doctor had advised him against performing any stressful duties. The accused was a superior officer to the deceased. When the deceased failed to comply with the orders of the accused, the accused became very angry and threatened to suspend the deceased, rebuking him very harshly for not listening to him. The accused also asked the deceased how he still found the will to live, despite being insulted so. The driver after all this, committed suicide. This Court found that such incident was a one time occurrence. For the purpose of bringing home any charge, vis-à-vis Section 306/ 107 IPC against the accused, this Court stated that there must be allegations to the effect that the accused had either instigated the deceased in some way, to commit suicide or had

engaged with some other persons in a conspiracy to do so, or that the accused had in some way aided any act or illegal omission to cause the said suicide. In the said case, this court, after assessing the material on record, found that the deceased was suffering from mental imbalance which caused depression. The accused had never intended for the deceased employed under him to commit suicide. This court observed that if the making of observations by a superior officer, regarding the work of his subordinate, is termed as abetment to suicide, it would become almost impossible, for superior officers to discharge their duties as senior employees.

12. In *Chitresh Kumar Chopra v. State (Government of NCT of Delhi),* AIR 2010 SC 1446, this Court while dealing with the term 'instigation' held:

> "Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Where the accused had, by his acts or omission or *by a continued course of conduct, created such circumstances* that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation.
>
> Thus, to constitute 'instigation', a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goading" or 'urging forward'. The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction.....to keep irritating or annoying somebody until he reacts."



13. This Court in *Ramesh Kumar v. State of Chhattisgarh,* AIR 2001 SC 3837, while dealing with a similar situation observed that what constitutes 'instigation' must necessarily and specifically be suggestive of the consequences. A reasonable certainty to incite the consequences must be capable of being spelt out. More so, a continued course of conduct is to create such circumstances that the deceased was left with no other option but to commit suicide.

14. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is done by the person who has abetted. The abetment may be by instigation, conspiracy or intentional aid as provided under Section 107 IPC. However, the words uttered in a fit of anger or omission without any intention cannot be termed as instigation. (Vide: *State of Punjab v. Iqbal Singh,* AIR 1991 SC 1532; *Surender v. State of Hayana,* (2006) 12 SCC 375; *Kishori Lal v. State of M.P.,* AIR 2007 SC 2457; and *Sonti Rama Krishna v. Sonti Shanti Sree,* AIR 2009 SC 923.)

15. In fact, from the above discussion it is apparent that instigation has to be gathered from the circumstances of a particular case. No straight-jacket formula can be laid down to find out as to whether in a particular case there has been instigation which force the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to under Section 228 Cr.P.C.

16. Thus, the case is required to be considered in the light of aforesaid settled legal propositions. In the instant case,

alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant, upon non-fulfillment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for a long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide" is what makes the present case distinct from the aforementioned cases considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this court as regards the impugned judgment and order of the High Court. The appeal is, therefore, dismissed accordingly.

Before parting with the case, we would clarify that none of the observations made hereinabove would have adverse effect on the rights of the appellant in any of the proceedings during trial as such observations have been made only and only to decide this case.

K.K.T. Appeal dismissed.



GAYTRI BAJAJ
*v.*
JITEN BHALLA
(Civil Appeal Nos. 7232-7233 of 2012)

OCTOBER 5, 2012

**[P. SATHASIVAM AND RANJAN GOGOI, JJ.]**

*CHILD AND FAMILY WELFARE:*

*Custody of children – Held: An order of custody of minor children is required to be made by the court treating the interest and welfare of the minor to be of paramount importance – It is not the better right of either of the parent to custody, but the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court – In the instant case, the children, two minor girls, one of whom is on the verge of attaining majority, do not want to go with their mother and appear to be happy in the company of their father, who is in a position to look after them, provide them with adequate educational facilities and also to maintain them in a proper and congenial manner – The children having expressed their reluctance to go with the mother, even for a short duration of time or to meet her, any visitation right to the mother would be adverse to the interest of the children – In the circumstances, visitation cannot be made possible by an order of the court – The children would continue to remain in the custody of their father until they attain the age of majority – Hindu Marriage Act, 1955 – s.13-B – Code of Civil Procedure, 1908 – s.151 – Guardian and Wards Act, 1890 – Hindu Minority and Guardianship Act, 1956.*

**The instant appeals arose out of an application filed by the appellant-wife u/s 151 CPC seeking to recall/set aside the decree of divorce by mutual consent passed u/**

**s 13-B of the Hindu Marriage Act, 1955. The application was filed despite the institution of a separate suit, seeking the same/similar relief, on the ground of fraud and deceit committed by the respondent-husband. In the joint petition u/s 13 B it was specifically stated under the terms of agreement between the parties that the respondent-husband would have the custody of the two minor daughters and, keeping in view their best interest and welfare, the appellant-wife had agreed to forgo her rights of visitation.**

**In the instant appeals, the parties agitated the question with regard to the custody of the children and if such custody was to remain with the husband, whether visitation rights should be granted to the appellant-wife. On 16.12.2011, the Court recorded that the two children who were aged about 17 and 11 years, were very clear and categorical that they wanted to** "continue to live with their father and they do not want to go with their mother," **and made arrangements through Supreme Court Mediation Centre for the mother to interact with the children and also to take them for overnight stay with her as specified in the order. Subsequently, the husband filed an application seeking vacation/ modification of the order dated 16.12.2011, mentioning details about the reluctance of the children to go with their mother or even to meet her; and efforts of mediator failed in persuading the children. The children even declined to visit the Mediation Centre any further. This was not controverted by the appellant-wife.**

**Dismissing the appeals, the Court**

**HELD: 1.1. In** *Mousmi Moitra Ganguli's* ***case***** **it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. Further, the**



**question of welfare of the child has to be considered in the context of the facts of each case and decided cases, on the issue may not be appropriate to be considered as binding precedents. [para 13] [1152-C-E]**

**Mousmi Moitra Ganguli v. Jayant Ganguli* **2008 (8) SCR 260 = (2008) 7 SCC 673;** *Sheila B. Das v. P. R. Sugasree* **2006 (2) SCR 342 = (2006) 3 SCC 62;** *Gaurav Nagpal v. Sumedha Nagpal* **2009(1) SCC 142;** *Rosy Jacob v. Jacob A. Chakramakkat* **1973 ( 3) SCR 918 = (1973) 1 SCC 840;** *Thirty Hoshie dolikuka v. Hoshiam Shavdaksha Dolikuka* **1983 (1) SCR 49 = (1982) 2 SCC 544 – relied on**

*Sarasvati Bai Shripad Ved v. Shripad Vasanji Ved* **AIR 1941 (Bom.) 103 – referred to.**

**1.2. An order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the court. [para 14] [1152-F-G; 1153-A]**

**1.3. In the instant case, irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her,**

**as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion.. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, this Court holds that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, visitation can not be made possible by an order of the court. Therefore, in the facts and circumstances, the impugned orders passed by the High Court are affirmed, visitation rights to the appellant-wife are denied, and the children would continue to remain in custody of their father until they attain the age of majority. [para 15-16] [1153-B-G]**

**Case Law Reference**

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|---|---|---|
| **2008 (8) SCR 260** | **relied on** | **para 12** |
| **AIR 1941 (Bom.) 103** | **referred to** | **para 12** |
| **1973 (3) SCR 918** | **relied on** | **para 12** |
| **1983 (1) SCR 49** | **relied on** | **para 12** |
| **2009(1) SCC 142** | **relied on** | **para 13** |
| **2006 (2) SCR 342** | **relied on** | **para 13** |

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7232-7233 of 2012.



From the Judgment and Order of the High Court of Delhi at New Delhi dated 10.7.2009 in Review Petition No. 371 of 2008 and dated 8.9.2008 in Matrimonial Appeal No. 72 of 2007.

Indu Malhotra, Arun K. Sinha, N.S. Bajwa, Rakesh Singh, Sumit Sinha, ADN Rao, Atul Sharma, Abhishek Agarwal, Neelam Jain for the Appellant.

Pinaki Mishra, Sunil Kumar Jain, Aneesh Mittal for the Respondent.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. Leave granted.

2. These appeals are directed against the judgment and order dated 08.09.2008 passed by the High Court of Delhi in Matrimonial Appeal No. 72/2007 and the order dated 10.7.2009 declining review of the aforesaid order dated 08.09.2008.

3. The facts lies in a short compass and may be usefully recapitulated at this stage.

The appellant (wife) and the respondent (husband) were married on 10.12.1992. Two daughters, Kirti and Ridhi, were born to them on 20.8.1995 and 19.4.2000 respectively. Disputes and differences having developed between the parties a joint petition dated 23.05.2003 was presented by the parties under Section 13 B of the Hindu Marriage Act (hereinafter referred to as 'the Act') seeking a decree of divorce by mutual consent. In the joint petition filed, it was stated by both the parties that they have been living separately since December, 2001, due to irreconcilable differences and in view of their separate residence and lack of any co-habitation as husband and wife, the parties, upon failure to effect any reconciliation of their differences, have agreed to dissolve their

marriage by mutual consent under the provisions of section 13B of the Hindu Marriage Act.

4. It appears that without waiting for the period prescribed under Section 13B (2) of the Act, a second Motion was moved by the parties before the learned Court on 26.05.2003 seeking divorce by mutual consent. By order dated 3.6.2003 the learned trial court, after recording its satisfaction in the matter, granted a decree of divorce under the aforesaid provision of the Act. It may be specifically noticed, at this stage, that in the joint petition filed before the learned trial court it was specifically stated that, under the terms of the agreement between the parties, the respondent-husband was to have sole custody of the two minor daughters and the appellant-wife had agreed to forego her rights of visitation keeping in view the best interest and welfare of the children.

5. After the expiry of a period of almost three years from the date of decree of the divorce granted by the learned trial court, the appellant-wife instituted a suit seeking a declaration that the decree of divorce dated 3.6.2003 is null and void on the ground that her consent was obtained by acts of fraud and deceit committed by the respondent – husband. A further declaration that the marriage between the parties is subsisting and for a decree of perpetual injunction restraining the husband from marrying again was also prayed for in the suit. The respondent-husband filed written statement in the suit denying the statements made and contesting the challenge to the decree of divorce. While the aforesaid suit was pending, the appellant-wife filed an application under Section 151 of the Code of Civil Procedure to recall/set aside the judgment and decree dated 03.06.2003 passed in the divorce proceeding between the parties. The aforesaid application under section 151 of the Code was filed despite the institution of the separate suit seeking the same/similar reliefs. On the basis of the aforesaid application filed by the appellant-wife the learned trial court by order dated 25.09.2007 recalled the decree of divorce dated



3.6.2003. Aggrieved, an appeal i.e. Matrimonial appeal No. 72/2007, was filed by the respondent-husband in the High Court of Delhi which was allowed by the order dated 08.09.2008. The application seeking review of the aforesaid order dated 08.09.2008 was dismissed by the High Court on 10.07.2009. Both the aforesaid orders dated 08.09.2008 and 10.07.2009 have been assailed before us in the present appeals.

6. In so far as the validity of the decree of divorce dated 03.06.2003 is concerned we do not propose and also do not consider it necessary to go into the merits of the said decree inasmuch as the High Court, while setting aside the order of the learned trial court dated 25.09.2007 recalling the decree of divorce, had clearly observed that it is open for the appellant-wife to establish the challenge to the said decree made in the suit already instituted by her. Thus, while taking the view that the order of the learned trial court dated 25.09.2007 recalling the decree of divorce was not correct, the High Court had left the question of validity of the decree, on ground of alleged fraud, open for adjudication in the suit.

7. Apart from the above, the parties before us have agitated only the question with regard to the custody of the children and if such custody is to remain with the husband the visitation rights, if any, that should be granted to the appellant-wife. As the above is only issue raised before us by the parties we propose to deal only with the same and refrain from entering into any other question.

8. We have already noticed that in the joint petition filed by the parties seeking a decree of divorce by mutual consent it was clearly and categorically stated that the husband would have custody of the children and the wife will not insist on any visitation rights. It was also stated that the wife had agreed to do so in the interest and welfare of the children.

9. The above issue, i.e. custody of the children has already received an elaborate consideration of this Court. Such

consideration is recorded in the earlier order of this court dated 16.12.2011. From the aforesaid order, it appears that proceeding on the basis of the statement made by Ms. Indu Malhotra, learned senior counsel for the appellant – wife that if the issue of visitation rights of the wife is considered by the court, she would not urge any other contention, this court had made an endeavour to explore the possibility of an amicable settlement of the dispute between the parties on the said score. After interacting with both the children this court in its order dated 16.12.2011 had recorded that the two children, who are aged about 17 and 11 years, were very clear and categorical that they wanted to *"continue to live with their father and they do not want to go with their mother".* This Court, therefore, was of the view that taking away the custody of the children from the father will not be desirable. In fact such a step would be adverse to the best interest of the children. However, keeping in mind the position of the appellant as the mother it was decided that the mother should be allowed to make an initial contact with the children and gradually built up a relationship, if possible, so as to arrive at a satisfactory solution to the impasse. Accordingly, the Court made the following interim arrangement:

> "(i) The respondent-husband is directed to bring both daughters, namely, Kirti Bhalla and Ridhi Bhalla to the Supreme Court Mediation Center at 10 a.m. on Saturday of every fortnight and hand over both of them to the petitioner-wife. The mother is free to interact with them and take them out and keep them in her house for overnight stay. On the next day, i.e. Sunday at 10 a.m. the petitioner-wife is directed to hand over the children at the residence of the respondent-husband. The above arrangement shall commence from 17.12.2011 and continue till the end of January, 2012.
>
> (ii) The respondent-husband is directed to inform the mobile number of elder daughter (in the course of hearing



> we were informed that she is having separate mobile phone) and also landline number to enable the petitioner-wife to interact with the children."

10. What happened thereafter has been stated in an application filed by the respondent-husband before this Court (Interlocutory Application No.4/2012) seeking vacation/ modification of the interim arrangement made by the order dated 16.12.2011. In the said application, it has been stated that pursuant to the order dated 16.12.2011 the respondent-father along with both the children had come to the Supreme Court Mediation Centre at about 10 a.m. on 17.12.2011. However, the children refused to go with their mother and the appointed Mediator, inspite of all efforts, did not succeed in persuading the children. At about 1.30 p.m. the respondent, who had left the children in the Mediation Centre, received a call that he should come and take the children back with him. In the aforesaid I.A. it has been further stated that on 30.12.2011 when the children were due to visit the Mediation Centre once again, both the children started behaving abnormally since the morning and had even refused to take any food. After reaching the Mediation Centre, the children once again refused to go with their mother and the mediator had also failed to convince the children. Eventually, at about 12.00 p.m., the respondent took both the children home. Thereafter, both the children have declined to visit the Mediation Centre any further. Before the next date for appearance in the Mediation Centre, i.e., 14.01.2012 the said fact was informed to the learned counsel for the appellant by the respondent through his counsel by letter dated 13.01.2012.

