STATE OF MAHARASHTRA THROUGH CBI, ANTI CORRUPTION BRANCH, MUMBAI

v.

BALAKRISHNA DATTATRYA KUMBHAR

(Criminal Appeal No. 1648 of 2012)

OCTOBER 15, 2012

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

Code of Criminal Procedure, 1973 - s. 389(1) - Suspension of conviction - Conviction of public servant u/s. 13(2) r/w s. 13(1)(e) of Prevention of Corruption Act - Pursuant thereto show-cause notice from employer for removal from service - Application for suspension of conviction - Allowed by High court - On appeal, held: Power to suspend the conviction can be exercised only in exceptional case - High Court was not justified in suspending the conviction in a case involving corruption - Such order could not be passed to save the job of the appellant - It was not such a case where damage, if done, could not be undone - Prevention of Corruption Act, 1988 - s. 13(2) r/w s.13(1)(e).

The respondent was convicted u/s. 13(2) r/w s. 13(1)(e) of Prevention of Corruption Act, 1988. Pursuant thereto, he was put under suspension and show cause notice was issued for his dismissal from service in view of provisions of r. 11 of CCS (CCA) Rules, 1965. The respondent filed an application u/s. 389(1) Cr.P.C. for suspension of his conviction during pendency of his appeal. The application was allowed. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The appellate court in an exceptional case,

may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the court as regards the evil that is likely to befall him, if the said conviction is not suspended. The court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examine whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done. [Para 12] [608-G-H; 609-A-B]

2. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the order of sentence, in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/respondent if ultimately succeeds, could claim all consequential benefits. [Para 14] [609-E-G]

Rama Narang v. Ramesh Narang and Ors. **(1995) 2 SCC 513:1995 (1) SCR 456;** *State of Tamil Nadu v. A. Jaganathan* **AIR 1996 SC 2449:1996 (3) Suppl. SCR 572 ;** *K.C. Sareen v. Central Bureau ofInvestigation, Chandigarh* **AIR 2001 SC 3320: 2001 (1) Suppl. SCR 224;** *State of Maharashtra v. Gajanan and Anr.* **AIR 2004 SC 1188;** *Union of India v. Atar Singh and Anr.* **(2003) 12 SCC 434;** *Ravikant S. Patil v. Savabhouma S. Bagali* **(2007) 1 SCC 673:2006(8) Suppl. SCR 1156 ;** *Navjot Singh Sidhu v. State of Punjab and Anr.* **AIR 2007 SC 1003: 2007 (1) SCR 1143;** *State of Punjab*

v. Navraj Singh **AIR 2008 SC 2962: 2008 (10) SCR 924; CBI,** *New Delhi v. Roshan Lal Saini* **AIR 2009 SC 755 - relied on.**

Case Law Reference:

1995(1) SCR 456	**Relied on**	**Para 6**
1996 (3) Suppl. SCR 572	**Relied on**	**Para 7**
2001 (1) Suppl. SCR 224	**Relied on**	**Para 8**
AIR 2004 SC 1188	**Relied on**	**Para 9**
(2003) 12 SCC 434	**Relied on**	**Para 9**
2006(8) Suppl. SCR 1156	**Relied on**	**Para 10**
2007 (1) SCR 1143	**Relied on**	**Para 11**
2008 (10) SCR 924	**Relied on**	**Para 11**
AIR 2009 SC 755	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1648 of 2012.

From the Judgment & Order dated 08.04.2008 of the High Court of Judicature at Bombay in Criminal Application No. 157 of 2008 in Criminal Appeal No. 1243 of 2007.

P.P. Malhotra, ASG, Prakriti Purnima, B. Krishna Prasad for the Appellant.

Sushil Karanjkar, Nikhilesh Kumar, K.N. Rai for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This Criminal Appeal has been preferred against the impugned judgment and order dated 8.4.2008 in Criminal Application No. 157 of 2008 in Criminal Appeal No. 1243 of 2007 passed by the High Court of Bombay, by way of which, the High Court passed an order of suspension

of the conviction of the respondent under Section 13(2) r/w Section 13(1)(e) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the `Act 1988'), passed by the Special Judge, vide order dated 15.10.2007 in Special Case No. 93 of 2000.

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

A) On 8.1.1999, Special Case No. 93 of 2000 in R.C. No. 39-A of 1999 was registered against the respondent, the then Superintendent of Central Excise, Mumbai, for the offences punishable under Section 13(2) r/w 13(1)(e) of the Act 1988, alleging that he possessed assets disproportionate to his disclosed source of income which was to the extent of Rs. 7,64,368/-.

B) After completing the investigation of the case, the investigating agency filed a charge-sheet dated 27.12.2000, under the said provisions of the Act, 1988. The trial court concluded the trial and convicted the respondent under the said provisions and awarded him a sentence of two years, along with a fine of Rs.1 lakh and, in default, to undergo imprisonment for a further period of three months, vide judgment and order dated 15.10.2007.

C) Subsequent to his conviction, the respondent was put under suspension by the competent authority vide order dated 1.11.2007 and was served a show-cause notice dated 25.1.2008, to explain that in view of his conviction for the offence punishable under the Act 1988, why he should not be dismissed from service, in view of the provisions of Rule 11 of CCS (CCA) Rules, 1965. The respondent was given 15 days time to make his representation against the said show cause notice.

D) The respondent approached the High Court by filing an application under Section 389(1) of the Code of Criminal

Procedure 1973, (hereinafter referred to as the 'Cr.P.C.') requesting that during the pendency of his appeal against the said impugned judgment, the order of conviction against him be suspended. The said application of suspension of conviction has been allowed vide impugned order dated 8.4.2008.

Hence, this appeal.

3. Shri P.P. Malhotra, learned ASG, appearing on behalf of the appellant, submitted that the High Court could exercise its power under Section 389(1) Cr.P.C., for suspension of such conviction only in the rarest of rare case. In the instant case, as the respondent was a public servant and had been convicted on charges of corruption, the High Court was not justified in passing the said order of suspension of conviction. The High Court should have considered the ramifications of such suspension, as such an order would, no doubt demoralise the employers and also other public servants. Under no circumstance, does the case of the respondent fall under the exceptional circumstances under which, such an order would be warranted. Thus, it is nothing but an abuse of the adjudicatory process of law and justice demands that he should be treated as a corrupt and guilty person, unless he is proved to be innocent. The appeal deserves to be allowed and the impugned judgment and order is liable to be set aside.

