SEVA LAL
v.
SRI KANT & ORS.
(Civil Appeal No. 6247 of 2012)

SEPTEMBER 3, 2012

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

UTTAR PRADESH LAND REVENUE ACT, 1901:

s. 219 - Revision before Board of Revenue in 1994 after dismissal of revision u/s 218, held by High Court as not maintainable - Held: There was no provision in s.219 prior to amendment in 1997, to bar the revision filed by appellant u/s 219 - The amended provision of 1997 has no application to the pending revision application before Board of Revenue under the then existing s.219 - Order of High Court set aside and writ petition of appellant before it restored for hearing on merits.

The respondents filed an appeal u/s 210 of the Uttar Pradesh Land Revenue Act, 1901 before the Sub-Divisional Officer, challenging the mutation ordered by the Naib Tehsi5ldar in favour of the appellant. The Sub-Divisional Officer by order dated 4.5.1993 remanded the matter to the Naib Tehsildar. The appellant's revision u/s 218 having been dismissed by the Additional Commissioner, he filed a further revision u/s 219 before the Board of Revenue, which allowed the same. However, in the writ petition filed by the respondents, the High Court held the second revision preferred by the appellant u/s 219 as not maintainable.

Allowing the appeal, the Court

HELD: 1.1 Section 218 of the Uttar Pradesh Land Revenue Act, 1901 provides that the revisional authority

mentioned therein if forms an opinion that the order passed by the subordinate officer needs to be varied, cancelled or reversed then it has to refer the case with its opinion to the Board of Revenue. In the instant case, there was no occasion for the Additional Commissioner to refer the matter to the Board of Revenue as the appellant's revision was dismissed by him. [para 6] [4-E-F]

1.2 There was no provision in s. 219 that was existing prior to the amendment in 1997 that if an application has been moved by any person either to the Board or Commissioner or Additional Commissioner or the Collector or the Record Officer or the Settlement Officer, no further application by the same person shall be entertained by any of them. The amended provision of 1997 has no application to the pending revision applications before the Board of Revenue already preferred under the then existing s. 219 of the Act. In the instant case, the appellant has preferred revision u/s 219 before the Board of Revenue against the order of the Additional Commissioner in 1994. That revision is maintainable in law under unamended s. 219 of the Act. Consequently, the impugned order is set aside and writ petition of the appellant is restored to the file of the High Court for hearing and consideration on merits in accordance with law. [para 7 and 9] [5-B-E, F]

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 6247 of 2012.

From the Judgment and Order dated 09.11.2009 of the High Court of Judicature at Allahabad in Writ Petition No. 59678 of 2009.

R.D. Upadhyay, Braham Singh, Vijay Kumar Pandita, J.P. Tripathi, Asha Upadhyay for the Appellant.

Rachna Gupta, Dr. Indra Pratap Singh for the Respondents.

The Judgment of the Court was delivered by

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

2. On May 4, 1992 Naib Tehsildar, Bithoor, Kanpur Nagar, allowed the application for mutation made by the appellant. Aggrieved by the order of the Naib Tehsildar, the present respondents preferred appeal under Section 210 of Uttar Pradesh Land Revenue Act, 1901 (for short, 'Act') before the Sub Divisional Officer, Kanpur. The Sub Divisional Officer by his order dated May 4, 1993 remanded the matter to the Naib Tehsildar for fresh consideration after giving opportunity to the parties. The appellant felt aggrieved by the order dated May 4, 1993 passed by the Sub Divisional Officer, Kanpur and preferred revision before the Additional Commissioner, Kanpur Division, underSection 218 of the Act. The Additional Commissioner dismissed the appellant's revision.

3. Not satisfied with the order of the Additional Commissioner, Kanpur Division, the appellant preferred further revision under Section 219 of the Act before the Board of Revenue. The Board of Revenue vide order dated 24.8.2009/ 1.9.2009 allowed the revision filed by the appellant, set aside the orders of the Additional Commissioner and the Sub Divisional Officer and restored the order of the Naib Tehsildar passed on May 4, 1992.

4. The present respondents challenged the order of the Board of Revenue in a Writ Petition before the Allahabad High Court. The Single Judge of the High Court has held that second revision preferred by the appellant under Section 219 of the Act was not maintainable and, accordingly, set aside the order of the Board of Revenue and directed the parties to appear before the Naib Tehsildar.

5. The appellant preferred the first revision before the

Additional Commissioner, Kanpur Division, against the order dated May 4, 1993 passed by the Sub Divisional Officer, Kanpur under Section 218 of the Act. Section 218 read as under :-

> "Section 218. Reference to the Board. – The Commissioner, the Additional Commissioner, the Collector, the Record Officer or the Settlement Officer may call for and examine the record of any case decided or proceedings held by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of the order passed and as to the regularity of proceedings, and, if he is of opinion that the proceeding taken or order passed by such subordinate officer should be varied, cancelled or reversed, he shall refer the case with his opinion thereon for the orders of the Board and the Board shall thereupon pass such orders as it thinks fit."

6. As noted above, the Additional Commissioner, Kanpur Division, dismissed the appellant revision preferred under Section 218 of the Act. What Section 218 provides is that the revisional authority mentioned therein if forms an opinion that the order passed by the subordinate officer needs to be varied, cancelled or reversed then it has to refer the case with its opinion to the Board of Revenue. There was no occasion for the Additional Commissioner to refer the matter to the Board of Revenue as the appellant's revision was dismissed by him. On dismissal of first revision by the Additional Commissioner, the appellant invoked the power of revision of the Board under Section 219 of the Act which in 1994 read as under :-

> "Section 219. Revision before the Board.– The Board may call for the record of any case decided by any subordinate court, and if the subordinate court appears-
>
> (a) to have exercised a jurisdiction not vested in it in law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of jurisdiction illegally or with material irregularity, the Board may pass such order as it thinks fit."

7. There was no provision in Section 219 that was existing prior to the amendment in 1997 that if an application has been moved by any person either to the Board or Commissioner or Additional Commissioner or the Collector or the Record Officer or the Settlement Officer, no further application by the same person shall be entertained by any of them. Sub-section (2) of Section 219 to the above effect came to be enacted for the first time vide U.P. Land Laws (Amendment) Act, 1997. The amended provision of 1997 has no application to the pending revision applications before the Board of Revenue already preferred under the then existing Section 219 of the Act. In the present case, the appellant has preferred revision under Section 219 before the Board of Revenue against the order of the Additional Commissioner in 1994. That revision is maintainable in law under unamended Section 219 of the Act.

8. The view of the High Court is thus clearly wrong that the revision application preferred by the appellant before the Board of Revenue under Section 219 of the Act was not maintainable.

9. Consequently, the Appeal is allowed, the impugned order dated November 9, 2009 is set aside and Writ Petition No. 59678 of 2009 titled *"Srikant and Ors. Vs. Board of Revenue, U.P., Lucknow and Ors."* is restored to the file of the Allahabad High Court for hearing and consideration on merits in accordance with law. No costs.

R.P. Appeal allowed.

MAHESH CHANDRA VERMA & ORS.

v.

STATE OF JHARKHAND & ORS.

(Civil Appeal No. 6647 of 2012 ETC.)

SEPTEMBER 19, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

JUDICIARY:

FAST TRACK COURTS (FTC) - Appointments of ADJ, FTC - Advertisement issued for direct recruitment from the Bar to regular cadre in Jharkhand Superior Judicial Service - 17 vacancies being available, appointments given to candidates at Sl. No.. 1 to 17 in the select list - Thereafter candidates from Sl. No. 18 to 27 in the select list appointed ADJ, FTC - Subsequently, 15 more candidates appointed as ADJ, FTC - Appointment of latter 25 candidates as ADJ, FTC challenged by Sub-Judges - Held: With the appointment of 17 candidates, the select list came to an end and with it the selection process for appointment of regular ADJs came to an end - When the advertisement for regular posts of ADJs in Jharkhand Superior Judicial Service was issued, the posts for FTCs were not sanctioned nor were they even in contemplation - Therefore, the advertisement was not and could not have been for FTC Judges - The unexhausted list was wrongly used for appointment of 10 FTC Judges - Further, out of list of unsuccessful candidates, 15 persons were appointed as FTC Judges - The whole procedure was irregular - Nevertheless, High Court's decision, however improper, cannot, in any way, be said to be vitiated by mala fides. - In the circumstances, the appointments made on 02/02/2002 and 12/08/2002 are held as irregular, made in ignorance of settled principles underlying service law, in an anxiety to comply with the desire expressed by the Law

Ministry and to set up FTCs to deal with the problem of pendency of cases - Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 - Locus Standi..

FAST TRACK COURTS (FTC) - Appointment of FTC Judges - Held: The FTC posts were temporary, ad hoc and ex-cadre posts and appointees to such posts cannot be said to have any legal right to the posts - The Rules of 2001 meant for Jharkhand Superior Judicial Service do not apply to ad hoc ADJs appointed under a scheme of temporary duration like Fast Tract Court Scheme - The appellants were appointed to ex-cadre posts for a temporary period - Merely because they were made to take written examination and viva voce their appointments cannot be termed as substantive appointments nor can the nature of work done by them make their appointments substantive.

FAST TRACK COURTS (FTC) - FTC Judges - Regularisation - Held: The case of the appellants FTC Judges in the instant matter is covered by the decision in Brij Mohan Lal-II - State Government and High Court will comply with the directions issued in Brij Mohan Lal-II to appoint the appellants in the regular cadre in the Higher Judicial Service in the State strictly in the manner laid down in Brij Mohan-II - Constitution of India, 1950 - Art. 142.

The High Court of Jharkhand issued an advertisement dated 23.5.2001 inviting applications to fill up the vacancies of regular Additional District Judges (ADJs) by direct recruitment from Bar in terms of the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001. On completion of the selection process, 17 candidates were appointed as ADJs in the regular cadre of Higher Judicial Service. Subsequently, 10 candidates from Sr.No.18 to 27 of the merit list were appointed as ADJ, Fast Track Court (FTC) by Notification dated 2.2.2002; and 15 more

candidates were appointed as ADJ, FTC by Notification dated 12.8.2002. Respondent Nos.5 to 35, who belonged to the category of Sub Judge in the Judicial Service in Subordinate Judiciary of the State, filed a writ petition before the High Court contending that the appointment of the latter 25 ADJs, FTC was illegal and it affected their promotional avenues. The affidavit filed on behalf of the High Court stated that at the time of advertisement (i.e. 23.05.2001) the States of Bihar and Jharkhand were newly bifurcated and cadre strength was not finalized. The High Court was waiting for more officers to be allocated to Jharkhand cadre. New Posts were also under the process of creation and, therefore, in the advertisement exact number of vacancies was not stated. It further stated that on the date of advertisement, 13 clear cut vacancies existed for appointment of ADJs directly from Bar and when the names were recommended on 20/10/2001, there were clear cut 17 vacancies for appointment of regular ADJs directly from Bar. The High Court allowed the writ petition. Aggrieved, some of the ADJs of FTCs filed the appeals.

Disposing of the appeals, the Court

HELD : 1.1 The important features of the advertisement dated 23.5.2001 are that it was an advertisement to fill-in the posts of ADJs; that the vacancies were not mentioned in the advertisement and that the appointments were to be finalized as per the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001. Thus, the advertisement was not and could not have been for FTC Judges. The Rules of 2001 were rightly mentioned in the advertisement because they deal with regular appointments in Superior Judicial Service cadre and the advertisement was for appointments of ADJs in regular cadre. [Para 23] [36-G-H; 37-A]

All India Judges Association & Ors. v. Union of India & Ors. **(2002) 4 SCC 247 = 2002 (2) SCR 712 - referred to.**

1.2 From the affidavit filed on behalf of the High Court, it appears that in the meantime letter dated 14/6/2001 from the Government of India was received by the High Court forwarding the necessary material on the Fast Track Court scheme. In the State-wise break-up, 89 additional courts are shown against the State of Jharkhand. However, the posts were not sanctioned. It is the case of the High Court, stated on affidavit, that at that time only 70 officers were available in the sub-judge cadre and as such the posts in FTCs could not have been filled-up by ad hoc promotion from service cadre. There is no reason to disbelieve this stand of the High Court. [Para 24] [37-B-D]

1.3 It is important to note that posts of FTC Judges were created only when Government of Jharkhand issued notification dated 29/11/2001. Thus, on the date when advertisement dated 23/5/2001 was issued, FTCs were not even sanctioned and, therefore, were not even in anticipation of the High Court. From the affidavit filed on behalf of the High Court it is evident that on the date of recommendation, there were clear cut 17 vacancies for appointment of regular ADJs directly from Bar. After written examination, oral interviews were conducted in pursuance to the said advertisement. In October, 2001 the High Court prepared a select list of 27 candidates for superior judicial service which was duly notified as per Rule 21 of the Rules of 2001. [Para 28-30] [38-G-H; 39-C-D]

1.4 By notification dated 29/11/2001, the State Government constituted 89 FTCs of Additional District & Sessions Judges for 5 years with immediate effect. On 14/12/2001, 20 promotee officers were appointed by the State as FTC Judges on ex cadre temporary posts. On

15/12/2001, 17 candidates whose names were found at Sr.Nos.1 to 17 of the merit list were appointed as ADJs in the regular cadre of Higher Judicial Service. Appointments of these persons cannot be faulted, because it is stated on oath that there were 17 clear cut vacancies. [Para 31] [39-E-G]

2.1 On 02/02/2002, ten candidates from Sr.Nos.18 to 27 of the merit list were appointed as FTC Judges. It is disclosed from the affidavit filed on behalf of the High Court that in the Full Court meeting held on 02/07/2002, it was resolved to fill up the remaining 45 posts of ADJs to preside over FTCs in addition to 30 FTCs already, functioning in the State. Thirty were to be by promotion from Sub-judges and 15 by direct recruitment from the panel prepared during selection process of regular District Judges. On 12/08/2002, 15 persons were appointed as FTC Judges from Bar on ad hoc basis in ex-cadre posts. The names of these 15 persons do not find place in the select list prepared by the High Court pursuant to advertisement dated 23/05/2001. [Para 32] [39-G-H; 40-A-C]

2.2 Since a select list of 27 persons was duly notified as per Rules of 2001, after candidates from Sr. No. 1 to 17 were appointed as regular ADJs on 15.12.2001, the select list came to an end because as per the affidavit filed on behalf of the High Court though vacancies were not mentioned in the advertisement, 17 posts of ADJs were available on the date of recommendation i.e. on 20/10/2001. On the appointment of 17 regular ADJs, the selection process for appointment of regular ADJs came to an end.The unexhausted select list was wrongly used for appointment of 10 FTC Judges. The persons from select list prepared for recruitment to posts of regular ADJ, can not be appointed as FTC Judges. Again, out of list of unsuccessful candidates, 15 persons were appointed as FTC Judges. Their names were not there

in the select list. The whole procedure was irregular. [Para 33 and 39] [40-D-F; 43-F]

Rakhi Ray v. High Court of Delhi **2010 (2) SCR 239 = 488 (2010) 2 SCC 637; and** *Surinder Singh v. State of Punjab* **1997 (3) Suppl. SCR 538 = (1997) 8 SCC - relied on.**

3.1 It cannot be said that the appellants were appointed under r.4(a) of the Rules of 2001 or that they can get advantage of r.25 thereof. The Rules of 2001 and the regulations which are meant for Jharkhand Superior Judicial Service do not apply to ad hoc ADJs appointed under a scheme of temporary duration like Fast Track Court scheme. The Rules of 2001 were not amended to make them applicable to FTCs. The appellants were appointed in ex-cadre posts for a temporary period. This is clear from their appointment letters. Therefore, their appointments were not under Rules of 2001. Merely because they were made to take written examination and viva voce, their appointments cannot be termed as substantive appointments nor can the nature of work done by them make their appointments substantive. [Para 33] [41-C-F]

3.2 Nevertheless, the High Court's decision, however improper, cannot, in any way, be said to be vitiated by mala fides. The Full Court Resolutions of the High Court and the correspondence of the Chief Justice with the Law Ministry also indicate that the High Court was ill-equipped to put the Fast Track Court Scheme in action in the State because of several difficulties, prominent amongst them being cadre bifurcation not having been completed and unavailability of officers from service cadre. The High Court was bona fide trying to comply with the Central Law Ministry's desire and in that it overstepped its limits. [Para 34] [42-B-D]

3.3 In the circumstances, this Court is of the view that the appointments made on 02/02/2002 and 12/08/2002 are irregular, made in ignorance of settled principles underlying service law, in an anxiety to comply with the desire expressed by the Law Ministry and to set up FTCs to deal with the problem of pendency of cases. [Para 34] [42-E-F]

Brij Mohan Lal v. Union of India & Ors. (Brig Mohan Lal-I) **(2002) 5 SCC 1=2002 (3) SCR 810 and** *Brij Mohan Lal v. Union of India & Ors. (Brij Mohan Lal-(II)* **(2012) 6 SCC 502 - relied on.**

Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr. **AIR (1986) SC 1571 = 1986 (2) SCR 278;** *O.P. Singla v. Union of India* **(1984) 4 SCC 450=1985 (1) SCR 351;** *Rudra Kumar Sain v. Union of India* **(2000) 8 SCC 25= 2000 (2) Suppl. SCR 573 and** *D. Ganesh Rao Patnaik v. State of Jharkhand* **(2005) 8 SCC 454=2005 (4) Suppl. SCR 102;** *Naseem Ahmad & Ors. v. State of Uttar Pradesh & Anr.* **(2011) 2 SCC 734= 2010 (14) SCR 822;** *Prem Singh v. State of Haryana* **(1996) 4 SCC 319=1996 (2) Suppl. SCR 401 and** *State of Jammu & Kashmir & Ors. v. Sanjeev Kumar & Ors.* **(2005) 4 SCC 148=2005 (2) SCR 400 - held inapplicable.**

4.1 In Brij Mohan Lal-II, this Court has, after considering the entire matter in its proper perspective, held that the FTC posts were temporary and ex-cadre posts and the appointees cannot be said to have any legal right to the posts. This settled position cannot be reopened. [Para 43 and 47] [44-F; 46-F]

4.2 In Brij Mohan Lal-II, this Court has given certain directions in terms of Art.142 of the Constitution to improve justice delivery system, to attain the constitutional goals and to do complete justice. One of the directions pertain to regularization of the FTC Judges

in the manner laid down therein. This Court observed that if the FTC ad hoc direct recruits, who have over the years gained a lot of judicial experience, are regularized and absorbed in the regular cadre of ADJs in different States, the problem of arrears of cases can be handled to some extent. While considering the claim of the appointees who were directly appointed as FTC Judges from Bar for regularization of their services and absorption in the regular cadre, this Court observed that the relief of regularization/ absorption cannot be granted to the petitioners in the manner in which they have prayed. They have no right to the post. They were solely appointed on the basis of an interview and, therefore, must undergo the requisite examination. Making it clear that it had no intention to interfere with the policy decision taken by the Union of India, this Court gave certain directions under Art.142 of the Constitution, as quoted in the instant judgment. It cannot be said that the appellants' case is not governed by the said judgment. Indeed, the appellants have referred to their long standing services as FTC Judges. They have left their practice at the Bar. Some of them have become age-barred. Brij Mohan Lal-II considers this grievance. So far as persons like the appellants, who are appointed by way of direct recruitment from the Bar are concerned, this Court made it clear that they shall be entitled to be appointed to the regular cadre in the manner provided in Brij Mohal Lal-II. [Para 43, 44, 48 and 49] [45-A; 48-E; 45-C; 49-B]

4.3 Indisputably, the appellants were not appointed on any permanent post. The notification of their appointment dated 12/08/2002 clearly states they were appointed against temporary and ex-cadre posts on ad hoc basis. They were not appointed under the Rules of 2001. Their appointment was made for a temporary purpose in a temporary Scheme created for speedy disposal of cases. Their case is, therefore, clearly covered

by Brij Mohan Lal-II. The directions given therein, particularly those contained in paragraph 207.9 quoted in the instant judgment, will clearly apply to them. In Brij Mohan Lal-II, this Court even considered the plea that the direct recruits had taken all the tests and, therefore, they should not be made to undergo them again, and directed that they will have to take written examination and they must also be interviewed. It must be noted at this stage that on behalf of the High Court of Jharkhand a statement is made that subject to the creation of necessary posts / FTCs by the State of Jharkhand, the High Court will consider the appellants' case afresh in terms of the decision of this court in Brij Mohan Lal-II. The High Court has also taken-up the matter with the State Government. [Para 50] [52-B-E]

4.4 The State of Jharkhand will now have to take steps to comply with directions issued in Brij Mohan Lal-II, if it has not complied with them so far. The State Government and the High Court will have to work in sync to ensure that the directions to appoint the appellants in the regular cadre in Higher Judicial Service are complied with strictly in the manner laid down in Brij Mohan Lal-II. [Para 51] [53-C]

4.5 The grievance of the contesting respondents that if the appellants are absorbed in regular cadre, their promotional avenues will get affected or they will suffer monetary loss, cannot be entertained in view of Brij Mohan Lal-II. The directions given by this Court in Brij Mohan Lal-II are under Art. 142 of the Constitution, to do complete justice and while issuing directions, obviously this Court has considered the entire issue in its proper perspective. This Court concurs with the view taken by the High Court and there is no reason to interfere with it. The State Government and the High Court are directed to comply with the directions to appoint the appellants in the regular cadre in Higher Judicial Service in the State

strictly in the manner laid down in Brij Mohan Lal-II. [53-D-G]

B. Prabhakar Rao and others v. State of Andhra Pradesh and others **1985 (Suppl) SCC 432= 1985 Suppl. SCR 573;** *Hari Bansh Lal v. Sahadar Prasad Mahto and others* **(2010) 9 SCC 655= 2010 (10) SCR 561;** *Narender Chandha & Ors. v. Union of India & Ors.* **(1986) 2 SCC 157= 1986 (1) SCR 211;** *N.K. Chauhan & Ors. v. State of Gujrat & Ors.* **(1977) 1 SCC 308= 1977 (1) SCR 1037;** *G.S. Lamba & Ors. v. Union of India & Ors.* **(1985) 2 SCC 604= 1985 (3) SCR 431;** *Satya Narain Singh v. High Court of Judicature at Allahabad & Ors.* **(1985) 1 SCC 225= 1985 (2) SCR 112;** *Sushma Suri v. Govt. of National Capital Territory of Delhi & Anr.* **(1999) 1 SCC 330= 1998 (2) Suppl. SCR 187;** *Satish Kumar Sharma v. Bar Council of H.P* **(2001) 2 SCC 365= 2001 (1) SCR 34;** *Hemani Malhotra v. High Court of Delhi* **(2008) 7 SCC 11 =2008 (5) SCR 1066;** *Uttar Pradesh Public Service Commission v. Satya Narayan Sheohare & Ors.* **(2009) 5 SCC 473= 2009 (4) SCR 491;** *Ravinder Kumar v. State of Haryana & Ors.* **(2010) 5 SCC 136= 2010 (5) SCR 116;** *Bhakra Beas Management Board v. Krishan Kumar Vij & Anr.* **(2010) 8 SCC 701= 2010 (10) SCR 462;** *Girjesh Shrivastava & Ors. v. State of Madhya Pradesh & Ors.* **(2010) 10 SCC 707= 2010 (12) SCR 839;** *Secy. A.P. Public Service Commission v. Y.V.V.R. Srinivasulu & Ors.* **(2003) 5 SCC 341= 2003 (3) SCR 742;** *State of Uttar Pradesh v. Johri Mal* **(2004) 4 SCC 714= 2004 (1) Suppl. SCR 560;** *Malik Mazhar Sultan and another v. U.P. Public Service Commission and others.* **(2006) 9 SCC 507= 2006 (3) SCR 689;** *State of Bihar v. Madan Mohan* **(1994) Supp. (3) SCC 308= 1993 (3) Suppl. SCR 242;** *Smt. K. Lakshmi v. State of Kerala* **(2012) 4 SCC 115;** *Arup Das v. State of Assam***2012(5) SCC 559 - cited**

Case Law Reference:

2010 (10) SCR 561	**Cited**	**Para 9**

1986 (1) SCR 211	**cited**	**Para 13**
1977 (1) SCR 1037	**cited**	**Para 13**
1985 (3) SCR 431	**cited**	**Para 13**
1985 (2) SCR 112	**cited**	**Para 13**
1998 (2) Suppl. SCR 187	**cited**	**Para 13**
2001 (1) SCR 34	**cited**	**Para 13**
2008 (5) SCR 1066	**cited**	**Para 14**
2009 (4) SCR 491	**cited**	**Para 14**
2010 (5) SCR 116	**cited**	**Para 14**
2010 (10) SCR 462	**cited**	**Para 14**
2010 (12) SCR 839	**cited**	**Para 14**
2003 (3) SCR 742	**cited**	**Para 16**
2004 (1) Suppl. SCR 560	**cited**	**Para 17**
2006 (3) SCR 689	**cited**	**Para 17**
1993 (3) Suppl. SCR 242	**cited**	**Para 18**
(2012) 4 SCC 115	**cited**	**Para 18**
2012 (5) SCC 559	**cited**	**Para 18**
2002 (3) SCR 810	**relied on**	**Para 35**
(2012) 6 SCC 502	**relied on**	**Para 35**
1986 (2) SCR 278	**inapplicable**	**Para 37**
1985 (1) SCR 351	**inapplicable**	**Para 38**
2000 (2) Suppl. SCR 573	**inapplicable**	**Para 38**
2005 (4) Suppl. SCR 102	**inapplicable**	**Para 38**
2010 (14) SCR 822	**inapplicable**	**Para 39**

1996 (2) Suppl. SCR 401 inapplicable Para 40

2005 (2) SCR 400 inapplicable Para 40

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6647 of 2012.

From the Judgment and Order dated 07.03.2011 of the High Court of Jharkhand at Ranchi in W.P. (s) No. 2872 of 2009.

WITH

C.A. No. 6648 and 6649 of 2012.

Nidesh Gupta, Kamal Nayan Choubey, Amarendra Sharan, Sunil Kumar, Vijay Hansaria, K.K. Rai, Ajit Kumar Sinha, Amit Kumar, Atul Kumar, Ashish Kumar, Rekha, Bakshi, Rituraj Kumar, Anil Kumar, Ritu Priyadarshany, Madhusmita Bora, Shiv Ram Sharma, Sweety Singh, Archana Kumari, N. Batray, T.N. Singh, V.K. Singh, H.L. Srivastava, Jayesh Gaurav, Chhaya Kumari, (For Anil K. Jha), Sneha Kalia, Akhilesh Kumar Pandey, Ajay Amrit Raj, Rajeev Singh, Shiv Ram Sharma, Asha Gopalan Nair, Ambhoj Kumar Sinha for the Appearing Parties.

The Judgment of the Court was delivered by

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

2. These appeals, by special leave, are directed against the judgment dated 07/03/2011 delivered by the Division Bench of the Jharkhand High Court. They involve the same questions of law and facts and hence can be disposed by a common judgment. The appellants in these appeals were posted as Additional District Judges, Fast Track Courts. They are direct recruits from the bar. By the impugned order, the High Court disposed of the Writ Petition filed by the Judicial Officers who are members of the Subordinate Judiciary of the State of Jharkhand, challenging the appointment of the appellants to the

posts of Additional District Judge (for short, "ADJ"), Fast Tract Courts (for short, "FTC"). The writ petitioners before the High Court, inter alia, claimed that they were eligible for being appointed as ADJs and that they are directly affected persons in monetary terms as well as in terms of their future promotional avenues because of the appellants' appointments. They sought a declaration that the entire selection process for appointment of the appellants to the post of ADJs, FTCs pursuant to advertisement dated 23/5/2001 is illegal. They prayed that the Notifications dated 2/2/2008 and 12/8/2002 whereby the appellants were appointed be quashed. They are respondents before this court. The High Court by the impugned judgment allowed the writ petition.

3. It is necessary to state case of respondents 5 to 35 before the High Court for better appreciation of the issues involved in these appeals.

On 15/11/2000 Bihar Reorganisation Act, 2000 was passed, whereby the State of Jharkhand was carved out of the State of Bihar. By Notification dated 22/02/2001, 90 Superior Judicial Officers (ADJs and District Judges) were transferred from the State of Bihar to the State of Jharkhand. Out of these 90 Judicial Officers, 62 were promotees and 28 were direct recruits. On 10/05/2001 the Governor of Jharkhand, in consultation with the High Court, framed Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 under Article 233 read with proviso to Article 309 of the Constitution of India ("Rules of 2001", for brevity). Rule 9 thereof prescribed the eligibility for appointment as an ADJ in the State of Jharkhand, which reads as under:

> "9. **Eligibility:** A candidate shall be eligible to be appointed as an ADJ under these Rules, if:-
>
> (a) he is above the age of 35 years and below the age of 45 years as on the last day of January preceding the year in which the examination is held; provided

that in the case of a candidate belonging to scheduled caste or scheduled tribe, there may be a relaxation of upper age limit by three years;

(b) is a graduate in law from a University recognized for the purpose of enrolment as an Advocate under the Advocates' Act, 1961;

(c) has an experience of more than seven years at the Bar as a practicing Advocate after having been duly enrolled as such under the Advocates Act, 1961;

(d) possesses good health, is of sound moral character and is not involved in, or related to any criminal case of any type involving moral turpitude."

4. In order to bring all the facts on record, it would be necessary to state here that Rule 5 of Rules of 2001 was amended on 20/08/2004, whereby the percentage from different sources was modified in terms of the direction of this Court in *All India Judges Association & Ors. v. Union of India & Ors.*[1] and it was fixed as 50% by promotion, 25% by promotion through a limited competitive examination and 25% by direct recruitment.

5. On 23/05/2001 the High Court of Jharkhand issued an advertisement inviting applications in the prescribed format from the eligible candidates to fill-up the vacancies in the post of ADJs. The prescribed eligibility criteria was as under:

"(i) **Qualification** - Graduate in law from University recognized for the purpose of enrolment as an Advocate under the Advocates Act, 1961.

(ii) **Age** - above 35 years, but below 45 years as on 31st January, 2001. The upper age limit is relaxable by three years in the case of SC/ST candidates.

1. (2002) 4 SCC 247.

(iii) **Experience** - more than 7 years at the Bar as a practicing advocate after having been duly enrolled as such."

6. The advertisement, however, did not disclose as to how many posts in the regular cadre of ADJs were sought to be filled. The number of vacancies was not mentioned. On 19/08/2001 written examination was held in which approximately 4,000 candidates appeared. On 20/09/2001 a list of successful candidates who were qualified to appear for oral interview was published. The list contained names of candidates upto merit serial number 134.

7. According to the respondents, the number of candidates called for the interview was much higher than the legally recognized ratio. Ultimately, out of the candidates whose names appeared in the list of successful candidates, 17 candidates were appointed as ADJs in the regular cadre of Higher Judicial Services. Upon issuance of their appointment letters the selection process pursuant to the advertisement dated 23/05/2001 should have come to an end, but 10 candidates from Sr. Nos.18 to 27 of the merit list were appointed as FTC Judges. No such panel was ever published by the respondents therein. In August, 2002, without any advertisement, 15 persons were appointed as FTC Judges from the Bar vide Notification dated 12/08/2002. Names of these persons were not mentioned in the select list prepared by the High Court pursuant to the advertisement dated 23/05/2001. The subsequent appointments of 10 & 15 ADJs in FTCs in February and August, 2002 by way of direct recruitment from amongst the members of the Bar were in violation of the rules of fairness, equality and fair play as enshrined in Articles 14 and 16 of the Constitution of India. They were also in derogation of directions given by this Court in *Brij Mohan Lal v. Union of India & Ors. (Brig Mohan Lal-I)*[2]. The respondents pointed out that in the counter affidavit filed by the Jharkhand High Court

2. (2002) 5 SCC 1.

in WP (S) No. 5613 of 2001, it was stated that the Full Court of the High Court in the meeting held on 18/10/2001 recommended the names of 17 candidates for regular appointments as ADJs in FTCs. FTCs were constituted in the State of Jharkhand vide Notification dated 29/11/2001. But even before creation of the FTCs, 10 names were recommended in October, 2001 for making appointments against non-existent posts. On 23/05/2001 when advertisement was issued, Fast Track Courts Scheme was not in vogue. Some of those appointed as ADJs, FTCs were working as Assistant Public Prosecutors in terms of Section 25 of the Code of Criminal Procedure, 1973 (for short, "the Code"). They could not have been appointed ADJs as they were not advocates within the meaning of Section 2 (1) (a) of the Advocates Act and they cannot be said to have fulfilled the mandatory eligibility criteria of having experience of more than 7 years at the Bar. While deciding eligibility criteria, Rule 9 (a) of the Rules of 2001 was breached. The candidates who were not above the age of 35 years on the last day of January of the preceding year in which the examination was held were selected. It was contended that though there was no provision for preparation of a panel for future appointment, a panel was prepared.

8. The case of respondents 3 to 35 found favour with the High Court. The High Court inter alia held that the appointments which were offered to the members of the Bar pursuant to the advertisement dated 23/05/2001 were meant for ADJs. On that day, whatever posts were existing or contemplated could have been made the subject matter of selection. On that day, there was no sanction from the State Government for those posts, therefore, those posts were not contemplated vacancies which can be covered by the advertisement in question. The High Court observed that the appellants were appointed on ex-cadre posts created for a temporary purpose and for a temporary period for an entirely different objective which was not the dominant object of Rules of 2001. The High Court further held that selection process by way of requisition and advertisement

can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. That is exactly what was done in this case. The High Court, in the circumstances, quashed the appointments.

9. The impugned order of the High Court has been severely criticized by the counsel for the appellants. By and large the counsel are unanimous on grounds of attack. We shall therefore, avoid repetition. Written submissions have been filed which reflect the submissions of the counsel. We shall give a gist thereof. On behalf of some of the appellants, senior advocate Mr. Choubey submitted that the appellants have been appointed under Rule 4(a) of the Rules of 2001. Placing heavy reliance on Rule 25 thereof, he submitted that the appellants are entitled to be treated on par with the first list of 17 appointees. Counsel submitted that the appellants have already, a decade back, passed the rigorous examination comprising preliminary test, main written test, viva-voce test and orientation course. The 17 persons who have undergone the same course are working as District Judges in the cadre. Counsel submitted that the appellants should not, therefore, be made to undergo any more tests. Relying on the *Central Inland Water Transport v. Brojo Nath Ganguly*[3]*; O.P. Singla v. Union of India*[4]*; Rudra Kumar Sain v. Union of India*[5] and *D. Ganesh Rao Patnaik v. State of Jharkhand*[6]*,* counsel submitted that the appellants are performing the same duties as are being performed by the regular ADJs. Therefore, their description as ex-cadre, temporary or ad hoc is unjustified. The appellants did not agitate the same issue as their names were shown in the seniority list consistently. Counsel submitted that from the record produced by the High Court, it is clear that the appellants were appointed on anticipated and contemplated vacancies and their

3. AIR 1986 SC 1571.
4. (1984) 4 SCC 450.
5. (2000) 8 SCC 25.
6. (2005) 8 SCC 454.

appointments were legal. Counsel submitted that the impugned judgment is based on case laws relating to specified vacancies. The impugned judgment, therefore, deserves to be set aside. Besides, there is inordinate delay and laches in filing the petition in the High Court and on that ground alone, the High Court should have rejected the petition. Counsel's criticism about the High Court's conduct was trenchant. It was submitted that unfortunately the High Court has chosen to take prevaricating and even inconsistent stand at different stages of the proceedings. In this connection counsel relied on *B. Prabhakar Rao and others v. State of Andhra Pradesh and others*[7] and *Hari Bansh Lal v. Sahadar Prasad Mahto and others*[8]. Finally, counsel submitted that in light of *Brij Mohan Lal v. Union of India & Ors. (Brij Mohan Lal-(II)*[9]*,* the services of the appellants must be regularized.

10. Mr. Sharma, learned counsel appearing for some of the appellants, submitted that from the documents, copies of which have been produced by the High Court and also from the submissions of the State of Jharkhand, it is clear that the vacancies of FTCs were anticipated and contemplated and that the appellants were in the select list of the examination process conducted in pursuance to advertisement dated 23/05/2001. The process of appointment cannot be said to have been completed after appointment of first lot of 17 as the posts of FTC Judges was still to be filled-up and the panel was valid for a year. Counsel submitted that the High Court never intended that the appointments would be ex-cadre appointments. Selection letters issued by the High Court state that names of the appellants have been included in the select list of Jharkhand Superior Judicial Service for appointment as ADJs, but appointment shall, initially be on ad hoc basis in the regular scale of ADJ. The selection letters further state that the

7. 1985 (Suppl) SCC 432.

8. (2010) 9 SCC 655.

9. (2012) 6 SCC 502.

appointments were likely to continue and in the first instance they will be posted as Presiding Officers of the FTCs. Counsel submitted that from the selection letters it is clear that the appointments were ad hoc initially, but were likely to continue and were, in fact, substantive appointments.

11. Counsel pointed out that the notification of creation of the posts of FTCs does not state that these posts will be ex-cadre posts. Notification of appointments which mentions the word ex-cadre was issued subsequently. The appellants have left their jobs, attended the orientation course and completed it successfully. Counsel urged that this court should go by the rules of appointment, the manner of appointment and the nature of work performed by the appointees and not by the subsequent nomenclature of deployment occurring in the letters of appointment which fall within the exclusive domain of the employer against which the appointees had no bargaining power.

12. Counsel submitted that the case of the appellants is on much better footing than those FTC Judges who were before this Court in Brij Mohan Lal-II because those FTCs were not appointed after completing the process stipulated in the rules for regular ADJs. Their appointments were under special schemes. They were appointed either after they took cursory written examination followed by an interview or only on the basis of interview and none of them underwent the orientation course. Counsel pointed out that the appellants in this case were selected after exhaustive process provided in the Rules of 2001 for appointment of regular ADJs. In addition to sessions trial, they were also doing the work of civil appeals, criminal appeals, revisions and MACT cases etc. The 17 officers who underwent the same process of selection are still in the service and are holding the posts of District Judges in selection grade. It will not be, therefore, proper to make the appellants take the written examination or viva voce for their confirmation. Counsel submitted that this court should direct the State of Jharkhand

and the High Court of Jharkhand to regularize the services of the appellants with all consequential benefits.

13. Shri Amrendra Sharan, senior counsel on behalf of appellant-Sanjay Kumar Chandhariyavi, submitted that finding of the High Court that there was no anticipated vacancy as on the date of advertisement is ex-facie wrong. He submitted that from the Full Court Resolution dated 07/10/2001 and affidavit of the High Court dated 07/08/2012 it is clear that the High Court was conscious of anticipated vacancies. Because the High Court wanted to take into account the anticipated vacancies, it deliberately did not mention the number of vacancies in the advertisement. Counsel submitted that cadre division was not finalized between the State of Bihar and State of Jharkhand, therefore, quota of direct recruits and vacancy of direct recruits could not be ascertained. Counsel pointed out that as per Rule 21 of the Rules of 2001 the select list is valid for a period of one year from the date of the notification. Counsel submitted that unless the number of vacancies is certain, it cannot be held that examination process started only for 17 posts of ADJs and with recruitment of 17 ADJs, recruitment process came to an end. Counsel submitted that the contesting respondents who are from Subordinate Services could not participate in the process of direct recruitment from Bar and hence, they had no locus to file petition in the High Court. Relying on *Narender Chandha & Ors. v. Union of India & Ors.*[10], *N.K. Chauhan & Ors. v. State of Gujrat & Ors.*[11] and *G.S. Lamba & Ors. v. Union of India & Ors.*[12], counsel submitted that as per Rule 5 of the Rules of 2001 quota can be deviated in either direction. As the appointments have been made on the recommendation of the High Court by the Jharkhand Government, there is deemed relaxation of quota. Counsel submitted that this is supported by the averment made by the High Court in its affidavit to the effect that total number

10. (1986) 2 SCC 157.

11. (1977) 1 SCC 308.

12. (1985) 2 SCC 604.

of vacancies sought to be filled through advertisement dated 23/5/2001 was 46. Counsel pointed out that as initially appointment of Shri Chandhariyavi was not for fixed period of five years but appointment was with further stipulation to the effect that regarding continuity further order would be passed, appointment in real sense was not a pure temporary appointment. Relying on *Rudra Kumar Sain v. Union of India*[13] it was urged that Shri Chandhariyavi was appointed after going through the entire selection process for regular appointment after recommendation of the High Court under Article 233. He tried all types of cases which is sufficient to establish that he was not appointed for particular purpose. His appointment was not on ad hoc basis. Counsel submitted that as per Rule 3 of the Rules of 2001, cadre strength and composition of the service along with pay-scale of different categories have not been specified by the State Government in consultation with the High Court. Seniority of 20 promotees and 10 direct recruits has been fixed which is sufficient to establish that Shri Chandhariyavi is holding cadre post. Counsel submitted that it was not the intention of the Jharkhand State to create courts only for sessions trial, if that was so, there would have been no mention of Sections 13 and 14 of the Bengal Agra and Assam Civil Court Act, 1887, which deals with powers of ADJ to deal with civil matters. The notification contains the words *"in supersession of all previous orders issued on the subject"*. Pertinently, all previous orders are regarding regular courts. Besides, the notification did not mention that 89 posts would be ex-cadre posts. Counsel submitted that Public Prosecutor can apply for the post in the Higher Judicial Services. They are eligible for recruitment under Article 233. In support of this submission he relied on *Satya Narain Singh v. High Court of Judicature at Allahabad & Ors.*[14], *Sushma Suri v. Govt. of National Capital Territory of Delhi & Anr.*[15] and *Satish Kumar*

13. (2008) 8 SCC 25.

14. (1985) 1 SCC 225.

15. (1999) 1 SCC 330.

Sharma v. Bar Council of H.P[16]*.* Counsel submitted that as per Rule 9 of the Rules of 2001 age should be counted from 21st January of preceding year of examination, however, year of examination has not been mentioned anywhere. There was specific date mentioned in the advertisement which is 31/01/2001, therefore, the date should be calculated from that date. Counsel submitted that Shri Chandhariyavi figured at Serial No. 22 of the select list. On the date of advertisement 46 vacancies were required to be filled up. Rule 22 of the Rules of 2001 states that the High Court shall recommend to the State Government the names for appointment of ADJs from the select list depending upon the number of vacancies available or those required to be filled up. Appointment letters were issued to all 27 persons. Seventeen persons were directed to join permanent courts whereas, Shri Chandhariyavi was directed to assume the charge as ADJ and posted in FTC at Hazaribagh at first instance along with other nine candidates. The appointment was made under Rule 4 of the Rules of 2001. Counsel pointed out that Notification dated 02/02/2002 was issued by the government to appoint these 10 remaining candidates initially in the FTCs. Counsel submitted that Shri Chandhariyavi took written examination and was called for interview in the first list. He was selected and offered appointment as ADJ and given posting as FTC Judge. He has put in 9 years dedicated and unblemished service. In the circumstances, his services deserve to be regularized.

14. On behalf of some of the appellants it was submitted by learned counsel Shri T.N. Singh that appointments of the appellants were quashed without properly deciding the preliminary issues with regard to the locus standi and maintainability of the writ petition. The writ petition before the High Court was barred by delay and laches of 7 years and as such the writ petitioners were not eligible to challenge the selection of the appellants at the belated stage. It was

16. (2001) 2 SCC 365.

submitted that appointments of the appellants have been made by the High Court in accordance with the Rules of 2001 on merit. The appellants were not only duly qualified but selected on merit by the High Court after they successfully passed the written examination as well as viva-voce test. They are working as ADJs since 2002 and as such they have legitimate expectation to be confirmed and made permanent as ADJs. The appointments have been made against anticipated/contemplated vacancies to fill up 89 vacancies. Counsel submitted that appointments of the appellants have been quashed after more than 8 years of continuous service rendered by the appellants as ADJs, FTCs. They were practicing as advocates at the Allahabad High Court. Their appointments have been made by way of direct recruitment from the Bar strictly in accordance with the provisions of the Rules of 2001. They left their legal practice and joined judicial services. Cancellation of their appointments is an example of travesty of justice inasmuch as the entire career of the appellants is ruined. It is, therefore, necessary to set aside the impugned judgment. In support of his submissions, counsel relied on *Prem Singh & Ors. v. Haryana State Electricity Board & Ors.*[17]*; Hemani Malhotra v. High Court of Delhi*[18]*; Uttar Pradesh Public Service Commission v. Satya Narayan Sheohare & Ors.*[19]*; Rakhi Ray & Ors. v. High Court of Delhi & Ors.*[20]*; Ravinder Kumar v. State of Haryana & Ors.*[21]*; Bhakra Beas Management Board v. Krishan Kumar Vij & Anr.*[22]*;* and *Girjesh Shrivastava & Ors. v. State of Madhya Pradesh & Ors.*[23]

17. (1996) 4 SCC 319.
18. (2008) 7 SCC 11.
19. (2009) 5 SCC 473.
20. (2010) 2 SCC 637.
21. (2010) 5 SCC 136.
22. (2010) 8 SCC 701.
23. (2010) 10 SCC 707.

15. On behalf of respondent - the High Court of Jharkhand, it is submitted that vide advertisement dated 23/05/2001, applications were invited for appointment to the post of ADJs to be recruited from the Bar. The exact vacancies available, at the time of advertisement, were not notified as the cadre bifurcation was not finalized between the State of Bihar and State of Jharkhand and new posts were being created. However, on the date of advertisement, 13 clear cut vacancies existed for regular appointment from the Bar and on the date of recommendation to the State Government i.e. on 18/10/2001, 17 clear cut vacancies existed for regular appointment directly from the Bar. Admittedly, the appointments of the appellants were made beyond the vacancies available on the date of advertisement i.e. 23/05/2001 and/or during the period of selection. In the impugned judgment it is rightly held that these ad hoc, temporary, ex-cadre appointments are beyond the ambit of Rules of 2001 because the said rules deal only with regular appointments in superior judicial service cadre. The appointments of the appellants were ex-cadre and made on ad hoc basis for FTCs for a particular period of time. As per the recommendation of the Eleventh Finance Commission, the Central Government had created 1734 additional courts for fast disposal of long pending cases, out of which 89 posts were created for the State of Jharkhand. Vide letter dated 15/10/2001, the Law Minister, Government of India, Shri Arun Jaitley had informed the then Chief Justice Shri V.K. Gupta that the FTCs need to be created. After bifurcation of the State of Bihar and Jharkhand suitable number of retired judges were not available for appointment in FTCs. The Chief Justice, Jharkhand High Court, had pointed out this fact to the Law Minister, Government of India and the Law Minister vide his letter dated 22/05/2001 had conveyed his approval to the Chief Justice for making appointments from the Bar as per the rules applicable in respect of the Jharkhand High Court. Only 70 officers were available in the Sub Judge Cadre. The number of FTCs created was 89 and, therefore, the FTCs could not have been filled up by ad hoc promotion of service cadre. As the State of

Jharkhand was lagging behind the other States as regards FTCs and there was persistent request from the Central Government to establish the FTCs as soon as possible and if fresh examination was conducted for appointments to be made to the FTCs from the Bar, that would have consumed a lot of time, the Jharkhand High Court decided to appoint officers from the merit list, who had appeared in the examination for the recruitment of regular ADJs. There were only 17 vacancies in the regular cadre at the time of recommendation of the names of officers who had successfully passed in the recruitment exam and the names of 25 officers (including the present 22 appellants) were recommended for their appointment in the FTCs which was ex-cadre, ad hoc post and the appointment of the appellants was subject to continuation of the post. The appellants have no legal or statutory or vested right which could be enforced by law and they are bound by the terms and conditions of their appointment letters. As per the direction of this court in Brij Mohan Lal-II, the Jharkhand High Court has requested the State to create 31 permanent FTCs and also for expansion of the cadre strength by 10 per cent. The Jharkhand High Court may consider the case of the appellants afresh subject to the creation of necessary posts/FTCs by the State of Jharkhand in the light of decision of this court in Brij Mohan Lal-II and the decision in these appeals.