11. Though the above facts stated in the aforesaid I.A. are not mentioned in the report of the Mediator submitted to this Court, what is stated in the aforesaid report dated 14.01.2012 is that on 14.01.2012 the respondent and the children were not present and that a letter dated 13.01.2012 from the counsel for the respondent had been placed before the Mediator wherein

it has been stated that though the children had earlier attended the Mediation Centre they are now refusing to come to the Centre and all efforts in this regard made by their father have failed. It will also be significant to note that the statements made in the I.A. have not been controverted by the appellant - wife in any manner.

12. The law relating to custody of minors has received an exhaustive consideration of this Court in a series of pronouncements. In *Gaurav Nagpal v. Sumedha Nagpal*[1] the principles of English and American law in this regard were considered by this Court to hold that the legal position in India is not in any way different. Noticing the judgment of the Bombay High Court in *Saraswati Bai Shripad Ved v. Shripad Vasanji Ved*[2]; *Rosy Jacob v. Jacob A Chakramakkal*[3] and *Thirty Hoshie Dolikuka v. Hoshiam Shavdaksha Dolikuka*[4] this Court eventually concluded in paragraph 50 and 51 that:

> "50. That when the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The Court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in *Mousmi Moitra Ganguli's* case the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

1. 2009 (1) SCC 142.
2. AIR 1941 (Bom.)103.
3. (1973) 1 SCC 840.
4. (1982) 2 SCC 544.



> 51. The word "welfare" used in section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which governs the rights of the parents and guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases."

13. The views expressed in Para 19 and 20 of the report in *Mousmi Moitra Ganguli v. Jayant Ganguli*[5] would require special notice. In the said case it has been held that it is the welfare and interest of the child and not the rights of the parents which is the determining factor for deciding the question of custody. It was the further view of this Court that the question of welfare of the child has to be considered in the context of the facts of each case and decided cases on the issue may not be appropriate to be considered as binding precedents. Similar observations of this Court contained in para 30 of the Report in *Sheila B. Das v. P.R. Sugasree*[6] would also require a special mention.

14. From the above it follows that an order of custody of minor children either under the provisions of The Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody

5. (2008) 7 SCC 673.
6. (2006) 3 SCC 62.

of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.

15. In the present case irrespective of the question whether the abandonment of visitation rights by the wife was occasioned by the fraud or deceit practiced on her, as subsequently claimed, an attempt was made by this Court, even by means of a personal interaction with the children, to bring the issue with regard to custody and visitation rights to a satisfactory conclusion. From the materials on record, it is possible to conclude that the children, one of whom is on the verge of attaining majority, do not want to go with their mother. Both appear to be happy in the company of their father who also appears to be in a position to look after them; provide them with adequate educational facilities and also to maintain them in a proper and congenial manner. The children having expressed their reluctance to go with the mother, even for a short duration of time, we are left with no option but to hold that any visitation right to the mother would be adverse to the interest of the children. Besides, in view of the reluctance of the children to even meet their mother, leave alone spending time with her, we do not see how such an arrangement, i.e., visitation can be made possible by an order of the court.

16. Taking into account all the aforesaid facts, we dismiss these appeals, affirm the impugned orders passed by the High Court of Delhi and deny any visitation rights to the petitioner and further direct that the children would continue to remain in the custody of their father until they attain the age of majority.

R.P. Appeals dismissed.



BALIYA@ BAL KISHAN
*v.*
STATE OF M.P.
(Criminal Appeal No. 2001 of 2008)

OCTOBER 5, 2012

**[P. SATHASIVAM AND RANJAN GOGOI, JJ.]**

*PENAL CODE, 1860:*

*ss. 302 and 120-B – Murder – Circumstantial evidence – Held: In the absence of credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an inference to guilt can reasonably follow – In the instant case, one of the two eye-witnesses has been declared hostile and the evidence of the other has not been found credible – Prosecution has not been able to prove the ingredients of 'criminal conspiracy' —Further, there is serious discrepancy in the statements of prosecution witnesses about the deceased last seen in the company of accused – Therefore, conviction of the accused not being sustainable, they are acquitted – Circumstantial evidence.*

*ss. 120-A – 'Criminal conspiracy' – Ingredients – Explained – Held: In the instant case, though it has been established that one of the accused asked the other two to do away with the deceased, but what is conspicuous by its absence is the essential meeting of minds amongst the accused to commit the murder of the deceased – There is no evidence to show as to what was the response of the latter two accused to the statement made by the former to the effect that the author of the pamphlet must be done away with — In the absence of any material to establish the said fact, the vital chain or link with regard to an agreement or meeting of minds*

*amongst the accused to commit the murder of the deceased is lacking.*

**A Head Constable of Police (PW 7) found one 'P' lying injured by the road side. He took him to the hospital where he was declared dead. The investigation led to the arrest of four persons, namely, accused-appellants 'B' and 'G', accused 'M'(died during trial) and accused 'Chh'. The prosecution case was that on the day of occurrence, in the afternoon, one Dr. 'SS' complained to accused 'B' that a pamphlet indicating her relationship with him and casting doubt on her character was circulated. 'B' was stated to have told her that he knew as to who authored/ published the pamphlet, and asked accused 'G' and 'M' that 'P' should be killed. Thereafter in the evening 'P' was found by PW7 lying injured. The trial court convicted accused-appellants 'B' and 'G' of the offences charged. Accused 'Chh' was acquitted.**

**Allowing the appeals, the Court.**

**HELD: 1.1. In the absence of any credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an inference of guilt can reasonably follow. In the instant case, though two alleged eye-witnesses were examined by the prosecution, not much reliance can be placed on the testimony of either. PW 3, had been declared hostile whereas the evidence of PW 4, suffers from material discrepancies if read with the evidence of PWs 1 and 5, particularly, in respect of the role of accused, 'B'. While PWs 1 and 5 did not mention about the presence of accused 'B' at the place of occurrence, PW 4 had identified the said accused in court as one of the assailants. The said witness, however, could not identify any of the accused while they were in police custody. In such circumstances, it will not be safe and**



**prudent to place any reliance on the evidence of PW 4. [Para 9-10] [1162-H; 1163-A-C]**

**1.2. A scrutiny of the prosecution evidence, would show that in so far as the charge of criminal conspiracy is concerned, the prosecution has sought to establish that a pamphlet authored / published by the deceased was in circulation casting doubt on the character of Dr. 'SS' and her relationship with accused 'B'. The said pamphlet though seized in the course of investigation was not exhibited in the trial. [Para 10] [1163-D-E]**

**1.3. The offence of "criminal conspiracy" is defined in s. 120A of the Indian Penal Code, 1860 whereas s.120B thereof provides for punishment for the said offence. The foundation of the offence of criminal conspiracy is an agreement between two or more persons to cooperate for the accomplishment / performance of an illegal act or an act which is not illegal by itself, through illegal means. Such agreement or meeting of minds creates the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed. [Para 12] [1164-G-H; 1165-A-B]**

**1.4. A conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. Naturally in evaluating the proved**

**circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused. [Para 14] [1165-E-G; 1166-A]**

*E. K. Chandrasenan v. State of Kerala* **1995 (1) SCR 277 =1995(2) SCC 99;** *Kehar Singh & Ors. v. State (Delhi Administration)* **1988 (2) Suppl. SCR 24 = 1988 (3) SCC 609;** *Ajay Aggarwal v. Union of India* **1993 (3) SCR 543 = 1993 (3) SCC 609 ;** *Yash Pal Mittal v. State of Punjab* **1978 (1) SCR 781 = 1977 (4) SCC 540 – referred to**

**1.5. In the instant case, the prosecution had proved by the evidence of PWs 8 and 11, the conversation between Dr. 'SS' and accused 'B'. However, even accepting the prosecution version what reasonably follows therefrom is that Dr. 'SS' had complained to accused 'B' that her reputation has been smeared because of the pamphlet; that accused 'B' had stated that he knew who was the author of the pamphlet and further that he had stated to accused 'M' and 'G' that the author of the pamphlet (deceased 'P') should be killed. But what is conspicuous by its absence is the essential meeting of minds between accused 'B', 'M' and 'G' to commit the murder of the deceased. No evidence is forthcoming as to what was the response of accused 'M' and 'G' to the statement made by 'B' to the effect that the author of the pamphlet must be done away with. In the absence of any material to establish the said fact, the vital chain or link with regard to an agreement or meeting of minds amongst the accused to commit the murder of deceased 'P' is lacking. The alleged participation of the accused in the commission of the actual act of murder cannot be the evidence of the conspiracy in as much as the commission of murder must be the result of the conspiracy already hatched. The alleged acts attributed to the accused insofar as the offence of murder is**



**concerned, naturally, has to be considered separately in order to determine the liability of the accused for the said offence. [Para 15-16] [1166-B; 1167-A-E]**

**1.6. Though from the evidence of PWs 1 and 5, the prosecution has also sought to prove that the deceased was seen in the company of accused 'M' and 'G' riding a red motorcycle belonging to accused 'M' shortly before his death. There is a serious discrepancy in the evidence of PWs 1 and 5 with regard to the presence of accused 'G' in the company of the deceased immediately before the crime. The prosecution version of last seen together even if it is hypothetically accepted in its entirely, at the highest, would establish only a solitary incriminating circumstance against the accused, which in the considered view of this Court cannot give rise to the conclusion that accused 'G' must be held liable for the murder of the deceased. [Para 11 and 17] [1164-D-E; 1168-B-C]**

**1.7. Recovery of the blood stained clothes of accused 'G' at his instance, by itself, again will not be sufficient. [Para 17] [1168-C-D]**

**1.8. Therefore, the conviction of the appellants u/s. 120B read with s.302 IPC is not legally sustainable. The judgment and order passed by the High Court is set aside and both the appellants are acquitted of the offences charged. [Para 18] [1168-D-E]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1995 (1) SCR 277** | **referred to** | **Para 13** |
| **1988 (2) Suppl. SCR 24** | **referred to** | **Para 13** |
| **1993 (3) SCR 543** | **referred to** | **Para13** |
| **1978 (1) SCR 781** | **referred to** | **Para 13** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2001 of 2008.

From the Judgment & Order dated 20.4.2007 of the High Court of Judicature for Madhya Prades at Indore Bench in Criminal Appeal No. 394 of 1998.

WITH

Crl. Appeal No. 2002 of 2008.

S.K. Bhattacharya, Suresh Bharti for the Appeallant.

C.D. Singh, Sakshi Kakkar for the Respondent.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. Criminal Appeal No. 2001/2008 has been filed by accused Baliya whereas Criminal Appeal No.2002/2008 has been filed by co-accused, Gopal. Both the appellants are aggrieved by the common order dated 20.4.2007 passed by the High Court of Madhya Pradesh by which the conviction of the appellants under Section 120B read with Section 302 IPC and the sentence imposed has been affirmed.

2. The short case of the prosecution is that on 11.10.1991 Head Constable, Mukesh Kumar (PW 7), of Police Station Balwada, while returning from the Court where he had gone to attend the hearing of a case, found a person lying unconscious on the road side on Indore road. As the person was profusely bleeding PW-7 sent information to the police station, Balwada, which was entered in the General Diary of the police station. Thereafter, the victim was brought to the hospital where he was declared dead. As there were injuries on the person of the deceased, PW 14, S.S. Tomar (Inspector of Police) registered an offence under Section 302 and took up investigation of the case. On completion of investigation, the two appellants' alongwith co-accused Manish (since dead) and Chhotu (acquitted) were charge sheeted for the offence under Section



120-B read with Section 302 IPC. The offences being triable by the Court of Sessions, the case was committed to the court of the learned Special Sessions Judge, West Nimar Mandaleshwar (M.P.). Charges under the aforesaid Sections of the Penal Code were framed against all the accused to which they pleaded not guilty and claimed to be tried. In the course of the trial prosecution examined as many as 14 witnesses besides exhibiting a large number of documents. Accused Manish died in the course of the trial whereas the remaining accused including the two appellants contested the charges framed against them. At the conclusion of the trial, while accused Chhotu was exonerated of the charges levelled, the accused-appellants have been convicted as aforesaid and sentenced to undergo, inter alia, rigorous imprisonment for life. The said conviction and sentence has been maintained by the High Court in the two separate appeals filed by the appellants giving rise to the present appeals.

3. We have heard Shri S.K. Bhattacharya, learned counsel for the appellants and Shri C.D. Singh, learned counsel on behalf of the respondent-State. We have also considered the evidence of the key witnesses examined by the prosecution as well as the several documents exhibited in the course of the trial. We have also perused the orders of the learned Trial Court as well as of the High Court.

4. The deposition of PWs 1,4,5,6,8 and 11 who are the key witnesses examined by the prosecution may now be noticed:

According to PW 1, the first informant, on the day of the occurrence, in the late afternoon, he was returning from the factory alongwith two lineman of the M.P. Electricity Board who had gone to the factory to carry out an inspection of a fault that had occurred in the electric connection. All the three were coming back from the factory in one scooter. According to PW 1, from the other side, accused Manish, deceased Pradeep

and accused Gopal were coming on a red motor cycle belonging to the accused Manish. As deceased Pradeep had asked him to stop PW-1 stopped the scooter and on being asked by the deceased he informed him that they were coming from the factory after getting the electric fault inspected. According to PW 1, at that point of time accused Gopal went away in the direction of the Gayatri Market and the deceased alighted from the motor cycle and after talking to PW 1, he drove away in the motor cycle with the other accused i.e. Manish. According to PW 1, the scooter by which he had brought the lineman belonged to the deceased and he was going to return the same. However, the brother of the deceased, one Mukesh (PW 5), asked for the scooter and as the house of PW 1 was near the Gayatri Market both of them i.e. PW 1 and PW 5 Mukesh rode the scooter together up to a certain point. Thereafter, PW 1 went to his house and shortly thereafter he came to know from one Satya Vijaya that the deceased Pradeep had been stabbed by somebody with a knife.

5. PW 3, Asha, examined as an eye witness was declared hostile. PW 4 Gangabai who was examined as another eye witness of the occurrence had deposed that on the day of the occurrence she alongwith PW 3 were returning from the factory after the day's work. This was at about 5 p.m. When they had reached Chor Bavadi she saw three persons quarreling and one person being stabbed. PW 4 also deposed that there was a red colour Motorcycle on which the persons were seated. The deposition of PW 4 further indicates that though she could not identify any of the alleged assailants in police custody, she had identified accused Baliya and Gopal in the court.

6. PW 5, Mukesh, is the brother of the deceased. According to this witness, after the deceased Pradeep and PW 1 had completed their conversation, the deceased had left towards Indore road alongwith accused Gopal and Manish. This part of the evidence of PW 5 is discrepant with the evidence of PW 1 who had stated that at this point of time



accused Gopal had parted company and had gone in the direction of the Gayatri Market, while the deceased had gone away in the Motorcycle with accused Manish. Furthermore, according to PW 5, after PW 1 had dropped the linemen and alongwith PW 5 had come to Gayatri Market accused Gopal had again appeared and had taken away the scooter. Shortly, thereafter, he was informed about the incident.