4. On the contrary, Shri Sushil Karanjkar, learned counsel appearing on behalf of the respondent, has vehemently opposed the appeal contending that the respondent did not have disproportionate assets as alleged. There has been a serious error on the part of the trial court in making such assessment and convicting the respondent on the basis of the same. In fact, it is the income of his wife which was duly proved before the statutory authorities, under the Income Tax Act 1961. Subsequent to the conviction of the respondent, the appeal was allowed by the Income Tax Appellate Tribunal, Mumbai, vide order dated 17.3.2009 wherein, it was accepted that the said

amount, belonged to respondent's wife. The High Court hence, committed no error in passing the impugned order. The special leave petition also, was filed at a belated stage and the said impugned order was passed over 4-1/2 years ago. The appeal of the respondent is in the list of matters listed for final hearing before the Bombay High Court, and thus, no interference is required. The appeal is liable to be dismissed.

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

6. In *Rama Narang v. Ramesh Narang & Ors.,* (1995) 2 SCC 513, this Court dealt with the said issue elaborately and held that if, in a befitting case, the High Court feels satisfied that the order of conviction needs to be suspended, or stayed, so that the convicted person does not have to suffer from a certain disqualification, provided for by some other statute, it may exercise its power in this regard because otherwise, the damage done cannot be undone. However, while granting such stay of conviction, the court must examine all the pros and cons and then, only if it feels satisfied that a case has infact been made out for grant of such an order, it may proceed to do so and even while doing so, it may, if it so considers it appropriate, impose such conditions as are deemed appropriate, to protect the interests of the other parties. Further, it is the duty of the applicant to specifically invite the attention of the appellate court as regards the consequences, which are likely to follow, upon grant of such stay, so as to enable it to apply its mind fully to the issue, since under Section 389(1) Cr.P.C., the court is under an obligation to support its order in a manner provided therein, the same being, "for the reasons to be recorded by it in writing".

7. In *State of Tamil Nadu v. A. Jaganathan,* AIR 1996 SC 2449, this Court dealt with a case wherein the High Court stayed the order of conviction for the sole reason that, in absence of such a stay, the accused was likely to lose his job. This Court reversed the impugned order therein observing:

"…… the High Court, though made an observation but did not consider at all the moral conduct of the respondent….. who was the Police Inspector….had been convicted under Sections 392, 218 and 466 I.P.C. while the other respondents, who are also public servants, have been convicted under the provisions of the Prevention of Corruption Act. In such a case, the discretionary power to suspend the conviction either under Section 389 or under Section 482 Cr.P.C. should not have been exercised. The order impugned, thus, cannot be sustained."

8. In *K.C. Sareen v. Central Bureau of Investigation, Chandigarh,* AIR 2001 SC 3320, this Court examined a case wherein a government servant who had been convicted under the provisions of the Prevention of Corruption Act would lose his job in the event that the conviction was not stayed. The Court held that when a public servant is found guilty of corruption by a Court, he has to be treated as corrupt until he is exonerated by a superior Court in appeal/revision. Mere stay of the conviction during the pendency of the appeal should not confer any benefit upon such an employee, for the reason that if such a public servant is permitted to hold office and to perform official acts (unless he is absolved from such findings by a superior Court), public interest may suffer tremendously. It may also impair the moral of other persons manning such office and may further, erode the confidence of the people in public institutions, besides of course, demoralising all other honest public servants.

9. In *State of Maharashtra v. Gajanan & Anr.,* AIR 2004 SC 1188, this Court reiterated a similar view, placing reliance upon the judgment in *K.C. Sarin* (supra) and *Union of India v. Atar Singh & Anr.,* (2003) 12 SCC 434. In the latter case, this Court held that an order of conviction should not be suspended merely on the ground that non-suspension of such conviction may entail the removal of the government servant from service.

10. In *Ravikant S. Patil v. Savabhouma S. Bagali,* (2007) 1 SCC 673, this Court held as under:-

"It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative…….All these decisions, while recognizing the power to stay conviction, have cautioned and clarified that *such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."*

(emphasis added)

11. In *Navjot Singh Sidhu v. State of Punjab & Anr.,* AIR 2007 SC 1003, this Court held that the Appellate Court can suspend "an order appealed against", i.e. an order of conviction, only if the convict specifically establishes the consequences that may follow if the operation of the said order is not stayed. Stay of conviction must be granted only in a rare case and that too, only under special circumstances.

(See also: *State of Punjab v. Navraj Singh* AIR 2008 SC 2962; and *CBI, New Delhi v. Roshan Lal Saini,* AIR 2009 SC 755).

12. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record

in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done.

13. The instant case is required to be examined in light of the aforesaid settled legal propositions. The relevant part of the impugned order reads as under:

> "As the applicant would suffer serious prejudice on account of order of dismissal, in my opinion, the applicant is justified in applying to this Court for suspending the order of conviction so that the Department shall not precipitate the matter further. The applicant through counsel fairly submits that relying on this order, the applicant will not claim further relief of setting aside the order of suspension which is already operating against the applicant passed by the Department on 1st November, 2007."

14. The aforesaid order is therefore, certainly not sustainable in law if examined in light of the aforementioned judgments of this Court. Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption. It was certainly not the case where damage if done, could not be undone as the employee/respondent if ultimately succeeds, could claim all consequential benefits. The submission made on behalf of the respondent, that this Court should not interfere with the impugned order at such a belated stage, has no merit for the reason that this Court, vide order dated 9.7.2009 has already stayed the operation of the said impugned order.

15. Thus, in view of the above, the appeal is allowed and the impugned order dated 8.4.2008 is hereby, set aside.

Before parting with the case, we clarify that the observations made in this judgment will not adversely affect the case of the respondent at the time of final disposal of his appeal.

K.K.T. Appeal allowed.

UCO BANK & ORS.

v.