16. On behalf of State of Jharkhand, it is submitted that the FTCs were constituted in the State of Jharkhand as per the Fast Track Court Scheme envisaged by the Central Government for which funds were allocated by the Central Government. The Scheme was to continue for five years. The State of Jharkhand issued Notification dated 12/08/2002 for appointment of ad hoc ADJs, FTCs on the recommendation of the High Court. The recommendation was based on an evaluation of inter se merit of the competing candidates who had taken a written test and interview. The appointments were co-extensive with the duration of FTCs and ad hoc nature of the appointment was clearly indicated in the notification of appointment. The

appointees had no right to claim regular appointment or continue as ad hoc Additional District & Sessions Judges, FTCs beyond the duration of FTCs. Relying on *Brij Mohan Lal-I*, it is submitted that the relevant notification pertaining to the appointment of ad hoc ADJs, FTCs indicate that the appointments of ADJs, FTCs were not appointments in the Jharkhand Superior Judicial Service. In *Brij Mohan Lal-I*, the distinction between appointments under the Fast Track Court Scheme and the State Judicial Service was clearly stated. The rules and regulations which applied to members of the Jharkhand Superior Judicial Service did not ipso facto apply to the ADJs under the Scheme. The word "preference" used in Brij Mohan Lal-I has to be viewed in the overall context of the FTC Scheme and it cannot mean absolute en bloc preference akin to reservation. The word "preference" is capable of different shades of meaning taking colour from the context, purpose and object of its use under the Scheme of things envisaged (Secy. *A.P. Public Service Commission v. Y.V.V.R. Srinivasulu & Ors.*[24]). The appointment of ADJs, FTC was to be made not against a vacancy in the Jharkhand Superior Judicial Service, but against temporary posts under a Scheme by following the method of selection as is normally followed for selection of members of the Bar as direct recruits to the Superior Judicial Services and the Full Court of the Jharkhand High Court in discharge of its constitutional obligation took a decision to utilize the list of candidates who had taken a written test and appeared for interview for FTC Judges. The said decision of the Full Court cannot be faulted. Respondents 5 to 35 belong to the category of Sub Judge in the Judicial Service of the State. As per Brij Mohan Lal-II, the vacancies in question cannot go to them and, therefore, they cannot challenge the legality of the appointments of the appellants.

17. On behalf of respondents 5 to 35, it is contended that FTCs were established in view of the Eleventh Finance

24. (2003) 5 SCC 341.

Commission Report in the year 2000 which accepted the recommendation of Shri N.C. Jain. The recommendation was that only retired Sessions & Addl. Sessions Judges should be appointed for two years on ad-hoc basis in FTCs. Judgment of this court in *Brij Mohan Lal-I* came on 06/05/2002, by which 3rd preference was to be given to the direct recruits from the members of the Bar. In this case, on 02/02/2002 i.e. before *Brij Mohan Lal-I*, appointments of 10 persons were made by direct recruitment contrary to recommendations of Shri N.C. Jain. On 12/08/2002, further 15 direct recruits were appointed as Ad hoc ADJs, FTCs which is in contravention of *Brij Mohan Lal-I* because sufficient number of eligible serving judicial officers were available and without considering their case, appointments of direct recruits were made. The said appointments were illegal also because the advertisement was not for the post of FTCs, there was no vacancy in FTCs, advertisement was only for regular cadre and the process came to an end after the regular direct ADJs were appointed. Appointment of ad hoc ADJs in FTCs on the basis of merit list prepared on the basis of the said advertisement was per se illegal. There was no notified select list for the appointment of fifteen persons on 12/08/2002. Some of the appointees were Public Prosecutors and, as such, were not eligible to be appointed as ADJs (*State of Uttar Pradesh v. Johri Mal*[25]). Some of the appointees did not fulfill the age criteria (*Malik Mazhar Sultan and another v. U.P. Public Service Commission and others.*[26]). Respondents 5 to 35 are directly affected in monetary terms. Their promotional avenues are also affected by the appointments. As the initial appointment of the appellants itself was illegal, they cannot get benefit of *Brij Mohan Lal-II*. If any extra posts are created as per *Brij Mohan Lal-II*, Rule 5 of the Rules of 2001 would come into play and 75% of the extra posts created would be required to be filled-up by the quota of promotees. Otherwise, it would disturb the

25. (2004) 4 SCC 714.

26. (2006) 9 SCC 507.

quota fixed for promotees. It is submitted that no interference is called for with the impugned order. In any case, adjustment, if any, can be made only against 25% quota.

18. Mr. Hansaria, learned senior advocate appearing for private respondents has assailed the appointment of the appellants on similar grounds. In addition to the grounds quoted, he added that it is well settled that appointments on posts which were neither advertised nor in existence on the date of issuance of advertisement could not be filled from select list prepared on the basis of such advertisement. Pertinently, though number of vacancies has not been mentioned in the advertisement, the High Court in its affidavit has stated that only 17 posts of ADJs were available on the date of advertisement. The posts of FTC Judges were created on 29/11/2001. On the date of advertisement dated 23/05/2001, the said posts were not even in anticipation of the High Court to be filled by direct recruitment. The advertisement dated 23/05/2001 and the select list prepared pursuant thereto which was duly notified as per the Rules of 2001 could not have been used for filling up of FTC Judges. The selection process comes to an end with the filling of vacancies for which advertisements have been issued. In any case, candidates in the select list have no right to be appointed beyond the number of posts to be filled. In this connection, reliance was placed on *State of Bihar v. Madan Mohan*[27] *Rakhi Ray, State of Orissa v. Rajkishore Nanda*[28], *Smt. K. Lakshmi v. State of Kerala*[29], *Arup Das v. State of Assam*[30] and *Surinder Singh v. State of Punjab*[31].

19. We have given anxious consideration to the submissions advanced by learned counsel. Certain facts can

27. 1994 Supp. (3) SCC 308.

28. (2010) 6 SCC 777.

29. (2012) 4 SCC 115.

30. 2012(5) SCC 559.

31. (1997) 8 SCC 488.

be gathered from the various affidavits on record, oral submissions of the counsel and written submissions filed in the court. It would be appropriate to note them while examining the grievance of the appellants and the case of the respondents.

20. On 25/11/2000, Bihar Reorganization Act, 2000 was passed whereby State of Jharkhand was carved out from the State of Bihar. On 15/01/2001, the then Law Minister Shri Jaitley wrote to Shri Gupta, the then Chief Justice of Jharkhand High Court, about the scheme of creation of 1734 additional courts for faster disposal of pending cases based on the recommendations of the Eleventh Finance Commission. He requested the Chief Justice to execute the scheme effectively and efficiently so that the courts start functioning from 01/04/2001. On 22/02/2001, notification was issued transferring 90 superior judicial officers from the State of Bihar to the State of Jharkhand out of which 62 were promotees and 28 direct recruits. From the note of the then Chief Justice dated 23/02/2001, it appears that issue whether in-service judges should be promoted on ad hoc basis or whether retired judges should be considered was debated upon. It was noted that the State of Jharkhand may not have sufficient number of retired judges. Decision was taken to discuss all the issues in the Chief Justices' conference to be held on 30/03/2001. Thereafter, letter dated 12/03/2001 was addressed by the then Chief Justice Shri Gupta to Shri Jaitley, the then Law Minister regarding the difficulties experienced by the Jharkhand High Court in appointing officers for FTCs so as to make them functional from 01/04/2001. It was stated that cadre division of the Judicial Officers between the two States of Bihar and Jharkhand had not been completed except in respect of judicial officers belonging to Higher Judicial Service and the cadre division in the rank of Sub Judge for which the Government had issued Notification dated 22/02/2001. It was stated that the cadre division in respect of the judicial officers in the ranks of sub-judges and munsiffs had not so far been effected. This had resulted in the High Court Registry being ill-equipped. The letter

further stated that whether the Presiding Officers of the FTCs are to be appointed from amongst District/ADJs or by granting ad hoc promotions to the serving judicial officers is also an important issue. It was further communicated to the Law Minister that only a handful of retired District Judges/ADJs were residing in the State of Jharkhand and they were of advanced age. As far as appointing Presiding Officers by granting ad hoc promotion to serving judicial officers is concerned, that can only be done after the Cadre Division is effected and the judicial officers belonging to Jharkhand Cadre take positions. Apart from this, problems of shortage of accommodation and other infrastructural problems were also communicated. It was stated that by Notification dated 22/02/2001 issued by Government of India only allocation of officers was finalized and not the strength/posts. This letter of the Chief Justice of Jharkhand High Court reflects several genuine difficulties faced by the High Court and his anxiety that as desired by the Law Ministry Fast Track Courts Scheme cannot be made functional in the State because of those difficulties. We need to view the High Court's actions, which have come under heavy criticism against the background of these facts.

21. By letter dated 22/05/2001 addressed to the then Chief Justice Shri Gupta, the Union Law Minister, considering the difficulties expressed by the Chief Justice in his letter dated 22/02/2001, communicated to him that he may make appointments to FTCs from the Bar as per the rules applicable to the High Court. There is no dispute that there were no rules for appointment of FTC Judges and the Rules of 2001 were not amended so as to make provision for appointment of FTC Judges.

22. On 23/05/2001, the High Court issued the advertisement to fill up vacancies for the post of ADJs. Number of vacancies was not stated in the advertisement. The stand of the State of Jharkhand in the affidavit filed by Shri A. Khaury, Chief Administrative Officer is that at the time of the

advertisement there was no provision for appointment of Judicial Officers in the FTCs as those courts were created on 29/11/2001 and the advertisement was restricted to regular appointments in the cadre of Superior Judicial Officer. On behalf of the High Court supplementary affidavit is filed by Shri Nath, Registrar (Admn.) High Court. It is stated in the affidavit that at the time of advertisement the States of Bihar and Jharkhand were newly bifurcated and cadre strength was not finalized. The High Court was waiting for more officers to be allocated to Jharkhand cadre. New Posts were also under the process of creation and therefore, in the advertisement exact number of vacancies was not stated. It is further submitted however that on the date of advertisement 13 clear cut vacancies existed for appointment of ADJs directly from the Bar and when the names were recommended on 20/10/2001, there were clear cut 17 vacancies for appointment of regular ADJs directly from the Bar.

23. As regards age criteria, it was mentioned in the advertisement that the candidate should be above 35 years but below 45 years as on 31/01/2001. Upper age limit was relaxable by three years in case of SC/ST candidates. Qualification necessary was Graduate in Law from University recognized for the purpose of enrollment as an advocate under Advocates Act, 1961. Required experience was 7 years practice at the bar as an advocate after enrolment. The advertisement clearly stated that the written examination shall be conducted, entire selection process shall be undertaken and the appointments shall be finalized as per the Rules of 2001. Thus, important features of this advertisement are that it was an advertisement to fill-in the posts of ADJs; that the vacancies were not mentioned in the advertisement and that the appointments were to be finalized as per the Rules of 2001. Thus, the advertisement was not and could not have been for FTC Judges. In fact, the posts of FTC Judges were not even in anticipation of the High Court so as to be filled by direct recruitment because such posts were not sanctioned at that

time. The Rules of 2001 were rightly mentioned in the advertisement because they deal with regular appointments in Superior Judicial Service cadre and the advertisement was for appointments of ADJs in regular cadre.

24. From the affidavit of Shri Nath, Registrar(Admn.) it appears that in the meantime letter dated 14/6/2001 was received from Joint Secretary, Government of India L & J, D. to the Secretary of the Chief Justice of the High Court forwarding the necessary material on the Fast Track Court scheme. In the state-wise break-up 89 additional courts are shown against the State of Jharkhand. However, the posts were not sanctioned. It is the case of the High Court, stated on affidavit, that at that time only 70 officers were available in the sub-judge cadre and as such the FTCs could not have been filled-up by ad hoc promotion from service cadre. There is no reason to disbelieve this stand of the High Court.

25. On 19/08/2001, written examination was held in which approximately 4000 candidates appeared. On 20/09/2001, list of successful candidates who were qualified to appear for oral interview was published. The list contained names of candidates upto merit list serial number 134. In this connection it is necessary to state that Rule 21 of the Rules of 2001 to which our attention is drawn by the counsel speaks of arranging the candidates in order of merit. Rule 21 says that from the said list the High Court shall prepare a select list and have it duly notified in a manner as specified in the regulations and such select list shall be valid for a period of one year from the date of being notified. Rule 22 states that out of the aforesaid select list, depending upon the number of vacancies available or those required to be filled up, the High Court shall recommend to the government the names for appointment as ADJs.

26. Minutes of the Full Court Meeting of the High Court dated 07/10/2001 indicate that the meeting was held to consider the question of calling more candidates for viva voce test for appointment in the Jharkhand Superior Judicial Service

as per Rules of 2001. The minutes note that having considered the trends in the viva voce test already going on and in view of large number of vacancies to be filled up, it is decided to expand the list of candidates to include more candidates so that wider spectrum and ambit of selection process is covered with a view to achieving the optimum level of suitable candidates for appointment in the service. It was resolved that more candidates from the merit list are required to be called. It was further resolved that candidates from Sr. No.135 to Sr. No.217 be called for viva voce test (upto this point candidates upto Sr.No.134 were called). The Registrar General was directed to fix up dates of viva voce test, staggering the list of candidates on three occasions. First session was to be held on 14/10/2001. The remaining two sessions were to be held on 15/10/2001 and 16/10/2001. Oral interviews were conducted of the remaining candidates upto Sr. No.217.

27. In the meantime, on 8/10/2001, the High Court wrote a letter to the State Government, inter alia, stating that at the time of bifurcation of the State under the Bihar Reorganisation Act, 90 officers of Superior Judicial Services were allocated to Jharkhand Higher Judicial Cadre, out of which 62 were promotees and 28 direct recruits. It was stated that the 42 vacancies will be apportioned in the ratio of 67% and 33% i.e. 28 posts for promotee officers and 14 posts for direct recruits.

28. On 18/10/2001, the High Court in its Full Court meeting took a decision to begin with 30 FTC Judges out of which 20 would be from service and 10 by direct recruitment as per quota of 2/3rd and 1/3rd. Moreover, by this date the entire selection process i.e. preliminary written examination, main written examination and viva voce was completed. It is important to note that posts of FTC Judges were created only when Government of Jharkhand issued notification dated 29/11/2001. Thus, on the date when advertisement dated 23/5/2001 was issued, FTCs were not even sanctioned and hence were not even in anticipation of the High Court. There can be no debate over this.

29. By letter dated 20/10/2001, the High Court recommended 20 sub-judges for promotion to the rank of ADJs keeping 2/3rd ratio. The High Court stated in that letter that out of 89 earmarked FTCs, it has created 30 FTCs. It was made clear that their promotion shall be on ad hoc basis and until further orders depending on continuation of FTCs and that the promotion shall be ex-cadre. It was stated that the said 20 sub-Judges on their appointment shall rank above, 10 direct recruits on ad hoc basis. We have already noted that in the affidavit of Shri Nath, Registrar (Admn.), High Court it is stated that on the date of recommendation there were clear cut 17 vacancies for appointment of regular ADJs directly from Bar.

30. After written exams, oral interviews were conducted in pursuance to the advertisement dated 23/5/2001, in October, 2001 the High Court prepared a select list of 27 candidates for superior judicial services which was duly notified as per Rule 21 of the Rules of 2001 to which we have already made a reference.

31. As already noted, on 29/11/2001, vide notification of the same date, the State Government constituted 89 FTCs of Additional District & Sessions Judges for 5 years with immediate effect. On 14/12/2001, 20 promotee officers whose names were recommended by the High Court on 20/10/2001 were appointed by the State as FTC Judges on ex cadre temporary posts. On 15/12/2001, 17 candidates whose names were found at Sr.Nos.1 to 17 of the merit list were appointed as ADJs in the regular cadre of Higher Judicial Services. Appointments of these persons cannot be faulted, because it is stated on oath that there were 17 clear cut vacancies.

32. Serious exception is however taken to appointments made on 02/02/2002 and 12/08/2002 and we are of the opinion that there is merit in the criticism levelled against the said appointments. On 02/02/2002, 10 candidates from Sr.Nos.18 to 27 of the merit list were appointed as FTC Judges. It is disclosed from the affidavit of Shri Nath, Registrar (Admn.),

High Court, Jharkhand that in the Full Court meeting held on 02/07/2002, it was resolved to fill the remaining 45 posts of ADJs to preside over FTCs in addition to 30 FTCs already functioning in the State. Thirty were to be by promotion from sub-judges and 15 were to be by direct recruitment from the panel prepared during selection process of regular District Judges. On 12/08/2002, 15 persons were appointed as FTC Judges from the bar on ad hoc basis in ex-cadre post. The names of these 15 persons do not find place in the select list prepared by the High Court pursuant to advertisement dated 23/05/2001.

33. Since a select list of 27 persons was duly notified as per Rules of 2001, after candidates from Sr. No. 1 to 17 were appointed as regular ADJs on 15.12.2001 the select list came to an end because as per the affidavit filed on behalf of the High Court though vacancies were not mentioned in the advertisement only 13 posts of ADJs were available on the date of advertisement i.e. on 23/05/2001 and 17 posts of ADJs were available on the date of recommendation i.e. on 20/10/2001. On the appointment of 17 regular ADJs, the selection process for appointment of regular ADJs came to an end. The unexhausted select list was wrongly used for appointment of 10 FTC Judges. Again, out of list of unsuccessful candidates, 15 persons were appointed as FTC Judges. Their names were not there in the select list. The whole procedure was irregular. Reliance placed by the High Court in the impugned judgment of this Court in *Rakhi Ray v. High Court of Delhi*[32] *and Surinder Singh v. State of Punjab*[33] is apt. It must be mentioned at the cost of repetition that on 23/05/2001 when the advertisement was issued, the posts for FTCs were not sanctioned. Therefore, these posts were not even in contemplation. They cannot be termed as vacancies contemplated or anticipated by the High Court. Undoubtedly, the correspondence between the Law Ministry and the High

32. (2010) 2 SCC 637.

33. (1997) 8 SCC 488.

Court indicates that the High Court was informed about the need for creation of FTCs and that Fast Track Court Scheme may be brought into action in Jharkhand but, till the posts for FTCs were sanctioned, there was no question of taking into account any anticipated vacancies. When advertisement is for specific number of posts, the State cannot appoint more than the number of posts advertised. The select list gets exhausted when all the advertised posts get filled. In Rakhi Ray and in a long line of other cases to which reference need not be made, this Court has clarified that appointments beyond the number of posts advertised would amount to filling up future vacancies and the said course is impermissible in law. There is no substance in the contention that appellants were appointed under Rule 4(a) of the Rules of 2001 or that they can get advantage of Rule 25 thereof. The Rules of 2001 and the regulations which are meant for Jharkhand Superior Judicial Service do not apply to ad hoc ADJs appointed under a scheme of temporary duration like Fast Track Court scheme. The Rules of 2001 were not amended to make them applicable to FTCs. The appellants were appointed in ex-cadre post for a temporary period. This is clear from their appointment letters. Therefore, their appointments were not under Rules of 2001. Merely because they were made to take written examination and viva voce their appointments cannot be termed as substantive appointments nor can the nature of work done by them make their appointments substantive.

34. We are, however, not inclined to hold that, however improper, the High Court's decision is in any way, vitiated by mala fides. We have already noted that when letter dated 14/06/2001 was received by the High Court from the Law and Judiciary Department of the State giving state-wise break-up showing 89 FTCs against State of Jharkhand, only 70 officers from sub-judge cadre were available and, as such, FTCs could not have been filled up by ad hoc promotion from service cadre. The situation does not appear to have improved. It is the case of the High Court that since the State of Jharkhand was lagging

behind in so far as creation of FTCs is concerned and there was persistent request from the Central Government to establish the FTCs as soon as possible, it was felt that if fresh examination was conducted for appointments to be made to the FTCs from the Bar, much time would have been consumed and, therefore, it was decided to appoint officers from the merit list who had appeared in the examination for the recruitment of regular ADJs. The Full Court Resolutions of the Jharkhand High Court and the correspondence of the Chief Justice with the Law Ministry also indicate that the High Court was ill-equipped to put the Fast Track Court Scheme in action in the State of Jharkhand because of several difficulties, prominent amongst them being cadre bifurcation not having been completed and unavailability of officers from service cadre. It is, therefore, not necessary for us to refer to cases cited before us in support of the contention that the High Court has taken prevaricating and inconsistent stand. We are of the opinion that the High Court was bona fide trying to comply with the Central Law Ministry's desire and in that it overstepped its limits.

35. In the ultimate analysis we are of the view that the appointments made on 02/02/2002 and 12/08/2002 are irregular, made in ignorance of settled principles underlying service law, in an anxiety to comply with the desire expressed by the Law Ministry and to set up FTCs to deal with the problem of pendency of cases. This conclusion of our's draws support from *Brij Mohan Lal-I* and *Brij Mohan Lal-II*. *Brij Mohan Lal-II* also offers a possible solution to the problem. We shall soon advert to these judgments.

36. Several other judgments have been cited on behalf of the petitioners. Quite frankly most of them have no application to the instant case and some of them need not be referred to as *Brij Mohan Lal-II* now holds the field. We shall, however, make a brief reference to them lest it is said that we overlooked some points.

37. In *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*[34], this court was inter alia, considering whether unconscionable clause in a contract of employment is void under Section 23 of the Indian Contract Act as being opposed to public policy. In our opinion, this case turns on its own facts and has no application to the facts of the instant case at all.

38. So far as judgments in *O.P. Singla; Rudra Kumar Sain* and *D. Ganesh Rao Patnaik* are concerned, in these cases, this court was considering the question of seniority between promotees and direct recruits appointed under specific rules. These judgments can have no application to the case on hand, where the appointments are made on ad hoc basis in a temporary scheme.

39. In *Naseem Ahmad & Ors. v. State of Uttar Pradesh & Anr.*[35], this court while dealing with U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955 considered what is wait list, select list and panel. It was held that wait list is not a selection list prepared for specific number of vacancies and wait list is exhausted only when all duly selected candidates are given appointments. This case will have no application to the instant case. Once it is held that the appointments of the appellants were ad hoc, ex-cadre and not made as per the Rules of 2001 and that they were made in a scheme of temporary duration, wait list prepared while selecting regular ADJs cannot be used to appoint FTC Judges. In this case, select list got exhausted when 17 ADJs were appointed and persons from select list prepared for recruitment to the post of regular ADJs cannot be appointed as FTC Judges.

40. In *Prem Singh v. State of Haryana*[36], this court held that selection process by way of requisition and advertisement

34. AIR (1986) SC 1571.

35. (2011) 2 SCC 734.

36. (1996) 4 SCC 319.

can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. We have already held that as on the date of advertisement, FTCs were not sanctioned. Therefore, there were no anticipated vacancies. *Prem Singh* will have no application to the facts of this case. For the same reasons, *State of Jammu & Kashmir & Ors. v. Sanjeev Kumar & Ors.*[37] is also not applicable to the present case.

41. Since we have held that appointments were not made under Rules of 2001, cases cited on deviation of quota or deemed relaxation of quota as per Rule 5 can have no application to this case. It must be borne in mind that appointments of ADJ FTCs in this case were made on ad hoc ex-cadre basis in a scheme of temporary duration. The fact that the High Court recommended the names makes no difference. Their appointments were irregular.

42. Arguments were advanced on delay and laches. It is true that there is some delay on the part of respondents 5 to 35 in approaching the High Court. A possible explanation has been given. Their locus standi has also been challenged. Looking to the importance of the question involved and having regard to the authoritative pronouncement of this Court in *Brij Mohan Lal-II*, we have examined the grievances of the parties, without going into this aspect.

43. In *Brij Mohan Lal-II*, this court has, after considering the entire matter in its proper perspective, held that the FTCs were holding ex-cadre post. We cannot reopen the settled position now. Certain judgments cited in this regard need not, therefore, be discussed. Besides, they have no application to this case. It was argued that certain Assistant Public Prosecutors were appointed as FTC Judges. It was also urged that the age criteria was not abided by. We do not propose to go into those submissions because in the peculiar

37. (2005) 4 SCC 148.

circumstances of this case, in *Brij Mohan Lal-II*, this court has given certain directions in terms of Article 142 of the Constitution to improve justice delivery system, to attain the constitutional goals and to do complete justice. One of the directions pertains to for the regularization of the appellants in the manner laid down therein. It is impossible to hold that the appellants' case is not governed by the said judgment.

44. Indeed, the appellants have referred to their long standing services as FTC Judges. They have left their practice at the Bar. Some of them have become age-barred. Certain judgments have been cited before us in support of the submission that these facts need to be considered and they must be absorbed in the regular services. *Brij Mohan Lal-II* considers this grievance. Hence, it is not necessary to refer to the cases cited on this point.

45. We have repeatedly referred to Brij Mohan Lal-I and Brij Mohan Lal-II. It is now necessary to see what they lay down. The Eleventh Finance Commission allocated funds for the purpose of setting up of 1734 courts in various States to deal with the long-pending cases. The Finance Commission suggested that States may consider re-employment of retired judges for a limited period since these courts were to be ad hoc courts in the sense that they would not be a permanent addition to the existing courts. The Fast Track Courts Scheme was challenged on various grounds. The said challenge was dealt with by this Court in Brij Mohan Lal-I. This Court issued number of directions in relation to establishment and functioning of FTCs. It was made clear that while making appointments, third preference should be given to direct recruits from the Bar. The following direction is material in this behalf:

> "4. The third preference shall be given to members of the Bar for direct appointment in these courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on their performance. They may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Services."

This Judgment made it clear that FTCs were to be ad hoc courts.

46. The Fast Track Courts Scheme was in operation till 31/03/2011. But thereafter the Union of India took a decision not to continue the financing of the Fast Track Courts Scheme beyond 31/03/2011. Some States decided to continue the Fast Track Courts Scheme and some States decided not to continue it. Several writ petitions were filed thereafter inter alia praying that necessary directions be given to the respondents to extend the Fast Track Court Scheme and release necessary funds for that purpose. Some of the petitioners who were direct recruits claimed absorption in the regular cadre.

47. While dealing with the points raised in the petitions, this Court in *Brij Mohal Lal-II* traced the history of the Fast Track Courts Scheme. This Court considered the notifications issued by various States appointing direct recruits, relevant rules of different States and methodology adopted for appointment to the FTCs and came to the conclusion that the said posts were temporary and the appointees cannot be said to have any legal right to the posts. It was observed that the appointments were governed under the separate set of rules than the rules governing the regular appointments to the States Higher Judicial Services. This court observed that the cumulative effect of the notifications appointing the petitioners therein to the said posts under the Fast Track Court Scheme and the relevant rules governing them clearly demonstrate that those were temporary and, in some cases, even time-bound

appointments terminable without prior notice and, therefore, it is difficult to accept the contention that the appointees were entitled to be absorbed regularly in those posts. It was observed that where neither the post is sanctioned nor is it permanent and, in fact, the entire arrangement is ad hoc or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees. It is necessary to quote relevant paragraphs of the said judgment:

> "172. The prayer for regularisation of service and absorption of the petitioner appointees against the vacancies appearing in the regular cadre has been made not only in cases involving the case of the State of Orissa, but even in other States. Absorption in service is not a right. Regularisation also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularisation shall depend upon the facts and circumstances of a given case as well as the relevant rules applicable to such class of persons.
>
> 173. As already noticed, on earlier occasions also, this Court has declined the relief of regularisation of the persons and workmen who had been appointed against a particular scheme or project. A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularisation or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be dehors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the posts concerned. [Refer to Umadevi (3)7]
>
> 174. It is not necessary for us to deliberate on this issue all over again in view of the above discussion. Suffice it to notice that the petitioner appointees have no right to the posts in question as the posts themselves were temporary and were bound to come to an end by efflux of time. With reference to the letters of their appointment and the Rules under which the same were issued, it is clear that these petitioners cannot claim any indefeasible right either to regularisation or absorption."

48. While dealing with the peculiar situation created by the decision taken by the Union of India to discontinue the Fast Track Courts Scheme, this Court noticed that with the help of funds allotted by the Eleventh Finance Commission, the States have already established the additional courtrooms for FTCs. The relevant aspects were not considered by the Union of India before taking decision to discontinue the Fast Track Courts Scheme but since the policy decision has already been taken and given effect to, this Court made it clear that it was not inclined to strike it down. This Court, however, noted that the Thirteenth Finance Commission had in its recommendations stated that there are 3 crore pending cases in various courts in the country and there is enormous delay in disposing of the cases resulting in immense hardship to people. This Court observed that if the FTC ad hoc direct recruits who have over the years gained a lot of judicial experience are regularized and absorbed in the regular cadre of ADJs in different States, the problem of arrears of cases can be handled to some extent. This Court observed that the Union of India as well as the State Governments of their own extended the Fast Track Courts Scheme till 2010 and thereafter, by another year. The Union of India ultimately took the decision not to finance the Fast Track Courts Scheme w.e.f. 30/03/2011. Even thereafter, a number of States have taken the decision to continue the Fast Track Courts Scheme while retaining the appointees thereto till 2012, 2013 and even till 2016. This Court observed that the cumulative effect of all these factors is that the petitioners have legitimate expectation that either their services would be continued as the Fast Track Courts Scheme would be made a permanent feature of the justice administration in the State concerned or they

would be absorbed in the regular cadre. This Court, however, clarified that mere expectation or even legitimate expectation of absorption cannot be a cause of action for claiming the relief of regularization, particularly when the same is contrary to the rules and letters of appointment. While considering the claim of the appointees who were directly appointed as FTC Judges from the Bar for regularization of their services and absorption in the regular cadre this Court observed that the relief of regularization/ absorption cannot be granted to these petitioners in the manner in which they have prayed. They have no right to the post. They did not pass any written competitive examination and were solely appointed on the basis of an interview and, therefore, must now undergo the requisite examination. Making it clear that it had no intention to interfere with the policy decision taken by the Union of India this Court gave certain directions under Article 142 of the Constitution. We may quote the directions which have relevance to this case.

"207.4. It is directed that all the States, henceforth, shall not take a decision to continue the FTC Scheme on ad hoc and temporary basis. The States are at liberty to decide but only with regard either to bring the FTC Scheme to an end or to continue the same as a permanent feature in the State.

207.5. The Union of India and the State Governments shall reallocate and utilise the funds apportioned by the 13th Finance Commission and/or make provisions for such additional funds to ensure regularisation of the FTC Judges in the manner indicated and/or for creation of additional courts as directed in this judgment.

207.8. We hereby direct that it shall be for the Central Government to provide funds for carrying out the directions contained in this judgment and, if necessary, by reallocation of funds already allocated under the 13th Finance Commission for judiciary. We further direct that for creation of additional 10% posts of the existing cadre, the burden shall be equally shared by the Centre and the State Governments and funds be provided without any undue delay so that the courts can be established as per the schedule directed in this judgment."

49. So far as persons like the appellants, who are appointed by way of direct recruitment from the Bar are concerned, this court made it clear that they shall be entitled to be appointed to the regular cadre. Following directions are material in this behalf:

"207.9. All the persons who have been appointed by way of direct recruitment from the Bar as Judges to preside over FTCs under the FTC Scheme shall be entitled to be appointed to the regular cadre of the Higher Judicial Services of the respective States only in the following manner:

(a) The direct recruits to FTCs who opt for regularisation shall take a written examination to be conducted by the High Courts of the respective States for determining their suitability for absorption in the regular cadre of Additional District Judges.

(b) Thereafter, they shall be subjected to an interview by a Selection Committee consisting of the Chief Justice and four senior most Judges of that High Court.

(c) There shall be 150 marks for the written examination and 100 marks for the interview. The qualifying marks shall be 40% aggregate for general candidates and 35% for SC/ST/OBC candidates. The examination and interview shall be held in accordance with the relevant Rules enacted by the States for direct appointment to Higher Judicial Services.

(d) Each of the appointees shall be entitled to one mark per year of service in the FTCs, which shall form part of the interview marks.

(e) Needless to point out that this examination and interview should be conducted by the respective High Courts keeping in mind that all these applicants have put in a number of years as FTC Judges and have served the country by administering justice in accordance with law. The written examination and interview module, should, thus, be framed keeping in mind the peculiar facts and circumstances of these cases.

(f) The candidates who qualify the written examination and obtain consolidated percentage as aforeindicated shall be appointed to the post of Additional District Judge in the regular cadre of the State.

(g) If, for any reason, vacancies are not available in the regular cadre, we hereby direct the State Governments to create such additional vacancies as may be necessary keeping in view the number of candidates selected.

(h) All sitting and/or former FTC Judges who were directly appointed from the Bar and are desirous of taking the examination and interview for regular appointment shall be given age relaxation. No application shall be rejected on the ground of age of the applicant being in excess of the prescribed age.

207.10. The members of the Bar who have directly been appointed but whose services were either dispensed with or terminated on the ground of doubtful integrity, unsatisfactory work or against whom, on any other ground, disciplinary action had been taken, shall not be eligible to the benefits stated in para 207.9 of the judgment.

207.11. Keeping in view the need of the hour and the constitutional mandate to provide fair and expeditious trial to all litigants and the citizens of the country, we direct the respective States and the Central Government to create 10% of the total regular cadre of the State as additional

posts within three months from today and take up the process for filling such additional vacancies as per the Higher Judicial Service and Judicial Services Rules of that State, immediately thereafter."

50. Indisputably, the appellants were not appointed on any permanent post. The notification of their appointment dated 12/08/2002 clearly states they were appointed against temporary and ex-cadre posts on ad hoc basis. They were not appointed under the Rules of 2001. Their appointment was made for a temporary purpose in a temporary Scheme created for speedy disposal of cases. Their case is, therefore, clearly covered by *Brij Mohan Lal-II*. The directions given therein, particularly those contained in paragraph 207.9 which we have quoted above, will clearly apply to them. In *Brij Mohan Lal-II*, this court even considered the contention that the direct recruits had taken all the tests and, therefore, they should not be made to undergo them again. After considering this argument, this court directed that they will have to take written examination and they must also be interviewed. It must be noted at this stage that on behalf of the High Court of Jharkhand a statement is made that subject to the creation of necessary post/FTCs by the State of Jharkhand, the High Court will consider the appellants' case afresh in terms of the decision of this court in *Brij Mohan Lal-II*. The High Court has also taken-up the matter with the State Government. Relevant portion from the affidavit of Shri Ambuj Nath, Registrar (Administration), High Court of Jharkhand, needs to be quoted.

"19. That as per the recommendation of 13th Finance Commission the Jharkhand High Court has requested the State Government to constitute 31 alternative Courts, in the cadre of Superior Judicial Service co-terminus with the holiday courts/shift Court scheme of the 13th Finance Commission as the terrain and deteriorating the law and other situation was not congruent for holding Morning / Evening / Shift Courts. However, after the direction of the

Hon'ble Apex Court in B.M. Lal Case (Tr. Civil Case No.22 of 2001), the Jharkhand High Court has taken up the matter with the State Government for creation of 31 permanent Fast Track Courts instead of 31 alternative court's co-terminus with the morning and evening shift courts and an expansion of 10% of Cadre strength as per the direction of the Hon'ble Apex Court in B.M. Lal Case (Tr. Civil Case No.22 of 2001) in response to the direction dated 19th April, 2012."

51. The State of Jharkhand will now have to take steps to comply with directions issued in Brij Mohan Lal-II, if it has not complied with them so far. The State of Jhakhand and the High Court will have to work in sync to ensure that the directions to appoint the appellants in the regular cadre in Higher Judicial Service are complied with strictly in the manner laid down in *Brij Mohan Lal-II*.

52. We are not prepared to entertain the grievance of the contesting respondents that if the appellants are absorbed in regular cadre their promotional avenues will get affected or they will suffer monetary loss. Their locus to challenge the appellants' appointments has been questioned. But, even if it is assumed that they have locus in view of *Brij Mohan Lal-II* such grievances cannot be entertained. The directions given by this Court in *Brij Mohan Lal-II* are under Article 142 of the Constitution, to do complete justice and while issuing directions, obviously this Court has considered the entire issue in its proper perspective. We, therefore, reject this submission. In the view that we have taken we dispose of these appeals by recording that we concur with the view taken by the High Court and see no reason to interfere with it. We direct the State of Jharkhand and the High Court of Jharkhand to comply with the directions to appoint the appellants in the regular cadre in Higher Judicial Service in the State of Jharkhand strictly in the manner laid down in Brij Mohan Lal-II within a period of six months from the date of receipt of this order by it.

R.P. Appeals disposed of.

CENTRAL BUREAU OF INVESTIGATION, HYDERABAD

v.

K. NARAYANA RAO

(Criminal Appeal No. 1460 of 2012)

SEPTEMBER 21, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Code of Criminal Procedure, 1973:

s.482 - Quashing of criminal prosecution - Scope - Allegation that respondent, an advocate on the panel of a Bank, submitted false legal opinion to the Bank in respect of housing loans, and along with other conspirators defrauded the Bank's money - High Court quashed charge sheet against the respondent - Propriety of - Held: Liability against the respondent would have arisen had he been an active participant in a plan to defraud the Bank - In the instant case, no evidence to prove that respondent was abetting or aiding the original conspirators - Merely because his legal opinion may not be acceptable, he cannot be mulcted with criminal prosecution, particularly, in absence of tangible evidence that he associated with other conspirators -At the most, respondent may be liable for gross negligence or professional misconduct if it is established by acceptable evidence - He cannot be charged u/ss.420 and 109 IPC along with other conspirators without proper and acceptable link between them - No prima facie case against him - High Court right in quashing criminal proceedings against the respondent - Penal Code, 1860 - s.120B r/w ss. 419, 420, 467, 468, 471 and 109 - Prevention of Corruption Act, 1988 - s.13(2) r/w s.13(1)(d).

ss.227 and 228 - Framing of charges - Discharge of accused - When warranted - Held: While exercising jurisdiction u/s.227, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the

evidence as if he was conducting a trial - If the Magistrate finds that there is no prima facie evidence or the evidence placed is totally unworthy of credit, it is his duty to discharge the accused at once.

Penal Code, 1860 - ss.120A and 120B - Criminal conspiracy - Essence of - Held: Is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both - However, it is a matter of common experience that direct evidence to prove conspiracy is rarely available - Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused - Even if some acts are proved to have committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy - Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation - An offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence.

Negligence - Professionals - When may be held liable for negligence - Held: A professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

Advocates - Duty of - Held: A lawyer owes an "unremitting loyalty" to the interests of the client - It is the lawyer's responsibility to act in a manner that would best advance the interest of the client.

The CBI registered an FIR against A-1 and A-2, the then Branch Manager and the Assistant Manager,

respectively of the Vijaya Bank, for the commission of offence punishable under Sections 120-B, 419, 420, 467, 468 471 read with Section 109 of IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 for abusing their official position as public servants and for having conspired with private individuals, viz., A-3 and A-4 and other unknown persons for defrauding the bank by sanctioning and disbursement of housing loans to 22 borrowers in violation of the Bank's rules and guidelines and thereby causing wrongful loss of Rs. 1.27 crores to the Bank and corresponding gain for themselves. In the charge sheet filed by CBI, the respondent, who is a legal practitioner and a panel advocate for the Vijaya Bank, was also arrayed as A-6. The allegation against him was that he gave false legal opinion in respect of 10 housing loans.

Respondent (A-6) filed petition under Section 482 CrPC before the High Court for quashing of the criminal proceedings pending against him on the file of the Special CBI Judge. The High Court quashed the proceedings against respondent (A-6). Aggrieved, the CBI filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. At the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, in that event, it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. A judicial magistrate enquiring into a case under Section 209 CrPC is not to act as a mere post office and has to arrive at a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is

sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. On the other hand, if the Magistrate finds that there is no prima facie evidence or the evidence placed is totally unworthy of credit, it is his duty to discharge the accused at once. It is also settled law that while exercising jurisdiction under Section 227 CrPC, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. This provision was introduced in the Code of Criminal Procedure to avoid wastage of public time and to save the accused from unavoidable harassment and expenditure. [Para 12] [69-A-F; 71-G]

State of Bihar vs. Ramesh Singh **(1977) 4 SCC 39; 1978 (1) SCR 257;** *P. Vijayan vs. State of Kerala and Another* **(2010) 2 SCC 398: 2010 (2) SCR 78 and** *Sajjan Kumar vs. Central Bureau of Investigation,* **(2010) 9 SCC 368: 2010 (11) SCR 669 - relied on.**

2. Section 120A IPC defines criminal conspiracy while Section 120B IPC speaks about punishment of criminal conspiracy. The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have committed, it must be clear that they were so committed

in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence. [Paras 19 and 20] [81-C-G; 82-C-F]

Shivnarayan Laxminarayan Joshi and Others vs. State of Maharashtra **(1980) 2 SCC 465 - referred to.**

3.1. In the instant case, the legal opinion rendered by the respondent in the form of Legal Scrutiny Reports show that the respondent, as a panel advocate, verified the documents supplied by the Bank and rendered his opinion. It also shows that he was furnished with Xerox copies of the documents and very few original documents as well as Xerox copies of Death Certificate, Legal heir-ship Certificate, Encumbrance Certificate for his perusal and opinion. It is the definite claim of the respondent that he perused those documents and only after that he rendered his opinion. [Para 17] [80-F-G]

3.2. It is an admitted case of the prosecution that the name of respondent was not mentioned in the FIR. Only in the charge-sheet, the respondent was shown as accused no. 6 stating that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties in question. The statements of several witnesses enclosed along with the charge-sheet speak volumes about others. However, there is no specific reference to the role of the respondent along with the main conspirators. [Paras 18, 21] [81-A-B; 82-H]

3.3. In the banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate's work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills. A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators. [Paras 22, 23 and 26] [83-D-G; 84-A-E]

3.4. A lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. However, merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At

the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. If there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent. There is no prima facie case for proceeding in respect of the charges alleged insofar as respondent is concerned. The High Court was right in quashing the criminal proceedings against Respondent (A-6). [Paras 27, 28] [84-F-H; 85-A-B]

Jacob Mathew vs. State of Punjab & Anr. **(2005) 6 SCC 1: 2005 (2) Suppl. SCR 307 and** *Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors.* **(1984) 2 SCC 556: 1984 (1) SCR 414 - relied on.**

Rupan Deol Bajaj (Mrs.) and Another vs. Kanwar Pal Singh Gill and Another **(1995) 6 SCC 194: 1995 (4) Suppl. SCR 237;** *Mahavir Prashad Gupta and Another vs. State of National Capital Territory of Delhi and Others* **(2000) 8 SCC 115 and** *State of Haryana vs. Bhajan Lal* **1992 Supp (1) SCC 335: 1990 (3) Suppl. SCR 259 - referred to.**

Case Law Reference:

1978 (1) SCR 257	**relied on**	**Para 9**
2010 (2) SCR 78	**relied on**	**Para 9**
2010 (11) SCR 669	**relied on**	**Para 9**
1995 (4) Suppl. SCR 237	**referred to**	**Para 13**
1990 (3) Suppl. SCR 259	**referred to**	**Para 13**

(2000) 8 SCC 115	**referred to**	**Para 14**
(1980) 2 SCC 465	**referred to**	**Para 15**
2005 (2) Suppl. SCR 307	**relied on**	**Para 24**
1984 (1) SCR 414	**relied on**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1460 of 2012.

From the Judgment & Order dated 09.07.2010 of the High Court of Andhra Pradesh at Hyderabad in Crl. Petition No. 2347 of 2008.

H.P. Raval, ASG, Rajiv Nanda, Padmalakshmi Nigam, Arvind Kumar Sharma for the Appellant.

R. Venkataramani, Ashok Panigrahi, Aljo Joseph, Surajit Bhaduri for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 09.07.2010 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Petition No. 2347 of 2008 whereby the High Court allowed the petition filed by the respondent herein under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code") and quashed the criminal proceedings pending against him in CC No. 44 of 2007 (Crime No. 36 of 2005) on the file of the Special Judge for CBI cases, Hyderabad.

3. Brief facts:

(a) According to the prosecution, basing on an information, on 30.11.2005, the CBI, Hyderabad registered an FIR being RC 32(A)/2005 against Shri P. Radha Gopal Reddy (A-1) and Shri Udaya Sankar (A-2), the then Branch Manager and the

Assistant Manager, respectively of the Vijaya Bank, Narayanaguda Branch, Hyderabad, for the commission of offence punishable under Sections 120-B, 419, 420, 467, 468 471 read with Section 109 of the Indian Penal Code, 1860 (in short 'the IPC') and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 for abusing their official position as public servants and for having conspired with private individuals, viz., Shri P.Y. Kondala Rao - the builder (A-3) and Shri N.S. Sanjeeva Rao (A-4) and other unknown persons for defrauding the bank by sanctioning and disbursement of housing loans to 22 borrowers in violation of the Bank's rules and guidelines and thereby caused wrongful loss of Rs. 1.27 crores to the Bank and corresponding gain for themselves. In furtherance of the said conspiracy, A-2 conducted the pre-sanction inspection in respect of 22 housing loans and A-1 sanctioned the same.

(b) After completion of the investigation, the CBI filed charge sheet along with the list of witnesses and the list of documents against all the accused persons. In the said charge sheet, Shri K. Narayana Rao, the respondent herein, who is a legal practitioner and a panel advocate for the Vijaya Bank, was also arrayed as A-6. The duty of the respondent herein as a panel advocate was to verify the documents and to give legal opinion. The allegation against him is that he gave false legal opinion in respect of 10 housing loans. It has been specifically alleged in the charge sheet that the respondent herein (A-6) and Mr. K.C. Ramdas (A-7)-the valuer have failed to point out the actual ownership of the properties and to bring out the ownership details and name of the apartments in their reports and also the falsity in the permissions for construction issued by the Municipal Authorities.

(c) Being aggrieved, the respondent herein (A-6) filed a petition being Criminal Petition No. 2347 of 2008 under Section 482 of the Code before the High Court of Andhra Pradesh at Hyderabad for quashing of the criminal proceedings in CC No.

44 of 2007 on the file of the Special Judge for CBI Cases, Hyderabad. By impugned judgment and order dated 09.07.2010, the High Court quashed the proceedings insofar as the respondent herein (A-6) is concerned.

(d) Being aggrieved, the CBI, Hyderabad filed this appeal by way of special leave.

4. Heard Mr. H.P. Raval, learned Additional Solicitor General for the appellant-CBI and Mr. R. Venkataramani, learned senior counsel for the respondent (A-6).

5. After taking us through the allegations in the charge sheet presented before the special Court and all other relevant materials, the learned ASG has raised the following contentions:

(i) The High Court while entertaining the petition under Section 482 of the Code has exceeded its jurisdiction. The powers under Section 482 are inherent which are to be exercised in exceptional and extraordinary circumstances. The power being extraordinary has to be exercised sparingly, cautiously and in exceptional circumstances;

(ii) The High Court has committed an error in holding that no material had been gathered by the investigating agency against the respondent herein (A-6) that he had conspired with the remaining accused for committing the offence; and

(iii) There is no material on record to show that the respondent herein (A-6) did not verify the originals pertaining to housing loans before giving legal opinion and intentionally changed the proforma and violated the Bank's circulars.

6. On the other hand, Mr. Venkataramani, learned senior counsel for the respondent (A-6), after taking us through the charge sheet and the materials placed before the respondent seeking legal opinion, submitted that he has not committed any offence much less an offence punishable under Section 120-B

read with Sections 419, 420, 467, 468, 471 and 109 of IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. He further submitted that based on the documents placed, the respondent herein after perusing and on satisfying himself, furnished his legal opinion for which he cannot be implicated as one of the conspirators for the offence punishable under Section 420 read with Section 109 IPC.

7. We have carefully perused all the relevant materials and considered the rival submissions.

8. In order to appreciate the stand of the CBI and the defence of the respondent, it is necessary to refer the specific allegations in the charge sheet. The respondent herein has been arrayed as accused No. 6 in the charge sheet and the allegations against him are as under:

> "Para 20: Investigation revealed that legal opinions in respect of all these 10 loans have been given by Panel Advocate - Sri K. Narayana Rao (A-6) and valuation reports were given by Approved Valuer - Sri V.C. Ramdas(A-7). Both, the advocate and the valuer, have failed to point out the actual ownership of the property and failed to bring out the ownership details and name of the apartments in their reports. They have also failed to point out the falsehood in the construction permission issued by the municipal authorities.
>
> Para 28: Investigation revealed that the municipal permissions submitted to the bank were also fake.
>
> Para 29: Expert of Finger Print Bureau confirmed that the thumb impressions available on the questioned 22 title deeds pertain to A-3, A-4 and A-5.
>
> Para 30: The above facts disclose that Sri P. Radha Gopal Reddy (A-1) and Sri M. Udaya Sankar (A-2) entered into criminal conspirary with A-3 and abused their official position as public servants by violating the bank norms and

in the process caused wrongful gain to A-3 to the extent of Rs.1,00,68,050/- and corresponding wrongful loss to the bank in sanctioning 22 housing loans. Sri P.Y. Kondal Rao(A-3) registered false sale deeds in favour of borrowers using impostors as site owners, produced false municipal permissions and cheated the bank in getting the housing loans. He is liable for conspiracy, cheating, forgery for the purpose of cheating and for using forged documents as genuine. Sri B. Ramanaji Rao(A-4) and Sri R. Sai Sita Rama Rao(A-5) impersonated as site owners, executed the false sale deeds. They are liable for impersonation, conspiracy, cheating, forging a valuable security and forgery for the purpose of cheating. Sri K. Narayana Rao (A-6) submitted false legal opinions and Sri K.C. Ramdas(A-7) submitted false valuation reports about the genuineness of the properties in collusion with A-3 for sanction of the loans by Vijaya Bank, Narayanaguda branch, Hyderabad and abetted the crime. Sri A.V. Subba Rao(A-8) managed verification of salary slips of the borrowers of 12 housing loans in collusion with A-3 and abetted the crime.

Para 33: In view of the above, the accused A-1, A-2, A-3, A-4, A-5, A-6, A-7 & A-8 are liable for offences punishable under Section 120-B read with Sections 419, 420, 467, 468, 471 and 109 read with Section 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and substantive offences thereof."