7. PW 6 Shantilal is a witness to the recovery and seizure of the wearing apparels of accused Gopal from the house of co-accused Chhotu (since acquitted). He is also a witness to the recovery of a knife at the instance of the accused Manish.

8. PW 8, Kamlesh Kumar Sharma, is another brother of the deceased. According to this witness at about noon time on the day of the occurrence while he was going home for his meal, he had seen one Dr. Sandhya Swami with the two accused appellants and accused Manish. PW 8 has deposed that Dr. Sandhya Swami, in a loud voice, was blaming accused Baliya that her reputation has been smeared because of him and that a pamphlet has been published with regard to her relationship with the accused Baliya. This witness has also deposed that the accused Baliya had stated that he knew the identity of the author of the pamphlet and had told accused Gopal and Manish that the said person should be done away with. Similar is the deposition of PW 11, Mansoor Khan. According to PW 11, when he was going to the market he found Dr. Sandhya Swami and accused Baliya talking in the course of which Dr. Sandhya Swami was telling Baliya that she has suffered in reputation on account of him and that a pamphlet has been published against her and others. According to PW1, he had heard accused Balia telling accused Manish and Gopal that Pradeep should not be spared and that he should be killed.

9. A consideration of the evidence adduced by the prosecution witnesses, the core of which has been noticed above, would go to show that though two alleged eye witnesses were examined by the prosecution not much reliance can be

placed on the testimony of either. PW 3, Asha, had been declared hostile by the prosecution whereas the evidence of PW 4, Gangabai, suffers from material discrepancies if read with the evidence of PW 1 and 5, particularly, in respect of the role of the accused, Baliya. While PWs 1 and 5 does not mention about the presence of accused Baliya at the place of occurrence, PW 4 had identified the said accused in Court as been one of the assailants. The said witness, however, could not identify any of the accused while they were in police custody. In such circumstances, it will not be safe and prudent to place any reliance on the evidence of PW 4.

10. In the absence of any credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an influence of guilt can reasonably follow. A scrutiny of the prosecution evidence, noticed above, would go to show that in so far as the charge of criminal conspiracy under Section 120B IPC is concerned, the prosecution has sought to establish that a pamphlet authored/published by the deceased was in circulation casting doubt on the character of Dr. Sandhya Swami and her relationship with the accused Baliya. The said pamphlet though seized in the course of investigation was not exhibited in the trial. From the evidence of PW 8 and PW 11 it transpires that in the afternoon of the day of the occurrence they had over heard a conversation between Dr. Sandhya Swami and Baliya with regard to the pamphlet distributed in the course of which the accused Baliya had stated that he knew who is the author of the pamphlet. From the evidence aforesaid two witnesses i.e PWs 8 and 11, it further transpires that Baliya had informed accused Manish and Gopal that it is Pradeep who was responsible for the pamphlet and that he should be killed. Shortly thereafter, the dead body of Pradeep was found lying on the road. From the evidence of PWs 1 ad 5 the prosecution has sought to establish that a little while before his death the deceased was seen in the company of accused Manish and Gopal and that the deceased was seen by PWs 1 and 5 riding



on a red motorcycle belonging to accused Manish. Over and above the aforesaid circumstances, from the evidence of PW 6, the prosecution has tried to establish that blood stained clothes of accused Gopal was recovered at the instance of the said accused whereas a knife was recovered at the instance of accused Manish. The aforesaid blood stains, according to the prosecution, stood proved by the F.S.L. Report which was duly exhibited in the trial.

11. Having considered the evidence adduced by the prosecution witnesses we find that in so far as the publication of the pamphlet; the conversation between Dr. Sandhya Swami and the accused Baliya and the statements attributed to accused Baliya along with the instructions to accused Manish and Gopal that Pradeep should be killed had been proved by the prosecution. Though the prosecution has also sought to prove that the deceased was seen in the company of accused Manish and Gopal shortly before his death there is some amount of discrepancy in the evidence of PWs 1 and 5, in this regard, as already noticed. That the accused Manish owned a red colour motorcycle and the use of such a motorcycle by the accused and the deceased shortly before the death had occurred have also been proved by the prosecution. There is also no doubt with regard to the recovery of blood stained clothes of the accused Gopal at the instance of the said accused and also the recovery of a knife at the instance of the accused Manish. What has fallen for our determination is whether on the aforesaid proved circumstances, the appellants are liable for the offences alleged against them?

12. The offence of "criminal conspiracy" is defined in Section 120A of the Indian Penal Code whereas Section 120B of the Code provides for punishment for the said offence. The foundation of the offence of criminal conspiracy is an agreement between two or more persons to cooperate for the accomplishment/performance of an illegal act or an act which is not illegal by itself, through illegal means. Such agreement

or meeting of minds create the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed.

13. More often than not direct evidence of the offence of criminal conspiracy will not be forthcoming and proof of such an offence has to be determined by a process of inference from the established circumstances of a given case. The essential ingredients of the said offence; the permissible manner of proof of commission thereof and the approach of the courts in this regard has been exhaustively considered by this Court in several pronouncements of which, illustratively, reference may be made to *E.K. Chandrasenan v. State of Kerala*[1], *Kehar Singh & Ors. v. State (Delhi Administration)*[2], *Ajay Aggarwal v. Union of India*[3] and *Yash Pal Mittal v. State of Punjab*[4].

14. The propositions of law which emanate from the above cases are, in no way, fundamentally different from what has been stated by us hereinabove. The offence of criminal conspiracy has its foundation in an agreement to commit an offence or to achieve a lawful object through unlawful means. Such a conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn.

1. 1995 (2) SCC 99.
2. 1988 (3) SCC 609.
3. 1993 (3) SCC 609.
4. 1977 (4) SCC 540.



Naturally in evaluating the proved circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused.

15. Applying the above tests we find that in the present case the prosecution had proved, through the evidence of PWs 8 and 11, the conversation between Dr. Sandhya Swami and the accused Balia to the effect that the reputation of Dr. Sandhya Swami had suffered because of accused Balia and further that a pamphlet in this regard has been published. The prosecution has also succeeded in proving that the accused Balia had stated that he knew who was the author of the pamphlet and that Balia had told accused Manish and Gopal that the author of the pamphlet (deceased Pradeep) should not be spared. While this happened in the afternoon of the day of the occurrence, in the early part of the evening hours the deceased Pradeep was found lying injured on the road and on being brought to the hospital, was declared dead. Whether on this evidence the conclusion that the accused appellant had hatched a conspiracy to commit the murder of Pradeep can be drawn to the exclusion of all other possible conclusions is the question that requires our answer.

16. We have already held that in the present case, from the evidence of PWs 8 and 11, the prosecution has succeeded in establishing the conversation between the accused persons and Dr. Sandhya Swami details of which need not be repeated. In coming to the above conclusion, we had considered the arguments advanced on behalf of the accused that the said fact is inherently improbably as such a conversation is alleged to have occurred in a busy market place and the exchanges are reported to have been in a loud voice within the hearing of the people in the immediate vicinity, like PWs 8 and 11. Balancing the totality of the facts and keeping in mind the strata of society to which the accused persons belong/belonged it will be difficult to disbelieve what has been stated by the prosecution witnesses in a clear and cogent manner merely on the assertion

that such an event is impossible. However, even accepting the prosecution version what reasonably follows therefrom is that Dr. Sandhya Swami had complained to accused Balia that her reputation has been smeared because of the pamphlet; that accused Balia had stated that he knew who was the author of the pamphlet and further that he had stated to accused Manish and Gopal that the author of the pamphlet (deceased Pradeep) should be killed. But what is conspicuous by its absence is the essential meeting of minds between accused Balia, Manish and Gopal to commit the murder of the deceased. No evidence is forthcoming as to what was the response of accused Manish and Gopal to the statement made by Balia to the effect that the author of the pamphlet must be done away with. In the absence of any material to establish the said fact the vital chain or link to enable us to satisfy ourselves with regard to an agreement or meeting of minds amongst the accused to commit the murder of deceased Pradeep is lacking. The alleged participation of the accused in the commission of the actual act of murder cannot be evidence of the conspiracy in as much as the commission of murder must be the result of the conspiracy already hatched. The alleged acts attributed to the accused insofar as the offence of murder is concerned, naturally, has to be considered separately in order to determine the liability of the accused for the said offence.

17. The above would now require the Court to consider whether either of the appellants can be held to be liable for the offence under Section 302 IPC. We have already indicated that we do not find the evidence of PW 4 to be credible or reliable in so far as identification of accused Balia at the place of occurrence is concerned. If the evidence of the alleged eye witnesses (PW 4) is to be excluded, as it has to be, the accused Balia has not been implicated, in any manner whatsoever, by the circumstances that the prosecution has sought to establish by examining PWs 1 and 5. The aforesaid witnesses have nowhere mentioned that the accused Balia was present at any point of time or at the place when the occurrence



took place. The said witnesses have, at best, implicated accused Gopal as being seen with the deceased Pradeep along with the accused Manish shortly before the incident. However, as already indicated, there is a serious discrepancy in the evidence of PWs 1 and 5 with regard to the presence of the accused Gopal in the company of the deceased immediately before the crime. The prosecution version of last seen together even if it is hypothetically accepted in its entirety, at the highest, would establish only a solitary incriminating circumstance against the accused, which in our considered view cannot give rise to the conclusion that the accused Gopal must be held liable for the murder of the deceased Pradeep. Recovery of the blood stained clothes of the accused Gopal at his instance, by itself, again will not be sufficient.

18. In view of the foregoing discussions we are of the view that the conviction of the accused appellants under Section 120 B read with Section 302 IPC is not legally sustainable. We, therefore, allow appeals, set aside the judgment and order dated 20.4.2007 passed by the High Court of Madhya Pradesh in Criminal Appeal Nos.394/1998 and 395/1998 and acquit both the accused appellants of the offences for which they were charged. The accused appellants be set at liberty forthwith unless their custody is required in connection with any other case.

R.P. Appeals allowed.

SUDHAKAR

*v.*

STATE OF MAHARASHTRA

(Criminal Appeal No. 1603 of 2012)

OCTOBER 05, 2012

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

*Penal Code, 1860 – s. 304 (Part I) – Prosecution of accused u/s. 302 – For killing his own son – Mother of deceased and one neighbour witnesses to the incident – Seizure of weapon of offence, blood-stained clothes of accused and bloodstained bed sheets – Report of the Chemical Analyst disclosing that blood on the clothes of accused matched with blood group of deceased – Mother in her cross-examination stating that the deceased was under the influence of liquor and in such condition he used to create ruckus in the house – Trial court convicting the accused u/s. 302 – High Court confirming the conviction – On appeal, held: Offence against the accused is conclusively proved – There is nothing to suggest that there was premeditation in the mind of the accused to cause death – Behavior of the deceased under influence of liquor created heat of passion in the accused – Therefore conviction altered to one u/s. 304 (Part I) – Sentence of Life Imprisonment altered to period already undergone i.e. 8 years.*

**The appellant-accused was prosecuted for killing his own son by stabbing him. Prosecution case was that PW1 (mother of deceased and wife of accused) lodged a complaint about the incident. The police seized the clothes of the accused, the knife, blood-stained bed sheets in presence of the panch witnesses. PW. 1 in her statement before court stated that the deceased was**





**under influence of liquor and in such condition, he used to throw house-hold articles and create a ruckus in the house. PW-2 was another witness stated that he had seen the accused in front of his house who told him that he killed his son. Trial court convicted the accused u/s. 302 IPC and sentenced him to life imprisonment and fine of Rs. 500/- with default clause. High Court confirmed the conviction. Hence the present appeal.**

**Partly allowing the appeal, the Court**

**HELD: 1. It came out in evidence that at the time of occurrence, there were only three persons, namely, the appellant, P.W.1 and the deceased. Though there is variation in the version of P.W.1, as between the complaint and her evidence before the court, going by the evidence available on record, the conclusion of the trial court that the appellant was responsible for the death of the deceased is unassailable. Apart from the exclusive presence of the appellant with a weapon in his hand as deposed by P.W.2, the other two persons were the deceased and P.W.1. The said conclusion of the trial court as well as that of the High Court cannot be doubted. Further the report of the chemical analysis also disclosed that the blood stained clothes of the appellant matched with the blood group of the deceased, which were found on the clothes of the deceased himself. Therefore, there was conclusive proof to hold that it was the appellant who was responsible for the single stab injury inflicted upon the deceased with the aid of the knife seized under Exhibit-47. [Para 8] [1174-F-H; 1175-A-C]**

**2. There was nothing to suggest that there was any premeditation in the mind of the appellant to cause the death of the deceased. Taking into account the statement of P.W.1 that the deceased was under the influence of liquor and that whenever he was under the influence of**

**liquor he used to throw the household articles and create a ruckus in the house was a factor which created a heat of passion in the appellant who as a father was not in a position to tolerate the behaviour of his son whose misbehaviour under the influence of liquor was the torment. Therefore, unmindful of the consequences, though not in a cruel manner, the appellant inflicted a single blow which unfortunately caused severe damage to the vital organs resulting into the death of the deceased. In such circumstances, the offence alleged and as found proved against the appellant can be brought under the First Part of Section 304 IPC. Accordingly, the conviction is altered as falling under Section 304 (Part I) IPC in place of Section 302 IPC. [Para 9] [1175-E-H; 1176-A]**

**3. Taking note of the sentence already undergone (8 years), it is held that the sentence already undergone would be sufficient punishment apart from the fine imposed with the default sentence as per the judgment of the trial court and as affirmed by the High Court. [Para 9] [1176-B-C]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1603 of 2012.

From the Judgment & Order dated 01.12.2011 of the High Court of Judicature of Bombay Bench at Nagpur in Criminal Appeal No. 84 of 2006.

K. Rajeev for the Appellant.

Asha G Nair for the Respondent.

The Judgment of the Court was delivered by

**FAKKIR MOHAMED IBRAHIM KALIFULLA, J.** 1. Leave granted and the scope of consideration in this appeal is limited to the nature of offence and the sentence to be imposed.



2. This appeal is directed against the judgment of the High Court of Judicature at Bombay, Nagpur Bench dated 01.12.2011 passed in Criminal Appeal No.84 of 2006. By the judgment impugned in this appeal, the conviction of the appellant for an offence under Section 302 of IPC with a sentence of life imprisonment apart from fine of Rs.500/- in default of which to undergo rigorous imprisonment for three months by the learned Sessions Judge, Amravati in Sessions Trial No.195/2004 dated 22.09.2005 came to be confirmed.