SUSHIL KUMAR SAHA
(Civil Appeal No. 7515 of 2012)

OCTOBER 15, 2012

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

SERVICE LAW:

Disciplinary proceedings - Disciplinary authority - Bank Officer, transferred to Head Office stated to have committed various irregularities during his earlier posting - Disciplinary authority of the erstwhile place of posting nominated to conduct disciplinary proceedings - Held: The disciplinary authority was duly empowered under the relevant provision to institute the disciplinary proceedings - Court is not expected to sit in judgment over wisdom of the Bank in taking such a decision which is to expedite the disciplinary proceedings - Division Bench of High Court erred in quashing the proceedings and the punishment of dismissal - Impugned order set aside - UCO Bank (Discipline and Appeal) Regulations 1976 - Regulation 5 - Note dated 3.8.2004 - Circular dated 11.8.2004.

The respondent, while working as the Senior Manager in the scale of MMGS-III, in a Branch of the UCO Bank from 15.10.2001 to 23.8.2005, was stated to have committed serious irregularities in sanctioning loan and granting indiscriminate excess drawings and overdrawing facilities to various parties beyond his powers and without approval of the Controlling Office. This was detected subsequently after he was transferred and posted as Senior Chief Officer at the Head Office of the Bank in August 2005. The Bank issued a charge-sheet to the respondent through the AGM (disciplinary authority). Ultimately, the AGM found the charges fully proved, and imposed the penalty of dismissal from

service. The departmental appeal and the writ petition of the respondent were dismissed. However, the Division Bench of the High Court allowed his appeal holding that the AGM had no jurisdiction to hold the disciplinary proceedings, and directed his reinstatement.

In the instant appeal filed by the Bank, the question for consideration before the Court was: whether the disciplinary authority of the erstwhile place of posting, where irregularities stated to have occurred/committed, could institute and complete the disciplinary proceedings against the erring officials (both officer and award staff), notwithstanding the fact that such persons are later posted under the administrative jurisdiction of some other authorities.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, the AGM is justified in initiating disciplinary proceedings which is in accordance with the decision dated 3.8.2004 as well as the circular dated 11.8.2004. The Note dated 3.8.2004 which was approved by CMD in exercise of the powers conferred on him under Regulation 5(1) of the UCO Bank (Discipline and Appeal) Regulations, 1976 is statutory in nature. Regulation 5 specifically provides that the Managing Director or the Executive Director or any other authority empowered by either of them by general or special order, may institute or direct the disciplinary authority to institute disciplinary proceedings. Further, note 2 to the Schedule also stipulates that the powers of the specified authorities may be exercised by any other authority nominated by the Executive Director/CMD, who is equal in rank or higher than the authority specified therein. The reason for entrusting the task of initiating the disciplinary proceedings on the disciplinary authority of the erstwhile place of posting is that the new disciplinary authority

might not be aware of the nature and extent of irregularities allegedly committed by the employee in his earlier place of posting, since the relevant records, documents etc. are kept in the old place of posting. The Bank in its wisdom felt that such a course will expedite disposal of the disciplinary cases within the stipulated time frame. This Court is not expected to sit in judgment over wisdom of the Bank in taking such a decision which is to expedite the disciplinary proceedings. [para 18] [625-G-H; 626-A-D]

1.2 Consequently, the AGM who had the disciplinary control over the respondent while he was working at the Branch Office has got jurisdiction to conduct an enquiry with regard to the irregularities committed by the respondent while he was working as the Senior Manager at the Branch Office of the Bank from 15.11.2001 to 23.8.2005. The High Court has taken a narrow view while interpreting Regulation 1976, the Note dated 3.8.2004, Circular dated 11.8.2004 read with Regulation 5(1). Omitting to note the purpose and object of the note and the circular, that is, speedy and expeditious disposal of cases with regard to the disciplinary proceedings against erring officials, the High Court has committed an error in quashing the note as well as the circular. [para 19-20] [626-E-F-H; 627-A-B]

Allahabad Bank v. Prem Narain Pande and Others **1995 (4) Suppl. SCR 481 = 1995 (6) SCC 634 - relied on.**

1.3 In the facts and circumstances of the case, the Division Bench of the High Court has committed an error in quashing the proceedings initiated by the AGM (Disciplinary Authority) and the punishment imposed. Consequently, the judgment of the Division Bench of the High Court is set aside. [para 21] [627-B-C]

Case Law Reference:

1995 (4) Suppl. SCR 481 relied on para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7515 of 2012.

From the Judgment and Order dated 19.12.2011 of High Court of Calcutta in APO No. 342 of 2009.

Vivek Tankha, Santosh Paul, Sameer Sodhi, Arti Singh, Pooja Singh, Naveen Kumar for the Appellant.

Soumitra G. Chaudhuri, Raja Chatterjee, Runa Bhuyan, G.S. Chatterjee for the Respondent.

The Judgment of the Court was delivered by

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

2. The question that is posed for consideration in this case is whether the disciplinary authority of the erstwhile place of posting, where irregularities stated to have occurred/committed, could institute and complete the disciplinary proceedings against the erring officials (both officer and award staff), notwithstanding the fact that such persons are later posted under the administrative jurisdiction of some other authorities.

3. The High Court, placing reliance on Regulations 5(1) and 6 of the UCO Bank (Discipline and Appeal) Regulations, 1976 [for short 'Regulations 1976'] read with Schedule thereto, took the view that it was only the Deputy General Manager (for short 'DGM') who had the power to initiate disciplinary proceedings against the respondent and not the Assistant General Manager (for short 'AGM'), as per the Schedule to Regulations 1976, since at the time of initiation of proceedings he was under the jurisdiction of the DGM. The High Court, therefore, set aside the entire disciplinary proceedings, including the charge-sheet, enquiry report, final order of punishment and the appellate order and directed the Bank to release all the admissible service benefits and pay admissible dues to the respondent. We are, in this case, concerned with the legality of the order of the High Court.