With the above details, let us consider whether there is prima facie allegation(s) and material(s) in order to pursue the trial against the respondent herein. In the same way, we have to see whether the reasoning and the ultimate conclusion of the High Court in quashing the charge sheet against the respondent herein (A-6) is sustainable. We are conscious of the power and jurisdiction of the High Court under Section 482 of the Code for interfering with the criminal prosecution at the threshold.

9. Mr. Raval, learned ASG in support of his contentions relied on the following decisions:

(i) *State of Bihar vs. Ramesh Singh,* (1977) 4 SCC 39;

(ii) *P. Vijayan vs. State of Kerala and Another,* (2010) 2 SCC 398; and

(iii) *Sajjan Kumar vs. Central Bureau of Investigation,* (2010) 9 SCC 368.

10. The first decision *Ramesh Singh* (supra) relates to interpretation of Sections 227 and 228 of the Code for the considerations as to discharge the accused or to proceed with trial. Para 4 of the said judgment is pressed into service which reads as under:

"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which- … (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce

are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion

of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

11. Discharge of accused under Section 227 of the Code was extensively considered by this Court in *P. Vijayan* (supra) wherein it was held as under:

"10. ……. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

12. While considering the very same provisions i.e., framing of charges and discharge of accused, again in *Sajjan*

Kumar (supra), this Court held thus:

"19. It is clear that at the initial stage, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce proves the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

20. A Magistrate enquiring into a case under Section 209 CrPC is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 CrPC, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

Exercise of jurisdiction under Sections 227 and 228 CrPC

21. On consideration of the authorities about the scope of

Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is

required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

From the above decisions, it is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, in that event, it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. A judicial magistrate enquiring into a case under Section 209 of the Code is not to act as a mere post office and has to arrive at a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. On the other hand, if the Magistrate finds that there is no prima facie evidence or the evidence placed is totally unworthy of credit, it is his duty to discharge the accused at once. It is also settled law that while exercising jurisdiction under Section 227 of the Code, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. This provision was introduced in the Code to avoid wastage of public time and to save the accused from unavoidable harassment and expenditure. While analyzing the role of the respondent herein (A-6) from the charge sheet

and the materials supplied along with it, the above principles have to be kept in mind.

13. In *Rupan Deol Bajaj (Mrs.) and Another vs. Kanwar Pal Singh Gill and Another,* (1995) 6 SCC 194, this Court has considered the scope of quashing an FIR and held that it is settled principle of law that at the stage of quashing an FIR or complaint, the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein. By noting the principles laid down in *State of Haryana vs. Bhajan Lal,* 1992 Supp (1) SCC 335, this Court held that an FIR or a complaint may be quashed if the allegations made therein are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

14. In *Mahavir Prashad Gupta and Another vs. State of National Capital Territory of Delhi and Others,* (2000) 8 SCC 115, this Court considered the jurisdiction of the High Court under Section 482 of the Code and held as under:

"5. The law on the subject is very clear. In the case of *State of Bihar v. Murad Ali Khan* (1988) 4 SCC 655 it has been held that jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised sparingly and with circumspection. It has been held that at an initial stage a court should not embark upon an inquiry as to whether the allegations in the complaint are likely to be established by evidence or not. Again in the case of *State of Haryana v. Bhajan Lal* 1992 Supp. (1) SCC 335 this Court has held that the power of quashing criminal proceedings must be exercised very sparingly and with circumspection and that too in the rarest of rare cases. It has been held that the court would not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint. It has been held that the extraordinary or inherent powers did not

confer an arbitrary jurisdiction on the court to act according to its whim or caprice.

15. Regarding conspiracy, Mr. Raval, learned ASG after taking us through the averments in the charge sheet based reliance on a decision of this Court in *Shivnarayan Laxminarayan Joshi and Others vs. State of Maharashtra,* (1980) 2 SCC 465 wherein it was held that once the conspiracy to commit an illegal act is proved, act of one conspirator becomes the act of the other. By pointing out the same, learned ASG submitted that the respondent herein (A-6), along with the other conspirators defrauded the Bank's money by sanctioning loans to various fictitious persons.

16. We have already extracted the relevant allegations and the role of the respondent herein (A-6). The only allegation against the respondent is that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties. As rightly pointed out by Mr. Venkataramani, learned senior counsel for the respondent, the respondent was not named in the FIR. The allegations in the FIR are that A-1 to A-4 conspired together and cheated Vijaya Bank, Narayanaguda, Hyderabad to the tune of Rs. 1.27 crores. It is further seen that the offences alleged against A-1 to A-4 are the offences punishable under Sections 120B, 419, 420, 467, 468 and 471 of IPC and Section 13(2) read with Section 13 (1)(d) of the Prevention of Corruption Act, 1988. It is not in dispute that the respondent is a practicing advocate and according to Mr. Venkataramani, he has experience in giving legal opinion and has conducted several cases for the banks including Vijaya Bank. As stated earlier, the only allegation against him is that he submitted false legal opinion about the genuineness of the properties in question. It is the definite stand of the respondent herein that he has rendered Legal Scrutiny Reports in all the cases after perusing the documents submitted by the Bank. It is also his claim that rendition of legal opinion

cannot be construed as an offence. He further pointed out that it is not possible for the panel advocate to investigate the genuineness of the documents and in the present case, he only perused the contents and concluded whether the title was conveyed through a document or not. It is also brought to our notice that LW-5 (Listed Witness), who is the Law Officer of Vijaya Bank, has given a statement regarding flaw in respect of title of several properties. It is the claim of the respondent that in his statement, LW-5 has not even made a single comment as to the veracity of the legal opinion rendered by the respondent herein. In other words, it is the claim of the respondent that none of the witnesses have spoken to any overt act on his part or his involvement in the alleged conspiracy. Learned senior counsel for the respondent has also pointed out that out of 78 witnesses no one has made any relevant comment or statement about the alleged involvement of the respondent herein in the matter in question.

17. In order to appreciate the claim and the stand of the respondent herein as a panel advocate, we have perused the legal opinion rendered by the respondent herein in the form of Legal Scrutiny Report dated 10.09.2003 as to the title relating to Sri B.A.V.K. Mohan Rao, S/o late Shri Someshwar Rao which is as under.

"Legal Scrutiny Report

Dated 10.09.2003.

To
The Branch Manager,
Vijaya Bank,
Narayanaguda
Hyderabad

Sir,

Sub:- Title Opinion Shri BAVK Mohan Rao
S/o Late Shri Someswar Rao.

With reference to your letter dated NIL. I submit my Scrutiny Report as hereunder:-

1. Name and address of the Mortgagor
Shri. BAVK Mohan Rao
S/o Late Shri Someswar Rao
R/o 1-1 290/3, Vidyanager, Hyderabad.

2. Details/Description of documents scrutinized:

Sl.No.	Date	Name of the documents	Whether Original/ Certified True Copy
1.	12.05.2003	C.C. Pahais for the year 1972-73 and 1978-79	Xerox Copy
2.	08.02.1980	Death Certificate of Shri PV Narahari Rao	Xerox Copy
3.	07.03.1980	Legal Heir Certificate of Shri PV Narahari Rao	Xerox Copy
4.	24.04.1980	C.C. of Regd. GPA No. 58/80	Xerox Copy
5.	19.09.1980	Regd. Sale Deed No. 1243/80 with Plan	Xerox Copy
6.	07.12.1998	Sanctioned Plan vide proceeding No. 2155/98	Xerox Copy
7.	02.01.2003	Development Agreement	Xerox Copy
8.	25.04.2003	EC No. 6654/2003 for the period from 28.06.1980 to 31.03.1982	Xerox Copy
9.	25.04.2003	EC No. 4136/2003 for the period from 01.04.1982 to 23.03.1984	Xerox Copy

10.	21.04.2003	EC No. 3918/2003 for the period from 24.03.1994 to 20.04.2003	Xerox Copy
11.	28.07.2003	Agreement for Sale	Original

3. Details/Description of Property:-

Sl.No. Sy. No./H.No. Extent of land Location Boundaries
Building Dist. Village

All that Flat bearing No. F-5 on First Floor, admeasuring 900 sq. Ft, along with undivided share of land 28 sq yds, out of total admeasuring 870 sq. yds constructed on Plot Nos. 3, 4 and 5 in Sy. Nos. 84 and 85 in the premises of "Guru Datta Nivas", situated at Nerdmet, Malkajagiri Municipality, and Mandal, Ranga Reddy Dist. Hyderabad and bounded by:

FLAT BOUNDARIES:	LAND BOUNDARIES
NORTH: Flat No. F-6	20-0"
SOUTH: Open to sky	Wide Road, Sy No. 86
EAST : Corridor & Stair Case	Sy. Nos. 76 and 78 open to sky.
WEST : Open to sky	

4. Brief History of the Property and How the owner/ Mortgagor has derived title:

The Pahains for the years 1972-73 and 1978-79 under document No. 1 reveals that Sri. Venkat Naraari Rao is the pattadar and possessor of the land admeasuring Ac. 1-31 guntas in Sy No. 84 and Ac. 1-22 guntas in Sy No. 85 of Malkajgiri, Hyderabad.

The document No. 2 shows that Sri. PV Narahari Rao was expired on 23.01.1980 as per the Death Certificate issued by MCH.

The document No 3 shows that Smt. Saraswathi Bai is only the legal heir of Late Shri PV Narahari Rao.

The document No. 4 shows that Smt. Saraswathi Bai executed a GPA in favour of Sri. CV Prasad Rao, empowering him to deal and sell the above said property. The GPA was registered in the office of sub-Registrar of Hyderabad-East vide document No. 58/80 dated 24.04.1980.

The document No. 5 shows that Smt. Saraswathi Bai sold the Plot Nos. 3, 4 and 5 admeasuring 870 sq yds. situated at Malkajgiri, Hyderabad to Smt. N. Samson Sanjeeva Rao and executed a sale deed in his favour by virtue of document No. 1243/80 dated 19.09.1980 registered in the office of sub-registrar of Uppat, Ranga Reddy.

The document No. 6 shows that Shri N. Samson Sanjeeva Rao obtained permission from Malkajgiri Municipality for construction of Residential building consisting of Ground + 4 floors vide permit No. G1/2155/98 dated 07.12.1998.

The document No. 7 shows that Shri N. Samson Sanjeeva Rao entered into development agreement with Shri PY Kondal Rao for construction of residential flats in the above said plots.

The document Nos. 8, 9 and 10 are the Encumbrance Certificates for the period from 28.06.1998 to 20.04.2003 (23 years) which disclose only the transactions mentioned in document No. 5.

The document No. 11 shows that Shri N. Samson Sanjeeva Rao (owner) along with Shri PY Kondal Rao (builder) agreed to sell the Schedule Property (referred under Item No. III of this opinion) to Shri BAVK Mohan Rao (applicant) for a total sale consideration of Rs. 5,50,000/- and Shri. BAVK Mohan Rao (applicant) also agreed to purchase the said property for the same consideration.

5. Search and Investigation.

5.1	The person who is the present owner of the property	Shri NS Sanjeeva Rao (present owner/vendor) and Shri BAVK Mohan Rao (purchaser/Vendee)
5.2 to 5.5	xxx	xxx
5.6	Whether there the latest title deed and immediately previous title deed(s) are available in original	The document No. 5 is available in Xerox (original verified)
5.7 to 5.13	xxx	xxx
5.14	Whether the proposed equitable mortgage by deosit of title deed is possible? If so, what are the documents to be deposited? If deposit is not possible, can there be simple mortgage or a registered memorandum or by any other mode of mortgage?	Yes, Equitable mortgage is possible. The original registered Sale Deed executed in favour of Shri BAVK Mohan Rao (applicant) by the Vendors along with all the documents as mentioned in the list in Item No. 2 of this opinion should be deposited.
5.15 to 5.20	xxx	xxx

6-8 xxx xxx xxx

9. CERTIFICATE

I am of the opinion that Shri NS Sanjeeva Rao is having clear marketable title by virtue of Regd. Sale Deed No.

1243/1980 dated 19.09.1980 referred document No. 5 of this opinion. He can convey a valid clear marketable title in favour of Shri BAVK Mohan Rao (applicant) in respect of the schedule property (referred under Item No. 3 of this opinion) by duly executing a Regd. Sale Deed in his favour.

Shri BAVK Mohan Rao (applicant) can create a valid equitable mortgage with the Bank by depositing the original Regd. Sale deed executed in his by the vendors and also depositing all the documents as mentioned in the list in Item No. 2 of this opinion. I further certify that:-

1.	There are no prior mortgage/charge whatsoever as could be seen from the encumbrance certificate for the period from 28.06.1980 to 20.04.2003 pertaining to the immovable property covered by the above title deed(s).	Yes
2.	There are prior mortgages/charges to the extent, which are liable to be cleared or satisfied by complying with the following.	NA
3.	There are claims from minors and his/her/their interest in the property to the extent of (specify) the share of minor(s) with name	NA
4.	The undivided share of minor of (specify the liability that is fastended or could be fastened on the property).	NA
5.	The property is subject to the payment of Rupees (specify the liability that is fastened or could be fastened on the property)	NA
6.	Provisions of Urban Land (Ceiling and Regulation) Act are not applicable. Permission obtained.	NA
7.	Holding/Acquisitions in accordance with the provisions of the land:	NA
8.	The mortgage if created will be perfect and available to the bank for the liability of the intending borrower: Shri BAVK Mohan Rao (Applicant)	

The Bank is advised to obtain the encumbrance certificate for the period from 21.04.2003 till the date after obtaining a registered sale deed in favour of Shri BAVK Mohan Rao (applicant)

SEARCH REPORT:

I have verified the title deed of Shri N.S. Sanjeeva Rao in the office of sub-Registrar of Uppal, Hyderabad on 18.07.2003 and found that the sale transaction between parties, schedule property stamp papers, regd. Sale Deed No. 1243/1980 are genuine. The verification receipt is enclosed herewith.

(K. NARAYANA RAO)
ADVOCATE"

The above particulars show that the respondent herein, as a panel advocate, verified the documents supplied by the Bank and rendered his opinion. It also shows that he was furnished with Xerox copies of the documents and very few original documents as well as Xerox copies of Death Certificate, Legal heir-ship Certificate, Encumbrance Certificate for his perusal and opinion. It is his definite claim that he perused those documents and only after that he rendered his opinion. He also advised the bank to obtain Encumbrance Certificate for the period from 21.04.2003 till date. It is pointed out that in the same way, he furnished Legal Scrutiny Reports in respect of other cases also.

18. We have already mentioned that it is an admitted case

of the prosecution that his name was not mentioned in the FIR. Only in the charge-sheet, the respondent has been shown as Accused No. 6 stating that he submitted false legal opinion to the Bank in respect of the housing loans in the capacity of a panel advocate and did not point out actual ownership of the properties in question.

19. Mr. Venkataramani, learned senior counsel for the respondent submitted that in support of charge under Section 120B, there is no factual foundation and no evidence at all. Section 120A defines criminal conspiracy which reads thus:

> *"120A. Definition of criminal conspiracy.*- When two or more persons agree to do, or cause to be done,-
>
> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> Explanation.- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Section 120B speaks about punishment of criminal conspiracy. While considering the definition of criminal conspiracy, it is relevant to refer Sections 34 and 35 of IPC which are as under:

> *"34. Acts done by several persons in furtherance of common intention.*- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

> *"35. When such an act is criminal by reason of its being done with a criminal knowledge or intention.* - Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

20. The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence.

21. In the earlier part of our order, first we have noted that the respondent was not named in the FIR and then we extracted the relevant portions from the charge-sheet about his alleged role. Though statements of several witnesses have been enclosed along with the charge-sheet, they speak volumes about others. However, there is no specific reference to the role of the present respondent along with the main conspirators.

22. The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge sheet and the materials placed for his scrutiny and arrived at a conclusion that the same does not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as one of the conspirators of the offence punishable under Section 420 read with Section 109 of IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether any prima facie material available against the person who has charged with an offence under Section 420 read with Section 109 of IPC. In the banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate's work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills.

23. A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of

the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

24. In *Jacob Mathew vs. State of Punjab & Anr.* (2005) 6 SCC 1 this court laid down the standard to be applied for judging. To determine whether the person charged has been negligent or not, he has to be judged like an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

25. In *Pandurang Dattatraya Khandekar vs. Bar Council of Maharashtra & Ors.* (1984) 2 SCC 556, this Court held that "…there is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct.

26. Therefore, the liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the Bank. In the given case, there is no evidence to prove that A-6 was abetting or aiding the original conspirators.

27. However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to

the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.

28. In the light of the above discussion and after analysing all the materials, we are satisfied that there is no prima facie case for proceeding in respect of the charges alleged insofar as respondent herein is concerned. We agree with the conclusion of the High Court in quashing the criminal proceedings and reject the stand taken by the CBI.

29. In the light of what is stated above, the appeal fails and the same is dismissed.

B.B.B. Appeal dismissed.

AVINASH SADASHIV BHOSALE (D) THR. LRS.

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 7005 of 2012)

SEPTEMBER 25, 2012

[SURINDER SINGH NIJJAR AND H.L. GOKHALE, JJ.]

Service Law – Dismissal – On grounds of misconduct – Appellant, Bank Manager, alleged to have been involved in fraudulent transactions – Prosecuted u/ss.120B, 420, 467, 468, 471 and 201 IPC alongwith three account holders – However, subsequently appellant and the other co-accused acquitted of all the charges by the criminal court – Simultaneous to the criminal proceedings, respondent bank had initiated departmental proceedings against the appellant which led to his dismissal from service – Order of dismissal in challenge – Plea of appellant that the departmental proceedings conducted against him were vitiated as he had been acquitted by the criminal court and continuation of departmental proceedings after the appellant was acquitted in the criminal trial was in violation of the principle underlying Article 20(2) of the Constitution – Held: Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common – The instant case did not fall within the said exception as the departmental proceedings herein and the criminal case were not grounded upon the same set of facts and evidence – The basic charge against the appellant in the departmental proceedings was that he failed to discharge his duties with utmost integrity, honesty, devotion and diligence to ensure and protect the interest of the Bank and acted in a manner unbecoming of a Bank Officer – Said charge had

nothing to do with any criminal liability attaching to such conduct – Failure of the prosecution in producing necessary evidence before the criminal court cannot have any adverse impact on the evidentiary value of the material produced by the Bank before the Inquiry Officer in the departmental proceedings – Before the Inquiry Officer, the Bank had placed on record all the relevant documents which clearly establish that appellant had exceeded his discretionary powers in purchasing cheques and issuing demand drafts to show undue favour to three construction companies – Appellant failed to maintain the high standards of integrity as required of the Bank officials and acted in violation of the Service Rules – Order of dismissal also not vitiated by non-application of mind – There was no breach of the rule of natural justice – Order of dismissal accordingly not interfered with – State Bank of India Officers Service Rules, 1992 – rr.50(4), 67(j) and 68(2)(iii) – Penal Code, 1860 – ss.120B, 420, 467, 468, 471 and 201.

Service Law – Departmental proceedings – If can be conducted simultaneously to criminal trial – Legal position discussed – Held: Departmental proceedings can be conducted simultaneously to criminal trial – The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced – But even such grounds would be available only in cases involving complex questions of facts and law – Such defence ought not to be permitted to unnecessarily delay the departmental proceedings – Interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings – Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common.

Service Law – Conduct – Bank officials – Standard of

integrity required of them – Held: Bank officials act as trustees of funds deposited by the public with the Bank – They have an obligation to earn the trust and confidence of not only the account holders but also the general public – High standards of integrity is required of the Bank officials, particularly the cashiers, accountants, auditors and the Management at all levels – They must be above suspicion.

The appellant, a Branch Manager in the State Bank of India, was alleged to have been involved in fraudulent transactions to the tune of Rs. 12 crores. After completion of investigation by the police, the appellant was prosecuted for having committed offences punishable under Sections 120B, 420, 467, 468, 471 and 201 IPC alongwith three account holders. However, subsequently the appellant and the other co-accused were acquitted of all the charges.

Simultaneous to the criminal proceedings, the respondent bank had initiated departmental proceedings against the appellant. He was served a charge sheet containing articles of charge and statement of imputation of misconduct in terms of Rule 68(2)(iii) of the State Bank of India Officers Service Rules, 1992. It was alleged that the appellant failed to discharge his duty with utmost integrity, honesty, devotion and diligence to ensure and protect the interest of the Bank and acted in a manner in violation of Rule 50(4) of the 1992 Rules. The Inquiry Officer submitted report, whereby it was held that all the charges were proved against the appellant. Consequently, the Disciplinary Authority dismissed the appellant from service in terms of Rule 67(j) of the 1992 Rules. Against the order of dismissal, the appellant preferred a statutory appeal which was dismissed. The appellant thereafter filed writ petition in the High Court. The writ petition was dismissed *in limine* and therefore the instant appeal.

It was *inter alia* contended before this Court on behalf of the appellant that the disciplinary proceedings conducted against him were vitiated as he had been acquitted by the Criminal Court; and that continuation of departmental proceedings after the appellant was acquitted in the criminal trial was in violation of the principle underlying Article 20(2) of the Constitution.

Dismissing the appeal, the Court

HELD: 1.1. Departmental proceedings can be conducted simultaneously to the criminal trial. There is no legal bar for both proceedings to go on simultaneously. The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts and law. Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings. Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common. [Para 44] [121-E-H; 122-A-C]

1.2. The departmental proceedings herein and the criminal case were not grounded upon the same set of facts and evidence. It cannot be said that because the appellant had been prosecuted, the departmental proceedings could not have been continued simultaneously. The charges against the appellant in the criminal trial related to the commission of criminal offences under Sections 120(B), 420, 467, 468, 471 and 201 of IPC. The proof of criminal charges depended upon prosecution producing proof beyond reasonable doubt

relating to the culpability of the appellant alongwith other persons. In the departmental proceedings, the basic charge was that appellant whilst posted as a Branch Manager, failed to discharge his duties with utmost integrity, honesty, devotion and diligence to ensure and protect the interest of the Bank and acted in a manner unbecoming of a Bank Officer. The aforesaid charge clearly related to the manner in which the appellant performed the duties as the Manager of the Branch of the Bank. It had nothing to do with any criminal liability attaching to such conduct. Bank officials act as trustees of funds deposited by the public with the Bank. They have an obligation to earn the trust and confidence of not only the account holders but also the general public. The standard of integrity required of the Bank officials, particularly the cashiers, accountants, auditors and the Management at all levels, is like the Caesar's wife, they must be above suspicion. The appellant failed to maintain such high standards of integrity. He therefore, acted in violation of Rule 50(4) of the 1992 Rules. [Para 45] [122-D-H; 123-A]

1.3. The conduct of the criminal trial was in the hands of the prosecuting agency. Having registered the First Information Report, the Bank had little or no role to play, apart from rendering assistance to the prosecuting agencies. The failure of the prosecution in producing the necessary evidence before the trial court cannot have any adverse impact on the evidentiary value of the material produced by the Bank before the Inquiry Officer in the departmental proceedings. Before the Inquiry Officer, the Bank had placed on the record all the relevant documents which clearly establish that the appellant had exceeded his discretionary powers in purchasing the cheques and issuing demand drafts to show undue favour to the three construction companies named in the charge sheet. In view of the above, the findings recorded by the Inquiry Officer cannot be said

to be based on no evidence. It is a settled proposition of law that the findings of Inquiry Officer cannot be nullified so long as there is some relevant evidence in support of the conclusions recorded by the Inquiry Officer. In the present case, all the relevant documents were produced in the Inquiry to establish the charges levelled against the appellant. It is a matter of record that the appellant did not doubt the authenticity of the documents produced by the Bank. He merely stated that the signature on the documents were not his. The aforesaid statement of the appellant was nullified by PW7, who appeared as a witness for the Bank. He clearly stated that he recognized the signature of the appellant as he had been working as his subordinate. In the circumstances of the case, the appellant cannot take any advantage of the findings of innocence recorded by the criminal court. The 'clean chit' given by the Magistrate was influenced by the failure of the prosecution to lead the necessary evidence. No advantage of the same can be taken by the appellant in the departmental proceedings. [Paras 46, 47] [123-B-H; 124-A-B]

1.4. Also it cannot be said that the order by the Disciplinary Authority was vitiated by non-application of mind. The Disciplinary Authority was alive to all the submissions made by the appellant and had taken into consideration all the relevant material and only then concluded that the charges have been duly proved against the appellant. Furthermore, it is a matter of record that the appellant was duly supplied a copy of the Inquiry Report and he had submitted detailed objections to the same. These objections were placed before the Disciplinary Authority together with the Inquiry Report. Therefore, the appellant cannot possibly claim that there has been a breach of rule of natural justice. Similarly, the Appellate Authority has also given cogent reasons in support of its conclusion. This is also apparent from the

extract of the order of the Appellate Authority. [Paras 48, 49] [124-A-F]

G.M. Tank vs. State of Gujarat & Ors. **(2006) 5 SCC 446: 2006 (2) Suppl. SCR 253;** *Union of India & Ors. vs. Naman Singh Shekhawat* **(2008) 4 SCC 1: 2008 (5) SCR 137 and** *Pritam Singh & Anr. vs. State of Punjab* **AIR 1956 SC 415 – distinguished.**

Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia & Ors. **(2005) 7 SCC 764: 2005 (3) Suppl. SCR 314 and** *Depot Manager, A.P. State Road Transport Corporation vs. Mohd. Yousuf Miya & Ors.* **(1997) 2 SCC 699: 1996 (8) Suppl. SCR 941 – held applicable.**

Divisional Controller, Karnataka State Road Transport Corporation vs. M.G.Vittal Rao. **(2012) 1 SCC 442: 2011 (14) SCR 1089 – relied on.**

Roop Singh Negi vs. Punjab National Bank & Ors. **(2009) 2 SCC 570: 2008 (17) SCR 1476;** *Calcutta Dock Labour Board & Ors. vs. Jaffar Imam* **1965 3 SCR 453;** *Subhash Chand vs. State of Rajasthan* **(2002) 1 SCC 702: 2001 (4) Suppl. SCR 163;** *Omar Salay Mohd Sait vs. Commissioner of Income Tax, Madras* **AIR 1959 SC 1238;** *Union of India vs. H.C. Goel* **AIR 1964 SC 364: 1964 SCR 718;** *Narinder Mohan Arya vs. United India Insurance Co. Ltd. & Ors.* **(2006) 4 SCC 713: 2006 (3) SCR 932;** *Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. & Anr.* **(1999) 3 SCC 679: 1999 (2) SCR 257 and** *Sawai Singh vs. State of Rajasthan* **(1986) 3 SCC 454: 1986 (2) SCR 957 – referred to.**

Case Law Reference:

2008 (17) SCR 1476	**referred to**	**Para 29,34**
1965 3 SCR 453	**referred to**	**Para 29, 35**
2001 (4) Suppl. SCR 163	**referred to**	**Para 29, 36**

AIR 1959 SC 1238	**referred to**	**Para 29, 37**
1964 SCR 718	**referred to**	**Para 29**
2006 (3) SCR 932	**referred to**	**Para 29**
2006 (2) Suppl. SCR 253	**distinguished**	**Para 29,39**
2008 (5) SCR 137	**distinguished**	**Para 29**
1999 (2) SCR 257	**referred to**	**Para 29**
1986 (2) SCR 957	**referred to**	**Para 29**
AIR 1956 SC 415	**distinguished**	**Para 29**
2011 (14) SCR 1089	**relied on**	**Para 30**
2006 (3) SCR 932	**referred to**	**Para 38**
2005 (3) Suppl. SCR 314	**held applicable**	**Para 39**
1996 (8) Suppl. SCR 941	**held applicable**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7005 of 2012.

From the Judgment & Order dated 30.03.2005 of the High Court of Judicature at Bombay in Writ Petition No. 8606 of 2004.

Sushil Kumar Jain, Dr. M. Shah Alam Khan, Sarad Kumar Singhania for the Appellant.

Rakesh Dwivedi, Sanjay Kapur, Ashmi Mohan, Priyanka Das, Anmol Chandan for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 30th March, 2005 passed in the Writ

Petition No. 8606 of 2004 by the High Court of Bombay, by which the writ petition against the order of dismissal of the petitioner from service dated 19th July, 2003 and the order passed by the Appellate Authority on 27th July, 2004 affirming the said order of the dismissal was dismissed in limine.

3. Before adverting to the facts leading to the filing of the present appeal, we must notice that the petitioner Mr. Avinash Sadashiv Bhosale died during the pendency of this appeal. His legal heirs have been brought on record, in his place. However, for the sake of convenience, he shall be referred to as Mr. Bhosale or as the appellant whichever is appropriate.

4. It appears that Mr. Bhosale joined the services of respondent No.2 Bank as a Probationary Officer on 31st July, 1975. He was confirmed as an Officer in Junior Management Grade Scale–I on 31st July, 1977. In course of time, he was promoted to Middle Management Scale-II (August, 1984). Thereafter, he was further promoted as Officer in Middle Management Scale–III in August, 1994. In course of time, he was posted as the Branch Manager at Washi Turbhe branch on 31st January, 1998 and was officiating in the Senior Management Scale-IV.

5. Whilst he was working at Washi Turbhe branch, it was discovered that the branch had indulged in fraudulent transactions to the tune of Rs. 12 crores. On 8th July, 1998, the appellant was relieved from the branch of the aforesaid bank, presumably due to his alleged involvement in the said transactions. On 16th July, 1998, he apparently reported the fraud to the Crime Branch, CBD, Belapur, Navi Mumbai. The A.G.M. in charge of the Region IV, State Bank of India, Zonal Office, Mumbai was also informed. In the complaint made to the police, he had requested that the culprits who are involved in the fraud be identified. He had also asked the police to initiate suitable action against the culprits in accordance with law.

6. It is claimed by Mr. Bhosale that instead of taking action on the complaint submitted by him, the A.G.M. on 22nd July, 1998 wrote to the police indicating that the appellant had no locus standi to file the complaint. It was stated that Mr. Bhosale "is not an authorised person to lodge a complaint on behalf of the Bank, since he himself is involved in the alleged offence in the above matter." As noticed earlier, the appellant was relieved from the Branch on 8th July, 1998. He had protested that he had an excellent and unblemished service record in the Bank for the past 23 years. He maintained that he was entirely innocent and did not commit any breach of the service regulations of the bank. He pointed out that he proceeded on leave on account of sickness on 26th March 1998 and also that he was mostly either on leave or on some outdoor assignment duties during the period immediately preceding the detection of the said fraudulent transactions. Further, it has been claimed that certain officials in the Bank in connivance with each other committed fraud by purchasing cheques without his knowledge.

7. The appellant was suspended from service on 23rd July, 1998 alongwith one Mr. Yadneshwar Choudhary. However, the latter was soon reinstated in service as he was not made a co-accused in the criminal proceedings initiated against Mr. Bhosale and three other co-accused.

8. It appears that after completion of investigation by the police, the appellant was prosecuted for having committed the offences punishable under Sections 120(B), 420, 467, 468, 471 and 201 of Indian Penal Code alongwith three others who were the account holders. By judgment dated 4th December, 2001, Mr. Bhosale and the other co-accused were acquitted of all the charges.

9. Simultaneously to the criminal proceedings, the respondent bank had initiated departmental proceedings against Mr. Bhosale. He was served a charge sheet dated 14th January, 2000 containing articles of charge and statement of imputation of misconduct in terms of Rule 68(2)(iii) of the State

Bank of India Officers Service Rules, 1992 (hereinafter referred to as the "1992 Rules"). In the aforesaid charge sheet certain specific and serious allegations have been made against Mr. Bhosale. The statement of imputation alleges that after his transfer at Washi Turbhe Branch on 31st January, 1998 from Rabala Trans Thane Creek Branch, he permitted M/s Kalgindar Construction Company Pvt. Ltd. to open a current account at Washi Turbhe Branch without completing the required formalities. Further, the account was allegedly opened with a view to accommodate the said construction company at a later date by executing the fictitious Demand Draft (D.D.) purchase transactions. The statement of imputation thereafter tabulates the departure from established norms which are to be observed by the Bank for DD purchase. It is alleged that Mr. Bhosale indiscriminately and without any justification authorised D.D. purchase of 11 cheques aggregating to Rs.5,51,51,070/- drawn in favour of M/s Kalgindar Construction Company Pvt. Ltd. and presented by it for credit of proceeds thereof to its Current Account. All the cheques so discounted except one for Rs.5 lacs were beyond the discretionary powers vested in Mr. Bhosale. While allowing D.D. purchases, no D.D. purchase limit was fixed for the said construction company, nor was the genuineness of the transactions or credentials of the parties ascertained by Mr. Bhosale. All the D.D. purchase transactions in question were also not reported to the Controllers. The high value cheques were allowed to be handed over to the representative of the said construction Company, instead of dispatching them to the Bank's branch located at the centre by Regd. A.D. Post. This deliberate action of Mr. Bhosale facilitated the said construction company to perpetrate a fraud on the Bank as the said cheques did not reach the drawee Banks.

10. Charge No.2 narrates a similar incident where Mr. Bhosale allowed M/s. Kumar Constructions Company, a proprietory firm, to open a current account on 15th June, 1998 without making enquiries of antecedents of the proprietor and

completing the other required formalities with a malafide intention to accommodate the aforesaid company at a later date by allowing fictitious D.D. purchase of cheques. Thereafter, the actual details of the D.D. purchase are tabulated.

11. The third Charge in the list of allegation relates to M/s. Kalani Builders and Developers Pvt. Ltd., dealing in construction business. The aforesaid company submitted a proposal prepared by a Chartered Accountant for being extended credit facilities. Based on the aforesaid proposal, Mr. Bhosale sanctioned cash credit limit of Rs.20 lacs (fund based) and Rs.20 lacs (non-fund based). All this was done by him without making independent enquiries, carrying out pre-sanction survey, arranging visits by the field officer or by himself, properly scrutinizing and appraising the proposal, compiling an opinion report on the borrowers and the guarantors and obtaining recommendations of the field officer. Mr. Bhosale, within a period of one month from the date of sanction of cash credit limit on 1st June, 1998 permitted D.D. purchase of a high value cheque for Rs.31,00,980/-, which was beyond his discretionary powers. He had not ascertained the genuineness of the large value D.D. purchase transaction nor made enquiries about the credentials of the drawer of the cheque. He also allowed cash withdrawals of Rs.30 lacs. Further, he directed the Dispatch Clerk to hand over the said purchased cheque to the representative of the said company for dispatching it to the drawee Bank instead of dispatching it by Regd. A.D. Post. Charge No. 3(iii) alleges that on 9th May, 1998, Mr. Bhosale issued a Letter of Credit for Rs.19,87,000/- on behalf of M/s. Kalani Builders Pvt. Ltd., without proper scrutiny/assessment of the required particulars. Even the counter guarantee was not obtained, nor was it ensured that obligations of the said company would be met on due date. Due to his reckless financing and allowing D.D. purchase to M/s. Kalani Builders and Developers Pvt. Ltd., the Bank suffered a huge financial loss to the extent of Rs.70 lacs. He wanted to conceal the facts

of his irregular financing and, therefore, he did not obtain prior sanction of the Controllers or reported for post facto confirmation of the Controllers.

12. Charge No.4 alleges that Mr. Bhosale indiscriminately sanctioned loan aggregating to Rs.56.43 lacs to 19 borrowers under "Big Buy Scheme for purchase of vehicles during 30th April, 1998 to 1st June, 1998." In these transactions, quantum of loans was to be related to the income of the borrowers. However, this basic factor was totally neglected.

13. Charge No. 5 points to the expenditure of Rs. 4.35 lacs incurred by Mr. Bhosale during the period from March, 1998 to June, 1998 for carrying out repairs to Bank's Property and providing furniture at the Branch. This was done without inviting any competitive quotations and without seeking approval from the Controlling Authority.

14. Charge No.6 relates to 86 bills of stationery items amounting to Rs.1.16 lacs. Here again, the expenditure was incurred without seeking sanction from the Controlling Authority. On the basis of the aforesaid allegations, it was held that Mr. Bhosale failed to discharge his duty with utmost integrity, honesty, devotion and diligence to ensure and protect the interest of the Bank and acted in a manner in violation of Rule 50(4) of the 1992 Rules.

15. Thereafter, the enquiry proceedings were initiated against Mr. Bhosale. Mr. P.P. Thomas, Officer, Senior Management Grade Scale-V was appointed as the Inquiry Officer on 30th June, 2000. The preliminary hearings of the inquiry were scheduled to be held on 7th September, 2001 and 25th September, 2001, none of which were attended by Mr. Bhosale, despite being reminded in advance by the Inquiry Officer. Consequently, the preliminary hearing proceedings were held ex-parte. The regular hearing of the inquiry was scheduled for 17th January, 2002. Again, Mr. Bhosale expressed his inability to attend the same on account of

sickness. The hearing of the inquiry was, therefore, postponed to 18th March, 2002, whereupon the regular hearing was conducted by the Inquiry Officer, in the presence of the presenting officer Mr. D.R. Bapat and Mr. Bhosale. The entire evidence, including the statement of Mr. Suresh Mahadeva Mahale was recorded in the presence of Mr. Bhosale. Mr. Mahale was working as a dispatcher at Washi Turbhe Branch during the period when the irregularities were committed thereat. Further, both Mr. Bhosale and the presenting officer were directed to submit their respective written briefs. Consequently, the presenting officer submitted a brief on 8th April, 2002, whereas Mr. Bhosale submitted his brief on 6th June, 2002.

16. Finally, the Inquiry Officer submitted his report on 19th August, 2002, whereby it was held that all the charges have been proved against Mr. Bhosale. A copy of the Inquiry Officer's report was made available to Mr. Bhosale for his submissions. It appears from the record that Mr. Bhosale had submitted a detailed defence to the findings of the Inquiry Officer. Ultimately, the Disciplinary Authority in its Order dated 19th July 2003 rejected all the pleas raised in defence by the appellant. Upon careful examination of the entire material on record, the disciplinary authority passed the following effective order:-

> "The C.O. has also contended that the I.A. has not taken into consideration the acquittal of the C.O. in the criminal case as a sufficient and judicial proof of there being no misconduct on his part. He has further stated that the I.A. has not considered the fact finding reports compiled by the Bank officials S/S. Vasant Karve and Mukand Joshi, which have not implicated the C.O. for the lapses mentioned in the charge sheet served on him.
>
> The Court has acquitted the C.O. of offences punishable under Indian Penal Code, whereas the departmental action is for his misconduct in terms of Rules 66 of the SBIOSR.

> The above submissions have no relevance to the allegations inasmuch as the allegations levelled against the C.O. have been inquired by the I.A. in the departmental enquiry as per the procedures adopted / in-vogue in departmental enquiry. Reasonable opportunity was given to the C.O. to put up his defence before the I.A. After evaluating the evidence brought before the inquiry, the I.A. has held the allegations as proved.
>
> On a careful examination and consideration, the submissions of the C.O. are found to be not convincing and hence not acceptable. I, therefore, considering the case in its entirety in my capacity as the Disciplinary and Appointing Authority, hold all the allegations and the charge as a whole as "Proved" on sufficient and acceptable evidence. The proven allegations are very serious in nature which have exposed the Bank to substantial financial loss. The proven misconduct evidently speaks of lack of honesty and integrity on the part of the Charged Officer. Considering all the facts and circumstances of the case, I am of the view that retaining the officer in the Bank's Service is fraught with grave risks. I, therefore, consider that imposition of penalty of "Dismissal" under rule 67(j) of the State Bank of India Officers Service Rules on Shri A. S. Bhosale, Officer, MMGS III (under suspension), would meet the ends of justice, treating the period of suspension undergone by the official, as such. I order accordingly.
>
> The C.O. may, if he so desires, prefer an appeal against this order to the Appellate Authority within 45 days from the date of receipt thereof in terms of Rule 69(1) and (2) ibid."

17. Against the aforesaid order of dismissal, Mr. Bhosale preferred a statutory appeal on 19th August, 2003 under the 1992 Rules. Upon consideration of the submissions made by Mr. Bhosale in the appeal by Order dated 27th February, 2004, the Appellate Authority (Chief General Manager) dismissed the

same. The relevant observations made by the Appellate Authority are as under:-

"I have examined the entire records of the case and on the basis thereof observe as under, seriatim:

(i) The contentions of the appellant are without basis. The entire inquiry process has been correctly followed and fair opportunity has been provided to the appellant to defend himself.

(ii) The Inquiry Authority in his report has unequivocally stated that the preliminary hearing, which was to be held on 17th August, 2001 was postponed to the 7th September, 2001, due to the charged official's absence. Later the hearing scheduled for 7th September, 2001 was also postponed to 25th September, 2001, for the same reasons. The appellant's submission that the Inquiring Authority was biased therefore has no basis.

(iii) The appellant's contention seems to be an after thought since in the Regular hearing on the 18th March, 2002, the appellant did not raise objections on this count. Moreover, during the hearing, the appellant confirmed having received these documents (presenting Officer's exhibits).

(iv) It is apparent from the inquiry proceedings that the defence was provided a fair opportunity to defend itself. The appellant's attempt to cry foul at this juncture is therefore not valid.

(v) This argument of the appellant does not have any basis. The charge sheet had clearly outlined these details.

(vi) The process followed in a departmental inquiry is

distinctly different from that followed in a proceedings before the court. The appellant's contention is therefore not acceptable.

(vii) The appellant cannot disclaim responsibility on this count. As the head of the Branch, he should have ensured that the Bank's instruction relating to dispatch of instruments (DD Purchased) should have been meticulously followed. Moreover, PW-1 (the dispatch clerk) has confirmed in the proceedings held on 18th March, 2002 that the covers containing the instruments were delivered at the behest of the appellant.

(viii) The Inquiring Authority's conclusion that the initials on the Demand Liability Register were those of the appellant is supported by reasoned logic. The Inquiring Authority has lucidly portrayed as to how he reached such a conclusion.

(ix) a) <u>Allegation 1 (i) & (ii) :</u>

The appellant cannot disown the fact that cheques were purchased for large amounts. He further cannot disassociate himself by stating that other officers permitted the withdrawals in the account. Moreover, the officials who permitted these withdrawals had done so, on the basis of the credit balance available in the account(s).

(b) <u>Allegation 1(iii) :</u>

In addition to stating that the cheques were delivered to the beneficiary at the instructions of Shri Balkawade, the witness had affirmed that these were also delivered at the behest of the appellant. His contention that the prosecution did not introduce key witness is irrelevant.

(c) Allegation 1(iv) :

The submission of the appellant has no basis.

(d) Allegation 2(i) and (ii) :

It has been proved in the inquiry that DD Purchases were authorised by the appellant. His attempt to pass the responsibility to officials who passed the withdrawals in the account is not appreciated. Further, it is a fact that tee account was not properly introduced.

(e) Allegation2(iii), (iv) and (v) :

The appellant is merely trying to raise vague issues. As already stated earlier, the Inquiry Authority has very aptly concluded that the initials in the Demand Liability Register were that of the appellant.

(f) Allegation 3 :

By merely stating that the documents were in the custody of the Field Officer, the appellant cannot disclaim responsibility. It was also open to the appellant to produce the field Officer as a defence witness.

(g) Allegation 4:

The allegation have been proved based on the documentary evidence produced by the Presenting Officer in the course of the inquiry proceeding. The appellant has during the regular hearing held on 18th March, 2002 confirmed having verified the documents. His contention that no document was produced in the inquiry is therefore incorrect.

(h) Allegation 5 :

The allegation has been proved based on documentary evidence. Splitting of Bills has been proved from the fact that 111 bills were paid in respect of 7 items of expenditure.

(i) Allegation 6 :

The allegation was proved based on documentary evidence. From the evidence brought out in the inquiry it is apparent that the appellant split bills pertaining to stationery items, in order to ensure that the amount of the split bills falls within his discretionary powers.

(x) Although there has been some delay in the issuance of the charge sheet, the appellant's claim that it had amounted to denial of opportunity to establish his innocence is not maintainable.

(xi) The Honourable Court had acquitted the appellant on the subject matter of criminal conspiracy. The appellant cannot draw a parallel between the findings of the departmental proceedings and the Court's verdict.

Having so considered the various points brought out in the appeal, I am of the view that the appellant has not been able to put forth any convincing point of merit. The appellant has committed serious and grave irregularities. There is therefore no scope for modification of the penalty imposed on him. I therefore reject the appeal and order accordingly."

18. Mr. Bhosale challenged the orders passed by the Disciplinary Authority as well as the Appellate Authority by filing Writ Petition No. 8606 of 2004 in the High Court of Judicature at Bombay by Order dated 30th March, 2005. The writ petition was dismissed by a Division Bench of the Bombay High Court

in limine. The aforesaid Order of the High Court is challenged by Mr. Bhosale in this appeal.

19. We have heard the learned counsel for the parties at length.

20. Mr. Sushil Kumar Jain, learned counsel appearing for the appellant submits that the disciplinary proceedings conducted against Mr. Bhosale are vitiated as he was acquitted by the Criminal Court. All the offences for which Mr. Bhosale was tried, and then acquitted by the criminal court, were founded on the facts which form the basis of the departmental enquiry. It has been emphasized that the departmental proceedings ought to have been stayed during the pendency of the criminal trial. Once the appellant had been acquitted by the trial court in its judgment dated 4th December, 2001, the appellant ought to have been reinstated forthwith.

21. Mr. Jain submits that continuation of departmental proceedings after the appellant was acquitted in the criminal trial is in violation of the principle underlying Article 20(2) of the Constitution of India. He argues that the statement of imputations of misconduct clearly show that the foundational facts on which the criminal charges were based are also the facts forming the basis of the charges levelled against the appellant. The learned counsel made a detailed and elaborate reference to the findings recorded by the learned Magistrate, in support of the submissions that there was clearly no evidence against the appellant on the basis of which the charges could be said to have been proved.

22. He pointed out that the learned trial court after considering the entire evidence on record has held and observed as under :-

> "18……If at all any foul play was played at the time of purchasing the cheques, persons like witness no.12 Yadneshwar Choudhary and others were responsible for

> it who were passing the cheques and putting their signatures. Instead of prosecuting such persons, prosecution has made them witnesses. In this way, when these persons are themselves at fault in the episode, naturally they will try to save their own skin when entered in the witness box therefore their evidence carries least evidentiary value.
>
> 23……..Sufficient evidence has come on record that during the period of transactions effected in between accused Nos.1, 3 and 4 with the aggrieved bank, all these bank officers were working in the bank and were taking active participation. If really any guilt is committed why all these persons are left at liberty by the prosecution and how they can be believed in the court. It has come on record that P.W. No.12 Yadneshwar Choudhary is suspended from his service only because of this case. Neither the Bank Officers nor the police is coming forward to make such a person accused in the case.
>
> 28……..Mr. Bhave is very specific in stating that if the despatch clerk fails to follow this practice, he is personally liable for the breach. Admittedly, the accused No.2 never issued any direction in writing to the despatch clerk to give the cheques by hand delivery.
>
> 30…….Witness No.7 Suresh Mahadik who is despatch clerk himself is responsible and faulty in discharging his duty.
>
> Witness No.10 Vinayak Kadam, witness No.11 Arun Balakawade, witness No.12 Yadneshwar Choudhary are all employees of the same bank where the incident has taken place. Not only this, but they actively participated in the transaction in question. Therefore to save their own skin, they may blame the Branch Manager. As such their evidence cannot be believed."

23. Relying on the aforesaid observations, Mr. Jain submitted that the entire departmental proceedings are vitiated as the appellant has been made scapegoat for the misconduct committed by other employees of the bank who were acting in connivance with each other. According to Mr. Jain, the fraud could not have been committed unless there was connivance at every level from the Clerk to the Deputy Manager. It is for this reason that Yadneshwar Chaudhary was reinstated in service and then used as a witness against the appellant. Mr. Jain emphasised that inspite of efforts made by the respondent-Bank the learned Judicial Magistrate had clearly held that there is no evidence of criminal conspiracy against the appellant. Hence, he was acquitted of the offences punishable under Section 120-B IPC with the following observations :-

> "In the result, I come to a firm conclusion that the accused are entitled to get clean chit in the matter".

24. Mr. Jain also pointed out to certain other observations made by the learned Magistrate to demonstrate that the enquiry proceedings are vitiated by legal mala-fides as the same were initiated and conducted against the appellant with the oblique purpose of shielding the real culprits. He points out to the observations made by the trial court to demonstrate that there was no breach of the service regulations. It is pointed out by the learned trial court that the bank had failed to place on record any rule which would show that the appellant was empowered to purchase a cheque only to the extent of Rs.6 lacs. The trial court further pointed out that the bank had also not placed on record any document or resolution to prove that there was a limit of Rs.6 lacs for purchase of cheques by the appellant. The trial court further observed that:-

> "If there was really any such rule then how all the bank officers actively participated in the process of purchasing cheques against or contrary to such so-called rule. Even the bank officers who have stepped in the witness Box did not feel shy to state that they are not fully conversant with banking rules."

25. The learned trial court also adverted to the evidence of Witness No.16 as follows :-

> "**20.** Witness No.16 Vinay Bhave who is Senior Officer of the bank working as a Regional Manager. He also in his examination-in-chief itself stated that he used to receive weekly reports of all the branches on every Friday including the branch in question, and he used to scrutinize the reports. If this gentleman was scrutinizing the reports on every Friday, how and why he kept mum when the cheques of more than Rupees 6,00,000/- were purchased in the concerned bank. This witness has tried to shift responsibility upon another bank officer named Shri Karve."