3. The brief facts which are required to be stated are that on 10.07.2004 P.W.1-Tulsabai preferred a complaint under Exhibit-38 with P.W.3-PSI Madhav Dhande attached to Police Station Frezarpura, Amravati which came to be registered as Crime No.138/2004. The printed First Information Report is Exhibit-39. According to the complainant, on 09.07.2004 between 9.30 p.m. to 10.00 p.m. while her husband, the appellant herein, was sleeping on a wooden cot which was in the front court-yard of the house, her son Balya-the deceased, came from outside and asked the appellant as to whether he had taken his dinner to which the appellant replied in the negative. Thereafter, the deceased asked P.W.1 to serve food for him which she did inside the house. Balya went inside the house for washing his hands. The deceased stated to have asked his father, appellant herein, to sleep inside the house and, thereafter, the appellant went inside which was being watched by P.W.1 who was standing near the door of the house. It is sated that at that point of time she saw the appellant inflicting a stab injury on the deceased on which the deceased raised shouts about the inflicting of the injury by his father and so saying he also fell down. The appellant stated to have come out of the house by shouting to the effect that he had stabbed the deceased and on hearing shouts the appellant's brother one Sunil Chandrabhan Bansod arrived at the spot and arranged for an auto rickshaw to take the deceased to Irwin Hospital, Amravati. It is stated that on being admitted in the hospital, it was declared that the deceased succumbed to the injuries.

4. After investigation, P.W.3 stated to have arrested the appellant at 1.50 a.m and drew the scene of occurrence in the presence of Panchas under Exhibit-45, seized the clothes of the appellant under seizure memo Exhibit-46, seized the knife under seizure memo Exhibit-47 and also seized two blood stained bed-sheets, simple and blood stained soil from the spot in the presence of Panch witnesses under seizure memo Exhibit-48 which were sent for chemical analyzer report. The report of the chemical analyzer was marked as Exhibits-30, 35 and 36. Exhibit 35 disclosed that the knife was stained with human blood while the clothes of the appellant were stained with blood group 'A' which was the blood group of Balya, the deceased. Exhibit-36 disclosed that the blood group of the appellant as 'B' group. On framing of the charges for the offence under Section 302 of IPC, the trial was held against the appellant in which four witnesses were examined on the side of the prosecution. In the 313 questioning the appellant totally denied the offence alleged against him.

5. P.W.1, the wife of the appellant, is also the mother of the deceased. As per her version before the Court on the date of the incident she was present along with her husband, when the deceased in the first instance asked the appellant whether he had his dinner and thereafter P.W.1 served dinner to the deceased inside the house. The appellant, who was sitting on the cot outside the house, stated to have went inside the house while P.W.1 was standing at the entrance of the house. Then P.W.1 stated to have heard the cries of the deceased to the effect that he was dying and when she asked him, he replied that he was stabbed by the appellant and that she cried for help to which the neighbours gathered who took the deceased in an auto rickshaw to the hospital and that thereafter she lodged the report Exhibit-38. In the cross-examination P.W.1 came out with the information that the deceased was under the influence of liquor and that whenever he was under the influence of liquor he used to throw the household articles and also beat himself.



6. According to P.W.2, a neighbour of the house, on hearing the cries of a lady i.e. P.W.1 he rushed towards her house where he saw the appellant standing outside his house and that the door was closed. According to him, when he asked the appellant as to what happened, the appellant, who was holding a knife in his hand, informed P.W.2 that he gave one blow to his son which made him sleep for ever. P.W.2 also stated that P.W.1 Tulsabai opened the door which was latched from inside and she ran outside the house. P.W.2 was declared hostile. He admitted that the appellant was holding a knife in his hand and was standing outside the house.

7. P.W.4, the postmortem doctor, who issued Exhibit 51-postmortem report deposed that the deceased sustained one stab injury of 1½ inch in length and 2 inches in depth which was perforated up to intestine. According to P.W.4 on internal examination he found that the abdominal wall was ruptured due to stab on right lateral part of abdominal wall and that peritoneal cavity was full of blood, the liver was also found ruptured below the stab injury. As per the opinion of P.W.4, the probable cause of death was the injury to the vital organ like liver which caused internal haemorrhage and shock. To the suggestion put to P.W.4 that the injury mentioned in postmortem report could have been caused by the knife of 19 cm. in length and 4 cm. in width, the same was denied by him.

8. Whatever be the subsequent versions made by P.Ws 1 and 2 before the Court, it came out in evidence that at the time of occurrence there were only three persons, namely, the appellant, P.W.1 and the deceased. The admission of P.W.1 that the deceased had drinking habit and that whenever he was under the influence of liquor he used to create a ruckus in the house was a factor which had to be necessarily borne in mind while considering the offence alleged and proved against the appellant. Though there is variation in the version of P.W.1, as between the complaint and her evidence before the Court, going by the evidence available on record, the conclusion of

the Trial Court that the appellant was responsible for the death of the deceased is unassailable. Apart from the exclusive presence of the appellant with a weapon in his hand as deposed by P.W.2, the other two persons were the deceased and P.W.1. The said conclusion of the Trial Court as well as that of the High Court cannot be doubted. Further the report of the chemical analysis Exhibits 35 and 36 also disclosed that the blood stained clothes of the appellant matched with the blood group of the deceased which were found on the clothes of the deceased himself. Therefore, there was conclusive proof to hold that it was appellant who was responsible for the single stab injury inflicted upon the deceased with the aid of the knife seized under Exhibit-47. Having reached the above conclusion, the only other question raised was as to whether there is any mitigating circumstance in order to hold that the offence would fall under any of the Exceptions to Section 300 of IPC to state that it was a case of culpable homicide not amounting to murder.

9. Going by the narration of the facts disclosed, there was nothing to suggest that there was any premeditation in the mind of the appellant to cause the death of the deceased. Taking into account the statement of P.W.1 that the deceased was under the influence of liquor and that whenever he was under the influence of liquor he used to throw the household articles and create a ruckus in the house was a factor which created a heat of passion in the appellant who as a father was not in a position to tolerate the behaviour of his son whose misbehaviour under the influence of liquor was the torment. Therefore, unmindful of the consequences, though not in a cruel manner the appellant inflicted a single blow which unfortunately caused severe damage to the vital organs resulting into the death of the deceased. In such circumstances, as rightly contended by learned counsel for the appellant, we are convinced that the offence alleged and as found proved against the appellant can be brought under the First Part of Section 304 of IPC. Accordingly, while affirming the conviction of the appellant, we



are only altering the same as falling under Section 304 Part I of IPC in place of Section 302 of IPC. As far as the sentence imposed on the appellant in as much as we reached at the conclusion that the conviction should fall under Section 304 Part I of IPC, taking note of the sentence already undergone, we find from the Imprisonment Certificate that the appellant is in jail from 12.07.2004 and he is 60 year old, P.W.1, who is the wife of the appellant, is left all alone and the appellant having suffered imprisonment for more than eight years, we hold that the sentence already undergone would be sufficient punishment apart from the fine imposed with the default sentence as per the judgment of the Trial Court and as affirmed by the High Court. The appeal stands partly allowed with the above modifications of the charge and the sentence imposed on the appellant.

10. In the light of the modification of the sentence, the appellant shall be set at liberty forthwith, if not required in any other case.

K.K.T. Appeal partly allowed.

SHAHEJADKHAN MAHEBUBKHAN PATHAN
*v.*
STATE OF GUJARAT
(Criminal Appeal No. 1592 of 2012)

OCTOBER 5, 2012

**[P. SATHASIVAM AND RANJAN GOGOI, JJ.]**

*Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 8(c), 21 and 29 – Accused-appellants convicted by courts below for carrying commercial quantity of brown sugar (narcotic substance) and sentenced to RI for 15 years – Prayer before Supreme Court for reduction of the sentence – Held: The appellants were first time offenders and there was no past antecedent about their involvement in offence of like nature on earlier occasions – In view of the same, while confirming the conviction of appellants, their sentence reduced to 10 years, the minimum prescribed sentence under the relevant provisions of the Act – Government Notification No. SO.1055 (E) dated 19.10.2001 – Sentence / Sentencing.*

*Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 8(c), 21 and 29 – Accused-appellants convicted by courts below for carrying commercial quantity of brown sugar (narcotic substance), sentenced to RI for 15 years and directed to pay fine of Rs.1.5 lakh, in default, to further undergo RI for 3 years – Prayer before Supreme Court for modification of the default sentence – Held: When default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount – It is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine – In the instant case, considering the circumstances, viz., the appellants are very poor and have to*





*maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the trial court, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence, serious prejudice will be caused not only to them but also to their family members who are innocent – The ends of justice would be met if it is ordered that in default of payment of fine of Rs.1.5 lakhs, the appellants are directed to undergo RI for 6 months instead of 3 years as ordered by the trial court and confirmed by the High Court – Government Notification No. SO.1055 (E) dated 19.10.2001 – Code of Criminal Procedure, 1973 – s.30 – Penal Code, 1860 – ss. 63 to 70 – Sentence / Sentencing – Default sentence.*

**On a tip-off, the Narcotic Cell arrested the two appellants allegedly for carrying 500 grams brown sugar (narcotic substance). The trial court, after considering the Government notification No. SO.1055 (E) dated 19.10.2001 and the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985, held that the quantity of the narcotic substance (brown sugar) fell under the head "Commercial Quantity" and convicted the appellants under Sections 8(c), 21 and 29 of the NDPS Act and sentenced them to suffer rigorous imprisonment (RI) for 15 years. Taking note of the fact that the appellants belong to the State of Madhya Pradesh and were carrying such commercial quantity of brown sugar to the State of Gujarat for doing business, the trial court also imposed a fine of Rs. 1.5 lakhs each, in default, to further undergo RI for 3 years. The order was upheld by the High Court and therefore the present appeals.**

**The appellants did not seriously challenge the conviction, however, prayed for reduction of sentence and also prayed for modification of default sentence awarded by the trial court and confirmed by the High Court.**

**Disposing the appeals, the Court**

**HELD:1. In view of the limited relief prayed for and considering the relevant and acceptable materials placed by the prosecution in support of their case, there is no need to traverse the finding relating to conviction, accordingly, the same is confirmed. [Para 7] [1183-F]**

**Sentence:**

**2. For offences punishable under Sections 8(c), 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the minimum sentence prescribed is 10 years which may extend to 20 years with fine. In the instant case, both the appellants are first time offenders and there is no past antecedent about their involvement in offence of like nature on earlier occasions. In view of the same, while confirming the conviction, the sentence is reduced to 10 years which is the minimum prescribed sentence under the relevant provisions of the NDPS Act. [Paras 8, 9] [1184-C, F-G]**

*Balwinder Singh vs. Asstt. Commr., Customs & Central Excise* **(2005) 4 SCC 146 – relied on.**

**Default Sentence:**

**3.1. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. If sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, it is the duty of**



**the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. Also where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases. [Para 12] [1190-E-H; 1191-A]**

**3.2. Section 30 CrPC speaks about sentence of imprisonment in default of fine. Clause (b) of sub-section (1) of Section 30 CrPC authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances, viz., the appellants-accused are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the trial court, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, serious prejudice will be caused not only to them but also to their family members who are innocent. The ends of justice would be met if it is ordered that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the trial court and confirmed by the High Court. [Para 14] [1191-D; 1192-A-D]**

*Shantilal vs. State of M.P.* **(2007) 11 SCC 243: 2007 (10) SCR 727 – relied on.**

**Conclusion:**

**4. The conviction recorded is confirmed and sentence imposed upon the appellants to undergo RI for 15 years is modified to 10 years. The order of payment**

**of fine of Rs.1.5 lakhs each is also upheld but the order that in default of payment of fine, the appellants shall undergo RI for 3 years is reduced to RI for 6 months. Since the appellants have already served nearly 12 years in jail, as per the modified period of sentence in respect of default in payment of fine, there is no need for them to continue in prison. The appellants shall be set at liberty forthwith unless they are required in any other offence. However, for any reasons, if the appellants have not completed the modified period of sentence, they will be released after the period indicated hereinabove is over. [Para 15] [1192-E-G]**

**Case Law Reference:**

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|---|---|---|
| **(2005) 4 SCC 146** | **relied on** | **Para 8** |
| **2007 (10) SCR 727** | **relied on** | **Para 11** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1592 of 2012.

From the Judgment & Order dated 8.7.2002 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 11 of 2002.

WITH

Crl. Appeal No. 1593 of 2012.

Dr. Sushil Balwada for the Appellant.

K. Enatoli Sema, Amit Kumar Singh, Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. Delay condoned.

2. Leave granted.



3. These appeals are directed against the final judgment and order dated 08.07.2002 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 11 and 75 of 2002 whereby the Division Bench of the High Court dismissed the appeals filed by the appellants herein and affirmed the judgment dated 10.12.2001 passed by the Additional Sessions Judge, Ahmedabad City in Sessions Case No. 381 of 2000.

4. Brief facts:

(a) On 04.09.2000, on a tip-off, the Narcotic Cell, Police Bhavan, Gandhinagar, Gujarat arrested two persons, viz., Shahejadkhan Mahebubkhan Pathan and Narendrasinh Chandrashekhar Rai (the appellants herein) carrying 500 grams brown sugar (narcotic substance) at Kalupur Railway Station, Ahmedabad while they were traveling in Sarvodaya Express from Delhi to Ahmedabad through Ratlam.

(b) After following the procedure regarding search and seizure and after registering the case under the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act'), the samples were sent to the Forensic Science Laboratory (FSL) for examination.

(c) On 19.12.2000, after filing of the charge sheet, the case was committed to the Court of Session and numbered as Sessions Case No. 381 of 2000.

(d) The Additional Sessions Judge, Ahmedabad City, after considering the notification of the Government being No. SO.1055 (E) dated 19.10.2001 and the provisions of the NDPS Act held that the quantity of the narcotic substance (brown sugar) falls under the head "Commercial Quantity" and found the appellants guilty for the offence punishable under Sections 8(c), 21 and 29 of the NDPS Act and sentenced them to suffer rigorous imprisonment (RI) for 15 years. The Additional Sessions Judge, after taking note of the fact that the appellants

belong to the State of Madhya Pradesh and were carrying such commercial quantity of brown sugar to the State of Gujarat for doing business, also imposed a fine of Rs. 1.5 lakhs each, in default, to further undergo RI for 3 years.

(e) Being aggrieved, the appellants herein filed Criminal Appeal Nos. 11 and 75 of 2002 before the High Court of Gujarat. The Division Bench of the High Court, by impugned order dated 08.07.2002, dismissed the said appeals. Questioning the same, the appellants herein have filed separate appeals by way of special leave before this Court.

5. Heard Dr. Sushil Balwada, learned counsel for the appellants-accused and Ms. K. Enatoli Sema, learned counsel for the respondent-State.

6. Learned counsel appearing for both the appellants before the High Court as well as before this Court, considering the materials placed by the prosecution, has not seriously canvassed the conviction, however, taking note of various aspects including the age and poorness, prayed for reduction of sentence. In addition to the same, learned counsel also prayed for modification of default sentence awarded by the Additional Sessions Judge, Ahmedabad City and confirmed by the High Court.

7. In view of the limited relief prayed for and considering the relevant and acceptable materials placed by the prosecution in support of their case, there is no need to traverse the finding relating to conviction, accordingly, we hereby confirm the same.