4. The Respondent joined the services of the Appellant UCO Bank (for short 'Bank') as the Field Officer on 11.11.1978. He was later promoted to the scale of MMGS-III on 17.7.2001. Respondent functioned as the Senior Manager in the Bansdroni Branch of the Bank from 15.10.2001 to 23.8.2005. Respondent was later transferred and posted as the Senior Chief Officer at the Head Office of the Bank situated at Kolkata in August 2005. It was then noticed that while the respondent was working as the Senior Manager at Bansdroni Branch, he had committed serious irregularities in sanctioning loan and had granted indiscriminate excess drawings and overdrawing facilities to various parties beyond his powers and without approval from the Controlling Office. Consequently, a show-cause-notice dated 23.3.2006 was issued by the Chief Officer, Regional Office, Kolkata. Respondent filed his reply to the said show-cause-notice on 17.4.2006. Being dissatisfied with the reply submitted by the respondent, the Bank issued a charge-sheet along with Statement of Allegations dated 15.12.2006 through the AGM (Disciplinary Authority) to hold a domestic enquiry against the respondent in terms of Regulation 6 of the Regulations 1976, levelling 7 charges which are extracted hereunder for easy reference:

(i) that the respondent granted indiscriminate excess drawings over the sanctioned Cash Credit Limits of various parties beyond his delegated power and without prior approval from Controlling Office;

(ii) that while granting unauthorized excess drawings, the respondent concealed the said fact from the controlling office;

(iii) that the respondent failed to induce the parties to observe credit discipline and indulged in granting them unauthorized accommodation detriment to the interest of the bank;

(iv) that before disbursement of credit facility, respondent did not take collateral security in respect of various cash

credit borrowers violating sanction stipulation rather extended the enhanced limit in favour of the borrowers etc.;

(v) that the respondent did not take steps for creation of valid stipulation in various cases and failed to effectively monitor/control and supervise the following advance accounts to protect the interest of the bank;

(vi) that the respondent in blatant violation of the sanctioned limits in the case of M/s J.C. Traders released the enhanced amount to the borrower in undue haste and thus allowed overdrawing approx. Rs.2 crores to the borrower party beyond the amount stipulated for the disbursement against the sanctioned enhanced limit;

(vii) That the respondent showed inclination to accommodate various parties in an irregular and unauthorized manner by abusing his official position and deliberately displayed indifference to bank's interest and exposed the bank to financial loss of Rs.598.07 lacs approx. as most of the accounts turned potential NPA/ NPA."

5. Respondent filed his reply to the said charge-sheet on 17.1.2007. The reply submitted by the respondent was considered by AGM in the capacity of the Disciplinary Authority and he found the same unsatisfactory and decided to hold a departmental enquiry against the respondent and appointed Shri Benod Bihari Hazra, Retired Executive of the Bank as an Enquiring Authority to enquire into various charges leveled against the respondent. Detailed enquiry was conducted and, ultimately, the enquiry report dated 12.3.2008 was submitted to the AGM.

6. AGM concurred with the findings of the Enquiring Officer in respect of the charges, including Charge No. 4, which the AGM found to be fully proved. A copy of the enquiry report was served on the respondent, to which he filed a detailed reply. AGM, after considering the reply submitted by the respondent, passed final order on 19.4.2008, in exercise of his powers

conferred under Regulation 4 of the Regulations 1976 and imposed penalty of dismissal from service. Aggrieved by the said order of AGM, Respondent filed an appeal before the Appellate Authority, namely DGM, Personnel Services, Department, Head Office. Appellate authority dismissed the appeal vide its order dated 22.7.2008.

7. Aggrieved by the order of the Appellate Authority, respondent filed a writ petition No. 1546 of 2008 before the High Court of Calcutta, which was dismissed by the learned single Judge of the High Court vide its judgment dated 19.11.2009. Appeal was preferred by the respondent to the Division Bench vide A.P.O. No. 342 of 2009 and the Bench vide its judgment dated 19.12.2011 allowed the appeal holding that AGM has no jurisdiction to initiate the disciplinary proceedings. The Division Bench also directed reinstatement of the respondent into service along with all consequential benefits, against which this appeal has been preferred by the Bank.

8. Shri Vivek Tankha, learned senior counsel appearing for the Appellant-Bank, submitted that the High Court has committed a grave error in holding that the proceedings initiated by AGM were without jurisdiction and ordered reinstatement of the respondent with all consequential benefits. Learned senior counsel also submitted that the respondent had not challenged the validity of the Circular dated 11.8.2004 or the note dated 3.8.2004 and that the High Court, on a wrong interpretation of those provisions, took the view that AGM had no jurisdiction to act as the Disciplinary Authority. In support of his contention, learned senior counsel relied upon the judgment of this Court in Allahabad Bank v. Prem Narain Pande and Others (1995) 6 SCC 634.

9. Shri Soumitra G. Chaudhuri, learned counsel appearing for the respondent, submitted that AGM has no jurisdiction to act as the Disciplinary Authority over the respondent and the Division Bench of the High Court has rightly held that the entire disciplinary proceedings, starting from the charge-sheet till the dismissal of the respondent, was without jurisdiction Learned

counsel, placing reliance on Regulations 5(1) and 6 of the Regulations 1976, contended that the DGM alone could have initiated the disciplinary proceedings against the respondent. Learned counsel, therefore, submitted that the Division Bench of the High Court has rightly quashed the entire proceedings and ordered reinstatement of the respondent with all consequential benefits.

10. We are, in this case, concerned only with the question whether the disciplinary proceedings were lawfully initiated by the AGM and whether power has been conferred on him to act as the Disciplinary Authority against the respondent, since the irregularities stated to have been committed while he was working at Bansdroni Branch of the Bank.

11. Regulations 1976 was framed by the Board of Directors of the UCO Bank, in exercise of its powers conferred under Section 19 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (for short 'Act 1970'), in consultation with the Reserve Bank of India and the previous sanction of the Central Government. Regulation 3(g) of the Regulations 1976 reads as under:

> "Disciplinary Authority" means the authority specified in the Schedule which is competent to impose on an officer employee any of the penalties specified in regulation 4."