26. The learned trial court further pointed out that the Bank rules were not known even to the other Senior Officers. Mr. Jain has made a reference to the observations made by the learned trial court whilst considering the evidence of PW-11, Arun Balkawade, who was a Senior Officer of the bank. In fact, he was next in the designation to the Chief Manager of Washi Turbhe branch at the material time. Even this witness admitted that he does not know fully all the rules and regulations regarding D.D. purchase of cheques. Learned trial court also concluded that since the other bank employee had actively participated in the fraudulent transactions, their statements could not be relied upon. Summing up the entire evidence, learned trial court had come to a firm conclusion that the accused are entitled to get "clean chit" in the matter. Relying on the aforesaid observations, Mr. Jain submitted that the acquittal of the appellant is proof of the total inability of the bank to produce any evidence in the trial. The appellant was acquitted as there was no evidence of culpability against him.

27. Relying on a number of judgments of this Court, Mr.

Jain has submitted that the submissions made by the appellant before the Disciplinary Authority have been totally ignored without any basis. According to Mr. Jain, the Departmental Enquiry conducted against the appellant was an eye wash. In the Departmental Enquiry, the bank examined only one witness PW-7, Suresh Mahadik, who has been disbelieved by the criminal court. Such a witness who has been proved to be not truthful could not have been relied upon, in the departmental enquiry. He points out that the criminal court recorded a categorical finding that there is no evidence to connect any particular officer with the non-completion of the proper documentation. In the face of such a finding, the Inquiry Officer, without any basis recorded the finding that the charge was proved against the appellant. Similarly, the evidence of Suresh Mahadik having been ignored by the learned trial court, no reliance could have been placed on the same by the Inquiry officer. Mr. Jain further pointed out that in the departmental enquiry, the bank had failed to produce any document or evidence by leading oral evidence. All the documents were merely placed on record by an employee of the bank. Mr. Jain further pointed out that the bias of the inquiry officer as well as the bank is obvious from the fact that all the employees involved in the completion of the transactions were neither prosecuted nor proceeded against departmentally. On the other hand, these individuals have been examined as prosecution witnesses. Having been acquitted, there was no justification for the bank to hold a departmental enquiry on the same facts and on the basis of same evidence.

28. Mr. Jain then submitted that the order passed by the appellate authority is vitiated as it has been passed with a closed mind. None of the submissions made by the appellant in the written submissions have been considered by the appellate authority. Further more, the submissions which have been considered have not been considered on the basis of the relevant material which was placed before the appellate authority.

29. In support of these submissions, Mr. Jain relied on some judgments of this Court which are as follows:-

Roop Singh Negi Vs. Punjab National Bank & Ors.[1], *Calcutta Dock Labour Board & Ors. Vs. Jaffar Imam*[2], *Subhash Chand Vs. State of Rajasthan*[3], *Omar Salay Mohd Sait Vs. Commissioner of Income Tax, Madras*[4], *Union of India Vs. H.C. Goel*[5], *Narinder Mohan Arya Vs. United India Insurance Co. Ltd. & Ors.*[6], *G.M. Tank Vs. State of Gujarat & Ors.*[7], *Union of India & Ors. Vs. Naman Singh Shekhawat*,[8] *Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Anr.*[9], *Sawai Singh Vs. State of Rajasthan*[10], and *Pritam Singh & Anr. Vs. State of Punjab*[11].

30. Mr. Rakesh Dwivedi, learned senior counsel appearing for respondent Nos. 2 to 5 has submitted that acquittal in a criminal case is not a bar for holding departmental proceedings against the bank official. Learned counsel pointed out that the proceedings before the criminal trial are different in nature to the proceedings in a Departmental Enquiry. Whereas prosecution had to prove the guilt of the accused in the criminal trial beyond reasonable doubt, in the departmental enquiry, the standard of proof is only preponderance of probabilities. Mr. Dwivedi further submitted that the appellant cannot take any advantage of non-production of the relevant evidence by the

1. (2009) 2 SCC 570.
2. 1965 2 SCR 453.
3. (2002) 1 SCC 702.
4. AIR 1959 SC 1238.
5. AIR 1964 SC 364.
6. (2006) 4 SCC 713.
7. (2006) 5 SCC 446.
8. (2008) 4 SCC 1.
9. (1999) 3 SCC 679.
10. (1986) 3 SCC 454.
11. AIR 1956 SC 415.

prosecution in the trial. The lapse committed by the prosecuting agency cannot be attributed to the bank. Further more, in the prosecution, the emphasis was on the involvement of individuals in a criminal conspiracy to defraud the bank. In the departmental proceedings, charges levelled against the appellant are that he has failed to maintain absolute devotion to duty. The charges were that he had disregarded the provisions of the bank regulations. Therefore, two proceedings cannot be placed in the same category. Mr. Dwivedi pointed out that, at the relevant time, the hierarchy in the Branch put the Branch Manager at the top. Below him were the Field Officer, Accountant, Cashier, Dispatch Clerk and a Peon. As a Branch Manager, the appellant was the controller of all the affairs of the branch. He had to ensure that all necessary precautions had been taken to prevent any loss being caused to the bank. The learned senior counsel pointed out that the appellant was in-charge of a small branch. Therefore, had he exercised due care and caution, such a massive fraud could not have taken place. Therefore, there was no overlap between the criminal proceedings and the departmental proceedings. In the criminal trial, the prosecution had to prove that the appellant was guilty beyond reasonable doubt that he had conspired with the other officials of the Bank to commit the offences with which he had been charged. In the departmental proceedings, the enquiry was to investigate as to whether the appellant had performed his duties as a Branch Manager in strict adherence to the procedural rules/regulations of the Bank. He, therefore, refutes the submission of Mr. Jain that there is any infringement of any principle underlying Article 20(2) of the Constitution of India. In support of his submissions, Mr. Rakesh Dwivedi relied on the judgment of this Court in *Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G.Vittal Rao*[12]*.*

31.Answering the objections raised by Mr. Jain with regard to the conduct of the departmental enquiry, Mr. Dwivedi

12. (2012) 1 SCC 442.

pointed out that all documents were duly produced and proved during the enquiry proceedings. The prosecution had failed to produce the relevant documents during the criminal trial. During the Departmental Enquiry, the appellant was asked to verify about the authenticity of the documents. At no stage, the appellant complained about their lack of authenticity. The appellant only made one statement during the departmental enquiry that his initials for purchase of the demand drafts had not been proved. Mr. Dwivedi pointed out to the procedural lapses committed by the appellant. The authenticity of the documents produced in the enquiry not having been doubted by the appellant, the findings of the Inquiry Officer can not be said to be based on no evidence. The appellant was aware that his limit for purchase of a cheque was Rs.6 lacs. Any purchase above Rs.6 lacs could only be done with the prior approval of the higher authorities. The appellant failed to take any prior approval from the higher authorities. In fact, the appellant never informed the higher authorities even after the transactions had been completed. Mr. Dwivedi pointed out that the transactions involved were so heavy, the appellant could not have failed to notice the irregularities. This would lead to a clear inference that either the appellant was acting in connivance with the account holders who were benefitted or he was grossly negligent in performance of his duties. Mr. Dwivedi then pointed out that once the appellant knew that the whole fraud has been exposed, he rushed to make a complaint to the police. Since by that time the higher officials had suspicion with regard to the conduct of the appellant, the police was informed not to act upon the complaint made by him. The actions of the appellant were in violation of Rules 48(4), 48(9), 66 and 67.

32. We have considered the submissions made by the learned counsel for the parties. We are not at all impressed by the submissions made by Mr. Jain.

33. We may, however, briefly notice the ratio of the judgments relied upon by the learned counsel.

34. In *Roop Singh Negi's* case (supra), this Court has reiterated the well known principle of law that findings of the Enquiry Officer have to be based on some relevant evidence. It is further re-stated that the orders passed by the disciplinary authority and the appellate authority, must also be supported by relevant reasons. The principles are stated thus :

> "**23.** Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the criminal court on the basis of selfsame evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the enquiry officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the enquiry officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

35. Similarly in *Calcutta Dock Labour Board* (supra) this Court has emphasised the principle that suspicion, however strong, cannot take the place of proof. The observations are as under:-

> "We are, therefore, satisfied that the Court of Appeal was right in taking the view that in a departmental enquiry which the appellant held against the respondents it was not open to the appellant to act on suspicion, inasmuch as the appellant's decision is clearly based upon the detention

> orders and nothing else, there can be little doubt that, in substance, the said conclusion is based on suspicion and nothing more".

36. In the case of *Subhash Chand* (supra), it is emphasised that in order to avoid any innocent individual being picked up and branded as a culprit, the conclusions ought not to be based on doubtful or dubious circumstances treating them as of "beyond doubt" evidentiary value.

37. Similarly in *Omar Salay Mohd Sait's* case (supra), this Court again emphasised that the conclusions ought to be recorded by the disciplinary authority on the basis of cogent evidence.

38. Mr. Jain then cited *Union of India Vs. H.C. Goel* (supra). Here again, the Constitution Bench of this Court emphasised that the suspicion, however, strong cannot be treated as proof against the accused in a criminal trial or a delinquent officer in domestic enquiry. Mr. Jain also relied upon the judgment in the case of *Narinder Mohan Arya Vs. United India Insurance Co. Ltd. & Ors*[13]. In paragraph 44 of this judgment, it is observed by this Court as under:-

> "The evidence adduced on behalf of the management must have nexus with the charges. The enquiry officer cannot base his findings on mere hypothesis. Mere *ipse dixit* on his part cannot be a substitute of evidence."

39. In *G.M. Tank's* case (supra), this Court was considering the case of an appellant, who had been acquitted by the Criminal Court. He had been prosecuted for having committed the offence under Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947. Upon examination of the facts and the evidence, it was observed by this Court that there is not an iota of evidence against the appellant to hold that he is guilty of having committed the offences under the Prevention

13. (2006) 4 SCC 713.

of Corruption Act. It was further observed that the departmental proceedings in the criminal case are based on identical and similar (verbatim), set of facts and evidence. It is further observed that in fact, respondents did not produce any evidence in support of and/or about the alleged charges involved against the appellant. The criminal proceedings were initiated against the appellant for the offences under the Prevention of Corruption Act *on the same set of facts and evidence*, which was the basis of the departmental proceedings. The Court noticed the observations made in the case of *Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia & Ors.*[14], which were as follows:-

> "**11.** As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is

14. (2005) 7 SCC 764.

> able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability". Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."

The Court further noticed the observations of this Court in *Depot Manager, A.P. State Road Transport Corporation Vs. Mohd. Yousuf Miya & Ors.,*[15] wherein this Court observed as follows:-

> "**8.** ……The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the

15. (1997) 2 SCC 699.

charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public (sic duty), as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. The enquiry in the departmental proceedings relates to the conduct of the delinquent officer and proof in that behalf is not as high as in an offence in criminal charge. It is seen that invariably the departmental enquiry has to be conducted expeditiously so as to effectuate efficiency in public administration and the criminal trial will take its own course. The nature of evidence in criminal trial is entirely different from the departmental proceedings. In the former, prosecution is to prove its case beyond reasonable doubt on the touchstone of human conduct. The standard of proof in the departmental proceedings is not the same as of the criminal trial. The evidence also is different from the standard point of the Evidence Act. The evidence required in the departmental enquiry is not regulated by the Evidence Act. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances. In this case, we have seen that the charge is failure to anticipate the accident and prevention thereof. It has nothing to do with the culpability of the offence under Sections 304-A and 338, IPC. Under these circumstances, the High Court was

not right in staying the proceedings."

Having noticed the aforesaid observations, the Court proceeded to distinguish the same with the following observations:-

> "The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same."

These observations are of no assistance to the appellant as the charges against him in the criminal trial were with regard to the commission of offences under Section 120(B), 420, 467, 468, 471 and 201 of IPC. In the departmental proceedings, the appellant has been punished on the basis of the findings that he failed to discharge his duties with utmost integrity, honesty, devotion and diligence. It was found that he had violated Rule 50(4) of the 1992 Rules. In our opinion, it would be the ratio of law laid down in the cases of *Ajit Kumar Nag* (supra) and *Depot Manager, A.P. State Road Transport Corporation* (supra) that would be applicable in the facts and circumstances of this case.

40. In the case of *Union of India & Ors. Vs. Naman Singh Shekhawat* (supra), on facts, the whole departmental proceedings were held to be vitiated by bias. It was a case where the offences of the disciplinary authority were held to be based on no evidence. It was also a case where no witness

was examined to prove the allegations against the respondent Shekhawat. It was a case in which the only witness examined on behalf of the disciplinary authority was the jeep driver, MS who at the material time was accompanying the respondent. Even this witness did not support the Department's case yet the departmental authorities held the charges against the respondent as proved. Besides, it was also found that the respondent had not been allowed services of a defence assistant of his choice. He was also not allowed to produce defence witness J. In paragraph 27 of the judgment, this Court observed that "the bias on the part of the inquiry officer is explicit from the record. Why the inquiry officer cross-examined the respondent is beyond anybody's comprehension. He was not the prosecutor. A presenting officer had been appointed. The inquiry officer could not have taken over the job of the presenting officer, particularly when he was a superior officer."

In our opinion, there is no parallel in the facts and circumstances of the aforesaid case and the present case.

41. In *Capt M.Paul Anthony's* case (supra), this Court reiterated the well established principle of law that proceedings in a criminal case and the departmental proceedings can proceed simultaneously. It was emphasised that the basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. The observations made in paragraph 13 which are relevant in the facts of this case are as under:-

> "As we shall presently see, there is a consensus of judicial opinion amongst the High Courts whose decisions we do not intend to refer to in this case, and the various pronouncements of this Court, which shall be copiously referred to, on the basic principle that proceedings in a criminal case and the departmental proceedings can proceed simultaneously with a little exception. As we understand, the basis for this proposition is that proceedings in a criminal case and the departmental

> proceedings operate in distinct and different jurisdictional areas. Whereas in the departmental proceedings, where a charge relating to misconduct is being investigated, the factors operating in the mind of the disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent or the other staff, the standard of proof required in those proceedings is also different than that required in a criminal case. While in the departmental proceedings the standard of proof is one of preponderance of the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. The little exception may be where the departmental proceedings and the criminal case are based on the same set of facts and the evidence in both the proceedings is common without there being a variance."

In our opinion, the facts of this case do not fall within the little exception culled out by this Court. The departmental proceedings herein and the criminal case are not grounded upon the same set of facts and the evidence. As noticed by the disciplinary authority as well as the appellate authority, the departmental proceedings related to honesty, integrity and devotion of the appellant as a very high ranking bank officer. On the basis of the evidence led before the enquiry officer, it was held that the appellant had failed to maintain the utmost integrity which is required for a bank officer.

42. The judgment in *Sawai Singh's* case (supra) examined three main submissions made by the counsel for the appellant, namely (i) the charges were not clear (ii) there was no evidence to support the charges and on the contrary (iii) the evidence on record was contrary to the charges made. Upon examination of the evidence, it was held that there was a total absence of any cogent and reliable evidence against the appellant. It was, therefore, held that the findings of the enquiry officer are based on no evidence. It was also found that the charges levelled

against the appellant were vague making it impossible for him to answer the same. In Paragraph 14, this Court observed as follows :

> "14. Quite apart from that fact, it appears to us that the charges were vague and it was difficult to meet the charges fairly by any accused. Evidence adduced was perfunctory and did not at all bring home the guilt of the accused."

In paragraph 16, this court further emphasised that the charges must be proved against the charge-sheeted employee in accordance with rules of natural justice. The report of the inquiry officer must demonstrate that there had been fair play in action. This is a settled principle of law which has been duly respected by the inquiry officer, the disciplinary authority as well as the appellate authority in this case.

43. The judgment in *Pritam Singh's* case (supra), in our opinion, has absolutely no relevance to the issues raised by the learned counsel for the appellant.

44. This Court recently reiterated the legal principle that departmental proceedings can be conducted simultaneously to the criminal trial in the case of *Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G.Vittal Rao* (supra). In this case, making reference to almost all the previous precedents, this Court has reiterated the legal position as follows:-

(a) There is no legal bar for both proceedings to go on simultaneously.

(b) The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts and law.

(c) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.

(d) Departmental proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common.

In our opinion, the principles culled out by this Court would be a complete answer to all the submissions made by Mr. Jain.

45. In view of the aforesaid legal principles enunciated and reiterated by this Court, we cannot accept that because the appellant had been prosecuted, the departmental proceedings could not have been continued simultaneously. As pointed out by Mr. Dwivedi, the charges against the appellant in the criminal trial related to the commission of criminal offences under Sections 120(B), 420, 467, 468, 471 and 201 of Indian Penal Code. The proof of criminal charges was depended upon prosecution producing proof beyond reasonable doubt relating to the culpability of the appellant alongwith other persons. In the departmental proceedings, the basic charge was that appellant whilst posted as a Branch Manager of Washi Turbhe Branch, failed to discharge his duties with utmost integrity, honesty, devotion and diligence to ensure and protect the interest of the Bank and acted in a manner unbecoming of a Bank Officer. The aforesaid charge clearly related to the manner in which the appellant performed the duties as the Manager of the Branch of the Bank. It had nothing to do with any criminal liability attaching to such conduct. It must be emphasised that Bank officials act as trustees of funds deposited by the public with the Bank. They have an obligation to earn the trust and confidence of not only the account holders but also the general public. The standard of integrity required of the Bank officials,

particularly the cashiers, accountants, auditors and the Management at all levels, is like the Caesar's wife, they must be above suspicion. Mr.Bhosale failed to maintain such high standards of integrity. He therefore, acted in violation of Rule 50(4) of the 1992 Rules. We, therefore, do not find any merit in the aforesaid submissions of Mr. Jain.

46. Mr. Dwivedi, in our opinion, has rightly pointed out that the conduct of the criminal trial was in the hands of the prosecuting agency. Having registered the First Information Report, the Bank had little or no role to play, apart from rendering assistance to the prosecuting agencies. In our opinion, the failure of the prosecution in producing the necessary evidence before the trial court can not have any adverse impact on the evidentiary value of the material produced by the Bank before the Inquiry Officer in the departmental proceedings. Before the Inquiry Officer, the Bank had placed on the record all the relevant documents which clearly establish that the appellant had exceeded his discretionary powers in purchasing the cheques and issuing demand drafts to show undue favour to the three construction companies named in the charge sheet. In view of the above, the findings recorded by the Inquiry Officer can not be said to be based on no evidence. It is a settled proposition of law that the findings of Inquiry Officer cannot be nullified so long as there is some relevant evidence in support of the conclusions recorded by the Inquiry Officer. In the present case, all the relevant documents were produced in the Inquiry to establish the charges levelled against the appellant. It is a matter of record that the appellant did not doubt the authenticity of the documents produced by the Bank. He merely stated that the signature on the documents were not his. The aforesaid statement of the appellant was nullified by Mr. S.M. Mahadik, who appeared as a witness for the Bank. He clearly stated that he recognized the signature of the appellant as he had been working as his subordinate.

47. The findings recorded by the Enquiry Officer cannot be said to be based on no evidence. In such circumstances, the appellant cannot take any advantage of the findings of innocence recorded by the criminal court. The 'clean chit' given by the learned Magistrate was influenced by the failure of the prosecution to lead the necessary evidence. No advantage of the same can be taken by the appellant in the departmental proceedings.

48. We also do not find any merit in the submissions made by Mr. Jain that the order by the Disciplinary Authority is vitiated by non-application of mind. The extracts reproduced above would clearly indicate that the Disciplinary Authority was alive to all the submissions made by the appellant. The Disciplinary Authority had taken into consideration all the relevant material and only then concluded that the charges have been duly proved against the appellant. Furthermore, it is a matter of record that the appellant was duly supplied a copy of the Inquiry Report and he had submitted detailed objections to the same. These objections were placed before the Disciplinary Authority together with the Inquiry Report. Therefore, the appellant can not possibly claim that there has been a breach of rule of natural justice.

49. Similarly, the Appellate Authority has also given cogent reasons in support of its conclusion. This is also apparent from the extract of the order of the Appellate Authority reproduced above.

50. In view of the aforesaid, we find no merit in this appeal and the same is hereby dismissed.

B.B.B. Appeal dismissed.

OM PRAKASH & ORS.

v.

STATE OF JHARKHAND THROUGH THE SECRETARY, DEPARTMENT OF HOME, RANCHI-1 & ANR.

(Criminal Appeal No. 1491 of 2012 etc.)

SEPTEMBER 26, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Code of Criminal Procedure, 1973:

ss. 482 and 197 – Complaint against police officials – Alleging killing in fake encounter – Case of the accused/police officials that encounter was genuine – FIR lodged by a citizen against the miscreants including the deceased for threatening him by firing at his house on the date of the encounter – One of the accused/police officials also filing FIR giving account of the encounter – NHRC in the complainant's complaint, relying on CID inquiry, holding that encounter was genuine – Magistrate taking cognizance of the case against the accused and initiating criminal proceeding – Petition before High Court for quashing criminal proceedings – Petition qua one of the accused (police officer) quashed on the ground of absence of sanction before prosecution – Not quashed in respect of other officials (other than officers) on the ground that they did not produce notification u/s. 197(3) Cr.P.C. to show that they were protected against prosecution – Appeal by the complainant as well as police officials (other than officers) – Held The facts of the case show that it is not a case of false encounter – The police officials were entitled to protection u/s. 197 because the acts complained of are so integrally connected with discharge of their official duty – Notification dated 16.5.1980 issued by State of Bihar extends the protection from prosecution to police personnel other than officers also – The criminal proceedings initiated against the police personnel is quashed.

s. 482 – Power under – Exercise of – Held: The power u/s. 482 to be exercised to prevent abuse of process of court, and not to stifle legitimate prosecution.

s. 197 – Protection against prosecution – Availability – When – Held: The protection is available only when the alleged act done by the public servant is reasonably connected with discharge of his official duty – Acting in excess of his duty will not be a sufficient ground to deprive the public servant of the protection – Unless unimpeachable evidence is on record to establish that the action of the public servant is indefensible, mala fide and vindicative, they cannot be subjected to prosecution.

s. 197 – Protection against prosecution – Ascertainment as to whether sanction u/s. 197 is necessary – Held: Such a question can be ascertained at any stage of proceeding depending on the nature of the case – Ascertainment of the question at the very inception of the case on the basis of the documents produced before the court is not barred.

A dealer in scrap, lodged an FIR on 1.7.2004 stating therein that on that day some miscreants riding on motor cycles fired at his office cum residence, threatening him to yield to their ransom demand and fled away.

The DSP (respondent in Crl. Appeal No. 1492/12) also filed an FIR on 2.7.2004 stating that he received information about the firing incident, the police party set out to arrest the accused. They traced them and asked them to surrender. The miscreants, instead, started firing at the police. When the police retaliated, four of the miscreants were killed.

The appellant in Criminal Appeal No. 1492/12 filed a complaint on 27.7.2004 against the police officials (including the respondents in Criminal Appeal No. 1492/12 and appellants in Criminal Appeal No. 1491/12)

alleging that on 1.7.2004 they killed his son (the deceased) and three others in a fake encounter. The Judicial Magistrate took cognizance of the offence alleged in the complaint and issued process against the accused. The complainant also filed a complaint regarding this case with NHRC, who directed inquiry by CID. The inquiry report concluded that the encounter was genuine. NHRC also accepted the report.

The accused persons filed petition u/s. 482 Cr.P.C. for quashing the criminal proceedings. High Court allowed the petition of the accused-police officer (respondent in Crl.A.No. 1492) on the ground that sanction required u/s. 197 Cr.P. C. was not obtained and the criminal proceedings against him was quashed. High Court dismissed the petition of other police personnel (other than police officer), on the ground that no notification u/s. 197 (3) Cr.P.C. was produced to show that they were protected against prosecution in respect of any offence alleged to have been committed while acting or purporting to act in discharge of their official duties. Hence the present appeals by the complainant as well as police officials.

The complainant contended that his son was killed in a fake encounter which is apparent from the fact that injury was on his chest indicating that firing was done from a close range and that the nails of the deceased were blackened; that the post-mortem was not videographed; that the dead body was not handed over to them; that police diaries did not show movements of the police during the period of encounter; that none of the members of the police party received injuries; that there was no credible private witness; that as the police personnel were guilty of cold-blooded murder, sanction before prosecution u/s. 197 Cr.P.C. was not required; and that the question regarding the false encounter must be considered only on the basis of complaint and the

testimonies, before the charge is framed and the material produced by the court should not be taken into account when there is impeachable evidence against the police officials.

Dismissing the appeal filed by the complainant and allowing the appeal filed by the police officials, the Court

HELD: 1. The reason given by the High Court for not quashing proceedings against appellants police-officials namely that no notification under Section 197(3) Cr.P.C. was produced by them protecting them from prosecution in respect of any offence alleged to have been committed while acting or purporting to act in discharge of their official duties, is incorrect. The Notification dated 16/5/1980 issued by the State of Bihar extends the protection of sub-section (2) of Section 197 Cr.P.C. to all the members of the police force as it includes both officers and men. [Para 8] [139-B-D]

2.1. It is not possible to infer that post-mortem was not videographed because the police wanted to suppress something. The Magistrate conducted the inquest. The CID fully investigated and submitted its report stating that it was a genuine encounter. NHRC was also satisfied with the postmortem. Even this Court having independently examined the relevant documents, like FIRs, postmortem notes, inquest report, seizure memo and extracts of FSL report, is of the view that this is not a case of false encounter. Therefore the case of the complainant that the police are guilty of killing deceased in cold blood in fake encounter, is rejected. [Para 28] [155-C-D]

2.2. The seizure memo, indicates that the criminals had used motor cycles and they were armed with deadly fire-arms. Three of the motor cycles were found at the scene of offence. The fire-arms used by the criminals

were of foreign make. There is no reason to doubt the veracity of this seizure memo because it is difficult for the police to concoct such a scene and plant such weapons. [Para 16] [147-A-B]

2.3. From the two FIRs, it is clear that the criminals riding on the motor cycles armed with deadly fire-arms had attacked the house of businessman, who lodged a complaint. Upon receiving information, the police machinery had swung into action. Dy.S.P. (respondent-accused) left his office along with his team to trace the criminals. They could trace the criminals. They asked the criminals to surrender. The criminals instead of surrendering fired at them. The police had to launch a counter attack to save themselves and also to nab the criminals, which was their legal duty and in this counter attack, four of the criminals received bullet injuries and succumbed to those injuries. The death of four criminals in the firing was preceded by an attack by them on businessman's house and also an attack on the police personnel. There is no doubt that the criminals had set out on a mission to attack the house of the businessman so as to recover ransom. From the weapons found lying at the scene of occurrence, it appears that the criminals had taken to the life of crime and were not novices. The past record of the criminals support this conclusion. [Para 17] [147-C-F]

2.4. NHRC on complaint regarding this case directed CID to conduct an inquiry. CID conducted the inquiry and submitted his report. From the report, it appears that the Inquiry Officer recorded the statement of the brother of the deceased, two independent witnesses who have confirmed that the firing incident did take place. The Inquiry Officer also recorded the statements of witnesses to the seizure memo. The report further states that Magistrate (Law & Order) came to the spot and prepared the inquest report. After considering inquest report,

postmortem report, forensic laboratory report, the statements of independent witnesses, the statement of the businessman whose house was attacked, the statement of the brother of the deceased and the antecedents of the deceased and other attendant circumstances, the report concluded that the encounter was genuine. There is no dispute about the fact that NHRC accepted this report and also came to a conclusion that it was not a case of fake encounter. [Para 21] [151-D, E-F; 152-D-E]

2.5. From the affidavit filed by Dy. S.P. and documents annexed to it, it is clear that on the written request of the complainant's son-in-law, the dead body of the deceased was handed over to him in the presence of brothers of the deceased. The body was finally cremated by members of the family of the deceased. The application made by the brother-in-law of the deceased is counter-signed by the brothers of the deceased. A receipt to that effect was given by him to the police and the same is counter-signed by brother of the deceased. There is on record a declaration made by the relative of the deceased that the deceased was cremated. The declaration is made on the certificate issued by the Ghat. [Para 22] [152-G-H; 153-A-B]

2.6. The police cannot be said to have made an attempt to involve the deceased in a Case of the year 1994. It is not the case of the police that deceased was involved in any case of the year 1994. It is the case of the police that he was not involved in that case. Perhaps, the information was related to some other person or the information was incorrect. [Para 23] [153-F-D-E]

2.7. The plea that no blood stains were found at the site of occurrence when PUCL visited the same, has no merit. There is on record the detailed seizure memo which

speaks about the recovery of blood stained soil. The inquest report, which is reproduced in the report of the CID confirms that the deceased had received bleeding injuries. The PUCL visited the scene of occurrence after four days in rainy season. Therefore, assuming blood stains were not found at the scene of occurrence after four days, that does not disprove the occurrence. [Para 24] [153-H; 154-A]

2.8. It is not correct to say that police movements were not recorded in police diaries. Extracts of police station diary of the police station concerned, show the police movements of the relevant period. [Para 25] [154-C]

2.9. The doctors' statements have been reproduced in the CID report. It is stated by the doctors that there was no blackening or charring suggesting that the deceased were shot at from a close range. The postmortem report also does not show that deceased had received chest injuries. [Para 26] [154-D]

2.10. It is true that the police personnel did not receive any bullet injuries. However, the police vehicle was hit by a bullet. From this, it cannot be said that no such incident had taken place. [Para 26] [154-E]

2.11. It is not correct to say that there are no independent eye-witnesses supporting the version of police. Statements of two witnesses have been recorded under Section 164 Cr.P.C. This is evident from the CID report. [Para 26] [154-F]

2.12. There is a reasonable explanation as regards filing of all the challans in respect of the deceased on the same day. The deceased was wanted in the cases of 2002 and 2003. He was absconding when he died. A report was required to be filed to inform the court that he was

dead. It is the case of the police that in these circumstances three challans were prepared and filed on the same day. These are not challans but final forms. Therefore, it cannot be said that this was done purposely with *mala fide* intention to create record against the deceased. [Para 27] [154-G-H; 155-A]

3.1. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. [Para 29] [155-E]

K. Satwant Singh v. The State of Punjab **1960 (2) SCR 89 – relied on.**

3.2. The protection given under Section 197 Cr.P.C. has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. [Para 29] [155-F-G]

State of Orissa through Kumar Raghvendra Singh and Ors. v. Ganesh Chandra Jew. **(2004) 8 SCC 40: 2004 (3) SCR 504 – relied on.**

3.3. If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 Cr.P.C. because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It cannot be concluded that the protection granted under Section 197 Cr.P.C. is used by

the police personnel in this case as a cloak for killing the deceased in cold blood. [Para 29] [155-G-H; 156-A]

3.4. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This court has repeatedly admonished trigger happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They amount to State sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. Requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, *mala fide* and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. No inference can be drawn in this case that the police action is indefensible or vindictive or that the police were not acting in discharge of their official duty. [Paras 38 and 39] [163-B-G]

4. Whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public

servant was acting in performance of his official duty and is entitled to protection given under Section 197 Cr.P.C. It is not possible to hold that in such a case, the court cannot look into any documents produced by the accused or the concerned public servant at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. [Para 37] [162-E-G]

Matajog Dobey v. H.C. Bhari **(1955) 2 SCR 925 – followed.**

Sankaran Moitra v. Sadhna Das and Anr. **(2006) 4 SCC 584: 2006 (3) SCR 305 – relied on.**

Raj Kishor Roy v. Kamleshwar Pandey and Anr. **(2002) 6 SCC 543;** *Pukhraj v. State of Rajasthan and Anr.* **1974 (1) SCR 559;** *Nagraj v. State of Mysore* **AIR 1964 SC 269: 1964 SCR 671 – distinguished.**

Dr. Hori Ram Singh v. Empower **AIR 1939 FC 43;** *Abdul Wahab Ansari v. State of Bihar and Anr.* **(2000) 8 SCC 500: 2000 (3) Suppl. SCR 747 – referred to.**

5. Though the power under Section 482 Cr.P.C. should be used sparingly and with circumspection to prevent abuse of process of court but not to stifle legitimate prosecution, but, if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of court, the power under Section 482 of the Code must be exercised and proceedings must be quashed. The instant case is one of such cases where the proceedings initiated against the police personnel need to be quashed. [Paras 39] [163-H; 164-A-B]

Zandu Pharmaceutical Works Ltd. and Ors. v. Mohd. Sharaful Haque and Anr. **(2005) 1 SCC 122: 2004 (5) Suppl. SCR 790 – referred to.**

Case Law Reference:

1960 (2) SCR 89	**Relied on**	**Para 29**
2004 (3) SCR 504	**Relied on**	**Para 29**
AIR 1939 FC 43	**Referred to**	**Para 30**
(1955) 2 SCR 925	**Followed**	**Para 31**
(2002) 6 SCC 543	**Distinguished**	**Para 32**
1974 (1) SCR 559	**Distinguished**	**Para 33**
1964 SCR 671	**Distinguished**	**Para 34**
2000 (3) Suppl. SCR 747	**Referred to**	**Para 35**
2006 (3) SCR 305	**Relied on**	**Para 36**
2004 (5) Suppl. SCR 790	**Referred to**	**Para 39**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1491 of 2012.

From the Judgment & Order dated 1.5.2006 of the High Court of Jharkhand at Ranchi in Crl. M.P. No. 822 of 2005.

WITH

Crl. A. No. 1492 of 2012.

K.V. Vishwanathan, Colin Gonsalves, Mukul Rohtagi, Naveen Kumar, Abhishek Kaushik, Tariq Adeeb, Jyoti Mendiratta, Ratan Kumar Choudhuri, Vishwajit Singh, Abhindra Maheshwari, Pankaj Singh, Veera Kual Singh for the Appearing parties.

The Judgment of the Court was delivered by

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

2. In both these appeals, by special leave, judgment and order dated 1/5/2006 delivered by the Jharkhand High Court in Criminal Misc. Petition No.822 of 2005 and Criminal Misc. Petition No.640 of 2005 filed under Section 482 of the Criminal Procedure Code (for short, "the Code") is challenged. Criminal Misc. Petition No.640 of 2005 was filed by Shri Rajiv Ranjan Singh, Deputy Superintendent of Police, (Dy.S.P.) Headquarter(II), Jamshedpur. Criminal Misc. Petition No.822 of 2005 was filed by the police personnel posted at Jamshedpur in different capacities. In the petitions, before the High Court, the prayer was for quashing the criminal proceedings in Complaint Case No.731 of 2004 and order dated 14/06/2005, passed thereon by the Judicial Magistrate First Class, Jamshedpur, taking cognizance of the offences alleged in the complaint.

3. Brief facts of the case need to be stated: Appellant Kailashpati Singh is the complainant. On 23/7/2004, he filed a complaint in the Court of C.J.M, Jamshedpur being Complaint Case\ No.731 of 2004 against (1) Rajiv Ranjan Singh, Dy.S.P.-II, (2) Pradeep Kumar, S.I., (3) Omprakash, S.I., (4) Shyam Bihari Singh, constable and (5) Bharat Shukla, constable. In the complaint, the complainant alleged that his son Amit Pratap Singh @ Munna Singh (for convenience, "deceased Munna Singh") was killed in a fake encounter by the accused named in the complaint including three others on 1/7/2004 at about 10.30 p.m. at Domohani, Sonari, Jamshedpur. According to the complainant, he received telephonic message on 2/7/2004 from one Sanjay Kumar of Jamshedpur that his son was killed in an encounter. This news was also published in the local newspapers of Jamshedpur. As per the newspaper report, along with the deceased, three others viz. Rajib Dubey, Babloo Prasad and Rambo were also killed. According to the complainant, he rushed to Jamshedpur with his eldest son

Krishna Singh and contacted the Jamshedpur Police Authorities for the purpose of receiving the dead body of his son for cremation. However, the police refused to handover the dead body. Therefore, the complainant's eldest son Krishna Singh reported the matter to the Deputy Commissioner, East Singhbhum, Jamshedpur. However, the police did not hand over the dead body of the deceased in spite of repeated requests made to the proper authorities. It is the complainant's case that he later on came to know that the police had obtained signature of one Sanjay Kumar under coercion on a challan, showing that the dead body was received by him. Instead of handing over the dead body to Sanjay Kumar, according to the complainant, it was cremated at Parvati Ghat, Adityapur. The complainant and members of his family were kept in dark. This was done to destroy the evidence and manufacture the story of police encounter. It is the case of the complainant that deceased Munna Singh was not involved in any criminal activities. He used to provide his jeep to people on rent at Jamshedpur and other places and earn his livelihood. According to the complainant, deceased Munna Singh was falsely involved in Sonari P.S. Case No.15 of 1994 dated 6/3/1994 under Section 392 of the Indian Penal Code (for short, "the IPC"). As a matter of fact, on that day, he was only 9 years old. The complainant stated that the postmortem report shows that three bullets were found in the chest of deceased Munna Singh indicating that he was killed by the police by firing from close range. The complainant took exception to the fact that the autopsy was not video-graphed. The complainant also contended that the accused committed the offence not in discharge of their official duties, therefore, no sanction was required to prosecute them under Section 197 of the Code. According to the complainant, the accused have thus committed offence under Sections 120-B, 203 and 302 read with Section 34 of the IPC.

4. The other version which also needs to be stated is disclosed from the FIR lodged on 1/7/2004 by one Jeevan Prasad Naredi, a dealer in scrap that on 1/7/2004 at 9.50 p.m. some miscreants came to his house riding on motor cycles. They were armed with firearms. They fired at his office situated in his house and ran away. This was done to threaten him and to force him to yield to their ransom demand. It is the case of the police personnel as disclosed in the FIR lodged by the Dy.S.P. Rajiv Ranjan Singh that, having received information about this incident, the police set out to arrest the accused. They traced them and asked them to surrender. However, instead of surrendering, they fired at the police. The police had to retaliate to save themselves and, in that, four criminals were killed. The rest escaped. Son of the complainant was one of those who were killed.

5. By the impugned judgment and order, the High Court allowed the petition filed by Rajiv Ranjan Singh, Dy.S.P., on the ground that sanction required under Section 197 of the Code was not obtained. The order impugned before the High Court to the extent it took cognizance of the offences against him, was quashed. So far as the other police personnel are concerned, the High Court dismissed their petition on the ground that no notification issued under Section 197(3) of the Code was produced by them to show that they were protected against prosecution in respect of any offence alleged to have been committed while acting or purporting to act in discharge of their official duties.

6. Being aggrieved by the rejection of their prayer for quashing the complaint, appellants Om Prakash & Ors. have come to this court. Being aggrieved by the impugned judgment and order of the High Court, to the extent it quashed the proceedings against Rajiv Ranjan Singh, Dy.S.P.-II, the complainant has come to this court. As both the appeals challenge the same judgment and order and they arise out of the same facts, we dispose them of by this common judgment.

7. We have heard Mr. K.V. Viswanathan, senior advocate for appellants Om Prakash & Ors., Mr. Colin Gonsalves, senior

advocate for complainant Kailashpati Singh and Mr. Mukul Rohtagi, senior advocate for the respondent- State and Dy.S.P. Rajiv Ranjan Singh.

8. Before we deal with the rival contentions, it is necessary to state one admitted fact which leads us to conclude that the reason given by the High Court for not quashing proceedings against appellants Om Prakash & Ors. namely that no notification under Section 197(3) of the Code was produced by them protecting them from prosecution in respect of any offence alleged to have been committed while acting or purporting to act in discharge of their official duties, is incorrect. We have been shown a copy of the Notification dated 16/5/1980 issued by the State of Bihar which extends the protection of sub-section (2) of Section 197 of the Code to all the members of the police force as it includes both officers and men. Mr. Gonsalves, learned senior counsel for the complainant has not disputed this position. It is, therefore, not necessary to dilate further on this issue.

9. It would be appropriate to begin with the submissions of Mr. Gonsalves, learned senior counsel appearing for the complainant, because the complainant's case is that his son was killed in a fake encounter. Counsel submitted that the postmortem notes disclose that deceased Munna Singh had received injuries on chest. This is indicative of firing from close range. The nails of deceased Munna Singh were blackened, which militates against the theory of genuine encounter. Counsel submitted that it was necessary for the police to videograph the postmortem as per the Guidelines issued by the National Human Rights Commission ("NHRC"). Counsel further submitted that the body of deceased Munna Singh was not handed over to his brother-in-law as alleged. His signature was taken under duress on a receipt created to show that the body was handed over. Deceased Munna Singh was cremated without informing the members of his family. Counsel further submitted that in the FIR lodged by Jeevan Naredi, it is stated

that blood was found at the site of occurrence. However, no such blood was found. Counsel submitted that the police diaries do not show the movements of the police during the period of encounter. Falsity of the encounter theory is evident because none of the members of the police party received injuries. Counsel pointed out that there are no credible private witnesses, to depose about the alleged encounter. The police have asserted that deceased Munna Singh was involved in a serious crime which took place in 1994. Relying on the certificate issued by Bihar School Examination Board in which birth date of deceased Munna Singh is shown as 10/1/1985 [Annexure P-1 in the appeal filed by the complainant], counsel contended that deceased Munna Singh was only nine years of age in 1994. Therefore, this is really a concocted case. Counsel pointed out that after the complainant filed a complaint on 27/7/2004, on 31/8/2004, three challans were filed against deceased Munna Singh just to show that he was a dreaded criminal. All these circumstances show that the police have made desperate efforts to cover up the cold blooded murders committed by them. They are trying to concoct a case of a genuine encounter.

10. As regards requirement of sanction, counsel submitted that there is intrinsic evidence to show that the police are guilty of cold blooded murders. By no stretch of imagination, it can be said that when deceased Munna Singh was shot dead, the police were discharging their public duty. Therefore, there is no question of obtaining sanction to prosecute the police personnel involved in this case. Counsel submitted that when the question of sanction is raised, it must be studied with reference to the complaint and not with reference to the documents produced by the accused to set up a plea of self defence. Counsel submitted that the plea of self defence can only be raised in the trial court. Counsel submitted that whether there is false encounter or not, must be considered only on the basis of the complaint and testimonies recorded before the charge is framed. No material produced by the accused should be taken

into account when there is unimpeachable evidence to show that the police are guilty of false encounter. In such case, sanction is not required. In support of his submissions, counsel relied on the judgment of the Federal Court in *Dr. Hori Ram Singh v. Empower*[1] judgments of this court in *Matajog Dobey v. H.C. Bhari,*[2] *Pukhraj v. State of Rajasthan & Anr.,*[3] *Nagraj v. State of Mysore*[4], *Raj Kishor Roy v. Kamleshwar Pandey & Anr,*[5] *K. Satwant Singh v. The State of Punjab*[6] and *State of Orissa through Kumar Raghvendra Singh & Ors. v. Ganesh Chandra Jew*[7]. Counsel also relied on *Zandu Pharmaceutical Works Ltd. & Ors. v. Mohd. Sharaful Haque & Anr.*[8] on the question of nature of powers of the High Court under Section 482 of the Code.

11. On the other hand, Mr. Vishwanathan, learned senior counsel appearing for the appellants Om Prakash and Ors. and Mr. Mukul Rohtagi, learned senior counsel appearing for the State of Jharkhand and *Dy.S.P. Rajiv Ranjan Singh placed heavy reliance on Sankaran Moitra v. Sadhna Das & Anr.*[9] and submitted that sanction is a condition precedent for successful prosecution of a public servant when the provision is attracted. It was submitted that in this case, there are unimpeachable circumstances which establish that deceased Munna Singh along with others had fired at the house of Jeevan Naredi and fled from there. The police tried to arrest them. They fired at the police. The police fired in defence and in performance of their duty. They cannot, therefore, be prosecuted

1. AIR 1939 FC 43.
2. (1955) 2 SCR 925.
3. 1974 (1) SCR 559.
4. AIR 1964 SC 269.
5. (2002) 6 SCC 543.
6. 1960 (2) SCR 89.
7. (2004) 8 SCC 40.
8. (2005) 1 SCC 122.
9. (2006) 4 SCC 584..

without sanction. The prosecution initiated against the police personnel without sanction must, therefore, be quashed. Counsel refuted each and every allegation made by Mr. Gonsalves.

12. Certain material facts which can be gathered from the documents, which are on record need to be stated. It would be necessary first to refer to the FIR lodged by Jeevan Prasad Naredi, whose house was attacked by the criminals because it is first in point of time. In his FIR dated 1/7/2004 lodged at PS Bistupur at 2330 hrs, Naredi stated that he is a scrap dealer, who purchases scrap from Telco and Tisco to supply the same to Telco Foundry Jamshedpur. He stated that on 1/7/2004 in the night at 9.45 p.m., he was in his office which is situated in his residence. Suddenly, at 9.50 p.m., some rounds of fire were fired at the room used by him as office. The bullets hit the outer wall of the said room and the wall of the gate of his house. He directed the members of his family to remain inside the house. On hearing the gun shots, his neighbour shouted. He mustered courage and went outside the house after opening the main gate. His neighbour told him that 2 to 3 motor cyclists had come there. They came from Regent Hotel road side towards his house and suddenly started firing at the wall of the room used by him as office. He found marks of firing at two places on the outer wall of the said room and also on the front side main wall of the gate of his house. He found empty cartridges and one bullet lying at the place of incident. He further stated that the dreaded criminal Babloo Prasad had given him threat. He had demanded ransom from him. Out of fear, he had changed his telephone number. Therefore, Babloo Prasad could not contact him and, out of frustration, he along with his associates had attacked his house so that ransom amount could be recovered from him.

13. It is also necessary to refer to the FIR filed by Dy.S.P. Rajiv Ranjan Singh dated 2/7/2004 at 0015 hrs. As per this FIR, on 2/7/2004, he received information at 2125 hours that within

Bistupur Police Station, some firing incident had occurred. He along with the task force officers left in a Sumo Car to verify the said information. On verification, he came to know that some criminals riding motor cycles came to the house of one Jeevan Naredi, a businessman dealing in scrap, fired bullets at his house and moved towards Rani Kudar, which comes within the jurisdiction of Kadma Police Station. He along with his police team left the Headquarters to trace the criminals. At that time, he received information that some boys riding motor cycles in a great speed had gone towards Matin Drive. He immediately informed SHO, Sonari D.K. Srivastava about the incident and asked him to start a search for the accused, who had gone towards Matin Drive. He also reached Sonari, Jhunjani. In the light of the Sumo Car, he saw five to six boys standing on the Pucci road with motor cycles. He stopped his car and ordered constable Bharat Shukla and constable Shyam Bihari Singh (the appellants before us) to ask the boys, as to who they were and why they were standing there. On being so questioned, one of the boys asked a counter question to them as to who they were. The constables replied that they were from the police force. As soon as they heard this, suddenly, one of them took out a pistol from his vest and fired. A shot hit the glass of Sumo Car. The police party was miraculously saved. Dy.S.P. Rajiv Ranjan Singh got out of the car and told his police team to take safe positions. He asked the criminals to surrender, but they divided themselves into two pairs and started firing at the police team. The police also started firing in defence. At that time, SHO, D.K. Srivastava, PO Sonari also came there along with other police personnel. Dy.S.P. Rajiv Ranjan Singh gave a call on his mobile to PCR and Patrol Officer about the encounter. The criminals had taken positions behind a tree. The firing continued for 15 to 20 minutes. Thereafter, they ran towards Nirmal Basti. Dy. S.P. Rajiv Ranjan Singh and others went to the spot and found that two criminals were lying dead near riverside and two criminals were lying in injured condition behind the tree.

14. On receiving information about the encounter, Superintendent of Police Jamshedpur, Assistant Superintendent of Police Saket Kumar, City Police Superintendent, Superintendent of Police, etc. came there. Articles lying at the seen of offence were seized. They included firearms of foreign make. The complaint of Dy.S.P. Rajiv Ranjan Singh further stated that it appeared that all these criminals had gathered at Dumjani after firing at the house of Jeevan Naredi for ransom and were planning further action. During that period, police party reached there. The criminals armed with illegal weapons started firing at the police to kill them. The police in order to defend themselves and to effect legal arrest of the criminals fired in retaliation. During this encounter, four criminals died and two unknown criminals ran towards Nirmal Basti.

15. Some of the articles seized by the police are described in the seizure memo as under:

"Details of seized items:

(i) 9 mm empty cartridge lying around the Chabutara – 6 nos.

(ii) Bullet Pillet – lying nearby Chabutara along the Sartua tree – 2 nos.

(iii) Black color Hero Honda Motorcycle (without number plate) Engine no.01B 18M20712 Chassis no.01B20C21175 lying in the west side of the Board of Nirmal Mahto Udyan.

(iv) A iron made pistol lying along the wheel of motorcycle – 'Made in Western Germany Auto Pistol 57914' marked on the Barrel and 'Made in Western Germany and Auto Pistol 9 Round CAL 765A 57914' marked on body. Length of the barrel is about 9 fingers and But – 6 finger having magazine fitted at the bottom. On opening, one

empty cartridge entangled in its chamber and 4 live cartridges of 7.65 bore loaded in the Magazine.