**Sentence:**

8. Coming to the question of sentence, it is not in dispute that the appellants were charged for possession of brown sugar in the quantity of 500 grams which falls under the head "commercial quantity". As per the notification of the Government



being No. SO.1055(E) dated 19.10.2001, it is necessary to consider the same in terms of Section 21(c) of the NDPS Act. The trial Judge, taking note of the fact that the appellants were carrying such commercial quantity of brown sugar to the State of Gujarat from the State of Madhya Pradesh, awarded RI for 15 years and also directed them to pay a fine of Rs.1.5 lakhs each, in default, to further undergo RI for 3 years. For offences punishable under Sections 8(c), 21 and 29 of the NDPS Act, undoubtedly, the minimum sentence prescribed is 10 years which may extend to 20 years with fine. In this regard, it is useful to refer a decision of this Court in *Balwinder Singh vs. Asstt. Commr., Customs & Central Excise,* (2005) 4 SCC 146. The appellant therein was convicted for offences punishable under Sections 18, 22, 23, 25, 28, 29 and 30 of the NDPS Act and Section 120-B of the Indian Penal Code, 1860 (in short 'the IPC'). This Court, having regard to the facts and circumstances and taking note of the fact that the appellant therein was convicted for the said offences for the first time (emphasis supplied), while confirming the conviction, reduced the sentence from 14 years to 10 years for the offences under the NDPS Act and the IPC.

9. It is projected before us that both the appellants are first time offenders and there is no past antecedent about their involvement in offence of like nature on earlier occasions. It is further brought to our notice, which is also not disputed by the learned counsel for the State that as on date, the appellants had served nearly 12 years in jail. In view of the same and in the light of the decision of this Court, in *Balwinder Singh* (supra), while confirming the conviction, we reduce the sentence to 10 years which is the minimum prescribed sentence under the relevant provisions of the NDPS Act.

**Default Sentence:**

10. Coming to the next claim of the appellants, i.e., default sentence, the trial Judge, taking note of various aspects including the fact that the appellants were carrying commercial

quantity of brown sugar from the State of Madhya Pradesh to the State of Gujarat for doing business, imposed a fine of Rs.1.5 lakh each, in default, ordered to undergo RI for 3 years.

11. According to the learned counsel for the appellants, the default sentence, i.e., 3 years, is very harsh and the Additional Sessions Judge ought not to have imposed such sentence for non-payment of fine amount. In view of the same, he relied on a decision of this Court in *Shantilal vs. State of M.P.* (2007) 11 SCC 243 wherein this Court considered the imprisonment in default of payment of fine with reference to various provisions of IPC and the Code of Criminal Procedure, 1973 (in short 'the Code') and held as under:

> "31. .....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.
>
> 32. A general principle of law reflected in Sections 63 to 70 IPC is that an amount of fine should not be harsh or excessive. The makers of IPC were conscious of this problem. The authors of the Code, therefore, observed:



> "Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence….
>
> The authors further stated: (Ratanlal & Dhirajlal at pp. 226-27)
>
> …..When a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender……
>
> …..On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in gaol, appears to us to be a very objectionable course…..
>
> …..We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment

which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days."

**33.** The issue also came up for consideration in some cases. In *Emperor v. Mendi Ali,* AIR 1941 All 310 M was charged with an offence of murder of his wife. The Sessions Court, however, convicted him for an offence punishable under Section 304 Part I IPC since M had committed the offence of killing his wife in grave and sudden provocation as he saw her (his wife) "with his own eyes committing adultery with N". M was thus altogether deprived of the power of self-control. But the Sessions Judge not only imposed the maximum imprisonment of ten years under Section 304 Part I but he also imposed a fine of Rs 100 or to undergo rigorous imprisonment for one year.

**34.** In a suo motu revision, the High Court observed that the Sessions Judge had awarded maximum term of sentence on M for the offence for which he was found guilty "and added to it a fine (which there could surely have been little prospect of his paying). The result was that he was, in effect, sentenced to eleven years' rigorous imprisonment."

**35.** Considering the facts, Braund, J. stated: (Mendi Ali case, AIR p. 311)

"So far as the fine is concerned, I cannot think it is proper, in the case of a poor peasant, to add to a very long term



of substantive imprisonment a fine which there is no reasonable prospect of the accused man paying and for default in paying which he will have to undergo a yet further term of imprisonment. And, in my judgment, without venturing to say whether it is a course which is strictly in accordance with the law or not, I cannot help thinking that it becomes all the more undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonment sanctioned by the particular section under which he is convicted. *I venture to think that Judges should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment."*

**36.** We may as well refer to a decision of this Court in *Palaniappa Gounder v. State of T.N.* (1977) 2 SCC 634. In that case, P was convicted by the Principal Sessions Judge, Salem and was sentenced to death. The High Court of Madras upheld the conviction but reduced the sentence from death to imprisonment for life. But while reducing the sentence, the Court imposed a fine of Rs 20,000 on P. Leave was granted by this Court limited to the question of the propriety of fine.

**37.** The Court considered the provisions of IPC as also CrPC and observed that courts have power to impose a sentence of fine and if fine is imposed on an offender, it cannot be challenged as contrary to law.

**38.** Speaking for the Court, Chandrachud, J. (as His Lordship then was) said: (SCC pp. 638-39, para 9)

> "9. But legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence

of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotten wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly 'inapposite' (see, for example, *State v. Pandurang Tatyasaheb Shinde,* AIR 1956 Bom. 711 at p. 714), but before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case. As observed by this Court in Adamji Umar Dalal v. State of Bombay, AIR 1952 SC 14 determination of the right measure of punishment is often a point of great difficulty and no hard-and-fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in



mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court, Mahajan, J. observed in that case that: (AIR p. 16, para 5)

'5. … In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases.'

Though that case related to an economic offence, this Court reduced the sentence of fine from Rs 42,300 to Rs 4000 on the ground that due regard was not paid by the lower court to the principles governing the imposition of a sentence of fine."

12. It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine

should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.

13. While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.

14. In view of the above, it is relevant to mention Section 30 of the Code which speaks about sentence of imprisonment in default of fine:

> **"30. Sentence of imprisonment in default of fine –** (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorized by law:
>
> Provided that the term-
>
> (a) is not in excess of the powers of the Magistrate under section 29;
>
> (b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.
>
> (2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29."



It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.

15. For the reasons stated above, both the appeals are partly allowed. The conviction recorded is confirmed and sentence imposed upon the appellants to undergo RI for 15 years is modified to 10 years. The order of payment of fine of Rs.1.5 lakhs each is also upheld but the order that in default of payment of fine, the appellants shall undergo RI for 3 years is reduced to RI for 6 months. Since the appellants have already served nearly 12 years in jail, we are of the view that as per the modified period of sentence in respect of default in payment of fine, there is no need for them to continue in prison. The appellants shall be set at liberty forthwith unless they are required in any other offence. It is further made clear that for any reasons, if the appellants have not completed the modified period of sentence, they will be released after the period indicated hereinabove is over.

16. The appeals are allowed to the extent mentioned above.

B.B.B. Appeals disposed of.

MD. SAHABUDDIN & ANR.
*v.*
STATE OF ASSAM
(Criminal Appeal No. 1602 of 2012)

OCTOBER 05, 2012

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

*Narcotic Drugs and Psychotropic Substances Act, 1985 – Transportation of huge quantity of cough syrup without valid documents – Cough syrup containing narcotic substance of codeine phosphate beyond the prescribed limit – Bail application of accused-appellants – Rejection of – Propriety – Held: When the appellants were not in a position to explain as to whom the supply was meant for, and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail could not be considered – Since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it could not be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993 – In view of the conduct of the appellants, they cannot be heard to state that they were not expected to fulfill any of the statutory requirements either under the Drugs & Cosmetics Act or under the NDPS Act – Drugs & Cosmetics Act – s.27 – Drugs & Cosmetics Rules – Rules 65, 97, 61(1) and 61(2) – Central Government Notifications bearing S.O.826(E) dated 14.11.1985 and G.S.R.40(E) published on 29.1.1993 – Bail.*

*Words and Phrases – "Therapeutic practice" – Meaning.*





**According to the prosecution, the accused-appellants were involved in the transportation of huge quantity of cough syrup without valid documents and further that the said quantity of cough syrup contained the narcotic substance of codeine phosphate beyond the prescribed limit, and thus offence was made out under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. The appellants were produced before the C.J.M. who remanded them to judicial custody. The appellants moved the Court of Sessions Judge for grant of bail but the Sessions Judge rejected the bail application. Thereafter, the appellants moved the High Court, which having declined to grant bail, the present appeal was filed.**

**Dismissing the appeal, the Court**

**HELD: 1.1. In view of the conduct of the appellants in having transported huge quantity of 347 cartons containing 100 bottles in each carton of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup without valid documents for such transportation, they cannot be heard to state that they were not expected to fulfill any of the statutory requirements either under the provisions of Drugs & Cosmetics Act or under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985. [Para 10] [1200-B-C]**

**1.2. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot**

**be considered. The contention of the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. However, as rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent. [Paras 11, 12] [1200-D-H; 1201-A-B]**

**1.3. Since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the**



**application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise. [Para 13] [1201-C-F]**

**2. As far as the grievance raised on the ground that the appellants were illegally detained beyond 24 hours by the police is concerned, the conclusion of the High Court having been based on the satisfaction reached by it, there is no scope to interfere with the same. [Para 14] [1201-F-G]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1602 of 2012.

From the Judgment & Order dated 25.5.2012 of the Gauhati High Court at Guwahati in Bail Application No. 885 of 2012.

Manoj, Aparna Sinha, B.N. Mazamder, Abhijat P. Medh for the Appellants.

Avijit Roy, Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the common order passed by the Gauhati High Court in Bail Application Nos.885/2012 and 886/2012. The allegations against the appellants concerned, in Bail Application No.885/2012, were that on 16.2.2012 at about 8.30 p.m., based on a secret information, the police intercepted a truck bearing registration No.HR-61-A6641 at Chgolia, Boxirhat, on the National Highway 31 and the vehicle along with appellants was taken to the Golakganj Police Station and that due to lack of proper light facility, the search could not be conducted and, therefore, the vehicle and

the appellants were kept in the police station on that night. On the next day i.e. on 17.2.2012 when a search was effected in the presence of the Deputy Superintendent of Police (HQ), Dhubri, Circle Inspector of Golakganj and local witnesses, it revealed that 347 cartons, each carton containing 100 bottles of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup were found concealed along with household articles. For transporting such a huge quantity of pharmaceutical products, the driver of the vehicle could not produce any valid documents. Further the chemical analysis of the contents of the cough syrup disclosed that it contained codeine phosphate beyond the prescribed quantity and, therefore, the articles were seized. The appellants were produced before the C.J.M., Dhubri on 18.2.2012 who remanded them to judicial custody.

3. As we are concerned with the Bail Application No.885/12, we do not deal with the details of seizure and arrest effected on accused concerned in Bail Application No.886/12.

4. The appellants moved the Court of Sessions Judge, Dhubri for grant of bail and learned Sessions Judge, by order dated 30.3.2012 rejected the bail application. Thereafter, the appellants moved the High Court, who by the order impugned in this appeal having declined to grant bail; the present appeal has been filed.

5. The learned counsel for the appellants, apart from making his submissions also filed written submissions on behalf of the appellants. The learned counsel submitted that appellants were only transporting cough syrup, that the content of codeine phosphate was less than 10 mg. (per dosage), namely, 5 ml. and, therefore, by virtue of Central Government Notifications bearing S.O.826(E) dated 14.11.1985 and G.S.R.40(E) published on 29.1.1993, no offence was made out under the provisions of the N.D.P.S. Act and, therefore, the rejection of the bail application by the learned Sessions Judge



as well as by the High Court was not justified. The learned counsel placed reliance upon certain decisions of the High Court of Punjab and Haryana in support of his submissions. Reliance was also placed upon Rules 65, 97, 61(1) and 61(2) of the Drugs & Cosmetics Rules along with Section 27 of the Drugs & Cosmetics Act in support of his submissions. It was also contended that the appellants have spent more than 180 days in custody since 17/18.2.2012 and were entitled for bail under Section 36A(4) of N.D.P.S. Act read with proviso (a) to Section 167(2) of Cr.P.C.

6. The bail application was opposed on behalf of the State contending that the seized materials, which admittedly contained codeine phosphate of prohibited quantity, were found concealed with household articles in the vehicle, that it was not the case of the appellants that the seized pharmaceutical products were meant for supply to any dealer or shop to be sold by way of medicine under the prescription of approved medical practitioner and having regard to total quantity content of the prohibited substance, the plea of the appellants that provisions of the N.D.P.S. Act are not attracted, cannot be accepted. According to learned counsel for the State, the submission based on the number of days spent by the appellants in the prison was not raised before the High Court and, therefore, the same cannot be a ground for consideration in this appeal.

7. Having heard respective counsels and having perused the order of the Sessions Court as well as the High Court, at the very outset, we feel that to appreciate the gravity of the offence alleged against the appellants, it is worthwhile to refer to the nature of materials seized, the total quantity and the extent of codeine phosphate contained therein which has been noted by the High Court in paragraph 34 of its order which can be usefully extracted hereunder:

"B.A. No.885/2012

Recodex 10200*182.73 milligrams =1863 grams =1.863 kilograms

Phensedyl 34700*183.15 milligrams = 6355 grams =6.355 kilograms

Total = 8.218 kilograms

i.e. Total 8 kilograms 219 grams"

8. The contentions of the appellants were fourfold. In the first place, it was contended that the cough syrup Phensedyl and Recodex are pharmaceutical products covered under the provisions of the Drugs & Cosmetics Act, that the Rules prescribe the measure of dosage as 5 ml. and that under Rules 65 and 97 of the Drugs & Cosmetics Rules, it is lawfully permissible to sell such cough syrups in the open market, which can also be transported, kept in stock and sold in the pharmaceutical shops as a prescribed drug under Schedule 'H' at Serial No.132. According to the appellants, such prescribed drugs under the Rules can contain codeine to the extent permissible. While referring to Rule 97, it was contended that Schedule H Drugs containing permissible extent of narcotic substance could be sold in retail on the prescription of Registered Medical Practitioner. The learned counsel, therefore, contended that each of the 100 ml. bottle, seized from the appellants, satisfy the requirement prescribed under the above referred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the N.D.P.S. Act.

9. By referring to Rules 61(1) and 61(2) of the Drugs & Cosmetics Rules, it was contended that the prescribed licence which is required for sale, stock, exhibit, offer for sale or distribution as a mandatory requirement under Section 27 of the Drugs & Cosmetics Act providing for imposition of penalty would be applicable only to manufacturers or those who sell, stock, exhibit or offer for sale or distribution of drugs and that



a transporter, in particular, the driver and a khalasi was under no obligation to hold a licence under the Drugs & Cosmetics Act.

10. At the very outset, the abovesaid submission of the learned counsel is liable to be rejected, inasmuch as, the conduct of the appellants in having transported huge quantity of 347 cartons containing 100 bottles in each carton of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup without valid documents for such transportation cannot be heard to state that he was not expected to fulfill any of the statutory requirements either under the provisions of Drugs & Cosmetics Act or under the provisions of the N.D.P.S. Act.