12. Regulation 4 deals with Minor and Major Penalties. Regulation 5 refers to the Authority to initiate disciplinary proceedings and impose penalties. Regulation 5 is extracted hereunder for easy reference:

> "5. Authority to institute disciplinary proceedings and impose penalties:
>
> (1) The Managing Director or the Executive Director or any other authority empowered by either of them by general or special order may institute or direct the Disciplinary Authority to institute disciplinary proceedings against an officer employee of the bank.
>
> (2) The Disciplinary Authority may himself institute

disciplinary proceedings.

(3) The Disciplinary Authority or any authority higher than it, may impose any of the penalties specified in regulation 4 on any officer employee."

(emphasis added)

Regulations 6(1) and (2) deal with the procedure for imposing major penalties and they are as follows:

"6. Procedure for imposing major penalties:

(1) No order imposing any of the major penalties specified in clauses (f), (g), (h), (i) and (j) of regulation 4 shall be made except after an inquiry is held in accordance with this regulation.

(2) Whenever the Disciplinary Authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehavior against an officer employee, it may itself enquire into, or appoint any other public servant (hereinafter referred to as the inquiring authority) to inquire into the truth thereof."

13. Regulation 18 (unamended) deals with Review and the same reads as follows:

"18. Review:

Notwithstanding anything contained in these regulations, the Reviewing Authority may call for the record of the case within six months of the date of the final order and after reviewing the case pass such orders thereon as it may deem fit.

Provided that -

(i) If any enhanced penalty, which the Reviewing Authority proposes to impose, is a major penalty specified in clauses (f), (g), (h), (i) or (j) of regulation 4 and an enquiry as provided under regulation 6 has not already been held in the case, the Reviewing Authority shall direct that such an enquiry be held in accordance with the provisions of regulation 6 and thereafter consider the record of the

enquiry and pass such orders as it may deem proper;

(ii) If the Reviewing Authority decides to enhance the punishment but an enquiry has already been held in accordance with the provisions of regulation 6, the Reviewing Authority shall give show cause notice to the officer employee as to why the enhanced penalty should not be imposed upon him and shall pass an order after taking into account the representation, if any, submitted by the officer employee."

14. The Board of Directors of UCO Bank, in exercise of its powers conferred under Section 19 read with sub-section (2) of Section 12 of the Act 1970, approved the amendment to Regulation 18 and the Schedule to the Regulations 1976, in consultation with the Reserve Bank of India and with previous sanction of the Central Government, and a circular No. CHO/POS/11/2002 dated 4.4.2002 to that effect was issued and sent by the Bank to all branches/office, the operative portion of the same reads as follows:

"In the UCO Bank Officer Employees (Discipline and Appeal) Regulations, 1976.

(a) For regulation 18, the following regulation shall be substituted namely:

18. Review

Notwithstanding anything contained in these regulations, the Reviewing Authority may at any time within six months from the date of the final order, either on his own motion or otherwise review the said order, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which was the effect of changing the nature of the case has come or has been brought to his notice and pass such orders thereon as it may deem fit.

xxx xxx xxx

xxx xxx xxx

The existing schedule, the following schedule shall be

substituted namely:

a.	Scale/ category of post	Disciplinary authority	Appellate authority	Reviewing authority
	xxx	xxx	xxx	xxx
b)	Officers in MMG/Scale III & officers in Grade B posted at Branches/ Offices under jurisdiction of Regional Offices headed by Regional Manager in Senior Management Grade/ Scale IV/ Grade A including officers sent on deputation	Asst. Gen. Manager attached to office of respective General Manager (Operations)	General Manager	E.D.
	xxx	xxx	xxx	xxx
c	Posted at Head office or any other office/ establishment coming under direct control of Head Office including the regional Rural Banks/ Regional Training Centres/Central Staff college and officers sent on deputation & inspecting officers	Dy. General Manager (Personal)	G.M. (Pers)	E.D.
	xxx	xxx	xxx	xxx

Note- 1. Where a post of any of the above said authorities remains vacant without officiating/ acting arrangement having been authorized, the powers should be exercised by the next higher authority. 2. The powers of any of the above specified authorities may be exercised by any other authority nominated by the Executive Director/Chairman & Managing Director who is equal in rank to or higher than the authority specified above.

The amendments to the above regulation and to the schedule came into force w.e.f. 9.2.2002."

15. The Top Management Committee (for short 'TMC') of the Bank convened its 11th Meeting on 26.6.2004 at Bank's Head Office at Calcutta and the necessity of expeditious disposal of disciplinary cases was discussed in that meeting, though it was not minuted in the proceedings, says the learned senior counsel appearing on behalf of the Bank. Following the TMC meeting held on 26.6.2004, an Inter Departmental Note dated 3.8.2004 was placed by the GM (Personnel) of the Bank before the Chairman and Managing Director (for short 'CMD') referring to the decision taken for expeditious disposal of disciplinary cases, the operative portion of the same reads as follows:

"NOTE TO CHAIRMAN & MANAGING DIRECTOR

Sub: Expeditious disposal of disciplinary action cases - decision taken in the TMC meeting dated 26.06.2004

In terms of existing Schedule of Disciplinary Authorities, consequent upon transfer of any employee (both officer and Award staff) from one region to another, the disciplinary authority changes. As per Head Office Circular No. CHO/PMG/4/2002 dated 16.1.2002 with the transfer of a charge sheeted employee (both officer and award staff), the disciplinary authority over him will remain the same and the said disciplinary authority would complete the RDA cases, irrespective of the fact that the charge sheeted employee has been transferred. This order has been made effective from 1.2.2002. In terms of the above circular, however, if the irregularity is detected after the transfer of the employee, the disciplinary authority at the new place of posting will take appropriate action.

In view of the above, it has been observed that delay

occurs in the matter of initiating appropriate action including disciplinary action against the erring employees, who had committed irregularities in his earlier place of posting. Therefore, the TMC in its meeting held on 26.6.2004 decided that henceforth the disciplinary authority of erstwhile place of posting where the irregularities took place, will institute and complete the RDA against the erring official (both officer and award staff) considering the nature and extent of irregularities as the relevant records are readily available with them.

Accordingly, Personnel Department, Head Office proposes to issue a Circular which would be made effective from 16.8.2004, in compliance with the above directives of TMC, a copy of which is enclosed for kind perusal and approval."