(v) xxx xxx xxx

(vi) Near the right hand of deceased Rajeev Dubey, a one barrel country-made .315 bore pistol measuring 8 fingers in length, 5 fingers in body having wooden handle. On opening, 'KF 8mm' mark was found in the barrel. One cartridge entangled in pistol. One live cartridge 8 mm in the right pocket of trouser of Rajeev Dubey and one used cartridge lying near the dead body and two used cartridges 7.65 bore near the head of the dead body.

(vii) xxx xxx xxx

(viii) Western-North from here – Without number plate Hero Honda Splendor bearing Engine no.97K17E05846 Chessis no.97K19F5777 with broken brake light.

(ix) xxx xxx xxx

(x) From the pocket of Munna Singh, Samsung Mobile phone in running condition. EMEI no. of the mobile set – 35236200608952/6-19 in which SIM no.9835413435 was installed. In addition, three SIM cards wrapped in a piece of paper kept in the plastic cover of mobile bearing no.9835186118, 9835374951, 9431066524. From the rear pocket of Munna Singh, a ballet marked 'Bihar Police' on it containing Rs.500x8+50x1+10x1 total Rs.4,060 and an identity card of Bihar Police showing Munna Singh in police uniform with following details : Name Saroj Kumar Singh; Post – Arakshi (729) with seal of Arakshi Adhikshak, Rohtas. An ATM Card of HDFC Bank of Amit Pratap Singh bearing

no.4386241704739313, two telephone diaries, one Receipt Book of Jamshedpur Cooperative College bearing no.02192 of Amit Pratap Singh 9, A-1 Roll No.337, a railway ticket of Bhagalpur Surat Express train no.9048 dated 28.6.2004 for Rs.781 of PNR No.613-9472666 from Jamalpur Junction to Baxar and other papers.

(xi) xxx xxx xxx

(xii) xxx xxx xxx

(xiii) In the South-West across the road along the river – without number plate Hero Honda Splendor bearing Engine no.18E00877 Chessis no.01E20F50766

(xiv) On the side of right hand of dead body of deceased Babloo Prasad, one iron made pistol (mauser) with inscription of 'State Property of the Italy Government CAL 765 A57391' on the body. On the left side of the barrel, CAL 9 mm A 57391' and on the right side of body, 'Auto Pistol 9 round only for public supply' written on it. Size measurement – 9 finger But with 6 finger magazine and one live cartridge lying along the dead body and 5 used cartridges of 7.65 bore spread all along.

(xv) xxx xxx xxx

(xvi) xxx xxx xxx

(xvii) xxx xxx xxx

(xviii) xxx xxx xxx

(xix) In the South – 9 mm used cartridges – total 14 nos. spread all along.

(xx) One bullet from Sumo."

16. This seizure memo, in our opinion, indicates that the criminals hadused motor cycles and they were armed with deadly fire arms. Three of the motor cycles were found at the scene of offence. The fire arms used by the criminals were of foreign make. There is no reason to doubt the veracity of this seizure memo because it is difficult for the police to concoct such a scene and plant such weapons.

17. From the two FIRs, it is clear that the criminals riding on the motor cycles armed with deadly firearms had attacked the house of businessman Naredi. Naredi lodged a complaint at Vistupur Police Station. Upon receiving information, the police machinery had swung into action. Dy.S.P. Rajiv Ranjan Singh left his office along with his team to trace the criminals. They could trace the criminals. They asked the criminals to surrender. The criminals instead of surrendering fired at them. The police had to launch a counter attack to save themselves and also to nab the criminals, which was their legal duty and in this counter attack, four of the criminals received bullet injuries and succumbed to those injuries. The death of four criminals in the firing was preceded by an attack by them on businessman Naredi's house and also an attack on the police personnel.There is no doubt that the criminals had set out on a mission to attack Naredi's house so as to recover ransom. From the weapons found lying at the scene of occurrence, we feel that the criminals had taken to the life of crime and were not novices. The past record of the criminals support this conclusion of ours.

18. In this connection, it is necessary to refer to the affidavit of Dy. S.P. Mr. S.K. Kujur. It brings certain important facts on record. Mr. Kujur has begun by describing the attack made by the deceased along with his friends on businessman Jeevan Naredi for extortion on the night of 1/7/2004 at around 9.15 p.m. He has referred to Jeevan Naredi's FIR lodged with Bistupur Police Station which was registered as Bistupur Police Station Case No.134 of 2003. He has then stated how after the incident

the criminals fled from the house of Jeevan Naredi and how after receiving information about the firing incident, Dy.S.P. Rajiv Ranjan Singh and his police party chased them. He has also stated that in the encounter, four criminals died and two managed to escape. He has described the weapons and other articles which were seized from the place of occurrence. He has stated that all the criminals were members of the dreaded criminal Akhilesh Singh's gang. He has further stated that after the incident, senior police officers reached the place of occurrence and the then S.P., East Singhbhum Mr. Arun Oraon, I.P.S. supervised the case. The inquest was done by the Magistrate and FIR was registered on the basis of self assessment of Dy.SP (Hq.), which was registered as Sonari P.S. Case No.53 of 2004 dated 2/7/2004 u/s. 307/427/353/34 IPC read with Section 25(1b)(A)/26/27/35 of the Arms Act corresponding to G.R. Case No.1065 of 2004. He has confirmed that on the written request made by the complainant's son-in-law Mr. Sanjay Narayan Singh, dead body of deceased Munna Singh was handed over to him after the postmortem examination was done and it was finally cremated at Parvati Ghat. Relevant documents are annexed to the affidavit. He has laid stress on the fact that the complainant filed his complaint 23 days after the incident. He has added that the case was supervised by the then S.P. Mr. Arun Oraon and after due investigation, charge sheet has been submitted against the deceased criminals showing them as dead accused.

19. After setting out the activities of Akhilesh Singh Gang, Dy.S.P. Kujur has given a chart indicating the cases registered against the deceased criminals. It reads thus:

"Accused Munna Singh (since deceased).

a. Sakchi P.S. Case No.208/02 u/s. 307/34 I.P.C. & 27 Arms Act later on converted to u/s. I.P.C.

b. Sakchi P.S. Case No.144/03 u/s. 324/307/367/34 I.P.C. and section 27 Arms Act.

c. Telco P.S. Case No.85/04 under section 392 of the Indian Penal Code.

d. Telco P.S. Case No.109/04 u/s. 379 I.P.C. and section 392 I.P.C.

e. Adityapur P.S. Case No.139/04 u/s. 392/411 I.P.C.

Accused Bablu Prasad alias Suman Kumar (since deceased).

a. Sitaramdera P.S. Case No.62/01 u/s. 379 I.P.C.

b. Bistupur P.S. Case No.244/01 u/s. 379 I.P.C.

c. Bistupur P.S. Case No.248/01 u/s. 379 I.P.C.

d. Sonari P.S. Case No.71/01 u/s.379 I.P.C.

e. Sakchi P.S. Case No.179/01 u/s. 379 I.P.C.

f. Bistupur P.S. Case No.149/03 u/s. 307/387/34/ 120(B) IPC and section 27 of the Arms Act.

g. Sakchi P.S. Case No.144/03 under sections 324/ 307/387/34 I.P.C. and 27 Arms Act.

h. Parsudhih P.S. Case No.182/03 u/s. 414 I.P.C. and section 25(1- B)(a)/26/35 of the Arms Act.

i. Sonari P.S. Case No.12/04 u/ss. 387/326/307/34 I.P.C. and section 27 Arms Act.

Accused Prakash Anand alias Ramesh alias Rambo (since deceased).

a. Telco P.S. Case No.266/02 u/s. 379 I.P.C.

b. Saraikella P.S. Case No.70/02 u/s. 392/411 I.P.C.

c. Telco P.S. Case No.268/97 u/s. 392/411 I.P.C.

d. Telco P.S. Case No.273/97 u/s. 392/411 I.P.C.

e. Bistupur P.> Case No.214/97 u/s. 392 I.P.C.

f. Telco P.S. Case No.278/97 u/s. 25(1-b)/A/26 of the Arms Act.

g. Telco P.S. Case No.258/92 u/s.394 and 397 I.P.C.

Accused Rajiv Kumar Dubey alias Raju Dubey.

a. Sadar Chaibasa P.S. Case No.10/01 u/ss. 307/ 120(B) IPC and section 4/5/6 of Explosive Substance Act.

b. Bistupur P.S. Case No.125/03 u/s. 25 (1-b)/A/26/ 35 Arms Act.

c. Adityapur P.S. Case No.139/04 u/ss.392/411 I.P.C."

20. Finally, Dy.S.P. Kujur has stated that the State of Jharkhand got the entire matter thoroughly inquired into by Deputy Commissioner, East Singhbhoom, Jamshedpur and the report of the Deputy Commissioner was sent to the Deputy Secretary, Home Department vide letter dated 31/10/2006. A copy of the said letter is annexed to the affidavit at Annexure-R4 (Colly.). We have carefully perused Annexure-R4 (Colly.) which includes the report submitted by the Dy.S.P., East Singhbhoom, Jamshedpur. In his report, Dy.S.P., Jamshedpur has, after giving details of the steps taken while conducting the inquiry, set out the antecedents of the deceased criminals. So far as the allegation that deceased Munna Singh had received bullet injuries on his chest is concerned, it is stated that as per the postmortem report, deceased Munna Singh had received only three injuries during the encounter – one at the forearm, second at the wrist and third on the stomach. After examining all the circumstances, in their proper perspective, the report concludes thus:

"It is clear from the records and investigation of other related points that firing was done by the criminals in the house of businessman Jiwan Naredi of Bishtupur for extortion and after the incident, the police team under the supervision of Shri Rajiv Ranjan Singh, Dy.SP (Hqrs) chased the criminals while performing their legitimate duty. Consequently, the encounter took place and Munna Singh, (son of the applicant) and three other dreaded criminals of the city, associated with Akhilesh Singh gang, were killed.

Therefore, the allegations made by the applicant are baseless and false. The original application along with inspection report is being sent for favour of information."

21. It appears that the complainant had made a complaint to the NHRC. Admittedly, on receipt of this complaint, NHRC directed CID to conduct an inquiry. Accordingly, Nagendra Choudhary, SP, CID, Jharkhand (Ranchi) conducted the inquiry and submitted his report to the Deputy Inspector General of Police, CID, Jharkhand, Ranchi. The report is exhaustive and we have carefully perused it. From the report, it appears that the Inquiry Officer recorded the statement of Krishan Pratap Singh the brother of deceased Munna Singh. He also recorded the statements of two independent witnesses namely Moni Borker and Vijay Singh. These witnesses have confirmed that the firing incident did take place. The Inquiry Officer also recorded the statements of witnesses to the seizure memo. The report further states that Mr. Sharma, learned Magistrate (Law & Order Jamshedpur) came to the spot and prepared the inquest report. Important extracts from the inquest report are noted in the report. So far as the deceased is concerned, the inquest report states that he had bleeding wounds on the right stomach, right leg and near the elbow of the right arm. Injuries appeared to be bullet injuries. Statement of Dr. Prof. Akhilesh Kumar Chaudhary attached to MGM Medical College, Jamshedpur who had performed postmortem of some of the

deceased criminals was also recorded. It is stated in the report that Dr. Chaudhary stated that there was no charring, blackening etc. found on the body which confirms that the bullets were fired from some distance. Reference is made to the statement of Dr. Lalan Chaudhary who had done postmortem of deceased Munna Singh i.e. the son of the complainant. Dr. Lalan Chaudhary has stated in his statement that there was no charring, blackening on the dead body. Postmortem report is also discussed. Similarly there is a detailed discussion on the report of the Forensic Laboratory. It is stated that the bullets were fired from the three pistols recovered from the scene of occurrence. Statement of Jeevan Naredi, the businessman whose house was attacked by the criminals is also recorded. Jeevan Naredi has given detailed account as to how the criminals fired at his house and fled away from there. After considering inquest report, postmortem report, forensic laboratory report, the statements of independent witnesses, the statement of the businessman whose house was attacked, the statement of the brother of the deceased and the antecedents of the deceased and other attendant circumstances, the report concludes that the encounter was genuine. There is no dispute about the fact that NHRC has accepted this report and has also come to a conclusion that this is not a case of fake encounter.

22. We shall now deal with Mr. Gonsalves' attack on the police. Mr. Gonsalves contended that the dead body was not handed over to the complainant's family. We have already referred to the affidavit in reply filed by Mr. S.K. Kujur, Dy.S.P. From his affidavit and the documents annexed to it, it is clear that on the written request of the complainant's son-in-law Sanjay Narayan Singh on 2/7/2004, the dead body of deceased Munna Singh was handed over to him in the presence of Ripunjay Kumar Singh and Asha Shankar Singh. The body was finally cremated at Parvati Ghat by members of the family of deceased Munna Singh. Our attention is drawn to the copy of the application made by the brother-in-law of deceased Munna Singh requesting that the dead body may be

handed over to him for cremation. It is counter signed by the brothers of deceased Munna Singh. The dead body was handed over to Sanjay Narayan Singh, the brother-in-law of deceased Munna Singh and a receipt dated 02/07/2004 to that effect was given by him to the police. The copy of the receipt is seen by us. It is counter signed by Asha Shankar Singh, brother of deceased Munna Singh. There is on the record a declaration made by the relative of deceased Munna Singh - one Raja Narayan Singh that deceased Munna Singh was cremated at Parvati Ghat, Bistupur, Jamshedpur. The declaration is made on the certificate issued by Parvati Ghat authorities.

23. Mr. Gonsalves contended that deceased Munna Singh's name was shown in a case registered in 1994 when he was only 9 years old. This shows that the police have fabricated a case to show that he was a dreaded criminal. We notice that in the postmortem notes, his age is shown as 28 years. It is not the case of the police that deceased Munna Singh was involved in any case of the year 1994. It is true that in the copy of the letter addressed by Dy.S.P. Jamshedpur to Superintendent of Police, Jamshedpur, Sonari P.S., Case No.15 of 1994 dated 6/3/1994 is shown to have been registered under Section 392 of the IPC against deceased Munna Singh. But as of today, it is the case of the police that he was not involved in this case. Perhaps, the information was related to some other person or the information was incorrect. It is not possible for us to hold that the police have made an attempt to involve him in Case No.15 of 1994. List of several other serious crimes in which according to the police, the deceased was involved, is given by Dy.S.P. Mr. Kujur in his affidavit in reply. We have reproduced it in the earlier part of this judgment.

24. The contention that no blood stains were found at the site of occurrence when PUCL visited the same has no merit. There is on record the detailed seizure memo which speaks about the recovery of blood stained soil. The inquest report,

which is reproduced in the report of the CID confirms that the deceased had received bleeding injuries. The PUCL visited the scene of occurrence after four days in rainy season. Therefore, assuming blood stains were not found at the scene of occurrence after four days, that does not disprove the occurrence.

25. It is then contended that police movements are not recorded in police diaries. This is not correct. Extracts of police station diary of P.S. Sonari show the police movements of the relevant period. These extracts are annexed to the affidavit of Dy. S.P. Kujur.

26. It was submitted that the deceased received injuries on chest. The doctors' statements have been reproduced in the CID report. It is stated by the doctors that there was no blackening or charring suggesting that the deceased were shot at from a close range. The postmortem report also does not show that deceased Munna Singh had received chest injuries. It is true that the police personnel did not receive any bullet injuries. However, the Sumo vehicle was hit by a bullet. Mercifully, the police did not receive injuries because they had taken safe positions. From this, it cannot be said that no such incident had taken place. It is submitted that there are no independent eye witnesses supporting the version of police. This is wrong. Statements of Moni Boker and Vijay Singh have been recorded under Section 164 of the Code. This is evident from the CID report.

27. It is submitted that all challans in respect of deceased Munna Singh were filed on the same day. There is a reasonable explanation given for this. The deceased was wanted in the cases of 2002 and 2003. He was absconding when he died. A report was required to be filed to inform the court that he was dead. It is the case of the police that in these circumstances three challans were prepared and filed on the same day. These are not challans but final forms. In the circumstances, we are unable to come to a conclusion that this was done purposely

with mala fide intention to create record against the deceased.

28. Mr. Gonsalves contended that nails of the deceased were blackened. This is not borne out by the postmortem report or the inquest conducted by the Magistrate. It is true that the postmortem was not videographed. In this case, the Magistrate conducted the inquest. The CID has fully investigated and submitted its report stating that it was a genuine encounter. NHRC is also satisfied with the postmortem. Therefore, it is not possible to infer that post-mortem was not videographed because the police wanted to suppress something. We would like to make it clear that we have independently examined the relevant documents, like FIRs, postmortem notes, inquest report, seizure memo and extracts of FSL report and we are of the view that this is not a case of false encounter. We reject the case of the complainant that the police are guilty of killing deceased Munna Singh in cold blood in fake encounter.

29. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come

to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.

30. We must now deal with the submission of Mr. Gonsalves that the question of sanction must be studied with reference to the complaint and not with reference to the documents produced by the accused to set up a plea of self defence. In support of this submission, Mr. Gonsalves heavily relied on *Hori Ram Singh.* In that case, the Federal Court was considering the expression "Act done or purporting to be done in execution of duty as servant of Crown" appearing in Section 270(1) of the Government of India Act, 1935. The following observations of the Federal Court are material:

> "As the consent of the Governor, provided for in Section 270(1), is a condition precedent to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceedings. If these allegations cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Crown," the consent of the authorities would, prima facie, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do "in the execution of his duty," the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not in good faith. Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts."

31. In *Matajog Dobey,* the Constitution Bench of this court

was considering what is the scope and meaning of a somewhat similar expression "any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty" occurring in Section 197 of the Criminal Procedure Code (Act V of 1898). The Constitution Bench observed that no question of sanction can arise under Section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. On the question as to which act falls within the ambit of above-quoted expression, the Constitution Bench concluded that there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim that he did it in the course of performance of his duty. While dealing with the question whether the need for sanction has to be considered as soon as the complaint is lodged and on the allegations contained therein, the Constitution Bench referred to *Hori Ram Singh* and observed that at first sight, it seems as though there is some support for this view in Hori Ram Singh because Sulaiman, J. has observed in the said judgment that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution and Varadachariar, J. has also stated that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceeding. It is pertinent to note that the Constitution Bench has further observed that a careful perusal of the later parts of the judgment however show that learned judges did not intend to lay down any such proposition. The Constitution Bench quoted the said later parts of the judgment as under:

> "Sulaiman, J. refers (at page 179) to the prosecution case as disclosed by the complaint or the police report and he winds up the discussion in these words: "Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground". The other learned Judge also states at page 185, "At this stage we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty". It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

The legal position is thus settled by the Constitution Bench in the above paragraph. Whether sanction is necessary or not may have to be determined from stage to stage. If, at the outset, the defence establishes that the act purported to be done is in execution of official duty, the complaint will have to be dismissed on that ground.

32. In *Raj Kishor Roy,* the appellant had filed a complaint against respondent 1 therein, who was a police officer that he had assaulted him and leveled false charges against him. The Judicial Magistrate, Bhagalpur, issued summons. Respondent 1 filed a petition for quashing the order issuing summons on the ground that sanction under Section 197 of the Code has not been obtained. The High Court quashed the said order on the ground that there was no sanction to prosecute respondent 1. In the facts before it, this court observed that the question whether respondent 1 acted in discharge of his duty, could not have been decided in a summary fashion. This court observed that it was the appellant's case that respondent 1 had brought an illegal weapon and cartridges and falsely shown them to

have been recovered from the appellant. This court observed that this is the type of case where the prosecution must be given an opportunity to establish its case by evidence and an opportunity be given to the defence to establish that he had been acting in the official course of his duty. There is thus a clear indication that this court had restricted its observations to the facts before it. It is pertinent to note that this court referred to the Constitution Bench Judgment in Matajog Dobey and observed that in that case, the Constitution Bench has held that need for sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein and the question may arise at any stage of the proceedings.

33. In *Pukhraj,* the appellant, who was a clerk in the Head Post Office, Jodhpur had filed a complaint against respondent 2, who was the Post Master General, Rajasthan, alleging offences under Sections 323 and 502 of the IPC. Respondent 2 filed an application praying that the court should not take cognizance of the offence without the sanction of the Government as the acts alleged, if at all done by him, were done while discharging his duties as a public servant. The Rajasthan High Court held that respondent 2 could not be prosecuted unless prior sanction of the Central Government has been obtained. The order taking cognizance was quashed. This court referred to *Hori Ram Singh* as well as *Matajog Dobey.* This court reiterated that whether sanction is necessary or not may have to be decided from stage to stage but in the facts of the case before it, this court set aside the High Court's order.

34. In *Nagraj,* the appeal was directed against the order of the High Court rejecting the reference made by the Sessions Judge Shimoga Division recommending the quashing of the commitment order of the Magistrate committing the accused to the Sessions trial of offences under Sections 307 and 326 of the IPC on the ground that the Magistrate could not have taken cognizance of the offences without sanction of the State

Government in view of the provisions of Sections 132 and 197 of the Criminal Procedure Code of 1898. The appellant therein was a Sub-Inspector. He along with another person had severely beaten up one Thimma and had wantonly fired from revolver at other persons. It was contended that if the question of sanction is not decided in the very first instance when a complaint is filed or when the accused alleges that he could not be prosecuted for the alleged offences without sanction of the Government, the protection given by law will be nugatory as the object of giving this protection is that the police officer is not harassed by any frivolous complaint. It is important to note that this court in the context of the peculiar facts before it, noted that there may be some such harassment of the accused, but it had no means to hold in the circumstances alleged that the prosecution of the appellant was in connection with such action as the complaint did not disclose the necessary circumstances indicating that fact and the bare word of the accused cannot be accepted to hold otherwise. It is in this background that the court observed that the jurisdiction of this court to proceed with the complaint emanates from what is alleged in the complaint and not from what is finally established in the complaint as the result of the evidence recorded. Pertinently this court made reference to the Constitution Bench judgment in Matajog Dobey where it is observed that whether sanction is necessary or not may have to be determined from stage to stage. In our opinion, the observation of this court that the mere allegation made by the appellant-police officer that the action taken by him was in performance of his duty, will not force the court to throw away his complaint of which it had properly taken cognizance on the basis of the allegations in the complaint will have to be read against the peculiar facts of the case and not as stating something which runs counter to the law laid down by the Constitution Bench in *Matajog Dobey.*

35. In *Abdul Wahab Ansari v. State of Bihar & Anr.*[10], this court was again considering the question as to when the plea

10. (2000) 8 SCC 500.

that sanction was required to be obtained under Section 197 (1) of the Code can be raised. This Court reiterated that previous sanction of the competent authority being a precondition for the court in taking cognizance of the offence if the offence alleged to have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate in the matter of taking cognizance and, therefore, there is no requirement that an accused should wait for taking such plea till the charges are framed.

36. In our opinion Sankaran Moitra puts doubts, if any, to rest. In that case the complainant had filed a complaint before the Deputy Comissioner of Police that she had come to know from the members of the public that her husband was beaten to death by the police. She arrayed Assistant Commissioner of Police and other police personnel as accused and prayed for stern action against them. Accused 1 filed a petition under Section 482 of the Code before the High Court for quashing of the complaint on the ground that the complaint could not have been entertained for want of sanction under Section 197(1) of the Code. The High Court dismissed the petition. Before this Court it was argued that want of sanction under Section 197 of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate stage. This Court considered *Hori Ram Singh,* Constitution Bench judgment in Matajog Dobey and several other judgments on the point and rejected the said submission. We must reproduce the relevant paragraph.

> "Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its

> opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question."

This Court also observed that postponing a decision on the applicability or otherwise of Section 197(1) of the Code can only lead tothe proceedings being dragged on in the trial court and a decision by this Court here and now would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind.

37. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the concerned public servant at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. At this point, in order to exclude the possibility of any misunderstanding, we make it clear that the legal discussion on the requirement of sanction at the very threshold is based on the finding in the

earlier part of the judgment that the present is not a case where the police may be held guilty of killing Munna Singh in cold blood in a fake encounter. In a case where on facts it may appear to the court that a person was killed by the police in a stage- managed encounter, the position may be completely different.

38. It is not the duty of the police officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This court has repeatedly admonished trigger happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. Requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. Plea regarding sanction can be raised at the inception.

39. In our considered opinion, in view of the facts which we have discussed hereinabove, no inference can be drawn in this case that the police action is indefensible or vindictive or that the police were not acting in discharge of their official duty. In *Zandu Pharmaceutical Works Limited,* this Court has held that the power under Section 482 of the Code should be

used sparingly and with circumspection to prevent abuse of process of court but not to stifle legitimate prosecution. There can be no two opinions on this, but, if it appears to the trained judicial mind that continuation of a prosecution would lead to abuse of process of court, the power under Section 482 of the Code must be exercised and proceedings must be quashed. Indeed, the instant case is one of such cases where the proceedings initiated against the police personnel need to be quashed. In the circumstances, we dismiss the appeal filed by the complainant Kailashpati Singh. We allow the appeal filed by Om Prakash, Pradeep Kumar, Shyam Bihari Singh and Bharat Shukla and set aside the impugned order to the extent it dismisses Cr.M.P.No.822 of 2005 filed by them for quashing order dated 14/06/2005 passed by Judicial Magistrate, 1st Class, Jamshedpur, in Complaint Case No.731 of 2004 issuing process against them. We quash Complaint Case No. 731 of 2004 pending on the file of Judicial Magistrate, 1st Class, Jamshedpur.

K.K.T. Appeals disposed of.

MSR LEATHERS
v.
S. PALANIAPPAN & ANR.
(Criminal Appeal Nos. 261-264 of 2002)

SEPTEMBER 26, 2012

[R.M. LODHA, T.S. THAKUR AND ANIL R. DAVE, JJ.]

Negotiable Instruments Act, 1881 - s. 138 - Dishonour of cheque - Prosecution based upon second or successive dishonour - When no prosecution initiated on first dishonour - Whether permissible - Held: In view of s. 138 and the object underlying therein, the prosecution based on second or successive default in payment of cheque is permissible even when no prosecution was initiated pursuant to first default - Even the legislative intention was not to impose such restriction - So long as the cheque remains unpaid within its validity period and condition precedent for prosecution in terms of proviso to s. 138 are satisfied, cheque holder's right to prosecute the drawer remains valid and exercisable - The benefit of further opportunity to the drawer by reason of a fresh presentation of cheque, cannot help the defaulter to get a complete absolution from prosecution - Interpretation of Statues.

Interpretation of Statutes - Purposive interpretation - The court should adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object.

Words and Phrases:

'Absolution' - Meaning of.

'Cause of Action' - Meaning of, in the context of s. 138 of Negotiable Instruments Act, 1881.

A Division Bench of this Court referred the question to the three Judges Bench 'Whether the prosecution u/s. 138 of Negotiable Instruments Act, 1881 based upon second or successive dishonour of cheque is permissible, if the holder of the cheque had not initiated prosecution when the cheque was dishonoured for the first time.

Answering the reference, the Court

HELD: 1. Prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. [Para 33] [192-G]

2. Presentation of the cheque and dishonour thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes 'cause of action' within the meaning of Sections 138 and 142(b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonour to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonour of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. There is, however, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even

when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. The complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations. [Para 14] [181-C-H; 182-A]

3. The expression 'cause of action' is more commonly and easily understood in the realm of civil laws. The expression is not defined anywhere in CPC to which it generally bears relevance but has been universally understood to mean the bundle of facts which the plaintiff must prove in order to entitle him to succeed in the suit. [Para 18] [184-A]

State of Madras v. C.P. Agencies **AIR 1960 SC 1309;** *Rajasthan High Court Advocates Association v. U.O.I. and Ors.* **AIR 2001 SC 416: 2000 (5) Suppl. SCR 743 ;** *Mohamed Khaleel Khan v. Mahaboob Ali Mia* **AIR 1949 PC 78- referred to.**

4. A careful reading of Sections 138 and 142, makes it abundantly clear that the cause of action to institute a complaint comprises the three different factual prerequisites for the institution of a complaint. None of these prerequisites is in itself sufficient to constitute a complete cause of action for an offence under Section 138. The expression 'cause of action' appearing in Section 142 (b) of the Act cannot therefore be understood to be limited to any given requirement out of the three requirements that are mandatory for launching a prosecution on the basis of a dishonoured cheque. Having said that, every time a cheque is presented in the

manner and within the time stipulated under the proviso to Section 138 followed by a notice within the meaning of clause (b) of proviso to Section 138 and the drawer fails to make the payment of the amount within the stipulated period of fifteen days after the date of receipt of such notice, a cause of action accrues to the holder of the cheque to institute proceedings for prosecution of the drawer. [Paras 19 and 20] [184-D-H; 185-A-B]

5. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, it is difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138. [Para 21] [185-D-E]

6. The right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-à-vis the holder of the cheque. There is nothing in the proviso to s. 138 to even remotely suggest that clause (a) would have no application to a cheque presented for the second time if the same has already been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision, a dishonour whether based on a second or any successive

presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) to proviso thereof. [Para 22] [185-G-H; 186-A-C]

7. So long as the cheque remains unpaid, it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied. [Para 22] [186-D-F]

8. There is nothing in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution. [Para 23] [186-G; 187-A-D]

9. The proviso to s. 142(b) permits the payee to institute prosecution proceedings against a defaulting drawer even after the expiry of the period of one month.

If a failure of the payee to file a complaint within a period of one month from the date of expiry of the period of 15 days allowed for this purpose was to result in 'absolution', the proviso would not have been added to negate that consequence. The statute as it exists today, therefore, does not provide for 'absolution' simply because the period of 30 days has expired or the payee has for some other reasons deferred the filing of the complaint against the defaulter. [Para 26] [188-F-H]

Subodh S. Salaskar v. Jayprakash M. Shah and Anr. **(2008) 13 SCC 689: 2008 (11) SCR 681 - referred to.**

10. The object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. One of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. [Para 27] [189-A-E]

New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar **AIR 1963 SC 1207: 1963 Suppl. SCR 459;** *Deputy*

Custodian, Evacuee Property v. Official Receiver **AIR 1965 SC 951: 1965 SCR 220 ;** *Nathi Devi v. Radha Devi* **(2005) 2 SCC 271: 2004 (6) Suppl. SCR 1141;** *S.P. Jain v. Krishan Mohan Gupta* **(1987) 1 SCC 191: 1987 (1) SCR 411 - relied on.**

Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. **(2006) 3 SCC 658:2006 (2) SCR 595 ;***C.C. Alavi Haji v. Palapetty Muhammed and Anr.* **(2007) 6 SCC 555: 2007 (7) SCR 326 ;** *Damodar S. Prabhu v. Sayed Babulal H.* **(2010) 5 SCC 663: 2010 (5) SCR 678 - referred to.**

11. Applying the purposive rule of interpretation and the provisions of Section 138, it can be held that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time. [Para 31] [191-C-G]

12. An interpretation which curtails the right of the parties to negotiate a possible settlement without

prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided there is no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. Neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138. If the first default itself must in terms of the decision in ****Sadanandan Bhadran's* **case result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. [Para 32] [192-B-D]

Sadanandan Bhadran v. Madhavan Sunil Kumar* **(1998) 6 SCC 514: 1998 (1) Suppl. SCR 178 - overruled.

Kumaresan v. Ameerappa **(1991) 1 Ker L.T. 893;** *S.K.D. Lakshmanan Fireworks Industries v. K.V. Sivarama Krishnan* **(1995) Cri L J 1384 (Ker).;** *Sil Import, USA v. Exim Aides Silk Exporters, Bangalore* **(1999) 4 SCC 567: 1999 (2) SCR 958 ;** *Uniplas India Ltd. and Ors. v. State (Govt. of NCT Delhi) and Anr.* **(2001) 6 SCC 8:2001 (3) SCR 985 ;** *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. and Anr.* **(2001) 6 SCC 463: 2001 (1) SCR 461 ;** *Prem Chand Vijay Kumar v. Yashpal Singh and Anr.* **(2005) 4 SCC 417: 2005 (3) SCR 1029 ;** *S.L. Constructions and Anr. v. Alapati Srinivasa Rao and Anr.* **(2009) 1 SCC 500: 2008 (15) SCR 51;** *Tameshwar Vaishnav v. Ramvishal Gupta* **(2010) 2 SCC 329:2010 (1) SCR 204 - referred to.**

Case Law Reference:

(1991) 1 Ker L.T. 893	**Referred to**	**Para 2**

(1995) Cri L J 1384 (Ker)	**Referred to**	**Para 5**
1999 (2) SCR 958	**Referred to**	**Para 16**
2001 (3) SCR 985	**Referred to**	**Para 16**
2001 (1) SCR 461	**Referred to**	**Para 16**
2005 (3) SCR 1029	**Referred to**	**Para 16**
2008 (15) SCR 51	**Referred to**	**Para 16**
2010 (1) SCR 204	**Referred to**	**Para 16**
AIR 1960 SC 1309	**Referred to**	**Para 18**
2000 (5) Suppl. SCR 743	**Referred to**	**Para 18**
AIR 1949 PC 78	**Referred to**	**Para 18**
2008 (11) SCR 681	**Referred to**	**Para 25**
2006 (2) SCR 595	**Referred to**	**Para 27**
2007 (7) SCR 326	**Referred to**	**Para 27**
2010 (5) SCR 678	**Referred to**	**Para 27**
1963 Suppl. SCR 459	**Relied on**	**Para 27**
1965 SCR 220	**Relied on**	**Para 28**
2004 (6) Suppl.SCR 1141	**Relied on**	**Para 29**
1987 (1) SCR 411	**Relied on**	**Para 30**
1998 (1) Suppl. SCR 178	**Overruled**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 261-264 of 2002.

From the Judgment & Order dated 19.1.2001 of the High Court of Judicature at Madras in Criminal Revision Petition No. 618, 624, 664, 665 of 2000.

Dr. A. Francis Julian, Danish Zubair Khan (for Arputham, Aruna & Co) for the Appellant.

K.K. Mani for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. In *Sadanandan Bhadran v. Madhavan Sunil Kumar* (1998) 6 SCC 514, this Court was dealing with a case under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as 'the Act') in which the complainant had, after dishonour of a cheque issued in his favour, taken steps to serve upon the accused-drawer of the cheque a notice under clause (b) of proviso to Section 138 of the Act. No complaint was, however, filed by the complainant despite failure of the accused to arrange the payment of the amount covered by the cheque. Instead, the complainant-payee of the cheque had presented the cheque for collection once again, which was dishonoured a second time for want of sufficient funds. Another notice was served on the drawer of the cheque to arrange payment within fifteen days of receipt of said notice. Only after failure of drawer to do so did the payee file a complaint against the former under Section 138 of the Act.

2. After entering appearance, the drawer filed an application seeking discharge on the ground that the payee could not create more than one cause of action in respect of a single cheque and the complaint in question having been filed on the basis of the second presentation and resultant second cause of action was not maintainable. The Magistrate accepted that contention relying upon a Division Bench decision of Kerala High Court in *Kumaresan v. Ameerappa* (1991) 1 Ker L.T. 893 and dismissed the complaint. The order passed by the Magistrate was then questioned before the High Court of Kerala who relying upon *Kumaresan's* case (supra) upheld the order passed by the Magistrate. The matter was eventually brought up to this Court by special leave. This Court formulated the following question for determination:

"Whether payee or holder of cheque can initiate proceeding of prosecution under Section 138 of Negotiable Instrument Act, 1881 for the second time if he has not initiated any action on earlier cause of action?"

3. Answering the question in the negative this Court held that a combined reading of Sections 138 and 142 of the Act left no room for doubt that cause of action under Section 142(b) can arise only once. The conclusion observed by the court is supported not only by Sections 138 and 142 but also by the fact that the dishonour of cheque gives rise to the commission of offence only on the failure to pay money when a notice is served upon the drawer in accordance with clause (b) of the proviso to Section 138. The Court further held that if the concept of successive causes of action were to be accepted the same would make the limitation under Section 142(b) otiose. The Court observed:

"7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be treated as non est so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again.

8. The other impediment to the acceptance of the concept

of successive causes of action is that it will make the period of limitation under clause (c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory."

4. The Court then tried to reconcile the apparently conflicting provisions of the Act - one enabling the payee to present the cheque and the other giving him opportunity to file a complaint within one month and observed:

".....Having given our anxious consideration to this question, we are of the opinion that the above two provisions can be harmonised, with the interpretation that on each presentation of the cheque and its dishonour, a fresh right — and not cause of action — accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of Section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once he gives a notice under clause (b) of Section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint will arise. Needless to say, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of fifteen days from the date of the receipt of the notice by the drawer expires."

5. The Court accordingly dismissed the appeal while

affirming the decision of the Kerala High Court in *Kumaresan's* case (supra), no matter the same had been in the meantime overruled by a decision of the Full Bench of that Court in *S.K.D. Lakshmanan Fireworks Industries v. K.V. Sivarama Krishnan* (1995) Cri L J 1384 (Ker).

6. When the present appeal first came up for hearing before a bench comprising Markandey Katju and B. Sudershan Reddy, JJ., reliance on behalf of respondents was placed upon the decision of this Court in *Sadanandan Bhadran's* case (supra) to argue that the complaint in the instant case had also been filed on the basis of the second dishonour of a cheque after the payee of the cheque had issued a notice to the drawer under clause (b) of the proviso to Section 138 of the Act based on an earlier dishonour. On the ratio of *Sadanandan Bhadran's* case (supra) such a complaint was not maintainable, argued the respondents. The Court, however, expressed its reservation about the correctness of the view taken in *Sadanandan Bhadran's* case (supra) especially in para 9 thereof and accordingly referred the matter to a larger Bench. That is precisely how the present appeal has come up for hearing before us. It is, therefore, evident that this Court has repeatedly followed the view taken in *Sadanandan Bhadran's case* (supra). But a careful reading of these decisions reveals that in these subsequent decisions there had been no addition to the ratio underlying the conclusion in *Sadanandan Bhadran's* case (supra).

7. Before adverting to the submissions that were urged at the Bar we may briefly summarise the facts in the backdrop of which the issue arises for our determination. Four cheques for a total sum of rupees ten lakhs were issued by the respondent-company on 14th August, 1996 in favour of the appellant which were presented to the bank for collection on 21st November, 1996. The cheques were dishonoured in terms of memo dated 22nd November, 1996 for insufficiency of funds. A notice under clause (b) of proviso to Section 138 was then issued by the appellant to the respondent on 8th January, 1997 demanding

payment of the amount covered by the cheques. Despite receipt of the notice by the respondent the payment was not arranged. The appellant's case is that the respondent assured the appellant that the funds necessary for the encashment of the cheques shall be made available by the respondent, for which purpose the cheques could be presented again to the bank concerned. The cheques were accordingly presented for the second time to the bank on 21st January, 1997 and were dishonoured for a second time in terms of a memo dated 22nd January, 1997 once again on the ground of insufficiency of funds. A statutory notice issued by the appellant under clause (b) of proviso to Section 138 of the Act on 28th January, 1997 called upon the respondent-drawer of the cheques to arrange payment of the amount within 15 days. Despite receipt of the said notice on 3rd February, 1997, no payment was arranged which led to the filing of Complaint Case No.1556-1557/1997 by the appellant before the II Metropolitan Magistrate, Madras for the offence punishable under Section 138 read with Section 142 of the Act. The Magistrate took cognizance and issued summons to the respondents in response whereto the respondents entered appearance and sought discharge primarily on the ground that the complaint had not been filed within 30 days of the expiry of the notice based on the first dishonour of the cheque. It was also alleged that the statutory notice which formed the basis of the complaint had not been served upon the accused persons. The Magistrate upon consideration dismissed the applications for discharge which order was then assailed by the respondents before the High Court of Madras in Criminal Appeal Nos. 618, 624, 664, 665/2000.

8. The High Court has, by the order impugned in this appeal, allowed the revision and quashed the orders passed by the Magistrate relying upon the decision of this Court in *Sadanandan Bhadran's* case (supra) according to which a complaint based on a second or successive dishonour of the cheque was not maintainable if no complaint based on an

earlier dishonour, followed by the statutory notice issued on the basis thereof, had been filed.

9. Section 138 of the Negotiable Instruments Act, 1881, constituting Chapter XVII of the Act which was introduced by Act 66 of 1988, inter alia, provides:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice. to any other provision of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both"

10. Proviso to Section 138, however, is all important and stipulates three distinct conditions precedent, which must be satisfied before the dishonour of a cheque can constitute an offence and become punishable. The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to

the holder in due course of the cheque within fifteen days of the receipt of the said notice. It is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to Section 138 as clauses (a), (b) and (c) thereof that an offence under Section 138 can be said to have been committed by the person issuing the cheque.

11. Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non-obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, by the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. In terms of sub-section (c) to Section 142, no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class is competent to try any offence punishable under Section 138.

12. A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of proviso to Section 138 of the Act.

13. What is important is that neither Section 138 nor Section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. That such presentation will be perfectly legal and justified was not disputed before us even at the Bar by learned counsel appearing for the parties and rightly so in

light of the judicial pronouncements on that question which are all unanimous. Even *Sadanandan Bhadran's case* (supra) the correctness whereof we are examining, recognized that the holder or the payee of the cheque has the right to present the same any number of times for encashment during the period of six months or during the period of its validity, whichever is earlier.

14. Presentation of the cheque and dishonour thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes 'cause of action' within the meaning of Sections 138 and 142(b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonour to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonour of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. There is, however, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by

several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonour of the cheque on its presentation.

15. *Sadanandan Bhadran's* case (supra) holds that while a second or successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is earlier, the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The decision gives three distinct reasons why that should be so. The first and the foremost of these reasons is the use of the expression "cause of action" in Section 142(b) of the Act which according to the Court has been used in a restrictive sense and must therefore be understood to mean that cause of action under Section 142(b) can arise but once. The second reason cited for the view taken in the *Sadanandan Bhadran's* case (supra) is that dishonour of a cheque will lead to commission of only one offence and that the offence is complete no sooner the drawer fails to make the payment of the cheque amount within a period of 15 days of the receipt of the notice served upon him. The Court has not pressed into service the doctrine of "waiver of the right to prosecute" but held that the failure of

the holder to institute proceedings would tantamount to "absolution" of the drawer of the offence committed by him. The third and the only other reason is that successive causes of action will militate against the provisions of Section 142(b) and make the said provision otiose. The Court in *Sadanandan Bhadran's* case (supra) held that the failure of the drawer/ payee to file a complaint within one month resulted in forfeiture of the complainant's right to prosecute the drawer/payee which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting a dishonour to be followed by a fresh notice and a delayed complaint on the basis thereof.

16. With utmost respect to the Judges who decided *Sadanandan Bhadran's* case (supra) we regret our inability to fall in line with the above line of reasoning to hold that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of proviso to Section 138 had been served upon the drawer. We are conscious of the fact that *Sadanandan Bhadran's* case (supra) has been followed in several subsequent decisions of this Court such as in *Sil Import, USA v. Exim Aides Silk Exporters, Bangalore,* (1999) 4 SCC 567, *Uniplas India Ltd. and Ors. v. State (Govt. of NCT Delhi) and Anr.,* (2001) 6 SCC 8, *Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. and Anr.*, (2001) 6 SCC 463, *Prem Chand Vijay Kumar v. Yashpal Singh and Anr.,* (2005) 4 SCC 417, *S.L. Constructions and Anr. v. Alapati Srinivasa Rao and Anr.,* (2009) 1 SCC 500, *Tameshwar Vaishnav v. Ramvishal Gupta,* (2010) 2 SCC 329.

17. All these decisions have without disturbing or making any addition to the rationale behind the decision in *Sadanandan Bhadran's* case (supra) followed the conclusion drawn in the same. We, therefore, propose to deal with the three dimensions that have been highlighted in that case while holding that successive causes of action are not within the comprehension of Sections 138 and 142 of the Act.

18. The expression 'cause of action' is more commonly and easily understood in the realm of civil laws. The expression is not defined anywhere in the Code of Civil Procedure to which it generally bears relevance but has been universally understood to mean the bundle of facts which the plaintiff must prove in order to entitle him to succeed in the suit. (See *State of Madras v. C.P. Agencies* AIR 1960 SC 1309; *Rajasthan High Court Advocates Association v. U.O.I. & Ors. 2001* SC *416 Mahaboob Ali* AIR 1949 PC78).

19. Section 142 of the Negotiable Instruments Act is perhaps the only penal provision in a statute which uses the expression 'cause of action' in relation to the commission of an offence or the institution of a complaint for the prosecution of the offender. A careful reading of Sections 138 and 142, as noticed above, makes it abundantly clear that the cause of action to institute a complaint comprises the three different factual prerequisites for the institution of a complaint to which we have already referred in the earlier part of this order. None of these prerequisites is in itself sufficient to constitute a complete cause of action for an offence under Section 138. For instance if a cheque is not presented within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier, no cause of action would accrue to the holder of the cheque even when the remaining two requirements, namely service of a notice and failure of the drawer to make the payment of the cheque amount are established on facts. So also presentation of the cheque within the stipulated period without service of a notice in terms of Section 138 proviso (b) would give no cause of action to the holder to prosecute the drawer just as the failure of the drawer to make the payment demanded on the basis of a notice that does not satisfy the requirements of clause (b) of proviso to Section 138 would not constitute a complete cause of action.

20. The expression 'cause of action' appearing in Section 142 (b) of the Act cannot therefore be understood to be limited to any given requirement out of the three requirements that are

mandatory for launching a prosecution on the basis of a dishonoured cheque. Having said that, every time a cheque is presented in the manner and within the time stipulated under the proviso to Section 138 followed by a notice within the meaning of clause (b) of proviso to Section 138 and the drawer fails to make the payment of the amount within the stipulated period of fifteen days after the date of receipt of such notice, a cause of action accrues to the holder of the cheque to institute proceedings for prosecution of the drawer.

21. There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.

22. That brings us to the question whether an offence punishable under Section 138 can be committed only once as held by this Court in *Sadanandan Bhadran's* case (supra). The holder of a cheque as seen earlier can present it before a bank any number of times within the period of six months or during the period of its validity, whichever is earlier. This right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-à-vis the holder of the cheque. If the holder of the cheque has a right, as

indeed is in the unanimous opinion expressed in the decisions on the subject, there is no reason why the corresponding obligation of the drawer should also not continue every time the cheque is presented for encashment if it satisfies the requirements stipulated in that clause (a) to the proviso to Section 138. There is nothing in that proviso to even remotely suggest that clause (a) would have no application to a cheque presented for the second time if the same has already been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision a dishonour whether based on a second or any successive presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) to proviso thereof. We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied.

23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which *Sadanandan Bhadran's* case (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one

month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution.

24. Absolution is, at any rate, a theological concept which implies an act of forgiving the sinner of his sins upon confession. The expression has no doubt been used in some judicial pronouncements, but the same stop short of recognizing absolution as a juristic concept. It has always been used or understood in common parlance to convey "setting free from guilt" or "release from a penalty". The use of the expression "absolution" in *Sadanandan Bhadran's* case (supra) at any rate came at a time when proviso to Section 142(b) had not found a place on the statute book. That proviso was added by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which read as under:

> "Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period."

25. The Statement of Objects and Reasons appended to

the Amendment Bill, 2002 suggests that the introduction of this proviso was recommended by the Standing Committee on Finance and other representatives so as to providediscretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of a case under the Act. This was so recognised judicially also by this Court in *Subodh S. Salaskar v. Jayprakash M. Shah & Anr.* (2008) 13 SCC 689 where this Court observed:

> "11. The [Negotiable Instruments] Act was amended in the year 2002 whereby additional powers have been conferred upon the court to take cognizance even after expiry of the period of limitation by conferring on it a discretion to waive the period of one month.
>
> xx xx xx xx
>
> 24...The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay..."

26. The proviso referred to above now permits the payee to institute prosecution proceedings against a defaulting drawer even after the expiry of the period of one month. If a failure of the payee to file a complaint within a period of one month from the date of expiry of the period of 15 days allowed for this purpose was to result in 'absolution', the proviso would not have been added to negate that consequence. The statute as it exists today, therefore, does not provide for 'absolution' simply because the period of 30 days has expired or the payee has for some other reasons deferred the filing of the complaint against the defaulter.

27. It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See *Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd.* (2006) 3 SCC 658, *C.C. Alavi Haji v. Palapetty Muhammed & Anr.* (2007) 6 SCC 555 and *Damodar S. Prabhu v. Sayed Babulal H.* (2010) 5 SCC 663). Having said that, we must add that one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognized purposive interpretation as a sound principle for the Courts to adopt while interpreting statutory provisions. We may only refer to the decisions of this Court in *New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar* (AIR 1963 SC 1207), where this Court observed:

> "It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid."