11. It is not in dispute that each 100 ml. bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg. of codeine phosphate and the each 100 ml. bottle of Recodex cough syrup contained 182.73 mg. of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.

12. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of

codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.

13. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise.

14. As far as the grievance raised on the ground that the appellants were illegally detained beyond 24 hours by the police is concerned, the conclusion of the High Court having been based on the satisfaction reached by it, we do not find any scope to interfere with the same.

15. As far as the submission now made for the first time that the appellants had been in jail for more than the minimum required period is concerned, since neither the Sessions Judge



nor the High Court had the opportunity to examine the said claim made by the appellants, we do not propose to deal with the same in this appeal.

16. When we refer to the decisions relied upon by the learned counsel for the appellants, we find that none of the facts relating to those decisions are parallel to the facts of the present case. Those are all cases which were related to the persons who had valid licences and in the course of their regular business transaction when they were dealing with the pharmaceutical products which contained the prescribed permitted content of narcotic substance and when they were proceeded against for violations, the relief came to be granted in their case. We do not, therefore, find any scope to apply any of the ratios of those decisions to the facts of this case.

17. We do not find any merit in this appeal. The appeal fails and the same is dismissed. We, however, make it clear that whatever stated in this order is only for the purpose of dealing with the appellants' application for grant of bail and we have not stated anything on the merits of the allegations levelled against the appellants.

B.B.B. Appeal dismissed.

RAJ PAUL SINGH & ANR.

*v.*

STATE THROUGH P.S. MUSHEERABAD, HYDERABAD

(Criminal Appeal No. 1339 of 2008)

OCTOBER 09, 2012

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

*Penal Code, 1860 – ss. 302/34 and 300 Exception 4 – Prosecution u/s. 302/34 – Conviction under by courts below – On the basis of evidence of two eye-witnesses – On appeal, plea that case was covered under Exception 4 to s. 300 – Conviction u/s. 302/34 was correct – The case does not fall under Exception 4 to s. 300 because the accused have taken undue advantage and have acted in cruel or unusual manner.*

**The appellants-accused were prosecuted for killing a person by stabbing him. The prosecution case was that PW1 (wife of the deceased) lodged an FIR that appellant No. 1 (brother of the deceased) started abusing her, her children and her husband (deceased). When the deceased asked him to stop this, he asked appellant No. 2 (his wife) to get a knife. Appellant No. 2 gave the knife to him, and he stabbed the deceased. PW-1 and PW-2 (son of the deceased) were the eye-witnesses to the incident. Trial Court convicted both the accused u/s. 302 r/w s. 34 IPC. High court confirmed the conviction.**

**In appeal to this Court, appellants contended that there was no premeditation and the accused stabbed the deceased in a heat of passion which arose out of sudden quarrel and hence Exception 4 to s. 300 IPC was attracted.**

**Dismissing the appeal, the Court**





**HELD: 1. It is clear from the language of *Exception 4* to Section 300 IPC, that culpable homicide will not amount to murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel provided the offender has not taken undue advantage or acted in a cruel or unusual manner. In a case where a man stabs another person, unless it is established that there was some threat from that person to the offender, the court cannot possibly hold that the offender by stabbing that person has not taken any undue advantage or has not acted in a cruel or unusual manner. [Para 6] [1207-G; 1208-E]**

**2. In the instant case, the conviction of the appellants for the offence under Section 302 r/w. Section 34 IPC, is based on the evidence of PW-1 and PW-2, the two eye-witnesses. It is clear from the evidence of the two eye-witnesses that the deceased was unarmed and there was absolutely no physical threat from the deceased to the appellants and appellant No.1 after being provided with a knife by appellant No.2, stabbed the deceased on the left side of the chest on the instigation of appellant No.2 and because of these injuries the deceased died. This was, thus, a case where the appellants have taken undue advantage and have acted in a cruel or unusual manner and the case does not fall within *Exception 4* to Section 300 IPC. The trial court and the High Court have rightly held the appellants guilty of the offence of murder u/s. 302 r/w. Section 34 IPC. [Paras 7, 8 and 9] [1208-F; 1210-B-C-F]**

*Narayanan Nair Raghavan Nair v. The State of Travancore – Cochin* **AIR 1956 SC 99;** *Kikar Singh v. State of Rajasthan* **AIR 1993 SC 2426:1993 (3) SCR 696 ;** *Naveen Chandra v. State of Uttranchal* **2006 (9) Suppl. SCR 668 – relied on.**

**Case Law Reference:**

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|---|---|---|
| **2006 (9) Suppl.SCR 668** | **Relied on.** | **Para 5** |
| **AIR 1956 SC 99** | **Relied on.** | **Para 6** |
| **1993 (3) SCR 696** | **Relied on.** | **Para 6** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1339 of 2008.

From the Judgment & Order dated 26.4.2007 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1258 of 2006.

Kuldip Singh, Mohit Mudgil for the Appellants.

D. Mahesh Babu, Mayur R. Shah, Bala Shivdu for the Respondent.

The Judgment of the Court was delivered by

**A.K. PATNAIK, J.** 1. This is an appeal against the judgment and order dated 16.04.2007 of the Andhra Pradesh High Court in Criminal Appeal No. 1258 of 2005.

2. The facts very briefly are that on 19.04.2004 Santoshi (hereinafter referred to as 'the informant') lodged an FIR in Musheerabad P.S., District Hyderabad, alleging that on 18.04.2004 at about 9.30 P.M. her husband's brother, the appellant no.1, came in an auto in a fully drunken condition, went to his house situated opposite to her house and started abusing her in filthy language and her husband, she and their children came down from their portion on the first floor and her husband warned the appellant not to abuse him, but the appellant did not listen and he asked his wife to get a knife and his wife, appellant no.2 herein, went to the kitchen and brought one knife and gave it to the appellant no.1 and the appellant no.1 took the knife and stabbed the husband of the complainant on the left side of his chest and as a result the husband of the



informant fell down with bleeding injury and he was taken to the Sagarlal Hospital, where he died subsequently. The Inspector of the P.S. Musheerabad, M. Bhasker Reddy, registered a case under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC'). He visited the hospital, the scene of occurrence, conducted the inquest and sent the dead body of the deceased for *post mortem* examination. The appellant no.1 was then arrested and at his instance the knife was recovered and after investigation, a charge-sheet was filed against both the appellants for the offence punishable under Section 302 read with Section 34, IPC. The case was registered as Sessions Case No. 562 of 2004 and after framing of charges, the appellants were tried.

3. At the trial, the informant was examined as PW-1, one of the sons of the deceased was examined as PW-2, Dr. C. Surender Reddy, who conducted the *post mortem* on the dead body of the deceased, was examined as PW-3 and M. Bhasker Reddy, the Inspector of Police and the Investigating Officer, was examined as PW-7. On behalf of the defence, the mother of the deceased, Laxmi Bai, was examined as DW-1. By the judgment dated 19.07.2005, the 1st Additional Metropolitan Sessions Judge held both the appellants guilty of the offence under Section 302 read with Section 34, IPC, and sentenced them to life imprisonment and to pay fine of Rs.100/- and in default to undergo Simple Imprisonment for one month.

4. The appellants then filed Criminal Appeal No. 1258 of 2005, but by the impugned judgment, the Division Bench of the High Court sustained the conviction and the sentence. Aggrieved, the appellants have filed this appeal by way of Special Leave under Article 136 of the Constitution. On 11.02.2008, this Court issued notice *qua* the nature of the offence only and on 18.08.2008 this Court granted leave after condoning the delay in filing the special leave petiton, but refused bail to the appellants.

5. Learned counsel for the appellants submitted that the

nature of the offence committed by the appellants is not murder as defined in Section 300, IPC, but culpable homicide not amounting to murder under Section 304, IPC, for which a punishment less than life imprisonment may be imposed on the appellants. He referred to *Exception 4* to Section 300, IPC, which states that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. He submitted that in the facts of the present case there was no premeditation on the part of the appellants and there was a sudden quarrel and a sudden fight and the appellant no.1 stabbed the deceased in the heat of passion and therefore *Exception 4* to Section 300, IPC, was attracted. In support of his submission, he cited the decision of this Court in *Naveen Chandra v. State of Uttranchal* [2007(1) RCR (Criminal) 689]. Learned counsel for the respondent, on the other hand, submitted that this is not a case which would at all fall under *Exception 4* to Section 300, IPC. and that both the trial court and the High Court have rightly held that the appellants were guilty of the offence of murder under Section 302 read with Section 34, IPC.

6. *Exception 4* to Section 300, IPC, is quoted hereinbelow:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

It will be clear from the language of *Exception 4* to Section 300, IPC, quoted above that culpable homicide will not amount to murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel provided the offender has not taken undue advantage or acted in a cruel or unusual manner. In *Narayanan Nair Raghavan Nair v. The State of Travancore – Cochin* (AIR 1956 SC 99), a three-Judge Bench of this Court speaking through Bose, J. held:

> "It is enough to say that the Exception requires that no undue advantage be taken of by the other side. It is impossible to say that there is no undue advantage when a man stabs an unarmed person who makes no threatening gestures and merely asks the accused's opponent to stop fighting. Then also, the fight must be with the person who is killed."

This view on *Exception 4* to Section 300, IPC, has also been taken by this Court in *Kikar Singh v. State of Rajasthan* (AIR 1993 SC 2426) wherein it has been held:

> "Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, exception 4 is not attracted and commission must be one of murder punishable under S. 302."

Thus, in a case where a man stabs another person, unless it is established that there was some threat from that person to the offender, the Court cannot possibly hold that the offender by stabbing that person has not taken any undue advantage or has not acted in a cruel or unusual manner.

7. In this case, the conviction of the appellants for the offence under Section 302 read with Section 34, IPC, is based on the evidence of PW-1 and PW-2, the two eye witnesses. If we read their evidence, we find that PW-1 has stated:

> "Disputes arose between me and A-2 with regard to collection of empty wine bottles between the children of A-2 and collected from a Raja Deluxe theater and that A-2 used to abuse in filthy language. The disputes arose prior to 4 months of the incident and disputes were continued. On 18.04.2004 at about 9.30 p.m. A-1 came to house in drunken condition and started abusing me in filthy language by saying Maake Loude. On that I along with my husband and children came down to ground floor. My

deceased husband chastised A-1 by saying that he should not abuse me as I am his sister in law and he did not stop abusing me.

A-1 instructed A-2 to bring a knife. On that A-2 went inside the house and brought a meat cutting knife and gave it to A-1 and instigated A-1 to stab my husband. Then A-1 stabbed my husband on the left side of chest, when A-1 removed the knife from injury my husband fell down on the ground and we noticed blood was oozing from injury."

Similarly, PW-2 has deposed:

"The disputes arose between family of accused and our family with regard to collection of empty wine bottles from the wine shop situated by the side of Rolex Café, Musheerabad. The disputes were going on for the last four months prior to the date of incident. While I was about to leave the house of PW-1 after taking meals, at 9.30 p.m. A-1 came to house in drunken condition and started abusing PW-1. He abused PW-1 by saying "*Maake Loude*". On hearing the abusive words, I along with my father, PW-1 and others came to ground floor.

My father questioned A-1 as to why he was abusing PW-1. A-1 replied that he will abuse PW-1 like that only. My father told A-1 not to abuse PW-1 as she is his sister-in-law. On that A-1 instructed A-2 to bring a knife from his portion of house. A-2 went inside the portion and brought a knife and gave it to A-1. Then A-1 stabbed my father on the left side of chest on the instigation of A-2. It was a mutton cutting knife. After stabbing accused removed the knife and went away. My father received bleeding injury and he fell down on the floor. After the incident both the accused went inside their portion and some time thereafter they escaped from the house. I lifted my father to Sagarlal Hospital 10 minutes after his admission, doctors informed me about the death of my father. I came



back to the house of PW-1 and informed her about the death of my father on that she became unconscious and fell down".

8. It will be clear from the evidence of the two eye witnesses quoted above that the deceased was unarmed and there was absolutely no physical threat from the deceased to the appellants and the appellant no.1 after being provided with a knife by the appellant no.2 stabbed the deceased on the left side of the chest on the instigation of the appellant no.2 and because of these injuries the deceased died. This was, thus, a case where the appellants have taken undue advantage and have acted in a cruel or unusual manner and the case did not fall within *Exception 4* to Section 300, IPC. In *Naveen Chandra v. State of Uttranchal* (supra) cited on behalf of the appellants, this Court has clearly held:

"Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken"

9. In our considered opinion, therefore, the case of the appellants does not fall within *Exception 4* to Section 300, IPC, and the trial court and the High Court have rightly held the appellants guilty of the offence of murder under Section 302 read with Section 34, IPC. The appeal has no merits and is accordingly dismissed.

K.K.T. Appeal dismissed.

TAMIL NADU WAKF BOARD
*v.*
SYED ABDUL QUADER & ORS.
(Civil Appeal Nos. 2232-2233 of 2002)

OCTOBER 9, 2012

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

*Tenancy – Madras City Tenants' Protection Act, 1921 – ss.9 and 11 – Madras City Tenants' Protection (Amendment) Act, 1994 – s.3 – Proceedings initiated by tenant-respondents under s.9 of the 1921 Act in respect of land owned by appellant-Wakf Board and pending before the court – Effect of coming into force of the 1994 Amendment Act – Held: In view of s.3 of the 1994 Amendment Act, the application made under s.9 of the 1921 Act abated by operation of law and the tenant-respondents ceased to have any enforceable rights in respect of such land.*

**The plaintiff-Wakf Board (alongwith Aminjikarai Mosque and Burial Ground represented by its Secretary) filed suit for a declaration that the suit property (land and superstructure) was a Wakf property and for directing the tenant-defendants to hand over vacant possession of the suit property to them. The tenant-defendants set up the defence that they were governed by Madras City Tenants' Protection Act, 1921 as amended from time to time and in the absence of any notice under Section 11 of the 1921 Act, the suit was not maintainable. They further stated that they had made an application under Section 9 of the 1921 Act for sale of the land on which superstructure had been built by their predecessor in title and as lessees they were entitled to purchase the land from the plaintiffs. The trial court decreed the plaintiffs' suit. The first appellate court affirmed the decree. On**





**second appeal, the High Court remanded the matter to the trial court to proceed further with the application made by the tenant-defendants under Section 9 of the 1921 Act. The plaintiffs filed Review Petition, bringing to the notice of the High Court that by virtue of Section 3 of the Madras City Tenants' Protection (Amendment) Act, 1994, the rights and privileges of the tenant-defendants had ceased to be enforceable and their application under Section 9 of the 1921 Act had abated. The Review Petition was dismissed by the High Court and, therefore, the present appeals by the plaintiff-appellant Board.**

**Allowing the appeals, the Court**

**HELD: 1. The Madras City Tenants' Protection Act, 1921 came to be amended by the Madras City Tenants' Protection (Amendment) Act, 1994. Section 3 of the 1994 Amendment Act leaves no manner of doubt that all proceedings initiated by tenants under the 1921 Act in respect of lands owned by religious institutions or religious charities belonging to Hindu, Muslim, Christian or other religion and pending before courts or authorities or officers on coming into force of 1994 Amendment Act have abated and the tenants in respect of such lands have ceased to have any enforceable rights. By virtue of Section 3 of the 1994 Amendment Act, whatever rights and privileges the tenants had in respect of the lands mentioned therein stood determined. The expression 'every proceeding' is too wide to include the proceedings initiated by the tenants under Section 9 of the 1921 Act. [Paras 11, 12] [1216-D; 1217-A-C]**

**2. In view of Section 3 of the 1994 Amendment Act, the application made by the tenant-defendants under Section 9 of the 1921 Act which is said to be pending before the trial court does not survive and by operation of law that application has abated. It is strange that when Second Appeal was heard by the High Court, none of the**

**parties brought to the notice of the Single Judge of the High Court the provisions of the 1994 Amendment Act. In the Review Petition, the provisions of the 1994 Amendment Act were expressly referred to, but the single Judge referred to Section 2 only and did not advert to Section 3 at all. [Para 13] [1217-D-F]**

**3. The requirements of Section 3 of the 1994 Amendment Act are fully met in the present case but this aspect was not considered by the High Court on both occasions, while disposing of Second Appeal as well as Review Petition. The Interlocutory Application made by tenant-defendants under Section 9 of the 1921 Act has abated by operation of law and does not survive for consideration by the trial court. By virtue of Section 3 of the 1994 Amendment Act all rights and privileges (including the right to purchase the land from the plaintiffs under Section 9 of the 1921 Act) that the tenant-defendants had in respect of the suit property in terms of 1921 Act had been extinguished and ceased to be enforceable. [Para 14] [1217-G-H; 1218-B-C]**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2232-2233 of 2002.