(emphasis added)

16. The note was perused and approved by the CMD of the Bank on 10.8.2004 in exercise of his powers conferred under Regulation 5(1) of the Regulations 1976. On the next day, i.e. 11.8.2004, the General Manager (Personnel) of the Bank issued a Circular No. CHO/PMG/22/2004 to all the branches for expeditious disposal of disciplinary cases stating, inter alia, as follows:

"As the new disciplinary authority is not naturally aware of the nature and extent of irregularities allegedly committed by the employee in his earlier place of posting and relevant records / documents etc. are kept in the old place of posting, it was decided vide Bank's Circular No. CHO/ PMG?4/2002 dated 16.1.2002 that with the transfer of a charge sheeted employee (both officer / award staff) the disciplinary authority over him would remain the same and the said DA would complete the RDA case irrespective of the fact that the charge sheeted employees has been

transferred. The operation of the circular was made effective from 1.2.2002. However the provision of this circular was not made applicable for employees, in whose cases the irregularities were detected subsequently and no appropriate steps for such irregularities which warrant timely action including disciplinary action against the erring officials, often gets delayed as neither the new disciplinary authority nor the old office/branch from where the employee has been transfers, takes proper care to facilitate initiation of RDA and expeditious disposal of the same.

The matter was thoroughly discussed in the Top Management Committee in meeting dated 26.6.2004. *To obviate delay in initiation of RDA and conclusion of the same, due to change of disciplinary authority consequent upon transfer of the employee, against whom lapses are attributable for his irregular action in earlier place of posting, the committee decided that henceforth, in terms of bank's circular No. CHO/PAS/2/2000 dated 23.6.2000 for Award staff and CHO/POS/11/2002 dated 4.4.2002 for officers, the disciplinary authority of erstwhile place of posting, where irregularities occurred/committed, will institute and complete the RDA against the erring officials (both officer and award staff), considering the nature and extent of the irregularities on case to case basis, notwithstanding such employees are presently posted under the administrative jurisdiction of some other authorities.* Similarly, the appellate authorities of earlier place of posting of the erring official (both officer and award staff) would take steps for disposal of the appeals preferred against the final orders passed by such disciplinary authorities. This decision has been taken keeping in view the position that the earlier disciplinary authority/appellate authority is better aware of the facts and circumstances of such cases and the relevant documents/ records are readily available in the earlier place of posting.

We feel that the above revised guidelines will expedite

disposal of RDA cases within the stipulated time frame of four and six months for non vigilance and vigilance cases respectively as directed by the DPC.

The disciplinary authorities/appellate authorities are advised to note this changes for strict compliance, which would come into operation w.e.f. 16.8.2004. Existing cases, where charge sheets / letters of imputations or lapses have already been issued, will however, not be affected by the operation of this circular.

A copy of this circular should be displayed on the notice board for the information of all concerned."

(emphasis added)

17. We have already indicated that the respondent was working as the Senior Manager at Bansdroni Branch of the Bank from 15.10.2001 to 23.8.2005 and the irregularities were committed or occurred while he was working at that branch of the Bank and the respondent was later transferred to the Head Office on August 2005. While he was working at the Head Office, the Bank came to know of the irregularities committed by him while he was working at the Branch Office of the Bank during the above mentioned period. Consequently, disciplinary proceedings were initiated against him and a charge-sheet dated 15.12.2006 was issued to him by AGM following the above mentioned circular dated 11..8.2004, which conferred powers on AGM since the irregularities occurred or committed when he was functioning at the Branch Office.

18. In the instant case, however, AGM is justified in initiating disciplinary proceedings which is in accordance with the decision dated 3.8.2004 as well as the circular dated 11.8.2004. The Note dated 3.8.2004 which was approved by CMD in exercise of the powers conferred on him under Regulation 5(1) is statutory in nature. Regulation 5 specifically empowers the Managing Director or the Executive Director or any other authority empowered by either of them by general or special

order, may institute or direct the disciplinary authority to institute disciplinary proceedings. Further, note 2 to the schedule also stipulates that the powers of the specified authorities may be exercised by any other authority nominated by the Executive / CMD, who is equal in rank or higher than the authority specified therein. The reasons for entrusting the task of initiating the disciplinary proceedings on the disciplinary authority of the erstwhile place of posting is that the new disciplinary authority might not be aware of the nature and extent of irregularities allegedly committed by the employee in his earlier place of posting, since the relevant records, documents etc. are kept in the old place of posting. The Bank in its wisdom felt that such a course will expedite disposal of the disciplinary cases within the stipulated time framed. This Court is not expected to sit in judgment over wisdom of the Bank in taking such a decision which is to expedite the disciplinary proceedings.

19. Consequently, the AGM who had the disciplinary control over the respondent while he was working at the Branch Office has got jurisdiction to conduct an enquiry with regard to the irregularities committed by the respondent while he was working as the Senior Manager at the Branch Office of the Bank from 15.11.2001 to 23.8.2005. We may indicate that in Allahabad Bank (supra), this Court while interpreting the provisions of Regulations 3, 4, 5(1) & (2), 6(3), 21(ii) and 7(3) of the Allahabad Bank (Discipline and Appeal) Regulations, 1976, held that the High Court has taken too narrow a view of the controversy posed before it and has set aside the dismissal on too hyper-technical a view which cannot be sustained on the scheme of the Regulations.

20. We are of the view that, in this case also, the High Court has taken a narrow view while interpreting Regulation 1976, the Note dated 3.8.2004, Circular dated 11.8.2004 read with Regulation 5(1). Omitting to note its purpose and object, that is speedy and expeditious disposal of cases with regard to the disciplinary proceedings against erring officials, the High

Court has committed an error in quashing the note as well as the circular.

21. In the facts and circumstances of the case, we are of the view that the Division Bench of the High Court has committed an error in quashing the proceedings initiated by the AGM (Disciplinary Authority) and the punishment imposed. Consequently, the appeal is allowed and the judgment of the Division Bench of the High Court is set aside.

R.P. Appeal allowed.

SELVAM

v.

THE STATE OF TAMIL NADU REP. BY INSPECTOR OF POLICE

(Criminal Appeal No. 1857 of 2009 etc.