28. Reference may also be made to the decision of this Court in *Deputy Custodian, Evacuee Property v. Official Receiver* (AIR 1965 SC 951), where this Court observed:

> "The rules of grammar may suggest that when the section says that the property is evacuee property, it prima facie indicates that the property should bear that character at the time when the opinion is formed. But Mr. Ganapathy Iyer for the appellants has strenuously contended that the construction of s. 7(1) should not be based solely or primarily on the mechanical application of the rules of grammar. He urges that the construction for which Mr. Pathak contents and which, in substance, has been accepted by the High Court, would lead to very anomalous results; and his arguments is that it is open to the Court to take into account the obvious aim and object of the statutory provision when attempting the task of construing its words. If it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the respondent, then it may be open to the Court to enquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible."

29. The decision of this Court in *Nathi Devi v. Radha Devi* (2005) 2 SCC271, reiterates the rule of purposive construction in the following words:

> "Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted."

30. To the same effect is the decision of this Court in *S.P. Jain v. Krishan Mohan Gupta* (1987) 1 SCC 191, where this Court observed:

"We are of the opinion that law should take a pragmatic view of the matter and respond to the purpose for which it was made and also take cognizance of the current capabilities of technology and life- style of the community. It is well settled that the purpose of law provides a good guide to the interpretation of the meaning of the Act. We agree with the views of Justice Krishna Iyer in *Busching Schmitz Private Ltd's* case (supra) that legislative futility is to be ruled out so long as interpretative possibility permits."

31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

32. The controversy, in our opinion, can be seen from another angle also. If the decision in *Sadanandan Bhadran's* case (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do

so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in *Sadanandan Bhadran's* case (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in *Sadanandan Bhadran's* case (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

33. In the result, we overrule the decision in *Sadanandan Bhadran's* case (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

K.K.T. Reference answered.

MUNISH MUBAR
V.
STATE OF HARYANA
(Criminal Appeal No. 294 of 2010)

OCTOBER 4, 2012

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

Penal Code, 1860 – ss.302/34, 201, 120-B and 404 – Homicidal death – Injuries found on the person of the deceased – Circumstantial evidence – Three accused – Conviction of accused-appellant – Justification – Held: Justified – Deceased was done to death after his arrival at the Delhi airport – Car belonging to appellant was parked at the airport for 3 hours, when the flight by which the deceased was to arrive, was scheduled to land, and the said car left after the arrival of such flight – Telephone call records reveal the presence of appellant in the vicinity of the place of occurrence, at the relevant time of the incident – Recoveries were made upon the disclosure statement of the appellant – Some of the articles found, had human blood on them and the same connects the appellant to the said crime – Appellant failed to furnish any explanation whatsoever in relation to any of the above, when examined u/s.313 CrPC – The fact that there was no independent witness of recoveries and the panch witnesses were only police personnel, did not affect the merits of the case – Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, not enough as none of the said allegations made by the appellant could be established – Conviction of appellant accordingly sustained.

Evidence – Circumstantial evidence – Significance and importance of motive in a case of circumstantial evidence – Discussed.

Evidence – Circumstantial evidence – Appreciation of – Held: In a case of circumstantial evidence, all the circumstances must be fully established and all the facts so established, must be consistent with the hypothesis regarding the guilt of the accused – The circumstances so established, should exclude every other possible hypothesis except the one sought to be proved – The circumstances must be conclusive in nature.

Code of Criminal Procedure, 1973 – s.313 – Case of circumstantial evidence – Examination u/s.313 – Obligation of the accused – Held: It is obligatory on the part of the accused, while being examined u/s.313 CrPC to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so to decide, whether or not, the chain of circumstances is complete.

On 27.12.2002, PW10 noticed a dead body lying in a plot of land in Village Bhondsi, District Gurgaon in the State of Haryana. Seeing that the corpse had multiple injuries, he informed PW21, Inspector, who recorded the statement of PW10 and then recovered the dead body, and also lifted from the spot, blood stained earth; a blood stained vest; a boarding card issued by Jet Airways; an almond coloured button, one blood stained hammer and a knife. One day later, the dead body so recovered was identified to be that of one 'A', a resident of Mumbai.

Challan was submitted against the appellant-accused and two other accused- 'S' and 'SS'. 'SS' could not be put to trial as he was absconding at the time. Placing reliance upon the circumstantial evidence, the trial court convicted the appellant and 'S' under Sections 302/34, 201 and 120-B IPC. In addition, the appellant was also convicted under Section 404 IPC. Both appellant and 'S' were sentenced to undergo life imprisonment. The conviction of appellant and 'S' was confirmed by the

High Court. Aggrieved, 'S' filed an S.L.P before this Court, which was dismissed in limine. The S.L.P. filed by the appellant, however, was admitted.

The appellant challenged his conviction before this Court contending that there was no evidence against him; that in a case of circumstantial evidence, motive is of paramount importance, which was not established in the instant case; that the recoveries relied upon by the courts below, alleged to have been made at the instance of the appellant were in fact, all planted and the appellant was falsely enroped into the matter; that furthermore, no independent witness was examined so far as the recoveries were concerned and all the witnesses of recoveries were actually police personnel.

Dismissing the appeal, the Court

HELD: 1. According to the post-mortem report, a number of injuries were found on the person of the deceased. All the injuries were anti-mortem in nature. In the opinion of the Doctor (PW13), the cause of death was due to haemorrhage and shock caused by the cutting of major blood vessels, as a result of injuries, which were sufficient to cause death in the ordinary course of nature. PW.13 explained while being cross-examined, that the injuries found on the person of the deceased could have been caused by a sharp edged weapon and were the possible result of stabbing. The possibility of use of two separate weapons could not be ruled out, however, the said injuries could also have been caused using only one weapon. Therefore, it is evident from the aforesaid evidence that, the deceased was a victim of homicidal death. [Para 6] [204-D; 206-B-D]

2.1. Both the courts below appreciated the entire evidence and material on record and thereafter, convicted the appellant and the co-accused 'S' on the basis of the

following circumstances: i) The intimate relations vis-a-vis 'S' and the appellant as also between her and the deceased, 'A'; ii) 'S' had knowledge that the deceased was coming to Delhi on the evening of 26.12.2002 and she was to receive him, upon his arrival, from the Delhi Airport; iii) 'S' falsely informed PW14, that 'A' had not arrived in Delhi at all, and thus, she was unable to receive him at the Airport on the said day. On all prior occasions, PW2 would receive him at the Airport; iv) Car belonging to the appellant was parked, on the evening of 26.12.2002, at precisely 17:26:21 hours in the car park of the Domestic Airport, Delhi and was taken therefrom, on the very same day, at 20:34:50 hours and within 3 hours of such taking away of the said car, the murder in question, is known to have taken place. The said car was later recovered from the possession of the appellant himself; v) The calls made from mobile No.9818082l95 at 21:26:41 hours on 26.12.2002, were routed through cell No.6572 which pertains to the Badshahpur, Gurgaon Tower, which was situated in the vicinity of the village Bhondsi, from where the dead body of 'A' was recovered; vi) The records of hotel Suji International in Paharganj, Delhi prove sufficiently that both appellant and 'S', along with 'SS' stayed in the said hotel on several occasions, including the evening of 26.12.2002 between 3.40 p.m. and 11.55 p.m. The appellant and 'SS' also stayed in hotel Ashoka Continental, Paharganj, Delhi on 24.12.2002, whereas the appellant had also stayed in the said hotel along with the co-accused 'SS' on 25.12.2002, while representing themselves under different names; vii) There was sufficient motive to rob 'A'of the ?valuables and getting rid of him, as the main hurdle in the love affair between the appellant and 'S'; viii) There was telephonic communication between the accused 'S' and the deceased on the day of occurrence of the said incident and also prior thereto; ix) There has been recovery of jewellery, cosmetic articles, a gold chain, a gold kara etc.

from the appellant, on the basis of disclosure statement made by him. x) Recovery of a torn vest, a blood stained hammer, one blood stained knife and a blood stained pair of trousers was also made, in pursuance of the disclosure statement made by the appellant on 13.1.2003 and xi) The act of absconding by the accused and ultimately the arrest of the accused on 10.1.2003. [Para 19] [209-E-H; 210-A-H; 211-A-B]

2.2. In a case of circumstantial evidence, all the circumstances must be fully established and all the facts so established, must be consistent with the hypothesis regarding the guilt of the accused. The circumstances so established, should exclude every other possible hypothesis except the one sought to be proved. The circumstances must be conclusive in nature. Circumstantial evidence is a close companion of factual matrix, creating a fine network through which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit any other inference but one, indicating the guilt of the accused. [Para 20] [211-C-E]

2.3. There is nothing on record to doubt the existence of the illicit relationship of the co-accused 'S' with the deceased 'A' as also with the appellant, as this fact has been fully established from the evidence provided by several witnesses. It has further been proved that the Santro Car belonging to the appellant was parked on 26.12.2002, at the Delhi Airport for a duration of 3 hours, when the flight by which 'A (deceased) was to arrive, was scheduled to land, and the said car left after the arrival of such Jet Airways flight. The telephone call records reveal the presence of the appellant in the Bhondsi village area, i.e., the place of occurrence, at the relevant time of the incident. The recoveries in the said case, were made upon the disclosure statement of the

appellant. Some of the articles found, had human blood on them and the same connects the appellant to the said crime. The appellant failed to furnish any explanation whatsoever in relation to any of the above, when examined under Section 313 Cr.P.C. [Para 21] [211-E-H; 212-A]

2.4. In a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. However, the evidence regarding existence of motive which operates in the mind of an assassin is very often, not within the reach of others. The said motive, may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to such evil thought, in the mind of the assassin. In a case of circumstantial evidence, the evidence indicating the guilt of the accused becomes untrustworthy and unreliable, because most often it is only the perpetrator of the crime alone, who has knowledge of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggest sufficient/ necessary motive to commit a crime, it may be conceived that the accused has committed the same. [Para 22] [212-B-F]

Subedar Tewari v. State of U.P. & Ors. **AIR 1989 SC 733: 1989 (1) Suppl. SCC 91;** *Suresh Chandra Bahri v. State of Bihar* **AIR 1994 SC 2420: 1994 (1) Suppl. SCR 483 and** *Dr. Sunil Clifford Daniel v. State of Punjab* **JT 2012 (8) SC 639 – relied on.**

3. It is obligatory on the part of the accused, while being examined under Section 313 Cr.P.C. to furnish

some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so to decide, whether or not, the chain of circumstances is complete. It is evident that inspite of the fact that in this case there is no independent witness of recoveries and panch witnesses are only police personnel, it may not affect the merits of the case. In the instant case, the defence did not ask this issue in the cross-examination to Inspector PW.21 as why the independent person was not made the panch witness. More so, it was the duty of the appellant to furnish some explanation in his statement under Section 313 Cr.PC., as under what circumstances his car had been parked at the Delhi Airport and it remained there for 3 hours on the date of occurrence. More so, the call records of his telephone make it evident that he was present in the vicinity of the place of occurrence and under what circumstances recovery of incriminating material had been made on his voluntary disclosure statement. Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, is not enough as none of the said allegations made by the appellant could be established. [Para 24, 25] [213-G-H; 214-A-E]

State, Govt. of NCT of Delhi v. Sunil & Anr. **(2001) 1 SCC 652: 2000 (5) Suppl. SCR 144;** *Musheer Khan v. State of Madhya Pradesh* **(2010) 2 SCC 748: 2010 (2) SCR 119 and** *The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors.* **AIR 1983 SC 1225: 1983 (3) SCR 729 – relied on.**

Case Law Reference:

1989 (1) Suppl. SCC 91	**relied on**	**Para 22**
1994 (1) Suppl. SCR 483	**relied on**	**Para 22**

JT 2012 (8) SC 639	**relied on**	**Para 22**
2000 (5) Suppl. SCR 144	**relied on**	**Para 22**
2010 (2) SCR 119	**relied on**	**Para 24**
1983 (3) SCR 729	**relied on**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 294 of 2010.

From the Judgment & Order dated 27.03.2008 of the High Court of Punjab and Haryana at Chandigarh in Crl. Appeal No. 553-DB of 2006.

Kawaljit Kochar, Kusum Chaudhary for the Appellant.

Kamal Mohan Gupta, Mohd. Zahid Hussain, M.K. Goel 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 27.3.2008 in Criminal Appeal No. 553-DB of 2006 of the High Court of Punjab & Haryana at Chandigarh, by way of which, the High Court has affirmed the judgment and order of the learned Additional Sessions Judge, Gurgaon, dated 26.4.2006, by which the appellant was convicted alongwith the co-accused, Shivani Chopra under Sections 302/34 of Indian Penal Code, 1860, (hereinafter referred to as the `IPC'), and sentenced to undergo life imprisonment and to pay a fine of Rs.5000/- each; under Section 201 IPC, to undergo rigorous imprisonment for three years and to pay a fine of Rs.300/- each; and also under Section 120-B IPC, to undergo rigorous imprisonment for three years. In addition to this, the appellant was also convicted under Section 404 IPC, and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.200/-. However, it was ordered that all the aforementioned substantive

sentences, would run concurrently.

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

A. On 27.12.2002 at 1.00 P.M., one Krishan Pal (PW.10), a resident of Village Bhondsi, District Gurgaon, noticed a dead body lying in a plot of land belonging to one Babu Singh. Seeing that the corpse had multiple injuries, he informed Inspector Shamsher Singh, (PW.21), who was present at the Bus Stand, Bhondsi alongwith other police personnel. Inspector Shamsher Singh, thereafter recorded the statement of Krishan Pal (Ex. PL) and reached the said land of Babu Singh. Inspector Shamsher Singh, I.O., then recovered the dead body lying there, and got the same photographed; he also lifted from the spot, blood stained earth; a blood stained vest; a boarding card issued by Jet Airways; an almond coloured button, one blood stained hammer and a knife, and upon recovery of the same, he prepared the recovery memos. He then sent ruqa on the basis of which, an FIR was registered. An inquest report was prepared, as regards the dead body.

B. On 28.12.2002, the dead body so recovered, was identified to be that of one Ashok Jain, son of Shri Mehar Chand Jain, resident of Mehardeep, 1/9, Sarojni Road, Santa Cruz, Mumbai. On 30.12.2002, Inspector Shamsher Singh (PW.21) obtained the details of mobile phone no. 9818082192, from the Airtel office at Okhla, New Delhi, and also collected a list of articles which the deceased had brought along with him on 4.1.2003 by Jet Airways.

C. In the course of investigation, the investigating officer took into his possession, the records related to the parking of one Santro car no. UP-32-AG-9991 on 9.1.2003, from the car parking stand of the New Delhi Airport. The investigating officer, further collected the records of hotel Suji International, Paharganj, Delhi and took the same into possession. The investigating officer also arrested Shivani Chopra - the co-

accused on 10.1.2003 and recovered from her one mobile phone. The investigating officer then arrested the appellant, Munish Mubar on the same day while he was traveling in the abovementioned Santro car. He recovered from the accused another mobile phone.

D. On 11.1.2003, the appellant made a disclosure statement to the effect that he would show to the police, the place where he, along with the co-accused, had disposed of the dead body of the deceased, as also, the place where they had gotten rid of deceased's clothes. Thus, on 13.1.2003, the investigating officer got recovered the articles belonging to the deceased.

E. The investigating officer recorded the statements of a large number of persons, which revealed that there existed an illicit relationship between the appellant and co-accused Shivani Chopra, and also that, she was an employee of Ashok Kumar Jain - the deceased and was supposed to receive the deceased at the Airport, upon his arrival from Mumbai.

F. Upon conclusion of the investigation, the I.O. submitted a challan against the appellant and the co-accused Shivani Chopra, as well as one Sudhir Srivastava. On committal of the said proceedings, both the accused were charged for the aforementioned offences, and the appellant was additionally charged under Section 404 IPC. Both of them pleaded not guilty and hence, claimed trial. The co-accused Sudhir Srivastava could not be put to trial as he was absconding at the time.

G. In order to substantiate the charges against the accused, the prosecution examined 22 witnesses. The appellant also examined some witnesses in his defence and, after the conclusion of the trial, the trial court upon appreciation of the complete material and evidence on record, found the appellant as well as the co-accused Shivani Chopra, guilty of all the charges against them and imposed upon them punishment as has been described, hereinabove.

H. Aggrieved, the appellant, as well as the co-accused Shivani Chopra, filed Criminal Appeal Nos. 553-DB of 2006 and 359-DB of 2006. Both the appeals were heard and disposed of by way of common judgment dated 27.3.2008.

I. Being aggrieved, the co-accused Shivani Chopra, filed an S.L.P(Crl.) before this Court, which was dismissed in limine. The S.L.P. filed by the present appellant, however, was admitted vide order dated 8.2.2010.

Hence, this present appeal.

3. Mrs. Kawaljit Kochar, learned counsel for the appellant, has submitted that both the courts below have erred in convicting the appellant, even though there is no evidence against him. In a case of circumstantial evidence, the issue of motive to commit the crime in question, is of paramount importance, which could not be established in the instant case. The parameters laid down by this Court for deciding such a case of circumstantial evidence, have not been applied. The recoveries relied upon by the courts below, alleged to have been made at the instance of the appellant have in fact, all been planted and the appellant has falsely been enroped into the matter, merely because he had an alleged intimate relationship with the co-accused, Shivani Chopra, who was an employee of the deceased and had allegedly also developed an intimate relationship with him. Furthermore, no independent witness has been examined so far as the recoveries are concerned. All the witnesses of recoveries are actually police personnel. Thus, the judgments of conviction passed by the courts below are liable to be set aside.

4. On the contrary, Shri Kamal Mohan Gupta, learned standing counsel appearing for the State, has vehemently opposed the appeal, contending that there is no justification for this Court to interfere with the concurrent findings of fact that have been recorded by the courts below. Of course, the present

case is one of circumstantial evidence, but with respect to the same, the chain of events is complete, and every link thereof, is a pointer towards the guilt of the appellant. The appellant has failed to furnish any explanation in relation to the incriminating circumstances put to him, while recording his statement under Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as the `Cr.P.C.'). The present appeal, thus, 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. The post-mortem of the dead body was conducted on 28.12.2002 by Dr. Renu Saroha, Medical Officer, General Hospital Sohna. According to the post-mortem report, the following injuries were found on the person of the deceased:

i) Cut incised wound on scalp left side 7 cm x 1.5 cm. Spindal shaped left frontal region, bone deep. Reddish in colour. Extending from the hair line to be posteriorally.

ii) Spindal shaped wound 4 cm x 1 cm left side of the frontal region. Fracture of tempo frontal region bone. Subdural hematoma was present.

iii) Incised wound on forehead between two eye brows 6 cm x.5 cm. Obliquely situated on the nasion.

iv) Incised cut wound of the nose horizontally incising thoroughly nasal bone and cavity extending to the both side of the face maxillary region and communicating with the vertical wound as described in injury no.3 right side of cheek to left side 12 cm x .5 cm bone deep. Incising the nose completely disfiguring the face.

v) Incising cut wound on left cheek placed horizontally. Extending horizontally from the left cheek upto the base of the nose. 11 cm x 1 cm in length.

vi) Obliquely placed incised wound extending from the right eye brow merging below with wound no.4 at nasal level.

vii) Obliquely situated cut wound. Size of 7 cm x .5 cm over the left cheek crossing the wound no.5 at perpendicular.

viii) Cut wound incised of the left lower lip 4 cm x 1.2 cm Spindal shaped.

ix) Incised wound on right side starting from right angle of mouth and going posteriorally 2 cm in front of the right pinna.

x) Obliquely situated incised cut wound over to the chin 4 cm x .5 cm.

xi) Cut incised wound of 13 cm x 2 cm extending from the tragus left ear and going to interiorally midline of neck. 4 cm below the chin.

xii) Incised irregular almost spindal shaped wound over the neck. Extending from the anterior border of right crapezius muscle to the opposite left crapezius border anterior part. Cutting the voice box and major vessels of neck on left side.

xiii) Superficial cut wound on left side of the shoulder anteriorally 9 cm in size.

xiv) Cut wound on left side elbow joint front part spindal shaped. Obliquely situated cutting skin and muscle and blood vessels are exposed. 5 cm x 3 cm.

xv) Horizental incised cut wound on right arm involving skin and muscle at the level of upper 1/3rd and lower 1/3rd. 10 cm x 2 cm spindal shaped.

xvi) Spindal shaped cut wound on right elbow joint 11 cm x 5 cm involving skin, muscle and major vessels.

xvii) Spindal shaped wound on right forearm 5 cm x 2 cm involving skin facia and muscle region at the junction of lower 1/3rd and upper 2/3rd.

All the injuries were anti-mortem in nature. In the opinion of the Doctor, the cause of death was due to haemorrhage and shock caused by the cutting of major blood vessels, as a result of injuries, which were sufficient to cause death in the ordinary course of nature. The duration of time taken to inflict such injuries was approximately 24 hours. Dr. Renu Saroha (PW.13), explained while being cross-examined, that the injuries found on the person of the deceased could have been caused by a sharp edged weapon and were the possible result of stabbing. The possibility of use of two separate weapons could not be ruled out, however, the said injuries could also have been caused using only one weapon. Therefore, it is evident from the aforesaid evidence that, the deceased was a victim of homicidal death.

7. Chander Shekhar Jain (PW.1), testified that he had gone to identify the dead body of the deceased, but was unable to do so, owing to the fact that his face had been mutilated. The next day, he re-visited the said place, along with Mahender Jain, brother of the deceased and thoroughly examined the dead body. They then identified the same to be that of Ashok Jain.

8. Anil Garg (PW.2) deposed that Ashok Jain was a resident of the United States of America and would visit India occasionally. Shivani Chopra, the co-accused was an employee of Ashok Jain. He stated that the deceased had informed him in December, 2002, that he would be coming to Delhi on 26.12.2002 and that he would instruct him, at a later date whether or not he would be required to come to receive him from the Airport. He further gave the contact numbers (landline and mobile) of Shivani Chopra both, in Delhi and in Mumbai.

9. Bijender Kumar (PW.3), who was in-Charge of the car

park at the Delhi Airport testified that on 26.12.2002, Car No.UP-32-AG 9991 remained parked at the Airport parking between 5.26 p.m. and 8.34 p.m.

10. Shambhu Chaudhary (PW.4), the Receptionist of Hotel Suji International, Paharganj, Delhi deposed that the appellant and the co-accused Shivani Chopra had stayed at his Hotel between 18-19.11.2002, and then, between 7-8.12.2002 and yet again, on 26.12.2002, this time along with one Shri Sudhir Srivastava. This witness provided proof of such stay, by producing requisite guest-log registers and further identified both the said accused in Court.

11. Naresh Kapoor (PW.9), the proprietor of Ashoka Continental Hotel, Paharganj, deposed that the appellant and co-accused, Shivani Chopra stayed in the said hotel on 24.12.2002, upon providing fake names and representing themselves as Munish Mathur and Shivani Mathur respectively. Their stay here was proved by producing the guest-log Register maintained for the purpose of keeping a record of guests, in the normal course of business.

12. Narain Singh (PW.11), ASI made recoveries of several articles, including cosmetic items, blood stained clothes of the appellant, a gold chain and one gold kara on 11.1.2003 and 14.1.2003 on the basis of a disclosure statement made by the appellant. The appellant and the co-accused Shivani Chopra, identified the place where the dead body was lying.

13. Inspector Shamsher Singh (PW.21), corroborated the testimony of Narain Singh, ASI (PW.11) with respect to all material particulars. He also supported the case of the prosecution by explaining how the investigation was conducted, how he had taken readings of the said mobile phone numbers belonging to the accused persons, and therefore, concluded the said investigation.

14. Surender Mohan Jain (PW.14), brother-in-law of the

deceased deposed that the deceased was a Non Resident Indian. He would however, visit India 2-3 times in a year. It came to the knowledge of the said witness that the co-accused Shivani Chopra, would receive the deceased at the Airport on the day of his arrival, on his particular visit to India. Ms. Urvashi, a niece of Ashok Jain, deceased, informed him that her father had talked to her on the mobile phone of Shivani Chopra, the co-accused before his death. He also stated that Shivani Chopra had told him that she had, in fact, gone to Airport to receive the deceased, however, he never showed up. He further deposed that, Shivani Chopra had developed illicit relations with the deceased.

15. Mahender Kumar Jain (PW.17), elder brother of the deceased corroborated the testimony of Surender Mohan Jain (PW.14), and further deposed that upon hearing the news regarding the death of the deceased, he immediately went to General Hospital on 28.12.2002, and identified the dead body of Ashok Jain. He also disclosed that at the time that Ashok Jain had left the city of Mumbai, he was carrying upon his person, jewellery, i.e., a gold chain, a pair of diamond rings, various cosmetic articles and also cash.

16. Capt. Rakesh Bakshi (PW.22), provided proof regarding the records of mobile phone numbers belonging to the accused persons.

Other witnesses also deposed in support of the case of the prosecution and proved all material particulars.

17. When the appellant and the co-accused Shivani Chopra, were examined under Section 313 Cr.P.C., they denied any involvement in the said crime. The appellant explained that he was being falsely implicated in this case. He also stated that in connection with the same, he had been arrested 5 days prior to the alleged date of arrest from Lucknow, and had since such date, been illegally detained. The police had planted each of the alleged recoveries made by them. The

jewellery recovered, actually belonged to him. He deposed that he did not know the deceased, Ashok Jain at all, and all alleged details of calls etc., were supported by way of fabricated documents. A similar version was given by the co-accused Shivani Chopra who stated that the deceased Ashok Jain, was in fact, her family friend. He had telephoned her father to inform him that he would visit their house at Rohini, on 26.12.2002 but then he failed to show up. She had absolutely no intimacy with the deceased. The alleged records of phone calls etc. were untrue stories based on fabricated records. She did not, in fact, own any of the telephone numbers, as shown as part of the evidence on record.

18. The appellant also examined Samita Sinha (DW.1), and Shailender (DW.2), both of whom are sales persons at Bharti Jewellers, Mumbai and also, one Subhash, who is the proprietor of Bharti Jewellers (DW.3), to prove that the jewellery recovered, belonged to his family and not to the deceased Ashok Jain.

19. In the above backdrop, both the courts below have appreciated the entire evidence and material on record and thereafter, have convicted the appellant and the co-accused Shivani Chopra on the basis of the following circumstances:

i) The intimate relations vis-a-vis Shivani Chopra and the appellant, Munish Mubar as also between her and the deceased, Ashok Jain.

ii) Shivani Chopra had knowledge that the deceased was coming to Delhi on the evening of 26.12.2002 and she was to receive him, upon his arrival, from the Delhi Airport.

iii) Shivani Chopra falsely informed Surender Mohan Jain (PW14), that Ashok Jain had not arrived in Delhi at all, and thus, she was unable to receive him at the Airport on the said day. On all prior occasions, Anil Garg (PW2) would receive him at the Airport.

iv) Car No. UP-32-AG-999l belonging to the appellant was parked, on the evening of 26.12.2002, at precisely 17:26:21 hours in the car park of the Domestic Airport, Delhi and was taken therefrom, on the very same day, at 20:34:50 hours and within 3 hours of such taking away of the said car, the murder in question, is known to have taken place. The said car was later recovered from the possession of the appellant himself.

v) The calls made from mobile No.9818082l95 at 21:26:41 hours on 26.12.2002, were routed through cell No.6572 which pertains to the Badshahpur, Gurgaon Tower, which was situated in the vicinity of the village Bhondsi, from where the dead body of Ashok Jain was recovered.

vi) The records of hotel Suji International in Paharganj, Delhi prove sufficiently that both the accused, along with one Sudhir Srivastava (since the date of incident, proclaimed absconder), stayed in the said hotel on several occasions, including the evening of 26.12.2002 between 3.40 p.m. and 11.55 p.m. The appellant Munish Mubar, and Sudhir Srivastava also stayed in hotel Ashoka Continental, Paharganj, Delhi on 24.12.2002, whereas the appellant had also stayed in the said hotel along with the co-accused Sudhir Srivastava on 25.12.2002, while representing themselves as Munish Mathur, Shivani Mathur and Sunil Srivastava, respectively.

vii) There was sufficient motive to rob Ashok Jain of the valuables and getting rid of him, as the main hurdle in the love affair between the appellant and Shivani Chopra.

viii) There was telephonic communication between the accused Shivani Chopra and the deceased on the day of occurrence of the said incident and also prior thereto.

ix) There has been recovery of jewellery, cosmetic articles, a gold chain, a gold kara etc. from the appellant, on the

basis of disclosure statement made by him.

x) Recovery of a torn vest, a blood stained hammer, one blood stained knife and a blood stained pair of trousers was also made, in pursuance of the disclosure statement made by the appellant on 13.1.2003.

xi) The act of absconding by the accused and ultimately the arrest of the accused on 10.1.2003.

20. Undoubtedly, in a case of circumstantial evidence, all the circumstances must be fully established and all the facts so established, must be consistent with the hypothesis regarding the guilt of the accused. The circumstances so established, should exclude every other possible hypothesis except the one sought to be proved. The circumstances must be conclusive in nature. Circumstantial evidence is a close companion of factual matrix, creating a fine network through which there can be no escape for the accused, primarily because the said facts, when taken as a whole, do not permit us to arrive at any other inference but one, indicating the guilt of the accused.

21. If the case is examined in the light of the aforesaid settled legal propositions, we are of the considered opinion that, there is nothing on record to doubt the existence of the illicit relationship of the co-accused Shivani Chopra with the deceased, Ashok Jain as also with the appellant, as this fact has been fully established from the evidence provided by several witnesses. It has further been proved that the Santro Car belonging to the appellant was parked on 26.12.2002, at the Delhi Airport for a duration of 3 hours, when the flight by which Ashok Jain (deceased) was to arrive, was scheduled to land, and the said car left after the arrival of such Jet Airways flight. The telephone call records reveal the presence of the appellant in the Bhondsi village area, i.e., the place of occurrence, at the relevant time of the incident. The recoveries in the said case, were made upon the disclosure statement of the appellant. Some of the articles found, had human blood on

them and the same connects the appellant to the said crime. The appellant failed to furnish any explanation whatsoever in relation to any of the above, when examined under Section 313 Cr.P.C.

22. In a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. However, the evidence regarding existence of motive which operates in the mind of an assassin is very often, not within the reach of others. The said motive, may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to such evil thought, in the mind of the assassin. In a case of circumstantial evidence, the evidence indicating the guilt of the accused becomes untrustworthy and unreliable, because most often it is only the perpetrator of the crime alone, who has knowledge of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggest sufficient/ necessary motive to commit a crime, it may be conceived that the accused has committed the same. (See: *Subedar Tewari v. State of U.P. & Ors.,* AIR 1989 SC 733; *Suresh Chandra Bahri v. State of Bihar,* AIR 1994 SC 2420; and *Dr. Sunil Clifford Daniel v. State of Punjab,* JT 2012(8) SC 639)

23. The issue of non-examination of independent witnesses and reliance upon the deposition of police officials as "Panch witnesses" was considered at length by this Court in *State, Govt. of NCT of Delhi v. Sunil & Anr.,* (2001) 1 SCC 652, wherein this Court held as under:

> "….But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so

prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.

We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust……At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

24. It is obligatory on the part of the accused, while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation, even in a case of circumstantial evidence, so to

decide, whether or not, the chain of circumstances is complete. The aforesaid judgment has been approved and followed in *Musheer Khan v. State of Madhya Pradesh,* (2010) 2 SCC 748. (See also: *The Transport Commissioner, A.P., Hyderabad & Anr. v. S. Sardar Ali & Ors.,* AIR 1983 SC 1225).

25. In view of the aforesaid discussion, it is evident that in spite of the fact that in case there is no independent witness of recoveries and panch witnesses are only police personnel, it may not affect the merits of the case. In the instant case, the defence did not ask this issue in the cross-examination to Inspector Shamsher Singh (PW.21) as why the independent person was not made the panch witness. More so, it was the duty of the appellant to furnish some explanation in his statement under Section 313 Cr.PC., as under what circumstances his car had been parked at the Delhi Airport and it remained there for 3 hours on the date of occurrence. More so, the call records of his telephone make it evident that he was present in the vicinity of the place of occurrence and under what circumstances recovery of incriminating material had been made on his voluntary disclosure statement. Merely making a bald statement that he was innocent and recoveries had been planted and the call records were false and fabricated documents, is not enough as none of the said allegations made by the appellant could be established.

In view of the above, we do not find any force in this appeal. The appeal is therefore, dismissed accordingly.

B.B.B. Appeal dismissed.

BOARD OF TRUSTEES OF MARTYRS MEMORIAL TRUST AND ANOTHER
v.
UNION OF INDIA AND OTHERS
(Civil Appeal No. 4444 of 2010)

OCTOBER 4, 2012

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

Constitution of India, 1950:

Art. 226 - Writ petition - Disposal of, without adjudication on the issues involved - Held: A slipshod consideration or cryptic order or decision without due reflection on the issues raised in a matter may render such decision unsustainable - Each and every matter that comes to court must be examined with the seriousness it deserves - In the instant case, the writ petition was disposed of by High Court without calling for any counter-affidavit from respondents - Appellants have raised some serious issues concerning the action of the District Collector, who wrote the letter in his capacity as Secretary of the Trust to himself and then passed an order of cancellation of allotment of Government accommodation of the Trust in his capacity as District Magistrate under pressure of the political party then ruling the State - These serious allegations did require response from the District Magistrate - Impugned order is set aside - Writ petition is restored to the file of High Court for consideration and disposal afresh - Judgments/ Orders - Administration of justice.

Appellant No. 1, a public charitable trust, was created with the object to perpetuate the memory of the martyrs of National Freedom Movement, and on 27.3.2002 was allotted Government Accommodation nos. 1 and 2 of Revenue Department, Ballia (U.P.). An I.T.Training

Institute for the poor and underprivileged students was established under aegis of the Trust in the subject premises and the building constructed on the adjoining land. The Institute was recognized by the Government of India under the Employment Generation Training Scheme (EGTS). It was the case of the appellant-Trust that on 15.05.2009, the District Collector, who was also the Secretary of the Trust, issued an order canceling the allotment of the Government Accommodation made in favour of the Trust on the ground that a request had been received from the Secretary of the Trust by letter dated 28.02.2009 to cancel the allotment. Subsequently, the subject premises were sealed by the official of the State Government. In the writ petition filed by the Principal of the Institute, the High Court passed an interim order dated 28.08.2009 directing the authorities to remove the seal, and permitted examinations to be held. Subsequently, the appellant Trust also filed Civil Misc. Writ Petition No. 49841 of 2009 challenging the order dated 15.05.2009. The High Court declined to interfere and disposed of the writ petition observing that the writ petitioners had no vested right in the subject premises.

Allowing the appeal, the Court

HELD: 1.1 A slipshod consideration or cryptic order or decision without due reflection on the issues raised in a matter may render such decision unsustainable. Hasty adjudication must be avoided. Each and every matter that comes to the court must be examined with the seriousness it deserves. What is required of any judicial decision is due application of mind, clarity of reasoning and focused consideration. [Para 21] [224-E-F]

1.2 In the instant case, admittedly, the writ petition was disposed of by the High Court without calling for any counter-affidavit from the respondents. The appellants

have raised some serious issues concerning the action of the District Collector. The Secretary of the Trust also happened to be the District Collector. He is alleged to have not convened any meeting of the Trust and on his own, took a decision to surrender the Government accommodation allotted to the Trust on make believe and self-created grounds that the allotted Government accommodation was not being used by the Trust for the purpose for which it was allotted to the said Trust. The appellants have alleged that the action of the District Magistrate by sending the communication dated 28.02.2009, as the Secretary of the Trust for surrendering the Government accommodation and then passing the order himself on 15.05.2009 cancelling the allotment was at the behest of the political party ruling the State at that time. It has also been alleged that this was done because the ruling party did not have any office in the City and so it started putting pressure on the District Magistrate for cancelling the Government accommodation allotted to the Trust. These serious allegations did require response from the District Magistrate, who wrote the letter in his capacity as Secretary of the Trust on 28.2.2009 to himself and then passed an order of cancellation of allotment of Government accommodation of the Trust in his capacity as District Magistrate on 15.05.2009. [Para 22] [224-G-H; 225-A-D]

1.3 The impugned order cannot be sustained as the writ petition filed by the appellants (petitioners before the High Court) deserves fresh consideration and hearing after receipt of the response from the respondents. The impugned order is set-aside. Civil Misc. Writ Petition No. 49841 of 2009 is restored to the file of the High Court for consideration and disposal afresh. [Paras 23 and 24] [225-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4444 of 2010.

From the Judgment and Order dated 16.09.2009 of the High Court of Judicature at Allahabad in Civil Writ Petition No. 49841 of 2009.

Ajay Vikram Singh (for Renjith. B), M. Khairati, Vikas Bansal (For D.S. Mahra), M.R. Shamshad, Vivek Vishnoi, Rohit for the Appearing Parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. This appeal raises the question pertaining to cancellation of allotment of Government Accommodation Nos. 1 and 2, Civil Lines, Ballia (U.P.) (hereinafter referred to as "Government accommodation").

2. Martyrs Memorial Trust (Shaheed Smarak Nyas), the first appellant, a public charitable trust (for short "the Trust"), was constituted by a deed of declaration dated June 5, 1997. The preamble of the Deed of Trust records that the people of India suffered immensely under the British Rule for more than two hundred years and at the call of Mahatma Gandhi, thousands of men and women from different walks of life joined the National Freedom Movement and directly associated themselves with various constructive programmes. It was decided to constitute a public charitable trust in the fond memory of the martyrs and freedom fighters hailing from Ballia and eastern Uttar Pradesh with a view to perpetuate their names and strengthening the task of nation building.

3. On August 19, 1992, the then Prime Minister of India Mr. P.V. Narasimha Rao, on the occasion of Golden Jubilee Celebration of the Quit India Movement of 1942 at Ballia, had announced while addressing a meeting at Jayaprakash Nagar, the birth place of Shri Jayaprakash Narayan, that a sum of rupees one crore would be made available by the Government of India for the construction of Shaheed Smarak (Martyrs

Memorial) at Ballia. The then Chief Minister of Uttar Pradesh also announced a sum of Rs. 25 lakhs for this purpose.

4. In order to ensure the establishment of Shaheed Smarak at Ballia, the Ministry of Human Resources & Development nominated Shri Chandra Shekhar as the President and some freedom fighters and other including ex-officio trustees to look after various aspects of the Trust.

5. The aims and objectives declared in the trust deed, inter alia, provide for the Trust to be a centre for perpetuating the memory of the martyrs and freedom fighters and for carrying on such constructive activities as may be beneficial to the surviving freedom fighters and their dependents; to collect, preserve, publish and distribute various records, plans, books, writings, lectures, letters, correspondence, teachings and messages of the martyrs and freedom fighters together with their autobiographies, biographies, anecdotes and reminiscence highlighting their feelings and sentiments against British Tyranny and strong determination for the independence of the country; to set up, maintain and run museum where various relics, objects of veneration photographs, paintings, sketches, articles and things connected with the history of struggle for independence have to be preserved; to establish rapport with various educational institutions and Government organizations, public undertakings and private enterprises for the admission in different courses of studies and subsequent absorption for employment of the children and freedom fighters on some reservation basis and to motivate, encourage and assist people of different age groups regardless of caste, creed, religion and sex for their active participation in various types of suitable sports for them and to provide necessary coaching facilities for the same.

6. The Deed of Trust also provides that the management and control of the Trust and the Trust properties shall vest in the Board of Trustees which shall comprise of not less than three nor more than fifteen trustees including the Chairman and

Managing Trustee. Shri Chandra Shekhar, Shri Narayan Dutt Tiwari and the Secretary, Culture, Government of India were first three trustees; Shri Chandra Shekhar being the Chairman. In addition to the above, the Secretary, Culture, Government of Uttar Pradesh, the Accountant General, U.P (or their respective nominees) and District Magistrate, Ballia are made ex-officio trustees and they hold their office as long as they continue in the same capacity.

7. Clause 11 of the Deed of Trust provides for appointment of new trustees. Power to sell and manage the immovable property is provided in clause 22.

8. On March 27, 2002, the office of the District Collector, Ballia allotted Government accommodation Nos. 1 and 2 of the Revenue Department, Ballia to the Trust as it was lying vacant. The permission for allotment of the above Government accommodation to the Trust was also accorded by the State Government. The Board of Trustees passed a resolution to establish I.T. Training Institute under the aegis of the Trust for the poor and underprivileged students. The Institute was established in the name of Dr. Ganeshi Prasad, a well known Mathematician. The Institute had been functioning from the Government accommodation and also the building constructed on the adjoining land. The building on the adjoining land is said to have been constructed under the M.P. Local Area Development Scheme for 2002-2003 and 2003-2004 and some other funds. The said Institute is authorized to run DOEACC Society's 'O' Level and 'CCC' courses conducted by the Information and Technology Ministry, Government of India. This Institute is recognized by the Government of India to teach backward and poor students under EGTS (Employment Generation Training Scheme).

9. From the communication dated June 6, 2004, sent by the Additional District Development Officer (Social Welfare) to the Managing Director, Scheduled Caste Finance and Development corporation Ltd., Lucknow, it transpires that on

physical inspection at that time, it was found that 500 students had been imparted computer education in the Institute by then. Out of the 150 students, who were being imparted education in the Institute at the time of inspection, 80 students belonged to Scheduled Caste and Scheduled Tribe poor families and those students were being imparted computer education on minimum fee. The communication also noted that the Institute was equipped with 40 computers and the teachers of the Institute were highly educated and experienced as well.

10. Strangely, on May 15, 2009, the District Collector, Ballia issued an order cancelling theallotment of Government accommodation made in favour of the Trust on the grounds that a request has been received from the Secretary of the Trust vide his letter dated February 28, 2009 that allotment be cancelled because no work of the Trust was being done from the premises and the Trust was not using the said accommodation. The Secretary of Trust is none other than the District Collector himself.

11. Subsequent to the order of cancellation dated May 15, 2009, the District Collector, Ballia and other officials of the State accompanied by the police force sealed the Government accommodation although the examinations were to commence on August 29, 2009. This led the Principal of the Institute, Mr. Pradeep Rai to file a Writ Petition No. 44477 of 2009 before the Allahabad High Court seeking a writ of mandamus for a direction to the District Collector, Ballia and other officials of the State to open the locks and seal.

12. By an interim order dated August 28, 2009, the Division Bench of the High Court of judicature at Allahabad, directed the concerned respondents to remove the seal and permitted the examinations to be held.

13. On August 30, 2009, the trustees of the Trust wrote to the District Officer/Secretary of the Trust to call for the meeting of the Trust and place for consideration the letter dated

February 28, 2009, sent by him to himself as District Collector for surrender of the Government accommodation. The said letter recorded that in the absence of consideration of any proposal by the Trust, the communication dated February 28, 2009 sent by the District Officer in his capacity as the Secretary of the Trust was not acceptable. No meeting of the Trust was called to discuss the matter nor the matter was considered by the Trust in that regard.

14. The letter dated August 30, 2009 sent by the trustees of the Trust to the District Officer/Secretary of the Trust was followed by another letter dated September 4, 2009 reiterating that the meeting of the Trust be called within two days for discussion with regard to the letter dated February 28, 2009 failing which suitable action would be taken.

15. It was then that a Writ Petition was filed by the Trust being Civil Miscellaneous Writ Petition No. 49841 of 2009 before the High Court of judicature at Allahabad.

16. In the above Writ Petition, the Trust challenged the order dated May 15, 2009 cancelling the allotment of Government accommodation in favour of the Trust.

17. Inter alia, in the Writ Petition, it was averred that the Board of Trustees had passed a resolution to establish I.T. Training Institute under the aegis of the Trust for the poor and unprivileged students and they also decided to start some recognized courses like 'O' level and 'A' level courses from DOEACC Society, New Delhi. The Institute was established in the name of a well known Mathematician Dr. Ganeshi Prasad. The Trust made a proposal for establishment of education center for information technology under the EGTS (Employment General Training Scheme) to the Minister of Information & Technology, who having considered the proposal, granted sanction to start training programme for the weaker section of the society and released fund to the Trust for imparting education. The Ministry had also made available computer

apparatus and other allied materials for implementingthe scheme.

18. After the death of Shri Chandra Shekhar, a resolution was passed wherein it was decided that Shri Ravi Shanker Singh – appellant No. 2 shall be the Chairman till the next election was held.

19. The appellants alleged in the Writ Petition that Bahujan Samaj Party (BSP), which was ruling the State, did not have a office at Ballia. BSP started putting pressure on the District Magistrate, Ballia for cancellation of the Government accommodation and the District Magistrate, under the political pressure, wrote a letter to himself in his capacity as Secretary of the Trust requesting for surrender of the Government accommodation. The misuse of the position by the District Magistrate was also alleged. It was alleged that in the absence of any resolution passed by the Board of Trustees, the decision taken by the District Magistrate, Ballia, who happened to be the Secretary of the Trust, to surrender the Government accommodation to himself and then cancelling the allotment in his capacity as District Magistrate was illegal.

20. There is nothing on record to show that counter-affidavit was filed by the District Magistrate, Ballia or other functionaries of the State in opposition to the Writ Petition before the High Court. Learned counsel for the parties agreed that the Writ Petition was disposed of by the High Court without calling for any counter-affidavit from the respondents. The order of the High Court reads as under:

> "Vide order dated 15th may, 2009 which has been impugned in the present Writ Petition the allotment of Government Residential Accommodation No. 1 and 2 to Shaheed Smarak Nyas, Basantpur, Ballia has been cancelled.
>
> We are not inclined to interfere in the said order as the

> petitioner has no vested right to continue to hold the said accommodation as it is only a licensee. Shri Ashok Khare, learned senior standing counsel assisted by Shri H.K. Singh has submitted that under the garb of the order dated 15th May, 2009, the authorities are also disturbing the peaceful possession of the constructions made in the adjoining land.
>
> It is not clear as to whether adjoining land is part of this accommodation or not. If the same is not part of the accommodation No. 1 and 2 then obviously under the garb of this order the authorities cannot disturb the possession of the petitioner in respect of the constructions made on the adjoining land. However, if the adjoining land on which the construction is alleged is part of the Government accommodation No.1 and 2, then the authorities are justified on their part. The Writ Petition is disposed of with the aforesaid observation. Ms. Poonam Singh, learned counsel has appeared for the respondent Nos. 1 and 2."

21. Brevity in judgment writing has not lost its virtue. All long judgments or orders are not great nor brief orders are always bad. What is required of any judicial decision is due application of mind, clarity of reasoning and focused consideration. A slipshod consideration or cryptic order or decision without due reflection on the issues raised in a matter may render such decision unsustainable. Hasty adjudication must be avoided. Each and every matter that comes to the court must be examined with the seriousness it deserves.

22. In the present case, the appellants have raised some serious issues concerning the action of the District Collector, Ballia. The Secretary of the Trust also happened to be the District Collector. He is alleged to have not convened any meeting of the Trust and on his own, took a decision to surrender the Government accommodation allotted to the Trust on make believe and self created grounds that the allotted Government accommodation was not being used by the Trust

for the purpose for which it was allotted to the said Trust. The appellants have alleged that the action of the District Magistrate by sending a communication dated February 28, 2009, as the Secretary of the Trust for surrendering the Government accommodation and then passing the order himself on September 15, 2009 cancelling the allotment was at the behest of the BSP which was ruling the State at that time. It has also been alleged that this was done because BSP was not having any office in Ballia and so it started putting pressure on the District Magistrate for cancelling the Government accommodation allotted to the Trust. These serious allegations did require response from the District Magistrate, Ballia who wrote the letter in his capacity as Secretary of the Trust on February 28, 2009 to himself and then passed an order of cancellation of allotment of Government accommodation of the Trust in his capacity as District Magistrate on May 15, 2009.

23. We are satisfied that the impugned order cannot be sustained and has to be set-aside as the Writ Petition filed by the appellants (petitioners before the High Court) deserves fresh consideration and hearing after receipt of the response from the respondents.

24. Appeal is allowed to the above extent. The impugned order is set-aside. Civil Misc. Writ Petition No. 49841 of 2009 – Board of Trustees of Martyrs Memorial Trust and another vs. Union of India and others is restored to the file of the High Court of judicature at Allahabad for fresh consideration and disposal, as noted above. The parties shall bear their own costs.

R.P. Appeal Allowed.

SHANTI DEVI

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 954 of 2005)

OCTOBER 5, 2012

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

PENAL CODE, 1860:

ss.302 and 201 - Appellant causing murder, and with the help of three others, burying the dead body in a place adjacent to her house - Principles as to circumstantial evidence, culled out - Held: In the instant case, the circumstances from the day the deceased went to the house of accused-appellant till recovery of his dead body at her instance, which have been found proved, formed a chain closely linked together without giving any scope for any other conclusion than a definite tendency unerringly pointing towards the guilt of the accused-appellant - In the circumstances, the conclusion was inescapable that the appellant was squarely responsible for the murder of the deceased - Circumstantial evidence.

DELAY/LACHES

Delay of 52 days in lodging FIR - Held: The conduct of the appellant in misdirecting the wife and minor son of the deceased, first orally and subsequently by sending a letter by post, as if the deceased himself was communicating with his wife and son, cumulatively influenced their minds which resulted in reporting the fact of missing of the deceased to the police belatedly - Having regard to the facts of the case, it can not be said that delay in registration of the FIR makes the prosecution case unbelievable.