From the Judgment and Order of the High Court of Madras dated 23.9.1998 in Second Appeal No. 640 of 1986 and dated 28.4.1999 in Review Application No. 31 of 1999.

J.M. Khanna, Col. S.B. Kumar for the Appellant.

K.K. Mani, Abhishek Krishna, S.A. Saud, Mohd. Pravez Dabas, Shuaibuddin, Shakil Ahmed Syed fo the Respondents.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. We have heard learned counsel for the parties.



2. The present appellant – Tamil Nadu Wakf Board – alongwith Aminjikarai Mosque and Burial Ground represented by its Secretary (hereinafter referred to as 'plaintiffs') filed a suit for a declaration that the suit property was a Wakf property and for directing S.A. Rasool, since deceased and now represented by his legal representatives, who are respondent Nos. 2, 4, 5(i) to (iii), 6, 8 and 9, referred to as the legal representatives of the original defendant, to hand over vacant possession of the suit property to the plaintiffs.

3. The case of the plaintiffs was that the suit property (land and superstructure) was a Wakf property known as Aminjikarai Mosque and burial ground. The suit property had been surveyed and published in the Fort St. George Gazette on May 20, 1959 and the said notification had not been questioned by any one. The suit property was leased out to the father of the original defendant by the then Muthavalli in 1921. Earlier the original defendant paid rent to then Muthavalli but thereafter no rent had been paid and he asserted his title over the property.

4. The legal representatives of the original defendant set up the defence that they were governed by Madras City Tenants' Protection Act, 1921 (for short, '1921 Act') as amended from time to time and in the absence of any notice under Section 11 of the 1921 Act, the suit was not maintainable. It was their case that the superstructure did not belong to the Wakf and, therefore, the Wakf Board was not the owner of the superstructure. They further stated that they had made an application under Section 9 of the 1921 Act for sale of the land on which superstructure had been built by their predecessor in title and as lessees they were entitled to purchase the land from the plaintiffs.

5. On the basis of the pleadings of the parties, diverse issues were framed. The parties let in their evidence. After hearing the parties, vide judgment and decree dated July 16, 1981, the trial court decreed the plaintiffs' suit.

6. The legal representatives of the original defendant preferred an appeal challenging the judgment and decree of the trial court. The first appellate court, by its judgment dated February 22, 1984, dismissed the appeal and affirmed the decree passed by the trial court. As regards superstructure, the legal representatives of the original defendant were allowed to remove it.

7. The legal representatives of the original defendant preferred Second Appeal before the High Court. The High Court, after hearing the parties, by its judgment dated September 23, 1998, allowed the Second Appeal and set aside the judgment and decree of the two courts below and remanded the matter to the trial court to proceed further with the application made by the legal representatives of the original defendant under Section 9 of the 1921 Act.

8. The plaintiffs filed a Review Petition seeking review of the judgment dated September 23, 1998. In the Review Petition, it was brought to the notice of the High Court that by virtue of Section 3 of the Madras City Tenants' Protection (Amendment) Act, 1994 (for short, '1994 Amendment Act'), the rights and privileges of the legal representatives of the original defendant had ceased to be enforceable and their application under Section 9 of the 1921 Act had abated.

9. The Review Petition was dismissed by the High Court on April 28, 1999. This is how the present Civil Appeals, by special leave, have arisen.

10. Section 9 of the 1921 Act, to the extent it is relevant, reads as under :

"SECTION 9. APPLICATION TO COURT FOR DIRECTING THE LANDLORD TO SELL LAND – (1)(a)(i) Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small



Cause Courts Act, 1882, taken by the landlord may, within one month of the date of the publication of Madras City Tenants Protection Amendment Act, 1979 in the Tamil Nadu Government Gazette or of the date with effect from which this Act is extended to the municipal town, township or village in which the land is situate or within one month after the service on him of summons, apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of the extent of and specified in the application.

xx xx xx xx"

11. 1921 Act came to be amended by the 1994 Amendment Act. Section 3 of the 1994 Amendment Act reads as under:-

"Section 3. Certain pending proceedings to abate.-Every proceeding instituted by a tenant in respect of any land owned by any religious institution or religious charity belonging to Hindu, Muslim, Christian or other religion and pending before any court or other authority or officer on the date of the publication of this Act in the Tamil Nadu Government Gazette, shall, in so far as the proceeding relates to any matter falling within the scope of the principal Act, as amended by this Act, in respect of such land, abate, and all rights and privileges which may have accrued to that tenant in respect of any such land and subsisting immediately before the said date shall in so far as such rights and privileges relate to any matter falling within the scope of the principal Act, as amended by this Act, cease and determine and shall not be enforceable:

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which a decree or order passed has been executed or satisfied in full before the said date."

12. The provision contained in Section 3 of the 1994 Amendment Act leaves no manner of doubt that all proceedings initiated by tenants under 1921 Act in respect of lands owned by religious institutions or religious charities belonging to Hindu, Muslim, Christian or other religion and pending before courts or authorities or officers on coming into force of 1994 Amendment Act have abated and the tenants in respect of such lands have ceased to have any enforceable rights. By virtue of Section 3 of the 1994 Amendment Act, whatever rights and privileges the tenants had in respect of the lands mentioned therein stood determined. The expression 'Every proceeding' is too wide to include the proceedings initiated by the tenants under Section 9 of the 1921 Act.

13. In view of Section 3 of the 1994 Amendment Act, the application made by the legal representatives of the original defendant being Interlocutory Application No. 16520 of 1973 under Section 9 of the 1921 Act which is said to be pending before the trial court does not survive and by operation of law that application has abated. It is strange that when Second Appeal was heard by the High Court, none of the parties brought to the notice of the learned Judge the provisions of the 1994 Amendment Act. In the Review Petition, the provisions of the 1994 Amendment Act were expressly referred to but the learned single Judge referred to Section 2 only and did not advert to Section 3 at all. The omission to consider Section 3 of the 1994 Amendment Act has rendered the impugned judgment and impugned order legally unsustainable.

14. The requirements of main Section 3 of the 1994 Amendment Act are fully met in the present case but unfortunately this aspect was not considered by the High Court on both occasions, while disposing of Second Appeal as well as Review Petition. The Interlocutory Application No. 16520 of 1973 made by the legal representatives of the original defendant has abated by operation of law and does not survive for consideration by the trial court. The central reason of the



impugned judgment dated September 23, 1998 had been the pendency of the application made by the legal representatives of the original defendant under Section 9 of the 1921 Act but that reason noted in the impugned judgment even did not exist on that date in view of Section 3 of the 1994 Amendment Act. As noted above, by virtue of Section 3 of the 1994 Amendment Act all rights and privileges (including the right to purchase the land from the plaintiffs under Section 9 of the 1921 Act) that the legal representatives of the original defendant had in respect of the suit property in terms of 1921 Act had been extinguished and ceased to be enforceable.

15. It is not possible to sustain the impugned judgment dated September 23, 1998. As a result of this, the order dated April 28, 1999 also has to go.

16. We, accordingly, allow these Appeals and set aside the impugned judgment dated September 23, 1998 and the order dated April 28, 1999. Second Appeal No. 640 of 1986 titled *"Kathija Bi & Ors. Vs. The Tamil Nadu Wakf Board & Others"* is restored to the file of the Madras High Court for fresh hearing and disposal in accordance with law.

17. Since the matter is very old, we expect the High Court to hear and decide the Second Appeal expeditiously and preferably within six months of the receipt of the order of this Court. No costs.

B.B.B. Appeals allowed.

DAHARI & ORS.
*v.*
STATE OF U.P.
(Criminal Appeal No. 1253 of 2008)

OCTOBER 11, 2012

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

*Penal Code, 1860 – s. 302/34 – Murder – Prosecution of 7 accused u/s. 302/149 – Eye-witnesses to the incident – FIR lodged within time – Enmity between complaint and accused party – Conviction by trial court – High Court confirming conviction of 4 accused while acquitting 3 accused – On appeal held: In the facts of the case, conviction of appellants-accused and acquittal of 3 accused correct – However, since the total number of accused was reduced to less than 5, on acquittal of the 3 accused, conviction with the aid of s. 149 not correct – Conviction altered to u/s. 304/34.*

*Witness – Related witness – Reliance on – Held: Where the evidence of related witness has a ring of truth, is cogent, credible and trustworthy, it can be relied upon.*

**The 4 appellants-accused, alongwith 3 other accused were prosecuted for having caused death of one person. The prosecution case was that the deceased, on a motor-cycle, with the pillion rider, was going to attend court proceedings. He was followed by his brothers PWs 1 and 2 on a moped. The accused persons, armed with country-made pistol, came and fired at the deceased resulting in instantaneous death. PWs 3 and 5 were eye-witnesses to the incident. Trial court convicted all the 7 accused u/ss. 302 r/w s. 149 and 148 IPC. High Court acquitted 3 accused and affirmed the conviction and sentence of the appellants-accused.**





**In appeal to this Court, appellants contended that prosecution case is not reliable as it withheld its most material witness i.e. the pillion rider; that absence of injuries on the pillion rider makes the prosecution case doubtful; that PWs 1 and 2 being related to the deceased, their evidence was not reliable; that in view of acquittal of 3 accused, conviction of appellants not justified; and that after acquittal of 3 accused, the number of accused remained only 4 and hence the provisions of s. 149 IPC are not attracted.**

**Dismissing the appeal, the Court**

**HELD: 1.1. The appeal is devoid of any merit. The medical evidence i.e. the deposition of PW.6 corroborates the ocular version of events as has been given by the eye-witnesses. It was also stated that the deceased had fallen down and was then surrounded by the accused persons, who shot at him repeatedly. Thus, there is no incompatibility in the oral evidence and the medical evidence, on record. [Paras 20 and 7] [1227-G; 1232-G]**

**1.2. The FIR was lodged within a period of one hour, at a police station which was at a distance of 12 kms. from the place of occurrence, and this goes to prove that PW.1 and PW.2 were in fact, present at the place of occurrence and were in a position to see the accused from close quarters. They all were also known to the witnesses. The reason that they happened to be accompanying the deceased was because they were all going to the court in relation to a criminal case, in which son of PW.2 was the accused. There is nothing in the cross-examination of the eye-witnesses to cast a doubt upon the veracity of their testimony or to discredit it in anyway. [Para 8] [1227-H; 1228-A-C]**

**1.3. The evidence of closely related witnesses is required to be carefully scrutinised and appreciated**

**before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. PW.1 and PW.2 undoubtedly, are the real brothers of the deceased. They, at the time of the incident, were following the deceased on their 'Moped'. They have supported the case of the prosecution to the fullest extent, and even though they were thoroughly questioned by the defence in the course of cross-examination, they did not elicit anything which could shake their testimony. Thus, there is no reason to discard their testimonies. [Paras 9 and 10] [1228-D-G]**

*Himanshu v. State (NCT of Delhi)* **(2011) 2 SCC 36: 2011 (1) SCR 48:** *Ranjit Singh v. State of M.P.* **AIR 2011 SC 255: 2010 (14) SCR 133;** *Onkar and Anr. v. State of Uttar Pradesh* **(2012) 2 SCC 273 – relied on.**

**1.4. So far as the non-production of the witness (pillion rider on the bike of the deceased) is concerned during the cross-examination of the I.O. (PW.4), none of the accused raised any apprehension regarding the non-examination of the said witness. In such a situation, the appellants cannot be permitted to advance an argument stating that since the most material witness was withheld by the prosecution therefore, adverse inference should be drawn against them. [Para 11] [1228-G-H; 1229-A-B]**

**1.5. As regards the pillion rider not receiving even a single injury, both the courts below have come to the reasoned conclusion that the pillion rider must have ran away to save his life and hence, escaped uninjured. The evidence on record is to the extent that the deceased had fallen down and that he was then surrounded by the accused and fired upon. Thus, nothing turns in favour of the appellants based on this point raised by them. [Para 12] [1229-C-D]**



**1.6. In the instant case, there was prior ill-will existing between the parties, as criminal cases were pending between them and son of PW.2 was still in jail in connection with the same. Hence, there was sufficient motive for the appellants to kill the deceased. [Para 13] [1229-E]**

**2. A conviction cannot be made with the aid of Section 149 IPC, when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than 5, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. However, it is also a settled legal proposition that in such a fact-situation, the High Court could most certainly have convicted the appellants, under Section 302 r/w Section 34 IPC. [Para 18] [1231-D-E]**

*Amar Singh v. State of Punjab* **AIR 1987 SC 826;** *Nagamalleswara Rao (K.) and Ors. v. State of Andhra Pradesh* **AIR 1991 SC 1075: 1991 (1) SCR 875;** *Mohammed Ankoos and Ors. v. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad* **AIR 2010 SC 566: 2009 (15) SCR 616 – relied on.**

*Nethala Pothuraju and Ors. v. State of Andhra Pradesh* **AIR 1991 SC2214: 1991 (1) Suppl. SCR 4 ;** *Jivan Lal and Ors. v. State of M.P.* **(1997) 9 SCC 119: 1996 (9) Suppl. SCR 537 ;** *Hamlet @ Sasi and Ors. v. State of Kerala* **AIR 2003 SC 682;** *Willie (William) Slaney v. State of M.P.* **AIR 1956 SC 116: 1955 SCR 1140 ;** *Fakhruddin v. State of Madhya Pradesh* **AIR 1967 SC 1326;** *Gurpreet Singh v. State of Punjab* **AIR 2006 SC 191: 2005 (5) Suppl. SCR 90;** *Sanichar Sahni v. State of Bihar* **AIR 2010 SC 3786: 2009 (10) SCR 112 ;** *S. Ganesan v. Rama Raghuraman and Ors.* **(2011) 2 SCC 83: 2011 (1) SCR 27;** *Darbara Singh v. State of Punjab* **JT 2012 (8) SC 530 – referred to.**

**3. It is not probable that the real brothers of the**

**deceased who had been the eye-witnesses would implicate the appellants falsely sparing the real assailants, though false implication of some of the persons may not be ruled out. The High Court was justified in acquitting some of the convicts as they did not belong to the family of the appellants/assailants. [Para 20] [1232-F]**

**Case Law Reference:**

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|---|---|---|
| **2011 (1) SCR 48** | **Relied on** | **Para 9** |
| **2010 (14) SCR 133** | **Relied on** | **Para 9** |
| **(2012) 2 SCC 273** | **Relied on** | **Para 9** |
| **AIR 1987 SC 826** | **Relied on** | **Para 15** |
| **1991 (1) SCR 875** | **Relied on** | **Para 16** |
| **2009 (15) SCR 616** | **Relied on** | **Para 17** |
| **1991 (1) Suppl. SCR 4** | **Relied on** | **Para 19** |
| **1996 (9) Suppl. SCR 537** | **Relied on** | **Para 19** |
| **AIR 2003 SC 682** | **Relied on** | **Para 19** |
| **1955 SCR 1140** | **Referred to** | **Para 19** |
| **AIR 1967 SC 1326** | **Referred to** | **Para 19** |
| **2005 (5) Suppl. SCR 90** | **Referred to** | **Para 19** |
| **2009 (10) SCR 112** | **Referred to** | **Para 19** |
| **2011 (1) SCR 27** | **Referred to** | **Para 19** |
| **JT 2012 (8) SC 530** | **Referred to** | **Para 19** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1253 of 2008.