OCTOBER 16, 2012

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

PENAL CODE, 1860:

ss. 304 (Part-I) read with s.34 - Injuries on the head of victim by blunt side of 'aruval' and stick - Death of victim in hospital after 9 days - Held: The fact that the blunt side of the 'aruval' and a stick were used in the assault on the deceased would go to show that the accused did not have any intention to cause his death - Nonetheless, the injuries caused by the accused were all on the head of the deceased including the parietal and temporal regions - Accused, thus, had the intention of causing bodily injury as was likely to cause death and were liable to punishment for culpable homicide not amounting to murder u/s 304 (Part I) - After considering the oral and medical evidence and the fact that the deceased died after nine days of the assault, the conviction and sentence of the appellants u/s 302 is modified and instead they are convicted u/s 304 (Part-I) read with s. 34 and sentenced to rigorous imprisonment for seven years.

ss. 33 and 34 - Explained.

The appellants-accused nos. 1, 6, and 7 (A-1, A-6, A-7) along others were prosecuted for committing the murder of one 'Ch' (son of PW 2) and causing injuries to others. The prosecution case was that there was a land dispute between the families of the complainant-PW1 and A-1. On 15.11.2006, when the family of A-1 wanted to take a burial procession through the house street of the complainant family, the latter resisted it with the help of the village head and others; that on 16.11.2006, at about 15:00 Hrs., A-1 and his brothers A-2 to A-7 and others

came to the family house of the complainant and attacked its inmates causing injuries to 'Ch' and others. 'Ch' was taken to the hospital, where he succumbed to his injuries on 25.11.2006. The trial court convicted A-1 u/s 302 IPC, A-6 and A-7 u/s 302 read with s. 34 IPC and A-4 u/s 324 IPC. The High Court declined to interfere.

In the instant appeals filed by A-1, A-6 and A-7, it was contended for the appellants that keeping in view the FIR, there was improvement in the statements of P Ws 1 and 2 before the court as regards the role attributed to A-7 and the nature of injuries stated to have been caused by A-1 and A-6; the victim died in the hospital after several days of the incident; and there being inconsistency in the ocular evidence and the medical evidence, it was a case where ocular evidence could not be believed.

Allowing the appeal in part, the Court

HELD: 1. The difference in the version in the FIR and the version in the evidence of PW-1 and PW-2 is not very material so as to create a reasonable doubt with regard to the participation of A-1, A-6 and A-7 in the assault on the deceased. In the FIR, it has been alleged that A-1 and A-6 delivered a cut on the deceased. PW-1, in his evidence, has stated that A-1 had delivered a cut on the centre of the head of the deceased and A-6 delivered a cut on the head of the deceased. Similarly, PW-2 has stated that A-1 delivered cut on the centre of the head of the deceased and A-6 snatched the 'aruval' from A-1 and delivered a cut on the centre of the head of the deceased. The FIR and the evidence of PW-1 and PW-2 are, thus, clear that A-1 and A-6 delivered cut injuries on the deceased. Regarding the participation of the A-7 in the assault, in the FIR it is alleged that he assaulted on 'us' with a stick. The evidence of PW-1 and PW-2 is that A-7 assaulted on the left side of the head of the deceased with a stick. The word 'us' in the FIR cannot mean to exclude the deceased inasmuch as the deceased was the brother of PW-1 and was the son of PW-2. There is evidence to show that besides the deceased, PW-1 and PW-2 were also injured and were treated at the hospital. A-7 has, thus, used the stick not just against PW-1 and PW-2, but also against the deceased. Therefore, there is no material difference between the version in FIR and in the evidence of PW-1 and PW-2 on the role of A-7 in the assault. [para 10] [637-G-H; 638-A-E]

2. The evidence of PW-1 and PW-2 establishes beyond reasonable doubt that A-1 used the aruval to strike at the head of the deceased. From the evidence of PW-1 and PW-2, it is also established beyond reasonable doubt that A-6 snatched the aruval from A-1 and struck on the head of the deceased. The evidence of PW-1 and PW-2 also establishes that A-7 struck at the head of the deceased by a stick. The result of all these acts of accused nos.1, 6 and 7 is the death of the deceased. Section 34, IPC, states that 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. Section 33, IPC, states that the word "act" denotes as well a series of acts as a single act. Thus, even though A-1, A-6 and A-7 may have committed different acts, they have cumulatively committed the criminal act which has resulted in the death of the deceased and are liable for the criminal act by virtue of s. 34, IPC. Therefore, it cannot be said that A-7 was not liable for the same punishment as A-1 and A-6. [para 11] [638-E-H; 639-A-B]

3.1 The medical evidence of the doctor (PW-11) is clear that all the injuries of the deceased were most probably as a result of an assault by a blunt weapon and

the deceased appears to have died due to head injuries. PW-11 has also admitted in her cross-examination that she did not see any incised injuries during the post mortem examination and had a sickle been used it would have caused incised wounds. Thus, it appears that A-1 and A-6 had used not the sharp side but the blunt side of the aruval and A-7 had used the stick in the assault on the deceased. The fact that the blunt side of the aruval and a stick were used in the assault on the deceased would go to show that A-1, A-6 and A-7 did not have any intention to cause his death. Nonetheless, the injuries caused by the accused A-1, A-6 and A-7 were all on the head of the deceased, including the parietal and temporal regions. A-1, A-6 and A-7, thus, had the intention of causing bodily injury as was likely to cause death and were, thus, liable to punishment for culpable homicide not amounting to murder u/s 304 (Part I), IPC. [para 12] [639-C-F]

State of Punjab v. Tejinder Singh & Anr. **1995 (2) Suppl. SCR 856 =1995 (3) Suppl. SCC 515 - relied on**

3.2 In the instant case, the assault on the deceased was on 16.11.2006 and the deceased died in the hospital after nine days on 25.11.2006. In Abani K. Debnath's case this Court, after considering the nature of the injuries as well as the fact that the deceased succumbed to the injury after a lapse of seven days, took the view that the conviction of the accused in that case cannot fall u/s 302, IPC. [para 14] [640-D-E]