MEDICAL JURISPRUDENCE:

Cause of death - Dead body recovered in a decomposed state - Post-mortem report to the effect that the death could be as a result of murder as well as naturally - Held: It is not, as if based on the postmortem certificate and the version of post-mortem doctor, the offence of murder can be ruled out - Since the dead body was recovered in a decomposed state, it was quite natural that the doctor could not specifically state as to the nature of injury on the body.

The appellant alongwith three others was prosecuted for committing the murder of the father of PW2. The prosecution case was that on 22.08.1997, the deceased went to the house of the appellant and did not return. When PW2 asked the appellant about his father, she told him that he was involved in a 'charas' case and would be released shortly. Subsequently, the appellant visited the house of PW2 and took Rs. 5,000/- from him to get his father released. When there was no trace of the father of PW2, he lodged an FIR. The appellant and three others were arrested. On the disclosure statement of the appellant, the dead body of the father of PW2 was exhumed from a place near her house. The trial court convicted the appellant u/s.302 IPC and sentenced her to imprisonment for life. She was further convicted with other three accused u/s.201 IPC and all the four were sentenced to 5 years RI each on this count. On appeal, the High Court reduced the sentence of all the accused u/s.201 IPC to the period already undergone, but maintained the conviction and sentence of the appellant u/s.302 IPC.

Dismissing the appeal, the Court

HELD: 1.1 Since, it is a case of circumstantial evidence, the principles laid down in various decisions

of this Court can be set out as under:

(i) The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

(ii) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

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

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. [Para 8] [236-B-G]

1.2 In the instant case, when the circumstances placed before the trial court are considered and the various tests relating to the circumstantial evidence are applied there can be no difficulty in holding that the chain of circumstances had every definite link. After 22.08.1997, having known that the deceased had gone to the residence of appellant and since he did not return back for about seven days, P.W.2 in the natural course of events went to the residence of the appellant to find out his whereabouts. This particular fact was spoken to by P.W.1, the wife of the deceased and P.W.2, the son of the deceased. The sequence of events narrated by P.W.2 as from 22.08.1997 till the demand of Rs.5000/- was cogent and convincing. The trial court has noted that the said

version of P.W.1 and P.W.2 was not in any manner dislodged at the instance of the appellant. [Para 10] [238-C-G]

1.3 The further fact that P.W.2, who was a minor, in his anxiety to get his father released, succumbed to the demand of the appellant by raising funds for the payment of Rs.5000/- by borrowing the same from P.W.13 who supported the said fact by deposing before the court. The court has noted that his testimony was perfect in every respect and nothing could be brought out in the cross-examination to discredit his version. When the said circumstance was found proved and since there was no other explanation than what was demonstrated before the court by the prosecution through P.W.2 and P.W.13, the said circumstance was in addition to the earlier set of circumstances which linked the involvement of the appellant in the crime alleged against her. [Para 10] [239-B-E]

1.4 The subsequent factum of recovery of the body of the deceased at the instance of the appellant and that too from a place adjacent to her residence, was one other strong circumstance against the appellant in roping her in the elimination of the deceased and thereby providing no scope for any other hypothesis than her guilt in the killing of the deceased. The other recoveries made from the body of the deceased duly identified by P.W.2, was yet another relevant circumstance to show that the deceased was none other than the father of P.W.2 and husband of P.W.1. [Para 10] [239-E-G]

1.5 Therefore, the analysis of the circumstances alleged and found proved definitely formed a chain having closely linked together without giving any scope for any other conclusion than a definite tendency unerringly pointing towards the guilt of the appellant.

[Para 10] [239-G]

2. As regards the delay of 52 days in the registration of the FIR, it is significant to note that after the deceased went to the house of the appellant, i.e. on 22.08.1997, which happened to be his usual routine as spoken to by the prosecution witnesses in particular P.W.1 and P.W.2, no fault can be found in the conduct of P.W.1 and P.W.2 in having waited for a minimum period of a week for the deceased to return back. Thereafter, as rightly observed by the courts below, the appellant misdirected P.W.1 and P.W.2, whereby believing her words that the deceased was involved in a criminal case relating to charas they were waiting for his arrival. That apart, the appellant hatched a scheme of sending a letter by post as though the deceased himself was communicating to his wife and son to the effect that he got entangled in a criminal case relating to charas, that the same should not be revealed even to his own brothers and that he will be able to get himself released from the said case at the earliest possible time, which was truthfully believed by P.Ws.1 and 2 whose innocence was fully encashed by the appellant. A cumulative effect of these factors definitely influenced the minds of P.W.1 and P.W.2 which resulted in reporting the fact of missing of the deceased to the police belatedly. At one point of time they also approached the panchayat members, namely, P.W.8 and P.W.9 and sought for their guidance. Therefore, when P.W.8 and P.W.9 intervened and directly approached the appellant herself the game plan of the appellant came to light and, thereafter, the complaint was preferred by P.W.2 on 13.10.1997 which resulted in the registration of FIR (Ext.P-2). Having regard to the facts of the case, it cannot be said that the delay in registration of the FIR makes the prosecution case unbelievable. [Para 11] [240-A-H; 241-A-B]

3.1 As far as the cause of death is concerned, based on the information furnished by the appellant, the dead body of the deceased was exhumed in her presence and in the presence of the S.D.M (P.W.24) as well as PWs 6 and 11, the two independent eye-witnesses. The appellant herself confirmed that it was the body of the deceased. In the opinion of P.W.16, the postmortem doctor, the death could be a murder as well as natural. Therefore, it is not, as if based on the postmortem certificate and the version of P.W.16, the offence of murder can be ruled out. Since the dead body was recovered in a decomposed state, it was quite natural that the doctor could not specifically state as to the nature of injury on the body of the deceased. The articles which were recovered along with dead body, namely, wrist watch, pair of shoes, shirt, payajama and empty bag were all identified by P.W.2, the son of the deceased. [Paras 12 and 13] [241-C-E, H; 242-A-B]

3.2 Having regard to the clinching circumstances found proved against the appellant with the ultimate discovery of the body of the deceased from a place adjacent to her residence, at the instance of the appellant herself, who had the exclusive knowledge on that special factor, if the death of the deceased was due to any other cause the best person who could have explained could have been the appellant alone. In the circumstances, the conclusion was inescapable that the appellant was squarely responsible for the murder of the deceased. [Para 14] [242-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 954 of 2005.

From the Judgment & Order dated 16.2.2005 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 517 of 2002.

Ravindra Bana for the Appellant.

Dr. Manish Singhvi, AAG, Milind Kumar, Anjani Kumar Dubey for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The first accused is the appellant. The challenge is to the judgment of the Division Bench of the High Court of Rajasthan at Jodhpur dated 16.02.2005 passed in Criminal Appeal No.517 of 2002. Altogether four accused were involved in the crime. The Trial Court convicted the appellant for offences under Sections 302 and 201 of IPC while the other three accused were found guilty for offence under Section 201 of IPC alone. The appellant was imposed with the punishment of sentence for life for the offence under Section 302 of IPC apart from a fine of Rs.100/- and in default for further one month rigorous imprisonment, for the offence under Section 201 of IPC appellant was imposed with the rigorous imprisonment for five years along with the fine of Rs.100/- and in default of the payment of fine to undergo one more month rigorous imprisonment. The other three accused were awarded rigorous imprisonment for five years each and a fine of Rs.100/- and in default of the payment of fine to undergo further period of rigorous imprisonment for one month. The sentences awarded against the appellants were directed to run concurrently. The Division Bench while upholding the conviction and sentence imposed on the appellant for the offence under Section 302 of IPC modified the punishment so far as it related to be one under Section 201 of IPC to the effect that the period already undergone would be sufficient in the interest of justice. Similarly, in respect of other three accused also while confirming the conviction against them under Section 201 of IPC, the substantive sentence was modified to be one which was already undergone by them. Aggrieved against the same appellant preferred this appeal.

2. Shorn of unnecessary details, the case of the prosecution as projected before the Sessions Trial was that the father of P.W.2 went to the house of the appellant on 22.08.1997, that he had a sum of Rs.300/- with him on that day, that he frequently used to visit the house of the appellant and that appellant used to call him as her brother. According to P.W.2, after his father, the deceased Om Prakash went to the house of the appellant on 22.08.1997 he did not return back. P.W.2 went to the house of the appellant thrice and the appellant informed him that his father, the deceased, was entangled in a case of Charas and that she is taking every effort to get him released. Subsequently, on 01.09.1997 the Postman delivered a letter in his house which was purportedly in the hand-writing of Accused No.3 (A-3), the son of the appellant, and that on that very day appellant visited the residence of P.W.2 and asked for a sum of Rs.5000/- stating that money was required in order to enable her to get his father released from the criminal complaint. Believing her words P.W.2 stated to have borrowed a sum of Rs.5000/- from P.W.13 Tersem Ram and gave it to her.

3. In the above stated background P.W.2 lodged a complaint with Gharsana Police Station which was registered as F.I.R. No.535/1997 under Exhibit P-2. P.W.20, Investigating Officer, arrested the appellant and three accused persons, namely, Maniram, Shankar Lal and Jagdish. Based on the admissible portion of the said statement of the appellant the body of the deceased Om Prakash was recovered from a place near her house. The body was found buried in that place. Postmortem was conducted on the dead body. Two photographs were also seized during the course of investigation. The hand-writing of A-3 Jagdish was compared. Based on the final report, charges were framed against the appellant and other accused for offences under Sections 302 of IPC read with Section 302/120-B, 364, 364/120-B and 201 of IPC. The accused having denied the charges, case went into trial and 24 witnesses were examined on the side of the

prosecution apart from 50 documents marked and 14 articles were produced. On the side of the defence one witness was examined and eight documents were marked.

4. The Trial Court after detailed consideration of both oral and documentary evidence as well as after noting the chain of circumstances alleged against the appellant and other accused, held that the offences under Sections 302 read with Section 201 of IPC as against the appellant and the offence under Section 201 of IPC as against the rest of the accused were conclusively proved. Consequently, the sentences as described in the earlier part of the judgment were imposed. The appellants preferred an appeal before the High Court of Rajasthan at Jodhpur in which the impugned judgment came to be delivered as against which the appellant has come forward with this appeal.

5. We have heard Mr. Ravindra Bana, learned counsel for the appellant and Dr. Manish Singhvi, learned Additional Advocate General for the respondent-State. Mr. Bana in his submissions contended that there was inordinate delay of 52 days in the registration of FIR and, therefore, the story of the prosecution was unbelievable. Learned counsel then contended that the postmortem report has not mentioned the cause of death and, therefore, death cannot be held to be one of murder. By referring to the alleged extra-judicial confession stated to have been made by the appellant, learned counsel contended that the appellant stated to have used a kassi but the postmortem report did not reveal any injury on the body of the deceased and that no blood was also found on the kassi. It was also contended that the body of the deceased was exhumed only from a nearby place and not from the house of the appellant. The learned counsel, therefore, contended that in a case of circumstantial evidence, having regard to the above infirmities existing in the case of the prosecution, the conviction and sentence imposed on the appellant should be set-aside.

6. As against the above submissions, Dr. Singhvi, learned

Additional Advocate General by referring to Sections 24, 30 and 133 of the Evidence Act contented that so far as the extra-judicial confession is concerned, so long as the said piece of material was corroborated with material evidence and it was voluntary and truthful it can be relied upon. As far as the corroboration was concerned, learned Additional Advocate General referred to the recovery of the dead body based on the disclosure statement of the appellant which is fully governed by Section 27 of the Evidence Act. He also contended that the version of P.W.24, S.D.M was that she was present throughout the process of exhuming the body of the deceased along with two independent witnesses, namely, P.Ws.6 and 11 and also that the body was exhumed from a place adjacent to the house of the appellant which piece of evidence was clinching as against the accused.

7. The learned Additional Advocate General also pointed out that on the body of the deceased the articles which were worn by him such as wrist watch, shoes etc., were recovered and those articles were identified by P.W.2, the son of the deceased. He also contended that though no blood was found on the kassi, the injury no.2 to a great extent would confirm the use of kassi in the performance of the crime by the appellant. Apart from the above, learned counsel contended that the conduct of the appellant after 01.09.1997 and her dealing with P.W.2 as well as the letter written by P.W.7 were all corroborative piece of evidence strongly supporting the chain of circumstances in establishing the offence alleged against the appellant. Though the extra-judicial confession made by the appellant was relied upon by the Courts below, learned Additional Advocate General, however, submitted that the said part of the evidence was referred to only to confirm the motive which was twofold, namely, the demand for repayment of Rs.15000/- paid by the deceased apart from the alleged illicit relationship of the appellant with the fourth accused. Learned counsel relied upon *Ratan Gond Vs. The State of Bihar* - AIR 1959 SC 18 and *Wakil Nayak Vs. State of Bihar* - 1971 (3)

SCC 778 in support of his submissions.

8. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the judgment impugned before us and other material papers, as it is a case of circumstantial evidence, we wish to quote the well settled principles laid down by this Court in various decisions which are to be applied in order to examine the conclusions arrived at by the Courts below while convicting the accused based on circumstantial evidence. The principles laid down in those decisions can be mentioned before finding out whether or not the conviction and sentence on the appellant can be held to have been established as stated in the judgment of the High Court as well as that of the learned Trial Court. The principles can be set out as under:

(i) The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

(ii) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

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

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

9. Keeping the above tests in mind when the circumstances enumerated in the case on hand as against the appellant are examined, we find the following circumstances

existing as against the appellant:

(i) The deceased Om Prakash went to the house of the appellant on 22.08.1997 when he was last seen.

(ii) The deceased did not return back to his house even after a week's time.

(iii) When the son of the deceased, namely, P.W.2 approached the appellant to find out his father's whereabouts he was told by the appellant that his father was involved in the case of Charas and that she is taking efforts to get him released.

(iv) On 01.09.1997 the appellant herself approached P.W.2 and asked for a sum of Rs.5000/- in order to enable her to get his father released from the criminal case.

(v) P.W.13 Tersem Ram deposed that the said sum of Rs.5000/- was borrowed from him by P.W.2 which was paid to the appellant.

(vi) On 01.09.1997 Exhibit P-19 letter was delivered in the house of the deceased purportedly to have been written by the deceased himself mentioning that he was entangled in the case of Charas and was lodged in Bikaner Police Station. In the said letter it was also mentioned that the said information should not be revealed to his own brothers and that he was likely to get released very soon.

(vii) The address on Exhibit P-19 was found to be in the hand-writing of A-3 which was also established by legal evidence. The Trial Court also found as a matter of fact that the letter was got written by the appellant while the address was written by co-accused, namely, A-3.

(viii) Based on the information furnished by the appellant herself the body of the deceased was recovered from a place which was adjacent to her house.

(ix) The body was identified by P.W.2 in the presence of P.W.24 S.D.M., Anoopgarh on which the personal articles worn by him such as shoe, watch, bag etc., were also found and recovered.

(x) The last of the circumstance was the extra-judicial confession of the appellant before the Members of the Panchayat, namely, P.W.8 and P.W.9.

10. When the above circumstances placed before the Trial Court are considered and the various tests relating to the circumstantial evidence were applied there can be no difficulty in holding that the chain of circumstances had every definite link, namely, from the date the deceased was stated to have gone to the residence of appellant and, thereafter, his death was discovered based on the information furnished by the appellant herself pursuant to which the body of the deceased was recovered from a place which was adjacent to her house. In between 22.08.1997 and the date of recovery of the body of the deceased, the appellant met P.W.2 once at her residence and, thereafter, the appellant herself approached P.W.2 asking for a sum of Rs.5000/- to enable her to get his father released from the criminal case. After 22.08.1997, having been known that the deceased had gone to the residence of appellant and since he did not return back for about seven days, P.W.2 in the natural course of events had gone to the residence of the appellant to find out his whereabouts. This particular fact was spoken to by P.W.1, the wife of the deceased and P.W.2, the son of the deceased. The Trial Court has noted that the said version of P.W.1 and P.W.2 was not in any manner dislodged at the instance of the appellant. P.W.2 was a minor, aged about 14 years. Therefore, when the appellant, who was known to his father who was frequently visiting her, informed him that his father was involved in a criminal case relating to charas,

believing her words P.W.2 returned back with the fond hope that the appellant would take every effort to get his father released from the custody of the police. Not stopping with that the appellant herself approached P.W.2 on 01.09.1997 with a demand for payment of Rs.5000/- for the purpose of getting his father released from the criminal case. The sequence of events narrated by P.W.2 as from 22.08.1997 till the demand of Rs.5000/- was cogent and convincing. The further fact that P.W.2 in his anxiety to get his father released, succumbed to the demand of the appellant by raising funds for the payment of Rs.5000/- by borrowing the same from P.W.13 who supported the said fact by deposing before the Court. The Court has noted that his testimony was perfect in every respect and nothing could be brought out in the cross-examination to discredit his version. According to P.W.13, the sum of Rs.5000/- borrowed by P.W.2 from him was handed over to the appellant. When the said circumstance was found proved and since there was no other explanation other than what was demonstrated before the Court by the prosecution through P.W.2 and P.W.13, the said circumstance was in addition to the earlier set of circumstances which linked the involvement of the appellant in the crime alleged against her. The subsequent factum of recovery of the body of the deceased at the instance of the appellant was one other strong circumstance against the appellant in roping her involvement in the elimination of the deceased and thereby providing no scope for any other hypothesis other than her guilt in the killing of the deceased. The other recoveries made from the body of the deceased duly identified by P.W.2 was yet another relevant circumstance to show that the deceased was none other than the father of P.W.2 and husband of P.W.1. Therefore, the analysis of the above circumstances alleged and found proved definitely formed a chain of circumstances having closely linked together without giving any scope for any other conclusion than a definite tendency unerringly pointing towards the guilt of the accused.

11. When we consider the submission of learned counsel for the appellant, according to learned counsel there was inordinate delay of 52 days in the registration of the FIR and, therefore, the story of the prosecution was unbelievable. It is true that between 22.08.1997 and the date of the registration of the crime, there was a considerable delay. However, after the deceased went to the house of the appellant i.e. on 22.08.1997 which happened to be his usual routine as spoken to by the prosecution witnesses in particular P.W.1 and P.W.2, no fault can be found in the conduct of P.W.1 and P.W.2 in having waited for a minimum period of a week for the deceased to return back. Thereafter, as rightly observed by the Courts below, it was the game plan of the appellant in having misdirected P.W.1 and P.W.2, whereby believing her words that the deceased was involved in a criminal case relating to charas they were waiting for his arrival, as informed to them by the appellant. It was quite natural that the wife of the deceased P.W.1 who was dependent on her minor son P.W.2, aged about 14 years was waiting in the fond hope that her husband would have been involved in the criminal case that too relating to charas, it would take sometime for him to get out of the clutches of the police. P.W.2 was also in a similar state of mind especially when the appellant was further reinforcing her misdirection by collecting a sum of Rs.5000/- in order to enable her to get the deceased released from the police. That apart, the appellant hatched a scheme of sending a letter by post as though the deceased himself was communicating to his wife and son to the effect that he got entangled in a criminal case relating to charas, that the same should not be revealed even to his own brothers and that he will be able to get himself released from the said case at the earliest possible time which was truthfully believed by P.Ws.1 and 2 whose innocence was fully encashed by the appellant. A cumulative effect of the above factors definitely influenced the minds of P.W.1 and P.W.2 which resulted in the reporting the fact of missing of the deceased to the police belatedly. At one point of time they also approached the panchayat members, namely, P.W.8 and

P.W.9 and sought for their guidance as to how they can find out the whereabouts of the deceased. Therefore, when P.W.8 and P.W.9 intervened and directly approached the appellant herself the game plan of the appellant came to light and, thereafter, complaint was preferred by P.W.2 on 13.10.1997 which resulted in the registration of FIR Exhibit P-2. Having regard to the above factors, we find no substance in the submission made on behalf of the appellant based on the delay aspect.

12. The learned counsel for the appellant then contended that the postmortem report did not specify the cause of death and, therefore, it was not a case of murder. As far as the said contention is concerned, based on the information furnished by the appellant herself which was recorded under Exhibit P-36, the dead body of the deceased Om Prakash was exhumed under Exhibit P-30 in the presence of P.W.24 S.D.M as well as the appellant herself who identified the place where the dead body was buried. The said place was excavated and a bundle was taken out which contained the dead body over which a white shirt and payajama was found. The appellant herself confirmed that it was the body of the deceased Om Prakash. The watch worn by the deceased was found on the hand of the dead body which was in a decomposed condition as noted in Exhibit P-13.

13. P.W.6 Kishan Lal an independent eye-witness confirmed the digging and the excavation made from where the dead body was exhumed. Apart from the watch, a pair of shoes was also recovered under Exhibit P-16. P.W.11, another independent eye-witness, also confirmed the above factum and recovery of the dead body at the instance of the appellant. Exhibit P-29 was the postmortem report prepared by P.W.16 Dr. Om Prakash Mahayach along with P.W.17 Dr. Sunil Kumar Kaushik and P.W.18 Dr. Chander Bhan Midha. The articles which were recovered along with dead body, namely, wrist watch, pair of shoes, shirt, payajama and empty bag were all

identified by P.W.2, the son of the deceased. In the opinion of P.W.16, the postmortem doctor, the death could be a murder as well as natural. Therefore, it is not, as if based on the postmortem certificate and the version of P.W.16, the offence of murder can be ruled out. Since the dead body was recovered in a decomposed state, it was quite natural that the doctor could not specifically state as to the nature of injury on the body of the deceased.

14. Having regard to the clinching circumstances found proved against the appellant with the ultimate discovery of the body of the deceased at the instance of the appellant herself, who had the exclusive knowledge on that special factor, if the death of the deceased was due to any other cause the best person who could have explained could have been the appellant alone. In the circumstances, the conclusion was inescapable that the appellant was squarely responsible for the death of the deceased and the contention to the contrary made on behalf of the appellant cannot, therefore, be countenanced.

15. Learned counsel raised a contention that by the own version of P.W.8 and P.W.9, to whom the appellant stated to have made the extra-judicial confession, pressure was applied on her which forced her to make the said statement and, therefore, the same was hit by Section 24 of the Evidence Act. Though the said submission of the learned counsel has been satisfactorily dealt with by the Courts below in particular in the order impugned in this criminal appeal even by ignoring the said aspect for the present, as we have found that the chain of circumstances established in the case on hand sufficiently established the guilt of the appellant in the killing of the deceased, we do not find the said submission causing any dent in the case of the prosecution. For the very same reason the submission that no blood was found on the Kassi also does not merit acceptance.

16. The last submission made was that the body of the deceased was only recovered from an adjacent place not from

the house of the appellant herself, we do not find any substance in the said submission in order to interfere with the judgment impugned. The very fact that the recovery of the dead body came to be made at the instance of the appellant and that too from an adjacent place to the residence of the appellant was sufficient enough to rope in the appellant in the murder of the deceased.

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

18. The appellant is on bail. The bail bond stands cancelled and she shall be taken into custody forthwith to serve out the remaining part of sentence, if any.

R.P. Appeal dismissed.

ABUZAR HOSSAIN @ GULAM HOSSAIN
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 1193 of 2006 etc.)

OCTOBER 10, 2012

[R.M. LODHA, T.S. THAKUR AND ANIL R. DAVE, JJ.]

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

s.7-A read with r.12 of 2007 Rules - Claim of juvenility - Held: Can be raised at any stage, even after final disposal of the case - Delay in raising the claim cannot be a ground for rejection of the claim - Legal position with regard to s.7-A and r.12 summarised - Procedure for making a claim with regard to juvenility, and guidelines for inquiring into such a claim, laid down - Procedure, where accused setting up the plea of juvenility is unable to produce any of the documents enumerated in r. 12(a)(i) to (iii) - Explained - Juvenile Justice (Care and Protection of Children) Rules, 2007 - r.12 - Juvenile Justice Act, 1986 - Constitution of India, 1950 - Arts. 15(3), 39(e),(f), 45 and 47 - Convention on the Rights of the Child - United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 - United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

The appellant in Crl. Appeal No. 1193 of 2006, raised a plea that he was juvenile on the date of incident and, as such, he could not have been tried in the normal criminal court. Since the plea of juvenility of the appellant was not pressed before the courts below, *Gopinath Ghosh v. State of West Bengal*[1] **was relied on to contend that**

1. 1984 SCR 803

notwithstanding the fact that the plea of juvenility had not been pressed, it was obligatory on the court to go into the question of juvenility and determine the age. The two Judge Bench before which the instant group of appeals was listed for hearing, felt that there was substantial discordance in the approach of the matter on the question of juvenility in *Gopinath Ghosh,* and *Akbar Sheikh and others v. State of West Bengal*[2]**, and, therefore, referred the matter to larger Bench.**

The question for consideration before the Court was: when should a claim of juvenility be recognised and sent for determination when it is raised for the first time in appeal or before Supreme Court or raised in trial and appeal but not pressed and then pressed for the first time before Supreme or even raised for the first time after final disposal of the case.

Answering the reference, the Court

HELD: (Per R.M. Lodha, J. (for himself and for Anil R. Dave, J)

1.1 Parliament felt it necessary that uniform juvenile justice system should be available throughout the country which should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country and there was also need for larger involvement of informal systems and community based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles and with these objectives in mind, it enacted Juvenile Justice Act, 1986, which was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000. The 2000 Act has been enacted to carry forward the constitutional philosophy engrafted in Arts. 15(3), 39(e) and (f), 45 and 47 of the Constitution and also

2. 2009 (7) SCR 518.

to incorporate the standards prescribed in the Convention on the Rights of the Child, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and all other relevant international instruments. [para 3-4] [254-G; 255-A-D]

1.2 By Act 33 of 2006, Parliament brought in significant changes in 2000 Act. Inter alia, s. 7A came to be inserted, which provides for procedure to be followed when claim of juvenility is raised before any court. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 provides for procedure to be followed in determination of age. [para 7 and 10] [256-E; 258-E]

Pratap Singh v. State of Jharkhand and Another **2005 (1) SCR 1019 = 2005 (3) SCC 551- referred to.**

1.3 It is incorrect to say that the claim of juvenility cannot be raised before this Court after disposal of the case. The expression, 'any court' in s.7A is too wide and comprehensive; it includes this Court. Supreme Court Rules surely do not limit the operation of s.7A to the courts other than this Court where the plea of juvenility is raised for the first time after disposal of the case. In Pawan*, a 3-Judge Bench has laid down the standards for evaluating claim of juvenility raised for the first time before this Court. From the consideration of the matter by this Court, Akbar Sheikh and others v. State of West Bengal, it is clear that the case turned on its own facts. [para 35] [278-H; 279-A; 278-F]

******Pawan v. State of Uttaranchal* **2009 (3) SCR 468 = 2009 (15) SCC 259 - relied on**

Akbar Sheikh and others v. State of West Bengal **2009**

(7) SCR 518 - referred to.

1.4 The legal position with regard to s.7A of 2000 Act and r.12 of the 2007 Rules is summarised as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court;

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility;

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in r.12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under r.12. The statement recorded u/s 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and

fast rule can be prescribed that they must be prima facie accepted or rejected. If such documents prima facie inspire confidence of the court, it may act upon such documents for the purposes of s.7A and order an enquiry for determination of the age of the delinquent;

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent;

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/ guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability;

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised. [para 35-36] [279-C-H; 280-A-H]

Gopinath Ghosh v. State of West Bengal **1984 SCR 803;** *Hari Ram v. State of Rajasthan and Another* **2009 (7) SCR 623 = (2009) 13 SCC 1.1** *Bhoop Ram v. State of U.P.* **(1989) 3 SCC 1;** *Pradeep Kumar v. State of U.P.* **1995 (2) Suppl. SCR 590 = 1995 (3) Suppl. SCC 419;** *Bhola Bhagat v. State of Bihar* **1997 (4) Suppl. SCR 711 = 1997 (8) SCC 720;** *State of Haryana v. Balwant Singh* **1993 (1) Suppl. SCC 409;** *Jitendra Singh alias Babboo Singh and another v. State of Uttar Pradesh* **2010 (13) SCR 879 = 2010 (13) SCC 523;** *Daya Nand v. State of Haryana* **2011 (1) SCR 173 = 2011 (2) SCC 224;** *Lakhan Lal v. State of Bihar* **2011 (1) SCR 770 = 2011 (2) SCC 251;** *Shah Nawaz v. State of Uttar Pradesh and another* **2011 (9) SCR 859 = 2011 (13) SCC 751 - referred to.**

Per T.S. Thakur, J. (Concurring):

1.1 In paragraph 36(iv) of the order (Per R.M. Lodha, J) fall cases in which the accused setting up the plea of juvenility is unable to produce any one of the documents referred to in r. 12(3)(a) (i) to (iii) of the Rules framed under the Act, not necessarily because, he is deliberately withholding such documents from the court, but because, he did not have the good fortune of ever going to a school from where he could produce a certificate regarding his date of birth. Para 36 (iv) sounds a note of caution that an affidavit of a parent or a sibling or other relative would not ordinarily suffice, to trigger an enquiry into the question of juvenility of the accused, unless the circumstances of the case are so glaring that the court is left with no option except to record a prima facie satisfaction that a case for directing an enquiry is made out. [para 1] [281-C-E]

1.2 The expression 'glaring case' cannot be confined to a strait-jacket formulation. In order to fall under the expression 'glaring case', the first factor is the most mundane of the inputs that go into consideration while

answering a claim of juvenility like "physical appearance" of the accused made relevant by r. 12(2) of the Rules. [para 1] [281-G]

1.3 "Physical appearance" of the accused is, therefore, a consideration that ought to permeate every determination under r. 12 no matter appearances are at times deceptive, and depend so much on the race or the region to which the person concerned belongs. Physical appearance can and ought to give an idea to the court at the stage of the trial and even in appeal before the High Court, whether the claim made by the accused is so absurd or improbable that nothing short of documents referred to in r. 12 can satisfy the court about the need for an enquiry. The advantage of "physical appearance" of the accused may, however, be substantially lost, with passage of time, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct assessment of the age of the accused. In cases where the claim is made in this Court for the first time, the advantage is further reduced as there is considerable time lapse between the incident and the hearing of the matter by this Court. [para 2] [282-C-F]

1.4 The second factor which must ever remain present in the mind of the court is that the claim of juvenility may at times be made even in cases where the accused does not have any evidence, showing his date of birth, by reference to any public document like the register of births maintained by Municipal Authorities, Panchayats or hospitals nor any certificate from any school, as the accused was never admitted to any school. Even if admitted to a school no record regarding such admission may at times be available for production in the court. Again, there may be cases in which the

accused may not be in a position to provide a birth certificate from the Corporation, the Municipality or the Panchayat. Rule 12(3) of the Rules makes only three certificates relevant. These are enumerated in sub-r. (3)(a)(i) to (iii) of r.12. [para 3] [282-G; 283-A-B]

1.5 Non-production of the certificates mentioned in r.12(3)(a)(i) to (iii) or any one of them is not, however, fatal to the claim of juvenility, for sub-r. 3(b) of r.12 makes a provision for determination of the question on the basis of the medical examination of the accused in the 'absence' of the certificates. [para 4] [283-E]

1.6 The expression 'absence' appearing in r.12(3) is not defined under the Act or the Rules. The word shall, therefore, be given its literal dictionary meaning. It is axiomatic that the use of the expression and the context in which the same has been used strongly suggests that 'absence' of the documents mentioned in r.12(3) (a)(i) to (iii) may be either because the same do not exist or the same cannot be produced by the person relying upon them. Mere non-production may not, therefore, disentitle the accused of the benefit of the Act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the court is, in the peculiar facts and circumstances of a case, of the opinion that the non-production is deliberate or intended to either mislead the court or suppress the truth. It is in this class of cases that the court may have to exercise its powers and discretion with a certain amount of insight into the realities of life. One of such realities is that illiteracy and crime have a close nexus though one may not be directly proportional to the other. Juvenile delinquency in this country as elsewhere in the world, springs from poverty and unemployment, more than it does out of other causes. A large number of those engaged in criminal activities, may never have had the opportunity to go to school.

Therefore, the approach at the stage of directing the enquiry has of necessity to be more liberal, lest, there is avoidable miscarriage of justice. Suffice it to say that while affidavits may not be generally accepted as a good enough basis for directing an enquiry, that they are not so accepted is not a rule of law but a rule of prudence. The court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the parents, the age of siblings and the like, to be furnished before it decides on a case to case basis whether or not an enquiry u/s 7A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima facie conclusion that the court may or may not direct an enquiry. [paras 4-7] [283-H; 284-A, D-H; 286-B-D]

Black's Law Dictionary; 'Juvenile Delinquency and Justice System' by B.N. Mishra, Study conducted by National Crime Records Bureau (NCRB) Ministry of Home Affairs, Government of India - Report 2011 **- referred to.**

Case Law Reference:

2009 (7) SCR 623	**referred to**	**para 2**
(1989) 3 SCC 1	**referred to**	**para 14**
1995 (2) Suppl. SCR 590	**referred to**	**para 15**
1997 (4) Suppl. SCR 711	**referred to**	**para 16**
1993 (1) Suppl. SCC 409	**referred to**	**para 17**
2009 (3) SCR 468	**relied on**	**para 22**
2005 (1) SCR 1019	**referred to**	**para 25**
2010 (13) SCR 879	**referred to**	**para 31**
2011 (1) SCR 173	**referred to**	**para 32**

2011 (1) SCR 770 referred to para 33

2011 (9) SCR 859 referred to para 34

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1193 of 2006.

From the Judgment & Order dated 12.05.2006 of the Hon'ble High Court at Calcutta in C.R.A. No. 240 of 2003.

WITH

Criminal Appeal No. 1397/2003,

SLP (Crl.) No. 1451/2006,

R.P. (Criminal) No. 390/2010 in SLP (Crl.) No. 2542 of 2010.

SLP (Crl.) No. 8768/2011,

SLP (Crl.) No. 8855/2011,

Criminal Appeal No. 654/2002,

and SLP (Crl.) No. 616/2012

Pradip Kr. Ghosh, S.R. Singh, Nagendra Rai, Rauf Rahim, Yadunandan Bansal, Chanchan Kumar Ganguli, Rajiv Mehta, V. Sivasubramanian, Yogesh Swaroop, Antaryami Upadhyay, Dr. Kailash Chand, Sandhya Goswami, Nikhar Berry, Smarhar Singh, Shantanu Sagar, Gopi Raman, Preeti Rashmi, Amrita Rai, T. Mahipal, Kabir Shankar Bose, Abhijit Sengupta, B.P. Yadav, Tara Chandra Sharma, Neelam Sharma, Kamal Mohan Gupta, Kavita Wadia, Vivek Vishnoi, M.R. Shamshad, Manish Kumar, Chandan Kumar, (For Gopal Singh), Kuldip Singh, Mohit Mudgil for the Appearing Parties.

The Judgments of the Court was delivered by

R.M. LODHA, J. 1. Delinquent juveniles need to be dealt with differently from adults. International covenants and domestic laws in various countries have prescribed minimum standards

for delinquent juveniles and juveniles in conflict with law. These standards provide what orders may be passed regarding delinquent juveniles and the orders that may not be passed against them. This group of matters raises the question of when should a claim of juvenility be recognised and sent for determination when it is raised for the first time in appeal or before this Court or raised in trial and appeal but not pressed and then pressed for the first time before this Court or even raised for the first time after final disposal of the case.

2. It so happened that when criminal appeal preferred by Abuzar Hossain @ Gulam Hossain came up for consideration before a two-Judge Bench (Harjit Singh Bedi and J.M. Panchal, JJ) on 10.11.2009, on behalf of the appellant, a plea of juvenility on the date of incident was raised. In support of the contention that the appellant was juvenile on the date of incident and as such he could not have been tried in a normal criminal court, reliance was placed on a decision of this Court in *Gopinath Ghosh v. State of West Bengal*[1]. On the other hand, on behalf of the respondent, State of West Bengal, in opposition to that plea, reliance was placed on a later decision of this Court in *Akbar Sheikh and others v. State of West Bengal*[2]. The Bench found that there was substantial discordance in the approach of the matter on the question of juvenility in *Gopinath Ghosh*[1] on the one hand and the two decisions of this Court in *Akbar Sheikh*[2] and *Hari Ram v. State of Rajasthan and Another*[3]. The Bench was of the opinion that as the issue would arise in a very large number of cases, it was required to be referred to a larger Bench as the judgment in *Akbar Sheikh*[2] and Gopinath Ghosh1 had been rendered by co-ordinate Benches of this Court. This is how these matters have come up before us.

3. The Parliament felt it necessary that uniform juvenile justice system should be available throughout the country which

1. 1984 (Supp) SCC 228.
2. (2009) 7 SCC 415.
3. (2009) 13 SCC 211.

should make adequate provision for dealing with all aspects in the changing social, cultural and economic situation in the country and there was also need for larger involvement of informal systems and community based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles and with these objectives in mind, it enacted Juvenile Justice Act, 1986 (for short, '1986 Act').

4. 1986 Act was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, '2000 Act'). 2000 Act has been enacted to carry forward the constitutional philosophy engrafted in Articles 15(3), 39(e) and (f), 45 and 47 of the Constitution and also incorporate the standards prescribed in the Convention on the Rights of the Child, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and all other relevant international instruments. Clause (k) of Section 2 defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age. Clause (l) of Section 2 defines "juvenile in conflict with law" to mean a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age on the date of commission of such offence.

5. Section 3 of 2000 Act provides for continuation of inquiry in respect of juvenile who has ceased to be a juvenile. It reads as under:

> "S.3 . Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.—Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such

> person as if such person had continued to be a juvenile or a child."

6. Chapter II of 2000 Act deals with juvenile in conflict with law. This Chapter comprises of Sections 4 to 28. Section 4 provides for constitution of juvenile justice board and its composition. Section 5 provides for procedure, etc. in relation to juvenile justice board. Section 6 deals with the powers of juvenile justice board. Section 6 reads as under:

> "S.6 . Powers of Juvenile Justice Board.—(1) Where a Board has been constituted for any district, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to juvenile in conflict with law.
>
> (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise."

7. By Act 33 of 2006, the Parliament brought in significant changes in 2000 Act. Inter alia, Section 7A came to be inserted. This Section is lynchpin around which the debate has centered around in these matters. Section 7A provides for procedure to be followed when claim of juvenility is raised before any court. It reads as follows:

> "S.7A. Procedure to be followed when claim of juvenility is raised before any court.—(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile

or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

8. Section 49 of 2000 Act deals with presumption and determination of age. This Section reads as under:

"49 . Presumption and determination of age.—(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit)and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or the child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

9. Sections 52 and 53 deal with appeals and revision.

Section 54 provides for procedure in inquiries, appeals and revision proceedings, which reads as follows:

"S.54 . Procedure in inquiries, appeals and revision proceedings.—(1)Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973(2 of 1974)."

10. In exercise of powers conferred by the proviso to sub-section (1) of Section 68 of the 2000 Act, the Central Government has framed the rules entitled "The Juvenile Justice (Care and Protection of Children) Rules, 2007" (for short, "2007 Rules"). The relevant rule for the purposes of consideration of the issue before us is Rule 12 which provides for procedure to be followed in determination of age. Since this Rule has a direct bearing for consideration of the matter, it is quoted as it is. It reads as under:

"R. 12. Procedure to be followed in determination of Age.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of

the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i),(ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusion proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

11. It is not necessary to refer to facts of criminal appeal preferred by Abuzar Hossain @ Gulam Hossain or the other referred matters. Suffice it to say that in criminal appeal of Abuzar Hossain @ Gulam Hossain, in support of the argument that he was juvenile on the date of incident and as such he could not have been tried in the normal criminal court, his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'the Code') was pressed into service. It was, however, found from the evidence as well as the judgments of the trial court and the High Court that the issue of juvenility was not pressed at any stage and no evidence whatsoever was led by him to prove the age. It was in the backdrop of these facts

that Gopinath Ghosh1 was relied upon in support of the proposition that notwithstanding the fact that the plea of juvenility had not been pressed, it was obligatory on the court to go into the question of juvenility and determine his age.

12. *Gopinath Ghosh*[1] was a case where he was convicted along with two others for an offence under Section 302 read with Section 34 of IPC and sentenced to suffer imprisonment for life by the trial court. He and two co-accused preferred criminal appeal before Calcutta High Court. In the appeal, two accused were acquitted while the conviction and sentence of Gopinath Ghosh was maintained. Gopinath Ghosh filed appeal by special leave before this Court. On his behalf, the argument was raised that on the date of offence, i.e. on 19.8.1974 he was aged below 18 years and he is therefore a "child" within the meaning of the expression in the West Bengal Children Act, 1959 and, therefore, the court had no jurisdiction to sentence him to suffer imprisonment after holding a trial. Having regard to the contention raised on behalf of the appellant, this Court framed an issue for determination; what was the age of the accused Gopinath Ghosh (appellant) on the date of offence for which he was tried and convicted? The issue was remitted to the Sessions Judge, Nadia to ascertain his age and submit the finding. The Additional Sessions Judge, First Court, Nadia, accordingly, held an inquiry and after recording the evidence and calling for medical report and after hearing parties certified that Gopinath Ghosh was aged between 16 and 17 years on the date of the offence. The finding sent by the Additional Sessions Judge was not questioned before this Court. The Court examined the scheme of West Bengal Children Act, 1959 and also noted Section 24 thereof which had an overriding effect taking away the power of the court to impose the sentence of imprisonment unless the case was covered by the proviso thereto. Then in paragraph 10 (pg. 231) of the Report, this Court held as under:

"10. Unfortunately, in this case, appellant Gopinath Ghosh

never questioned the jurisdiction of the Sessions Court which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial court to hold the trial of the appellant, nor was it ever contended that he was a juvenile delinquent within the meaning of the Act and therefore, the Court had no jurisdiction to try him, as well as the Court had no jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provisions being extended to the appellant, if he was otherwise entitled to it."

13. In paragraph 13 (pgs. 232-233) of the Report, the Court observed as under:

"13. Before we part with this judgment, we must take notice of a developing situation in recent months in this Court that the contention about age of a convict and claiming the benefit of the relevant provisions of the Act dealing with juvenile delinquents prevalent in various States is raised for the first time in this Court and this Court is required to start the inquiry afresh. Ordinarily this Court would be reluctant to entertain a contention based on

factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special Acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining creditworthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the return journey to the grass-root court. If necessary and found expedient, the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated."

14. *In Bhoop Ram v. State of U.P.*[4], a two-Judge Bench of this Court was concerned with the question as to whether the appellant Bhoop Ram should have been treated as a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and sent to an approved school for detention therein till he attained the age of 18 years instead of being sentenced to undergo imprisonment in jail. In Bhoop Ram4, the Chief Medical Officer, Bareilly gave a certificate that as per the radiology examination and physical features, he appeared to be 30 years of age as on 30.4.1987. Bhoop Ram did not place any other

4. (1989) 3 SCC 1.

material before the Sessions Judge except the school certificate to prove that he had not completed 16 years on the date of commission of the offences. The Sessions judge rejected the school certificate produced by him on the ground that "it is not unusual that in schools ages are understated by one or two years for future benefits". As regards medical certificate the Sessions Judge observed that as he happened to be about 28-29 years of age on 1.6.1987, he would have completed 16 years on the date of occurrence. Before the Court, on behalf of the appellant, Bhoop Ram, it was contended that school certificate produced by him contained definite information regarding date of birth and that should have prevailed over the certificate of the doctor and the Sessions Judge committed wrong in doubting the correctness of the school certificate. This Court on consideration of the matter held that appellant Bhoop Ram could not have completed 16 years of age on 3.10.1975 when the occurrence took place and as such he ought to have been treated as "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and dealt with under Section 29 of the Act. The Court gave the following reasons for holding appellant, Bhoop Ram, a "child" on the date of occurrence of the incident:

"7. …….The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on 30-4-1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their

admission in schools for securing benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the trial Judge would lend credence to the appellant's case that he was less than 10 (sic 16) years of age on 3-10-1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date the offences were committed……."

15. A three-Judge Bench of this Court in *Pradeep Kumar v. State of U.P.*[5] was concerned with the question whether each of the appellants was a "child" within the meaning of Section 2(4) of the U.P. Children Act, 1951 and as such on conviction under Section 302/34 IPC, they should have been sent to approved school for detention till the age of 18 years. The Court dealt with the matter in its brief order thus:

"2. At the time of granting special leave, Jagdish appellant produced High School Certificate, according to which he was about 15 years of age at the time of occurrence. Appellant Krishan Kant produced horoscope which showed that he was 13 years of age at the time of occurrence. So far as appellant Pradeep is concerned a medical report was called for by this Court which disclosed

5. 1995 Supp (4) SCC 419.

that his date of birth as January 7, 1959 was acceptable on the basis of various tests conducted by the medical authorities.

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

16. The above three decisions came up for consideration before this Court in *Bhola Bhagat v. State of Bihar*[6]. The plea raised on behalf of the appellants that they were 'children' as defined in the Bihar Children Act, 1970 on the date of occurrence and their trial along with adult accused by the criminal court was not in accordance with law was rejected by the High Court observing that except for the age given by the appellants and the estimate of the court at the time of their examination under Section 313 of the Code, there was no other material in support of the appellants' claim that they were below 18 years of age. This Court flawed the approach of the High Court and observed as follows:

"8. To us it appears that the approach of the High Court in dealing with the question of age of the appellants and the denial of benefit to them of the provisions of both the Acts was not proper. Technicalities were allowed to defeat the benefits of a socially-oriented legislation like the Bihar Children Act, 1982 and the Juvenile Justice Act, 1986. If the High Court had doubts about the correctness of their age as given by the appellants and also as estimated by the trial court, it ought to have ordered an enquiry to determine their ages. It should not have brushed aside their plea without such an enquiry."

17. *Gopinath Ghosh*[1], *Bhoop Ram*[4] and *Pradeep Kumar*[5]

6. (1997) 8 SCC 720.

were elaborately considered in paragraphs 10, 11 and 12 of the Report. The Court also considered a decision of this Court in *State of Haryana v. Balwant Singh*[7] and held that the said decision was not a good law. In paragraph 15 of the Report, the Court followed the course adopted in *Gopinath Ghosh*[1] , *Bhoop Ram*[4] and *Pradeep Kumar*[5] and held as under :

> "15. The correctness of the estimate of age as given by the trial court was neither doubted nor questioned by the State either in the High Court or in this Court. The parties have, therefore, accepted the correctness of the estimate of age of the three appellants as given by the trial court. Therefore, these three appellants should not be denied the benefit of the provisions of a socially progressive statute. In our considered opinion, since the plea had been raised in the High Court and because the correctness of the estimate of their age has not been assailed, it would be fair to assume that on the date of the offence, each one of the appellants squarely fell within the definition of the expression "child". We are under these circumstances reluctant to ignore and overlook the beneficial provisions of the Acts on the technical ground that there is no other supporting material to support the estimate of ages of the appellants as given by the trial court, though the correctness of that estimate has not been put in issue before any forum…..".

18. Mr. Pradip Kr. Ghosh, learned senior counsel for the appellant Abuzar Hossain @ Gulam Hossain, relying heavily upon the above cases, submitted that what was earlier established by judicial interpretation in *Gopinath Ghosh*[1], *Bhoop Ram*[4] and *Pradeep Kumar*[5] became the statutory law with the enactment of Section 7A of 2000 Act and Rule 12 of the 2007 Rules and in view thereof a different approach is required with regard to the delinquent juveniles as and when plea of juvenility is raised before the court. Learned senior

7. (Supp) 1 SCC 409.

counsel would submit that the courts have to ensure that the beneficial provisions contained in Section 7A and Rule 12 are not frustrated by procedural rigidity. It was submitted that while enacting Section 7A, the Legislature has taken note of socio-economic ground realities of the country and had kept in view juveniles who come from amongst the poorest of the poor, slum dwellers, street dwellers and some of those having no shelter, no means of sustenance and for whom it would be a far cry to have any documents as they would have neither any schooling nor any birth registration. The law has to be applied in the manner so that its benefits are made available to all those who are entitled to it. He contended that the very fact that Rule 12 provided for every possible opportunity to establish the juvenility and when everything fails there is the mandate of holding the medical examination of the delinquent, shows the legislative intent.

19. Mr. Pradip Kr. Ghosh, learned senior counsel also submitted that the law with regard to juvenile delinquents by insertion of Section 7A has been given retrospective effect and made applicable even after disposal of the case and, therefore, in all such cases, those who had no occasion to claim the benefit of juvenility in the past deserve fresh opportunity to be given and they should be allowed to produce such materials afresh as may be available in support of the claim. He submitted that a purposive interpretation to Section 7A and Rule 12 must be given to bring within their fold not only documents which are contemplated in terms of sub-rule (3) of Rule 12 but also cases in which no such document is available but if the accused is referred to a medical board, his age would eventually be found to be such as would make him a juvenile.