From the Judgment & Order dated 27.4.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 3990 of 2005.



S.R. Singh, Ashok Kumar Sharma, Ram Shiromani Yadav, Avinash Kr. Jain for the Appellants.

Pramod Swarup, Pareena Swarup, Anuvrat Sharma, Alka Sinha for the Respodent.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred against the judgment and order dated 27.4.2007 in Criminal Appeal No. 3990 of 2005 passed by the High Court of Judicature at Allahabad, partly allowing the appeal against the judgment and order dated 7.9.2005 passed by the Sessions Court, Azamgarh, in Sessions Trial No. 215 of 1991, convicting the appellants and the co-accused under Sections 302, 149 and 148 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentencing them to undergo rigorous imprisonment for life, and also one year RI, under Section 148 IPC respectively and further, to pay a fine of Rs.10,000/- on each count, and in default of such payment, to further undergo a term of four months RI.

2. The facts and circumstances giving rise to this appeal are as follows:

A. On 7.9.1990, Tej Bahadur (deceased) was travelling on a motor bike alongwith his friend Ashok at 9.00 a.m. and while doing so, he was followed by his two brothers, namely, Man Bahadur and Raj Bahadur who were both on a moped in the village of Kiratpur, district Azamgarh. The deceased was riding the motor cycle, while Ashok was the pillion rider. When they left the village, they saw the appellants and the other accused come out of a sugarcane field, armed with country made pistols with which they fired at the deceased, killing him instantaneously. After this, they immediately ran away.

B. The incident was witnessed by one Rajesh Singh (PW.3) and also Shashi Bhushan (PW.5), alongwith some other persons. Man Bahadur (PW.1) and Raj Bahadur (PW.2) shifted

the dead body of the deceased and laid it near a Mango grove, beside the road.

C. Man Bahadur (PW.1) then lodged an FIR at 10.05 a.m. at a police station which was at a distance of about 12 K.M. from the place of occurrence of the incident. Mr. Sarvdev Singh (PW.4), I.O. thereafter began investigation. He came to the said spot, recovered the dead body, the cartridges and pellets, blood stained earth etc. from the aforementioned place of occurrence and prepared the panchnama. The I.O. then also recorded the statement of witnesses and after concluding the said investigation, submitted a charge sheet against 7 accused persons.

D. The learned trial Court, after holding trial, vide judgment and order dated 7.9.2005 convicted and sentenced all the seven accused persons, as has been stated hereinabove.

E. Aggrieved, all seven accused persons preferred Criminal Appeal No. 3990 of 2005 before the High Court, and by impugned judgment and order of the High Court, dated 27.4.2007, the conviction and sentence of the appellants was maintained. However, three of the convicts namely, Bane, Patiram and Phool Chand were acquitted of all charges.

Hence, this appeal.

3. Shri S.R. Singh, learned senior counsel appearing for the appellants submitted that the High Court committed an error by convicting the appellants under Sections 302, 149 and 148 IPC, as after the acquittal of three persons among the accused, the total number of accused in the said case, are only four. Therefore, the provisions of Section 149 IPC would no longer be attracted. Moreover, the prosecution withheld its most material witness, that is, Ashok, the pillion rider of the motorcycle ridden by the deceased, Tej Bahadur and no explanation whatsoever was furnished, by the prosecution for his non-examination. Furthermore, it was not possible to inflict



upon the deceased, the said gun shot injuries in the presence of a pillion rider on the motor bike. Shashi Bhushan (PW.5), a prime witness to the incident, turned hostile and did not support the case of the prosecution. Man Bahadur (PW.1) and Raj Bahadur (PW.2) are the real brothers of the deceased and therefore, their testimony should not be believed, as they are no doubt, interested witnesses. The evidence on record is insufficient to convict the said appellants. In view of the fact that the High Court acquitted three among the accused persons, disbelieving the testimony of the witnesses, there is no justification for the Court to convict the said appellants herein. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Pramod Swarup, learned senior counsel appearing for the State vehemently opposed the appeal, contending that the law does not require one to discard the testimony of witnesses who are closely related to the deceased/victim. Their evidence must in fact, be examined with due care and caution. The appellants must not be allowed to take the benefit of any technicalities. In case the High Court acquitted the three accused, it ought to have convicted the said appellants with the aid of Section 34 IPC. The appeal therefore, 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.

6. In the post-mortem report, the following injuries were found on the person of the deceased.

**EXTERNAL**: -

1. Gun shot wound of entry half cm x half cm x chest cavity deep irregular margin situated on left pectoral area five cm below left nipple.

2. Gun shot wound of exit Three cm x two cm x through eight cm lateral to thoracic-3, communicating to injury no one directing backward horizontally.

3. Gun shot wound of entry 2.4 cm x cavity deep situated over lateral part of back fourteen cm below and in line to left shoulder joint with irregular margin.

4. Gun shot wound of Exit 4 cm x 3 cm Through on right pectoral area eight cm above RT nipple at Ten O'clock position communicating to injury number three.

5. Gun shot wound of entry one cm x one cm x cavity deep with irregular margin situated on back at throaic-5.

6. Gun shot wound of Exit Two cm x one cm x through, ten cm lateral to left nipple communicating to injury number five.

7. Gun shot wound of entry one cm x one cm x bony deep irregular margin with multiple abrasion on right half of face and neck and fracture of scapula and humerus bone was found.

8. Gun shot wound of Entry one cm x one cm x muscle deep irregular margin, five cm left lateral to L4 spine.

9. Gun shot wound of Exit two cm x two cm x muscle deep situated on middle of Right Glutal area communicating to injury number eight.

The doctor opined the cause of death due to shock and haemorrhage as a result of ante- mortem injuries.

7. The medical evidence i.e. the deposition of Dr. A.K. Pandey (PW.6) corroborates the ocular version of events as has been given by the eye-witnesses, from which it can be understood that there were a total of five gun shot injuries. It was also stated that the deceased had fallen down and was then surrounded by the accused persons, who shot at him repeatedly. Thus, there is no incompatibility in the oral evidence and the medical evidence, on record.

8. In the instant case, the FIR was lodged within a period



of one hour, at a police station which was at a distance of 12 kms. from the place of occurrence, and this goes to prove that Man Bahadur (PW.1) and Raj Bahadur (PW.2) were in fact, present at the place of occurrence and were in a position to see the accused from close quarters. They were also all known to the witnesses. The reason that they happened to be accompanying the deceased was because they were all going to the Azamgarh Court in relation to a criminal case, relating to the murder of one Gharbharan, in which Raghu Prakash, son of Raj Bahadur (PW.2), was the accused. There is nothing in the cross-examination of the eye-witnesses to cast a doubt upon the veracity of their testimony or to discredit it in anyway.

9. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (Vide: *Himanshu v. State (NCT of Delhi),* (2011) 2 SCC 36; *Ranjit Singh v. State of M.P.,* AIR 2011 SC 255; and *Onkar & Anr. v. State of Uttar Pradesh,* (2012) 2 SCC 273).

10. Man Bahadur (PW.1) and Raj Bahadur (PW.2) undoubtedly, are the real brothers of the deceased. They, at the time of the incident, were following the deceased on their 'Moped'. They have supported the case of the prosecution to the fullest extent, and even though they were thoroughly questioned by the defence in the course of cross-examination, they did not elicit anything which could shake their testimony. Thus, we do not see any reason to discard their testimonies.

11. So far as the non-production of Ashok, the most material witness to the case is concerned, it is evident from the record that during the cross-examination of Sarvdev Singh, I.O. (PW.4), none of the said accused voiced their concerns or raised any apprehension regarding the non-examination of

Ashok. He was the only competent witness who would have been fully capable of explaining correctly, the factual situation. In such a situation, the appellants cannot be permitted to advance an argument stating that since the most material witness was withheld by the prosecution therefore, adverse inference should be drawn against them.

12. It has also been canvassed on behalf of the appellants that it seems rather improbable, that despite the fact that several injuries were caused to the deceased, the pillion rider did not receive a single injury, and therefore, the veracity of the entire case of the prosecution is doubtful. This very issue has been considered at length, by both the courts below. They have come to the reasoned conclusion that the pillion rider must have run away to save his life and hence, escaped injury. The evidence on record is to the extent that the deceased had fallen down and that he was then surrounded by the accused and fired upon. Thus, nothing turns in favour of the appellants based on this point raised by them.

13. In the instant case, there was undisputedly, prior ill-will existing between the parties, as criminal cases were pending between them and Ravi Prakash, son of Raj Bahadur (PW.2) was still in jail in connection with the same. Hence, there was sufficient motive for the appellants to kill the deceased.

14. Another question worth consideration is whether the appellants can be convicted under Section 302 r/w Section 149 IPC in the event that the High Court has acquitted three persons among the accused and the number of convicts has thus, remained at a number that is less than 5, which is in fact, necessary to form an unlawful assembly as described under Section 141 IPC.

15. This Court in *Amar Singh v. State of Punjab,* AIR 1987 SC 826, held as under:

"As the appellants were only four in number, there was no



question of their forming an unlawful assembly within the meaning of Section 141 IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or Section 149 IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under Section 141 IPC. In our opinion, the convictions of the appellants under Sections 148 and 149 IPC cannot be sustained." (Emphasis added)

16. Similarly, in *Nagamalleswara Rao (K.) & Ors. v. State of Andhra Pradesh,* AIR 1991 SC 1075, this Court observed:

"8. However, the learned Judges overlooked that since the accused who are convicted were *only four* in number and the prosecution has not proved the involvement of other persons and the courts below have acquitted all the other accused of all the offences, *Section 149 cannot be invoked for convicting the four appellants herein.…* It is not the prosecution case that apart from the said 15 persons there were other persons who were involved in the crime. When the 11 other accused were acquitted it means that their involvement in the offence had not been proved. It would not also be permissible to assume or conclude that others named or unnamed acted conjointly with the charged accused in the case unless the charge itself specifically said so and there was evidence to conclude that some others also were involved in the commission of the offence conjointly with the charged accused in furtherance of a common object.

(Emphasis added)

17. Similarly, this Court in *Mohammed Ankoos & Ors. v.*

*Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* AIR 2010 SC 566, held as under:

> **"35.** Section 148 IPC creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under Section 148 IPC for legally recording their conviction under Section 302 read with Section 149 IPC. However, where an accused is charged under Section 148 IPC and acquitted, conviction of such accused under Section 302 read with Section 149 IPC could not be legally recorded. We find support from a four-Judge Bench decision of this Court in *Mahadev Sharma v. State of Bihar,* AIR 1966 SC 302…":

18. Undoubtedly, this Court has categorically held that in such a situation, a conviction cannot be made with the aid of Section 149 IPC, particularly when, upon the acquittal of some of the accused, the total number of accused stands reduced to less than 5, and it is not the case of the prosecution that there are in fact, some other accused who have not yet been put to trial. However, it is also a settled legal proposition that in such a fact-situation, the High Court could most certainly have convicted the appellants, under Section 302 r/w Section 34 IPC.

19. In *Nethala Pothuraju & Ors. v. State of Andhra Pradesh,* AIR 1991 SC 2214, this Court while considering a similar case, held that the non-applicability of Section 149 IPC is no bar for the purpose of convicting the accused under Section 302 r/w Section 34 IPC, if the evidence discloses the commission of an offence, in furtherance of the common intention of such accused. This is because, both, Sections 149 and 34 IPC deal with a group of persons who become liable to be punished as sharers in the commission of an offence. Thus, in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty persons with the aid of Section 34 IPC, provided that there is adequate evidence on



record to show that such accused shared a common intention to commit the crime in question.

A similar view has been re-iterated in *Jivan Lal & Ors. v. State of M.P.,* (1997) 9 SCC 119; and *Hamlet @ Sasi & Ors. v. State of Kerala,* AIR 2003 SC 682.

(See also**:** *Willie (William) Slaney v. State of M.P.,* AIR 1956 SC 116; *Fakhruddin v. State of Madhya Pradesh,* AIR 1967 SC 1326; *Gurpreet Singh v. State of Punjab,* AIR 2006 SC 191; *Sanichar Sahni v. State of Bihar,* AIR 2010 SC 3786; *S. Ganesan v. Rama Raghuraman & Ors.,* (2011) 2 SCC 83; and *Darbara Singh v. State of Punjab*, JT 2012 (8) SC 530).

In view of the above, we do not find any force in the aforementioned submissions of the appellants and the same are not worth acceptance.

20. It is a broad day light murder at 9.00 a.m. on the main road. The eye-witnesses had been following the deceased on the 'Moped' as they had to attend the court's proceedings at Azamgarh. The enmity between the parties stood fully established as criminal cases were pending between them. The case of the prosecution stood fully corroborated by the medical evidence and the ocular evidence. It is not probable that the real brothers of the deceased who had been the eye-witnesses would implicate the appellants falsely sparing the real assailants, though false implication of some of the persons may not be ruled out. Thus, the High Court was justified in acquitting some of the convicts as they did not belong to the family of the appellants/assailants.

The appeal is hence, devoid of any merit and is therefore, accordingly dismissed.

K.K.T. Appeal dismissed.