20. Mr. Pradip Kr. Ghosh, learned senior counsel did not dispute that for the purpose of making a claim with regard to juvenility, the delinquent has to produce some material in support of his claim and in the absence of any documentary evidence, file at least a supporting affidavit affirmed by one of

his parents or an elder sibling or other relation who is competent to depose as to his age so as to make the court to initiate an inquiry under Rule 12(3). He did concede that a totally frivolous claim of juvenility which on the face of it is patently absurd and inherently improper may not be entertained by the court but at the same time the court must not be hyper-technical and must ensure that beneficial provision is not defeated by undue technicalities.

21. Learned senior counsel submitted that the statement under Section 313 of the Code or the voters' list may not be decisive but the documents of such nature may be adequate for the court to initiate an inquiry in terms of Rule 12(3). According to him, what is decisive is the result of the inquiry under Rule 12(3). However, semblance of material must justify an order to cause an inquiry to be made to determine the claim of juvenility.

22. Mr. Abhijit Sengupta, learned counsel for the State of West Bengal, submitted that although the provisions of 2000 Act as amended in 2006, and the Rules must be given full effect as these are beneficial provisions for the benefit of juveniles, but at the same time this Court must ensure that the provisions are not abused and a floodgate of cases does not start. He submitted that in *Pawan v. State of Uttaranchal*[8], a 3- Judge Bench of this Court had emphasized on the need for satisfactory, adequate and prima facie material before an inquiry under Rule 12 could be commenced and the law laid down in Pawan8 must be followed as and when claim of juvenility is raised before this Court. He submitted that claim of juvenility must be credible before ordering an inquiry under Rule 12.

23. Mr. Nagendra Rai, learned senior counsel for the petitioner in the connected Special Leave Petition being SLP (Criminal) No. 616 of 2012, *Ram Sahay Rai v. State of Bihar*

8. (2009) 15 SCC 259.

submitted that by amendment brought in 2006, 2000 Act has been drastically amended. The Legislature by bringing in Section 7A has clearly provided that the claim of juvenility may be raised before any court and it shall be recognised at any stage, even after the final disposal of the case and such claim shall be determined in terms of the provisions contained in 2000 Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the commencement of the Act. He would submit that even if the question of juvenility had not been raised by the juvenile even upto this Court and there is some material to show that a person is a juvenile on the date of commission of crime, it can be recognised at any stage even at the stage of undergoing sentence. He agreed that inquiry cannot be initiated on the basis of mere assertion of the claim. There must be prima facie material to initiate the inquiry and once the prima facie test is satisfied, the determination may be made in terms of Rule 12. With reference to Rule 12, learned senior counsel would submit that appearance, documents and medical evidence are the only materials which are relevant for determining the age and as such only such materials should form the basis for forming an opinion about the prima facie case. The oral evidence should rarely form the basis for initiation of proceeding as in view of Rule 12, the said material can never be used in inquiry and thus forming an opinion on that oral evidence will not serve the purposes of the Act.

24. Learned counsel for the State of Bihar on the other hand submitted that Legislature never intended to make Section 7A applicable to this Court after the final disposal of the case. He submitted that there was no provision in the Supreme Court Rules to re-open the concluded appeals or SLPs. Moreover, when SLP is filed, it is mandatory that no new ground or document shall be relied upon which has not been the part of record before the High Court and, therefore, if plea of juvenility has not been raised before the High Court, it cannot be raised before this Court. According to him, the power under the 2000 Act can be exercised only by the Juvenile Board,

Sessions Court or High Court after final disposal of the case but not this Court. He, however, submitted that the Supreme Court in exercise of its power under Article 142 may remand the matter to such forums, if it appears expedient in the interest of justice.

25. The amendment in 2000 Act by the Amendment Act, 2006, particularly, introduction of Section 7A and subsequent introduction of Rule 12 in the 2007 Rules, was sequel to the Constitution Bench decision of this Court in *Pratap Singh v. State of Jharkhand and Another*[9] . In *Hari Ram*[3], a two-Judge Bench of this Court extensively considered the scheme of 2000 Act, as amended by 2006 Amendment Act. With regard to sub-rules (4) and (5) of Rule 12, this Court observed as follows:

> "27. Sub-rules (4) and (5) of Rule 12 are of special significance in that they provide that once the age of a juvenile or child in conflict with law is found to be less than 18 years on the date of offence on the basis of any proof specified in sub-rule (3) the court or the Board or as the case may be the Child Welfare Committee appointed under Chapter IV of the Act, has to pass a written order stating the age of the juvenile or stating the status of the juvenile, and no further inquiry is to be conducted by the court or Board after examining and obtaining any other documentary proof referred to in sub-rule (3) of Rule 12. Rule 12, therefore, indicates the procedure to be followed to give effect to the provisions of Section 7-A when a claim of juvenility is raised."

26. This Court observed that the scheme of the 2000 Act was to give children, who have, for some reason or the other, gone astray, to realize their mistakes, rehabilitate themselves and rebuild their lives and become useful citizens of the society, instead of degenerating into hardened criminals. In paragraph 59 of the Report, the Court held as under:

9. (2005) 3 SCC 551.

> "59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted."

27. The Court observed in *Hari Ram*[3] that often parents of children, who come from rural backgrounds, are not aware of the actual date of birth of a child, but relate the same to some event which might have taken place simultaneously. In such a situation, the Board and the Courts will have to take recourse to the procedure laid down in Rule 12.

28. The judgment in the case of *Hari Ram*[3] was delivered by this Court on 5.5.2009. On that very day, judgment in *Akbar Sheikh*[2] was delivered by a two-Judge Bench of which one of us (R.M. Lodha, J.) was a member. In *Akbar Sheikh*[2] on behalf of one of the appellants, Kabir, a submission was made that he was juvenile on the date of occurrence. While dealing with the said argument, this Court observed that no such question had ever been raised. Even where a similar question was raised by five other accused, no such plea was raised even before the High Court. On behalf of the appellant, Kabir, in support of the juvenility, two documents were relied upon, namely, (i) statement recorded under Section 313 of the Code and (ii) voters' list. As regards the statement recorded under Section 313, this Court was of the opinion that the said document was not decisive. In respect of voters' list, this Court observed that the same had been prepared long after the incident occurred and it was again not decisive. In view of these findings, this Court did not find any merit in the claim of Kabir, one of the appellants, that he was juvenile and the submission was rejected. From a careful reading of the judgment in the matter of *Akbar Sheikh*[2], it is clear that the two documents on

which reliance was placed in support of claim of juvenility were not found decisive and, consequently, no inquiry for determination of age was ordered. From the consideration of the matter by this Court in *Akbar Sheikh*[2], it is clear that the case turned on its own facts.

29. As a matter of fact, prior to the decisions of this Court in *Hari Ram*[3] and *Akbar Sheikh*[2], a three-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) in *Pawan*[8] had considered the question relating to admissibility of claim of juvenility for the first time in this Court with reference to Section 7A. The contention of juvenility was raised for the first time before this Court on behalf of the two appellants, namely, A-1 and A-2. The argument on their behalf before this Court was that they were juvenile within the meaning of 2000 Act on the date of incident and the trial held against them under the Code was illegal. With regard to A-1, his school leaving certificate was relied on while as regards A-2, reliance was placed on his statement recorded under Section 313 and the school leaving certificate. Dealing with the contention of juvenility, this Court stated that the claim of juvenility could be raised at any stage, even after final disposal of the case. The Court then framed the question in paragraph 41 of the Report as to whether an inquiry should be made or report be called for from the trial court invariably where juvenility is claimed for the first time before this Court. It was held that where the materials placed before this Court by the accused, prima facie, suggested that he was 'juvenile' as defined in 2000 Act on the date of incident, it was necessary to call for the report or an inquiry to be made for determination of the age on the date of incident. However, where a plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even prima facie satisfaction of the court is not made out, further exercise in this regard may not be required. It was also stated that if the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the court must

be satisfied by placing adequate material that the accused had not attained the age of 18 years on the date of commission of offence. In absence of adequate material, any further inquiry into juvenility would not be required.

30. Having regard to the general guidelines highlighted in paragraph 41 with regard to the approach of this Court where juvenility is claimed for the first time, the court then considered the documents relied upon by A-1 and A-2 in support of the claim of juvenility on the date of incident. In respect of the two documents relied upon by A-2, namely, statement under Section 313 of the Code and the school leaving certificate, this Court observed that the statement recorded under Section 313 was a tentative observation based on physical appearance which was hardly determinative of age and insofar as school leaving certificate was concerned, it did not inspire any confidence as it was issued after A-2 had already been convicted and the primary evidence like entry from the birth register had not been produced. As regards school leaving certificate relied upon by A-1, this Court found that the same had been procured after his conviction and no entry from the birth register had been produced. The Court was, thus, not prima facie impressed or satisfied by the material placed on behalf of A-1 and A-2. Those documents were not found satisfactory and adequate to call for any report from the Board or trial court about the age of A-1 and A-2.

31. In *Jitendra Singh alias Babboo Singh and another v. State of Uttar Pradesh*[10], on behalf of the appellant, a plea was raised that he was minor within the meaning of Section 2(k) of 2000 Act on the date of commission of the offence. The appellant had been convicted for the offences punishable under Sections 304-B and 498A IPC and sentenced to suffer seven years' imprisonment under the former and two years under the latter. The appellant had got the bail from the High Court on the ground of his age which was on medical examination certified

10. (2010) 13 SCC 523.

to be around seventeen years on the date of commission of the offence. One of us (T.S. Thakur, J.) who authored the judgment for the Bench held that in the facts and circumstances of the case, an enquiry for determining the age of the appellant was necessary. This Court referred to the earlier decisions in *Gopinath Ghosh*[1], *Bhoop Ram*[4], *Bhola Bhagat*[6], *Hari Ram*[3] and *Pawan*[8] and then held that the burden of making out the prima facie case had been discharged. In paragraphs 9, 10 and 11 of the Report, it was held as under:

> "9. The burden of making out a prima facie case for directing an enquiry has been in our opinion discharged in the instant case inasmuch as the appellant has filed along with the application a copy of the school leaving certificate and the marksheet which mentions the date of birth of the appellant to be 24-5-1988. The medical examination to which the High Court has referred in its order granting bail to the appellant also suggests the age of the appellant being 17 years on the date of the examination. These documents are sufficient at this stage for directing an enquiry and verification of the facts.
>
> 10. We may all the same hasten to add that the material referred to above is yet to be verified and its genuineness and credibility determined. There are no doubt certain telltale circumstances that may raise a suspicion about the genuineness of the documents relied upon by the appellant. For instance, the deceased Asha Devi who was married to the appellant was according to Dr. Ashok Kumar Shukla, Pathologist, District Hospital, Rae Bareilly aged 19 years at the time of her death. This would mean as though the appellant husband was much younger to his wife which is not the usual practice in the Indian context and may happen but infrequently. So also the fact that the appellant obtained the school leaving certificate as late as on 17-11-2009 i.e. after the conclusion of the trial and disposal of the first appeal by the High Court, may call for a close scrutiny and

> examination of the relevant school record to determine whether the same is free from any suspicion, fabrication or manipulation. It is also alleged that the electoral rolls showed the age of the accused to be around 20 years while the extract from the panchayat register showed him to be 19 years old.
>
> 11. All these aspects would call for close and careful scrutiny by the court below while determining the age of the appellant. The date of birth of appellant Jitendra Singh's siblings and his parents may also throw considerable light upon these aspects and may have to be looked into for a proper determination of the question. Suffice it to say while for the present we consider it to be a case fit for directing an enquiry, that direction should not be taken as an expression of any final opinion as regards the true and correct age of the appellant which matter shall have to be independently examined on the basis of the relevant material."

32. In *Daya Nand v. State of Haryana*[11], this Court found that on the date of occurrence the age of the appellant was sixteen years five months and nineteen days and, accordingly, it was held that he could not have been kept in prison to undergo the sentence imposed by the Additional Sessions Judge and affirmed by the High Court. This Court set aside the sentence imposed against the appellant and he was directed to be released from prison.

33. In *Lakhan Lal v. State of Bihar*[12], the question was about the applicability of 2000 Act where the appellants were not juveniles within the meaning of 1986 Act as they were above 16 years of age but had not completed 18 years of age when offences were committed and even when claim of juvenility was raised after they had attained 18 years of age.

11. (2011) 2 SCC 224.

12. (2011) 2 SCC 251.

This Court gave benefit of 2000 Act to the appellants and they were directed to be released forthwith.

34. In *Shah Nawaz v. State of Uttar Pradesh and another*[13], the matter reached this Court from the judgment and order of the Allahabad High Court. An F.I.R. was lodged against the appellant, Shah Nawaz, and three others for the offences punishable under Sections 302 and 307 of IPC. The mother of the appellant submitted an application before the Board stating that Shah Nawaz was minor at the time of alleged occurrence. The Board after holding an enquiry declared Shah Nawaz a juvenile under the 2000 Act. The wife of the deceased filed criminal appeal against the judgment of the Board before the Additional Sessions Judge, Muzaffarnagar. That appeal was allowed and the order of the Board was set aside. Shah Nawaz preferred criminal revision before the High Court against the order of the Additional Sessions Judge which was dismissed giving rise to appeal by special leave before this Court. This Court considered Rule 12 of 2007 Rules and also noted, amongst others, the decision in *Hari Ram*[3] and then on consideration of the documents, particularly entry relating to the date of birth entered in the marksheet held that Shah Nawaz was juvenile on the date of occurrence of the incident. This Court in paragraphs 23 and 24 of the Report held as under:

> "23. The documents furnished above clearly show that the date of birth of the appellant had been noted as 18-6-1989. Rule 12 of the Rules categorically envisages that the medical opinion from the Medical Board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating to the date of birth in the marksheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules.
>
> 24. We are satisfied that the entry relating to date of birth entered in the marksheet is one of the valid proofs of evidence for determination of age of an accused person. The school leaving certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School marksheet produced by the appellant has duly been corroborated by the school leaving certificate of the appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd-o-Kalan and recorded by the Board. The date of birth of the appellant has also been recorded as 18- 6-1989 in the school leaving certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-o- Kalan, Muzaffarnagar as well as the said date of birth mentioned in the school register of the said School at Sl. No. 1382 which have been proved by the statement of the Principal of that School recorded before the Board."

In paragraph 26 of the Report, this Court observed that Rule 12 has described four categories of evidence which gave preference to school certificate over the medical report.

35. In *Pawan*[8], , a 3-Judge Bench has laid down the standards for evaluating claim of juvenility raised for the first time before this Court. If *Pawan*[8] had been cited before the Bench when criminal appeal of Abuzar Hossain @ Gulam Hossain came up for hearing, perhaps reference would not have been made. Be that as it may, in light of the discussion made above, we intend to summarise the legal position with regard to Section 7A of 2000 Act and Rule 12 of the 2007 Rules. But before we do that, we say a word about the argument raised on behalf of the State of Bihar that claim of juvenility cannot be

13. (2011) 13 SCC 751.

raised before this Court after disposal of the case. The argument is so hopeless that it deserves no discussion. The expression, 'any court' in Section 7A is too wide and comprehensive; it includes this Court. Supreme Court Rules surely do not limit the operation of Section 7A to the courts other than this Court where the plea of juvenility is raised for the first time after disposal of the case.

36. Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and

circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In *Akbar Sheikh*[2] and *Pawan*[8] these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.

37. The reference is answered in terms of the position highlighted in paragraph 36 (i) to (vi). The matters shall now be listed before the concerned Bench(es) for disposal.

T.S. THAKUR, J.

1. I have had the advantage of going through the order proposed by my esteemed brother R.M. Lodha J., which summarises the legal position with remarkable lucidity. While I entirely agree with whatever is enunciated in the judgment proposed by my erudite colleague, I wish to add a few lines of my own confined to the proposition stated in Para 36 (IV) of the judgment. In that paragraph of the order fall cases in which the accused setting up the plea of juvenility is unable to produce any one of the documents referred to in Rule 12(3)(a) (i) to (iii) of the Rules, under the Act, not necessarily because, he is deliberately withholding such documents from the court, but because, he did not have the good fortune of ever going to a school from where he could produce a certificate regarding his date of birth. Para 36 (IV) sounds a note of caution that an affidavit of a parent or a sibling or other relative would not ordinarily suffice, to trigger an enquiry into the question of juvenility of the accused, unless the circumstances of the case are so glaring that the court is left with no option except to record a prima facie satisfaction that a case for directing an enquiry is made out. What would constitute a 'glaring case' in which an affidavit may itself be sufficient to direct an inquiry, is a question that cannot be easily answered leave alone answered by enumerating exhaustively the situations where an enquiry may be justified even in the absence of documentary support for the claim of juvenility. Two dimensions of that question may all the same be mentioned without in the least confining the sweep of the expression 'glaring case' to a strait-jacket formulation. The first of these factors is the most mundane of the inputs that go into consideration while answering a claim of juvenility like "Physical Appearance" of the accused made relevant by Rule 12(2) of the Rules framed under the Act. The Rule reads:

> **"12. Procedure to be followed in determination of Age. –**
>
> (1) xxxx
>
> (2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail."

2. Physical appearance of the accused is, therefore, a consideration that ought to permeate every determination under the Rule aforementioned no matter appearances are at times deceptive, and depend so much on the race or the region to which the person concerned belongs. Physical appearance can and ought to give an idea to the Court at the stage of the trial and even in appeal before the High Court, whether the claim made by the accused is so absurd or improbable that nothing short of documents referred to in this Rule 12 can satisfy the court about the need for an enquiry. The advantage of "physical appearance" of the accused may, however, be substantially lost, with passage of time, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct assessment of the age of the accused. In cases where the claim is made in this Court for the first time, the advantage is further reduced as there is considerable time lapse between the incident and the hearing of the matter by this Court.

3. The second factor which must ever remain present in the mind of the Court is that the claim of juvenility may at times be made even in cases where the accused does not have any evidence, showing his date of birth, by reference to any public document like the register of births maintained by Municipal Authorities, *Panchayats* or hospitals nor any certificate from any

school, as the accused was never admitted to any school. Even if admitted to a school no record regarding such admission may at times be available for production in the Court. Again there may be cases in which the accused may not be in a position to provide a birth certificate from the Corporation, the municipality or the Panchayat, for we know that registration of births and deaths may not be maintained and if maintained may not be regular and accurate, and at times truthful. Rule 12(3) of the Rules makes only three certificates relevant. These are enumerated in Sub-Rule 3(a)(i) to (iii) of the Rule which reads as under:

> "(3)a (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

4. Non-production of the above certificates or any one of them is not, however, fatal to the claim of juvenility, for Sub-Rule 3(b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the 'absence' of the certificates. Rule 12(3)(b) runs as under:

> "12(3) (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court, or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year."

The expression 'absence' appearing in the above provision is

not defined under the Act or the Rules. The word shall, therefore, be given its literal dictionary meaning which is provided by Concise Oxford dictionary as under:

> "Being away from a place or person; time of being away; non-existence or lack of; inattenation due to thought of other things."

Black's Law Dictionary also explains the meaning of 'absence' as under:

> "1. The state of being away from one's usual place of residence. 2. A failure to appear, or to be available and reachable, when expected. 3. Louisiana Law. The State of being an absent person – Also termed (in sense 3) absentia."

5. It is axiomatic that the use of the expression and the context in which the same has been used strongly suggests that 'absence' of the documents mentioned in Rule 12(3) (a)(i) to (iii) may be either because the same do not exist or the same cannot be produced by the person relying upon them. Mere non-production may not, therefore, disentitle the accused of the benefit of the Act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the nonproduction is deliberate or intended to either mislead the Court or suppress the truth.

6. It is in this class of cases that the court may have to exercise its powers and discretion with a certain amount of insight into the realities of life. One of such realities is that illiteracy and crime have a close nexus though one may not be directly proportional to the other. Juvenile delinquency in this country as elsewhere in the world, springs from poverty and unemployment, more than it does out of other causes. A large number of those engaged in criminal activities, may never have had the opportunity to go to school. Studies conducted by

National Crime Records Bureau (NCRB), Ministry of Home Affairs, reveal that poor education and poor economic set up are generally the main attributes of juvenile delinquents. Result of the 2011 study further show that out of 33,887 juveniles arrested in 2011, 55.8% were either illiterate (6,122) or educated only till the primary level (12,803). Further, 56.7% of the total juveniles arrested fell into the lowest income category. A similar study is conducted and published by B.N. Mishra in his Book 'Juvenile Delinquency and Justice System', in which the author states as follows:

> "One of the prominent features of a delinquent is poor educational attainment. More than 63 per cent o f delinquents are illiterate. Poverty is the main cause of their illiteracy. Due to poor economic condition they were compelled to enter into the labour market to supplement their family income. It is also felt that poor educational attainment is not due to the lack of intelligence but may be due to lack of opportunity. Although free education is provided to Scheduled Castes and Scheduled Tribes, even then, the delinquents had a very low level of expectations and aspirations regarding their future which in turn is due to lack of encouragement and unawareness of their parents that they play truant."

7. What should then be the approach in such cases, is the question. Can the advantage of a beneficial legislation be denied to such unfortunate and wayward delinquents? Can the misfortune of the accused never going to a school be followed or compounded by denial of the benefit that the legislation provides in such emphatic terms, as to permit an enquiry even after the last Court has disposed of the appeal and upheld his conviction? The answer has to be in the negative. If one were to adopt a wooden approach, one could say nothing short of a certificate, whether from the school or a municipal authority would satisfy the court's conscience, before directing an enquiry. But, then directing an enquiry is not the same thing as

declaring the accused to be a juvenile. The standard of proof required is different for both. In the former, the court simply records a prima facie conclusion. In the latter the court makes a declaration on evidence, that it scrutinises and accepts only if it is worthy of such acceptance. The approach at the stage of directing the enquiry has of necessity to be more liberal, lest, there is avoidable miscarriage of justice. Suffice it to say that while affidavits may not be generally accepted as a good enough basis for directing an enquiry, that they are not so accepted is not a rule of law but a rule of prudence. The Court would, therefore, in each case weigh the relevant factors, insist upon filing of better affidavits if the need so arises, and even direct, any additional information considered relevant including information regarding the age of the parents, the age of siblings and the like, to be furnished before it decides on a case to case basis whether or not an enquiry under Section 7A ought to be conducted. It will eventually depend on how the court evaluates such material for a prima facie conclusion that the Court may or may not direct an enquiry. With these additions, I respectfully concur with the judgment proposed by my esteemed Brother Lodha J.

R.P. Reference Answered.

GULZAR AHMED AZMI & ANR.
v.
UNION OF INDIA & ORS.
(Writ Petition (Crl.) No. 19 of 2012)

OCTOBER 11, 2012

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

Constitution of India, 1950 – Article 32 r/w Article 21 – Bomb blast cases since 2002 – Investigation – Grievance of the writ petitioners that while the real culprits were being shielded, innocent Muslim boys were being roped in such cases – Prayer that in order to unearth the truth, the Supreme Court should direct the first respondent to constitute a Committee headed by a retired Judge of the Supreme Court and assisted by a team of officers having competent investigation skills along with other experts – Held: Not tenable – If any such Committee is directed to be constituted that will only result in making a roving inquiry into the various criminal proceedings so far lodged connected with cases of bomb blasts all over the country – Since criminal cases registered in connection with various incidents are either pending trial before the competent jurisdictional courts or being investigated by the jurisdictional police, it is premature to say whether any and if so which of the accused is innocent or has been falsely implicated – If anyone is falsely roped in any offence either under the provisions of Indian Penal Code or under any other special enactments, by way of criminal proceeding, there are enough safeguards provided under the various laws and under the criminal law jurisprudence, to protect the interest of any such person – When the time tested Criminal Procedure Code and other statutory provisions are working in the field providing for such well laid down procedure to be followed in the matter of regulating such criminal

proceedings, the granting of the petitioners' prayer would amount to creating a parallel body without any statutory sanction and to function only under some directions of the Supreme Court which would be lacking in very many procedural details and will ultimately result in utter chaos and confusion in dealing with the criminal proceedings which have already been lodged and progressing before various criminal courts – It is for the concerned individuals who face such criminal proceedings to work out their remedy in the manner known to law – Even if such individuals are not in a position to seek for any appropriate legal assistance on their own, there is no dearth for seeking legal assistance free of cost – It cannot be held that the concerned individuals will be left with no remedy – Writ petition accordingly dismissed.

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl) No. 19 of 2012.

Under Article 32 of the Constitution of India.

A. Sharan, Syed Mehdi Imam, Atif Suhrawardy, Tarbez Ahmed, Somesh Jha for the Petitioners.

The Order of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The petitioners have preferred this writ petition under Article 32 read with Article 21 of the Constitution ostensibly in public interest in which the petitioners pray for a Writ of Mandamus for constitution of a Committee to make further investigation of all the bomb blasts cases which have taken place since 2002.

2. When we examine the relief prayed for by the petitioners, we find that there are as many as six substantive prayers made by them including constitution of a Committee headed by a retired Judge of the Supreme Court along with team of competent officers and experts to make further investigation of all bomb blasts cases which have taken place

since 2002 onwards. The prayer specifically mentions a list by way of Annexure P-45 wherein the details have been mentioned in order to monitor the investigation to be ordered while granting any relief in the writ petition.

3. The further prayer in the writ petition is for a direction to the respondents to initiate criminal or departmental action against the erring police officers for having implicated alleged innocent Muslim boys by fabricating false evidence.

4. The third prayer in the writ petition is for a direction to the respondents to initiate criminal or departmental action against the officers of Central and State Intelligence Agencies, who furnished wrong inputs to the State Police and thereby pressurised them to arrest innocent Muslim boys.

5. In the fourth prayer the petitioners prayed for a direction to the respondents to make the contents of the laptops, recovered from Lt. Col. Purohit and Mahant Dayanand Pandey, public and thereafter make an inquiry for taking action against the culprits who were involved in anti-national terror activities.

6. In the fifth prayer they seek for a direction to the first respondent for taking action against communal organisations like RSS, VHP and their allied forums who alleged to have indulged in bomb blasts cases and other terror related activities. In the last prayer they seek for a direction to release on bail the detenus arrested in bomb blasts cases referred to in Annexure P-45 against whom there is no clinching or conclusive evidence.

7. To sum-up the grievance of the petitioners, as per the averments contained in the petition, is that the real culprits are being shielded from taking any action against them, while innocent Muslim boys have been roped in various bomb blasts cases throughout the country since the year 2002 and in order to unearth the said factor, this Court should direct the first respondent to constitute a Committee headed by a retired

Judge of the Supreme Court who should be assisted with the team of officers having competent investigation skills along with other experts.

8. At the very outset, we wish to state that if the prayer of the petitioners were to be accepted for whatever grounds stated in the petition and any such Committee is directed to be constituted that will only result in making a roving inquiry into the various criminal proceedings so far lodged connected with cases of bomb blasts all over the country. We are not, therefore, inclined to countenance such a wide prayer asked for in this writ petition.

9. Since criminal cases registered in connection with various incidents are either pending trial before the competent jurisdictional courts or being investigated by the jurisdictional police, it is premature to say whether any and if so which of the accused is innocent or has been falsely implicated. If anyone is falsely roped in any offence either under the provisions of Indian Penal Code or under any other special enactments, by way of criminal proceeding, it is needless to state that there are enough safeguards provided under the various laws and under the criminal law jurisprudence, to protect the interest of any such person claiming himself to be innocent and demonstrate before the concerned Fora that he has been falsely implicated in any offence. Therefore, it will be for the concerned individual against whom any criminal proceeding is lodged to work out his remedy. For instance, if in any particular criminal case, one wishes to seek for further investigation under Section 173 (8) of the Cr.P.C. the same can always be effected even after the filing of the final report. Such a power existing with the Investigating Officer, having been statutorily provided, it will be a futile exercise if such a statutory exercise is to be entrusted with a supernumerary body created under the head of a retired Judge of the Supreme Court along with other team of officers and experts. When the time tested Criminal Procedure Code and other statutory provisions are working in

the field providing for such well laid down procedure to be followed in the matter of regulating such criminal proceedings, the granting of the petitioners' prayer would amount to creating a parallel body without any statutory sanction and to function only under some directions of this Court which would be lacking in very many procedural details and will ultimately result in utter chaos and confusion in dealing with the criminal proceedings which have already been lodged and progressing before various criminal courts.

10. We are not, therefore, inclined to consider such a wide prayer applied for by the petitioners for constitution of a special Committee. The other directions prayed for by the petitioners will also only result in interfering with the already pending proceedings in which the concerned individuals who have been arrayed as accused or otherwise can seek for appropriate relief either for further investigation or for their discharge or in the event of any other adverse orders passed by the concerned Court, approach the higher fora for redressal of their grievances. There are various levels of Appellate Fora to examine the manner in which the proceedings are being pursued before the Courts wherein such criminal proceedings have already been lodged or in the event of any adverse orders having been passed, examine the correctness of such orders in order to grant appropriate relief or to confirm such decisions taken by the lower fora.

11. It will be for the concerned individuals who face such criminal proceedings to work out their remedy in the manner known to law. Even if such individuals are not in a position to seek for any appropriate legal assistance on their own, having regard to the set up of Legal Service Authority and its effective functioning, in the nook and corner of the country, there should be no dearth of legal assistance for those affected persons to seek for such legal aid free of cost. Therefore, when there is no dearth for seeking legal assistance free of cost, on that score as well it cannot be held that the concerned individuals

will be left with no remedy. In fact, it is now well known that on mere asking of the concerned presiding officer, those involved in such criminal proceedings are being offered free legal aid of high calibre in order to ensure that no innocent person is being punished for want of proper legal assistance.

12. Having regard to the above factors, we do not find any scope to entertain this writ petition and leave it open for the concerned parties against whom any criminal proceeding is lodged to work out their remedies in the appropriate manner before the appropriate forum in accordance with law. The writ petition fails and the same is dismissed.

B.B.B. Writ Petition dismissed.

HINDUSTAN COPPER LTD.
v.
MONARCH GOLD MINING CO. LTD.
(Civil Appeal No. 7449 of 2012)

OCTOBER 11, 2012

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

ARBITRATION AND CONCILIATION ACT, 1996:

s.11(6) - Application for appointment of arbitrator - Designate Judge holding that the request for appointment of arbitrator was proper, and then referring the matter to the Delegate of Chief Justice for appointment of arbitrator - Held: The procedure that is being followed by the High Court with regard to the consideration of the applications u/s 11 is legally impermissible - The piecemeal consideration of the application u/s 11 by the Designate Judge and another Designate Judge or the Chief Justice, as the case may be, is not contemplated by s. 11 - The function of the Chief Justice or Designate Judge in consideration of the application u/s 11 is judicial and such application has to be dealt with in its entirety by either Chief Justice himself or the Designate Judge and not by both by making it a two-tier procedure - The distinction drawn by the High Court in Modi Korea Telecommunications Ltd. between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded.

The procedure adopted by the Calcutta High Court in the applications u/s 11 of the Arbitration and Conciliation Act, 1996, namely, the Designate Judge first passed an order that the request for appointment of arbitrator was proper and then ordered that the application be referred to the Delegate of the Chief Justice for appointment of an arbitrator, was in issue in

the instant appeals. In C.A. No. 7449 of 2012 the Court felt that the views of the Registrar General, Calcutta High Court were necessary as the issue involved was whether an application u/s 11(6) of the Act for appointment of an arbitrator cold be considered in piecemeal by two Designate Judges. On behalf of the Registrar General of the High Court it was pleaded that it was permissible that the Designate Judge considered the general power of the court to determine whether the pre-conditions for the exercise of that power have been fulfilled leaving the power of naming the arbitrator u/s 11 to the exclusive jurisdiction of the Chief Justice and this was in conformity with the Division Bench decision of the Calcutta High Court in Modi Korea Telecommunication's case.

Allowing the appeals in part, the Court

HELD: 1.1 The majority in SBP & Co.* held that looking at the scheme of the Arbitration and Conciliation Act, 1996 as a whole and the object with which it was enacted, it seemed proper to view the conferment of power on the chief justice as a conferment of judicial power to decide on the existence of the conditions justifying the constitution of an arbitral tribunal. It was also observed that the power had been conferred u/s 11(6) on the highest judicial authority in their capacities as Chief Justices to pass an order contemplated u/s 11 of the Act. [para 15] [306-F-G; 307-A]

SBP & Co. v. Patel Engineering Ltd. and another **2005 (4) Suppl. SCR 688 = 2005 (8) SCC 618 - followed.**

Konkan Railway Corporation Limited & Ors. v. Mehul Construction Company **2000 (2) Suppl. SCR 563 = 2000 (7) SCC 201; and** *Konkan Railway Corporation Limited & Anr. v. Rani Construction (P) Ltd.* **2002 (1) SCR 728 = 2002 (2)**

SCC 388 - stood overruled.

1.2 The exposition of law by a seven-Judge Bench of this Court in SBP & Co., leaves no manner of doubt that the procedure that is being followed by the Calcutta High Court with regard to the consideration of the applications u/s 11 of the 1996 Act is legally impermissible. The piecemeal consideration of the application u/s 11 by the Designate Judge and another Designate Judge or the Chief Justice, as the case may be, is not contemplated by s. 11. The function of the Chief Justice or Designate Judge in consideration of the application u/s 11 is judicial and such application has to be dealt with in its entirety by either the Chief Justice himself or the Designate Judge and not by both by making it a two-tier procedure. The distinction drawn by the Division Bench of Calcutta High Court in Modi Korea Telecommunications Ltd.* between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded. Modi Korea Telecommunications Ltd. to the extent it is inconsistent with SBP & Co. stands overruled. [para 17] [309-F-H; 310-A-B

******Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd.* **1999 (II) Cal. H.C. Notes 107 - stands overruled**

1.3 The impugned orders are set aside. The arbitration petitions are restored to the file of the High Court for appropriate consideration. It is, however, clarified that the orders passed by the Chief Justice or the Designate Judge u/s 11 of the 1996 Act which have attained finality and the awards pursuant to such orders shall remain unaffected. [para 18-19] [310-C-D]

Case Law Reference:

1999 (II) Cal. H.C. Notes 107	**stand overruled**	**para 9**

2005 (4) Suppl. SCR 688	**followed**	**para 13**
2000 (2) Suppl. SCR 563	**stood overruled**	**Para 14**
2002 (1) SCR 728	**stood overruled**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7449 of 2012.

From the Judgment and Order dated 09.06.2011 of the High Court of Calcutta in AP No. 568 of 2010.

WITH

C.A. No. 7450 of 2012.

Gourab Banerji, ASG, Jaideep Gupta, Deba Prasad Mukherjee, Nandini Sen, Soumya Chakraborty (For Dharam Bir Raj Vohra), Amit Kumar, G.S. Chatterjee, Raja Chatterjee, Sachin Das, Anip Sachthey, Mohit Paul, Shagun Matta, Sumit Goel, Utsav Trivedi (For Parekh & Co.) for the Appearing Parties.

The Judgment of the Court was delivered by

R.M. LODHA , J . 1. Leave granted in both matters.

2. These appeals have raised the question about the procedure that is being followed by Calcutta High Court in consideration of the applications under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act').

3. When the special leave petition filed by M/s. Choudhury Construction came up for consideration before the Bench, the learned counsel for the petitioner submitted that the procedure adopted by the Designate Judge while hearing petition under Section 11 of 1996 Act was unknown in law and not sanctioned by Section 11 inasmuch as although the Designate Judge has held that there are live disputes between the parties which have to be resolved through arbitration, yet the matter has been ordered to be placed before the Chief Justice for appointment

of the arbitrator. In light of the submission made by the learned counsel, Registrar General, Calcutta High Court was ordered to be impleaded as party respondent.

4. In the matter of Hindustan Copper Limited, by an order dated 18.7.2012 this Court felt that the views of the Registrar General, Calcutta High Court were necessary as the issue involved was whether an application under Section 11(6) of the 1996 Act for appointment of an arbitrator could be considered in piecemeal by two Designate Judges.

5. In the matter of Hindustan Copper Limited, one Designate Judge first passed the order on 9.6.2011 holding that the request for appointment of the arbitrator was proper and then ordered that the application should be referred to Hon'ble Delegate of the Chief Justice for appointment of an arbitrator. The relevant part of the order dated 9.6.2011 reads as under:

> "Therefore, the request for appointment of arbitrator was proper. There is an arbitral dispute between the parties, as held above.
>
> I also notice that the petitioner have not appointed their arbitrator, which they ought to have done by this time. Therefore, in the circumstances, I think this application should be referred to the Hon'ble delegate of the Hon'ble the Chief Justice for appointment of an arbitrator/arbitrators to adjudicate the disputes between the parties as mentioned in the letter of the petitioner dated 28th December, 2009. I order accordingly."

6. In pursuance of the order dated 9.6.2011, the matter came up before another Designate Judge and he appointed the arbitrator by an order dated 8.7.2011. The following order reads as under:

> "It appears from the order dated 9th June, 2011 passed by a learned Judge of this Court that His Lordship has

> already found that there exists an arbitration agreement between the parties and the dispute involved herein is covered by the said agreement.
>
> In view of such fact, I, in exercise of power conferred under section 11(6) of the Arbitration & Conciliation Act, 1996 appoint Sri Rudrendra Nath Banerjee, a retired Judge of this Court as the Arbitrator on the fees of Rs. 15,000/- for each sitting."

7. In the appeal of M/s. Choudhury Construction, the Designate Judge on 6.9.2011 passed the following order:

> "The State does not dispute the existence of the arbitration agreement but says that matters specifically excepted by the agreement cannot be made the subject matter of any arbitral reference. If there is any excepted matter which is raised by the petitioner as claimant, it will be open to the State to object thereto, inter alia, under Section 16 of the Arbitration and Conciliation Act, 1996. Since it appears that there are live disputes to go to arbitration and the parties have failed to agree in the composition of the arbitral tribunal, AP No. 394 of 2009 is directed to be placed before the Hon'ble Designate of the Hon'ble The Chief Justice for constitution of an arbitral tribunal in accordance with the agreement between the parties to adjudicate upon the disputes covered thereby. There will be no order as to costs.

8. We have heard Mr. Gourab Banerji, learned senior counsel for the appellant – Hindustan Copper Limited, Mr. Soumya Chakraborty, learned counsel for the appellant – M/s. Choudhury Construction, Mr. Amit Kumar, learned counsel for Respondent No. 1– Monarch Gold Mining Co. Ltd., Mr. Anip Sachthey, learned counsel for the State of West Bengal and Mr. Jaideep Gupta, learned senior counsel for the Registrar General, Calcutta High Court.

9. Mr. Jaideep Gupta, learned senior counsel for the Registrar General, High Court, would submit that Section 11 of the 1996 Act did not put any embargo for piecemeal consideration of the matter. According to him, it is permissible that the Designate Judge considers the general power of the court to determine whether the pre-conditions for the exercise of that power have been fulfilled leaving the power of naming the arbitrator under Section 11 to the exclusive jurisdiction of the Chief Justice. He submits that this is in conformity with the Division Bench decision of the Calcutta High Court in *Modi Korea Telecommunication Ltd. v. Appcon Consultants Pvt. Ltd.*[1].

10. Section 11 of 1996 Act provides for the appointment of arbitrators. It reads as under:

"S. 11. Appointment of arbitrators.—(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and—

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the

1. 1999 (II) Cal. H.C. Notes 107.

third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, –

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief' Justice or the person or institution

designated by him, in appointing an arbitrator, shall have due regard to –

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall he construed as a reference to the "Chief Justice of India."

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8), and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High

Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

11. The Division Bench of the Calcutta High Court in Modi Korea Telecommunication Ltd.1 was concerned with the question of the jurisdiction of a Single Judge who has been given the power for determination to entertain, hear and dispose of arbitration matters under Section 11 of the 1996 Act. The Division Bench dealt with the scheme of the 1996 Act, particularly, with reference to Sections 5,8,11,16 and 37(1). In the opinion of the Division Bench, Section 11 makes a distinction between the procedure for appointment of arbitrator and the actual appointment of the arbitrator. Keeping that distinction in mind, the Division Bench proceeded to consider the matter thus:

"48. .....Under section 11(2) parties can agree on the procedure for appointing the arbitrator. If there is no such agreement on the procedure section 11(3) prescribes the procedure to be followed. When the arbitration is to be of three arbitrators, section 11(3) provides that "each party shall appoint one arbitrator and the two appointed arbitrators shall appoint a third arbitrator who shall act as the presiding arbitrator". If a party fails to appoint an arbitrator within 30 days from the receipt of request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institute designated by him under sub-section (4) of section 11.

49. Section 11(5) similarly provides that in the case of the arbitration with a sole arbitrator if the parties fail to agree on the arbitrator within 30 days from the receipt of the

request by one party from the other to do so, the appointment shall be made, upon request of a party by the Chief Justice or any person or institute designated by him. Section 11(6) deals with a situation where the appointment procedure has been agreed upon but there is non compliance of the agreed procedure. In this case also any party may request "the Chief Justice or any person or institute designated by him" to take the necessary measures unless the agreement on the appointment provides other means for securing the appointment.

50. A decision on the matter entrusted by sub-sections (4), (5) and (6) to the Chief Justice or any person or institute designated by him is final by virtue of section 11(7). Section 11(8) provides for considerations to which regard should be had before such power of appointment is exercised. Section 11(9) deals with International Commercial Arbitrations where the Chief Justice of India or any person or institute designated by him is given the powers of appointment. Section 11(11) deals with a situation where several requests are made to the Chief Justices of different High Courts or their designates. Section 11(12)(a) extends the operation of sub-sections (4), (5), (6), (7), (8) and (10) to International Commercial Arbitrations giving power of appointment to the Chief Justice of India in place of Chief Justice of the High Court. Section 11(12)(b) clarifies that the reference to Chief Justice means the Chief Justice of the appropriate High Court.

51. What does "appointment" mean—is it only limited to naming or does it include the adjudicatory process as to whether appointment should be made?

52. It is clear from a reading of section 11 that the word "appoint" has been used in section 11 to mean nomination or designation. Thus parties may appoint or name their

arbitrator under Section 11(2), (3) and (4). The parties do not, in appointing an arbitrator, do more than name or designate him.

53. The power which has been conferred exclusively under section 11 on the Chief Justice is the power of appointment or the power to name an arbitrator. The Chief Justice may, if he so chooses, designate some other person or institute to exercise this power.

54. This power is to be distinguished from the general power of a court to determine whether the pre-conditions for the exercise of that power have been fulfilled. This is a judicial act. The bifurcation between the two powers has been recognized in the unreported decision of *Harihar Yadav v. Durgapur Projects Ltd.* (supra) when it was said:

> "Undoubtedly the appointment of an arbitrator, on an application made by one of the parties involves a decision making process comprising the twin vital components and elements of consideration with regard to the points in issue, or the points of controversy between the parties and the actual act of appointment of the arbitrator. The act of actual appointment of an arbitrator has always to be preceded by a consideration as to whether in the facts and circumstances of the case the arbitrator in fact is required to be appointed or not. It is not only after this issue is resolved that the question of appointment of an arbitrator arises."

55. Given the definition of the word 'appointment', in our view, section 11 does not say that the Chief Justice could alone exercise the general power of judicially determining whether the pre-conditions for such appointment have been fulfilled. To hold otherwise would, not only be contrary to the express language of the section, but it would also mean that the Chief Justice could by designation clothe any

person or institution with the power to discharge judicial functions.

56. Besides the legislature could not have intended to burden either the Chief Justice of India (in connection with all international arbitrations) or the Chief Justice of a High Court (in connection with all domestic arbitrations) to be saddled with the impracticable task of determining the existence of the preconditions for appointment of an arbitrator/arbitrators in all cases nor to empower the Chief Justice with the power to clothe any person or authority of his choice with the discharge of judicial functions exercisable by Courts. In facts section 11 does not say anything on the matter.

57. In our view such judicial determination is to be exercised only by a Court. A Court has been defined in section 2(e) of the Act as:

> "(e) 'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary Civil Jurisdiction, having jurisdiction to decide the question forming the subjectmatter of the reference if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

12. The Division Bench then considered Section 14 of the High Court Act, 1861, Clause 36 of the Letters Patent, Chapter V Rule 1 of the Original Side Rules and Article 225 of the Constitution of India and in paragraph 64 of the Report concluded as under:

> "64. Pursuant to this power the Chief Justice has allocated the business of hearing matters pertaining to arbitrations to a Learned Single Judge. It is for that Learned Single Judge to exercise the general power referred to earlier, leaving the power of naming the arbitrator under section 11 to the exclusive jurisdiction of the Chief Justice."

13. We find merit in the submission of Mr. Gourab Banerji, learned senior counsel for one of the appellants that the view taken by the Division Bench of Calcutta High Court in *Modi Korea Telecommunication Ltd.*[1] is completely knocked out by a majority decision of this Court in *SBP & Co. v. Patel Engineering Ltd. and another*[2].

14. In *SBP & Co.*[2], a seven-Judge Bench of this Court was concerned with the question in relation to the nature of function of Chief Justice or his designate under Section 11 of the 1996 Act. The necessity to consider the said question arose as a three-Judge Bench of this Court in *Konkan Railway Corporation Limited & Ors. v. Mehul Construction Company*[3], as approved by a five-Judge Bench of this Court in *Konkan Railway Corporation Limited & Anr. v. Rani Construction (P) Ltd.,*[4] had taken the view that the function of the Chief Justice or his Designate under Section 11 was purely an administrative function; it was neither judicial nor quasi judicial and the Chief Justice or his nominee performing the function under Section 11(6) cannot decide any contentious issues between the parties.

15. The majority in *SBP & Co.*[2] held that looking at the scheme of the 1996 Act as a whole and the object with which it was enacted, it seemed proper to view the conferment of power on the chief justice as a conferment of judicial power to decide on the existence of the conditions justifying the constitution of an arbitral tribunal. In the majority judgment, it was also observed that the power had been conferred under Section 11(6) on the highest judicial authority in their capacities as Chief

2. (2005) 8 SCC 618.
3. (2000) 7 SCC 201.
4. (2002) 2 SCC 388.

Justices to pass an order contemplated under Section 11 of the Act. In paragraphs 42 to 44 of the Report (pg. 662-663), the majority in SBP & Co.2 held as under :

> "42. In our dispensation of justice, especially in respect of matters entrusted to the ordinary hierarchy of courts or judicial authorities, the duty would normally be performed by a judicial authority according to the normal procedure of that court or of that authority. When the Chief Justice of the High Court is entrusted with the power, he would be entitled to designate another Judge of the High Court for exercising that power. Similarly, the Chief Justice of India would be in a position to designate another Judge of the Supreme Court to exercise the power under Section 11(6) of the Act. When so entrusted with the right to exercise such a power, the Judge of the High Court and the Judge of the Supreme Court would be exercising the power vested in the Chief Justice of the High Court or in the Chief Justice of India. Therefore, we clarify that the Chief Justice of a High Court can delegate the function under Section 11(6) of the Act to a Judge of that Court and he would actually exercise the power of the Chief Justice conferred under Section 11(6) of the Act. The position would be the same when the Chief Justice of India delegates the power to another Judge of the Supreme Court and he exercises that power as designated by the Chief Justice of India.
>
> 43. In this context, it has also to be noticed that there is an ocean of difference between an institution which has no judicial functions and an authority or person who is already exercising judicial power in his capacity as a judicial authority. Therefore, only a Judge of the Supreme Court or a Judge of the High Court could respectively be equated with the Chief Justice of India or the Chief Justice of the High Court while exercising power under Section 11(6) of the Act as designated by the Chief Justice. A non-judicial body or institution cannot be equated with a Judge

> of the High Court or a Judge of the Supreme Court and it has to be held that the designation contemplated by Section 11(6) of the Act is not a designation to an institution that is incompetent to perform judicial functions. Under our dispensation a nonjudicial authority cannot exercise judicial powers.
>
> 44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act."

16. In paragraph 47 (pg. 663) of the Report, this Court in *SBP & Co.*[2] summed up its conclusions. To the extent they are relevant, the conclusions read as under:

> "47. (i) The power exercised by the Chief Justice of the

High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge."

17. The exposition of law by a seven-Judge Bench of this Court in SBP & Co.2 , leaves no manner of doubt that the procedure that is being followed by the Calcutta High Court with regard to the consideration of the applications under Section 11 of the 1996 Act is legally impermissible. The piecemeal consideration of the application under Section 11 by the Designate Judge and another Designate Judge or the Chief Justice, as the case may be, is not contemplated by Section 11. The function of the Chief Justice or Designate Judge in consideration of the application under Section 11 is judicial and

such application has to be dealt with in its entirety by either Chief Justice himself or the Designate Judge and not by both by making it a two-tier procedure as held in *Modi Korea Telecommunications Ltd.*[1]. The distinction drawn by the Division Bench of Calcutta High Court in *Modi Korea Telecommunications Ltd.*[1] between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded. *Modi Korea Telecommunications Ltd.*[1] to the extent it is inconsistent with *SBP & Co.*[2] stands overruled.

18. In view of the above, the impugned orders are set aside. The arbitration petitions are restored to the file of the High Court for appropriate consideration, as noted above. The appeals are allowed to the above extent. No order as to costs.

19. It is, however, clarified that orders passed by the Chief Justice or the Designate Judge under Section 11 of the 1996 Act which have attained finality and the awards pursuant to such orders shall remain unaffected insofar as the above aspect is concerned.

R.P. Appeals partly allowed.