Abani K. Debnath and Another v. State of Tripura **(2005) 13 SCC 422 - relied on**

3.3 After considering the evidence of PW-1 and PW-2, the medical evidence of PW-11 and the fact that the

deceased died after nine days of the assault, this Court is of the considered opinion that the trial court and the High Court were not right in convicting the appellants u/s 302 and they should have been convicted instead u/s 304 (Part-I) read with s.34. Accordingly, the conviction and sentence on the appellants u/s 302 is modified and instead they are convicted u/s 304 (Part-I) read with s. 34 and sentenced to rigorous imprisonment for seven years. [para 15] [640-E-G]

Kalyan and Others v. State of U.P. **2007 (5) SCR 1053 = 2007 (9) SCC 513 = (2001) 9 SCC 632 2001 (3) Suppl. SCR 407 = 2001 (9) SCC 632;** *B.N. Kavatakar and Another v. State of Karnataka* **1994 Supp. (1) SCC 304 - cited**

Case Law Reference:

2007 (5) SCR 1053	**cited**	**para 5**
2001 (3) Suppl. SCR 407	**cited**	**para 5**
1994 Supp.(1) SCC 304	**cited**	**para 6**
(2005) 13 SCC 422	**relied on**	**para 6**
1995 (2) Suppl. SCR 856	**relied on**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1857 of 2009.

From the Judgment & Order dated 12.12.2008 of the Madurai Bench of Madras High Court in Crl. A. (MD) Nos. 200 & 201 of 2008.

WITH

Criminal Appeal Nos. 1667-1668 of 2012.

S.B. Sanyal, S. Mahendran, K.K. Mani, Abhishek Krishna for the Appellant.

B. Balaji, M. Anbalagan for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted in S.L.P. (Crl.) Nos. 575-576 of 2010.Page 2

2. These Criminal Appeals are against the judgment dated 12.12.2008 of the Madras High Court, Madurai Bench, in Criminal Appeal Nos.200-201 of 2008.

3. The facts very briefly are that on 16.11.2006 at 21:00 Hrs. a First Information Report (for short 'FIR') was lodged in Ganesh Nagar Police Station pursuant to a statement of Meyyappan recorded by the SubInspector of Police. In this FIR, it is stated thus: Mayyappan lived at the Thethampatti, Thiruvarangulam, alongwith his family and that there was a dispute pending between his family and the family of Arangan over land. On 15.11.2006 at 11.00 a.m. Mariappan, who belongs to the family of Arangan, died and the family of Arangan wanted to take the burial procession through house street of Meyyappan and his family members but Meyyappan's younger brother Chinnadurai and his father Rengaiah appealed to the important persons of the village saying that there was a separate public pathway for taking the dead body to the cremation ground and the village head and other villagers accordingly requested the members of the family of Arangan to carry the dead body of Mariappan through that public pathway. On 16.11.2006 at about 15:00 Hrs. Arangan and his brothers, Meyyappan, Murugan, Subbaiah, Chidambaram, Senthil, Selvam and others, armed with aruvals and sticks came to the family house of Meyyappan and asked his family members to come out and thereafter Arangan and Senthil delivered a cut on Chinnadurai and Selvam and others assaulted them with sticks and Chinnadurai was first taken to the government hospital and thereafter to the Thanjavur Medical College Hospital for treatment.

4. On the basis of this statement of Meyyappan, Ganesh

Nagar Police Station Crime No. 795/06 under Sections 147, 148, 323, 324 and 307 of the Indian Penal Code, 1860 (for short 'the IPC') was registered. Chinnadurai died at the hospital on 25.11.2006. Investigation was conducted and a charge-sheet was filed. Charges were framed against Arangan (accused no.1) under Sections 148 and 302 of the IPC, against Meyyappan (accused no.2) under Sections 148 and 307 of the IPC, against Subbaiah (accused no.3) under Sections 147 and 307 of the IPC, against Chidambaram (accused no.4) under Sections 148 and 326 of the IPC, against Murugan (accused no.5) under Sections 148 and 326 of the IPC, against Senthil (accused no.6) under Sections 148 and 302 read with Section 34 of the IPC, against Selvam (accused no.7) under Section 147, 302 read with Section 34 and Section 325 of the IPC, against Thilak (accused no.8) under Sections 147 and 325 of the IPC and against Marthandam (accused no.9) under Sections 147 and 302 read with Section 34 of the IPC. The Trial Court convicted accused no.1 under Section 302 of the IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.3000/- and in default, to further undergo rigorous imprisonment for a period of six months. The Trial Court also convicted accused nos. 6 and 7 under Section 302 read with Section 34 of the IPC and sentenced them to undergo life imprisonment and to pay a fine of Rs.3000/- and in default, to further undergo rigorous imprisonment for a period of six months. The Trial Court convicted the accused no.4 under Section 324 of the IPC and sentenced him to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.1000/- and in default, to further undergo rigorous imprisonment for a period of two months. Accused nos. 1, 4 and 6 filed Criminal Appeal no. 200 of 2008 and accused no.7 filed Criminal Appeal no. 201 of 2008 before the High Court against their conviction and sentences, but by the impugned judgment the High Court sustained the conviction and the sentences. Accused no.7 has filed Criminal Appeal no. 1857 of 2009 and accused nos. 1 and 6 have filed the other Criminal

Appeal arising out of SLP (Crl.) Nos. 575-576 of 2010.

5. Mr. S.B. Sanyal, learned senior counsel appearing for the accused No.7, submitted that in the FIR it is alleged by the informant that the accused No.7 had assaulted persons other than Chinnadurai with stick. He submitted that the informant was examined before the Trial Court as PW-1 and he has given an entirely different version in his evidence and has said that the accused no.7 assaulted on the left side of the head of Chinnadurai. He further submitted that the father of Chinnadurai, namely, Rengaiah, has also been examined before the Trial Court as PW-2 and he has deposed that the accused no.7 assaulted on the left side of the head of Chinnadurai with stick. He submitted that PW-1 and PW-2 have improved upon the role of the accused No.7 in the assault on the deceased after coming to know of the opinion of the doctor in the post mortem report about the injuries on the deceased. He argued that where there is such variance between the version in the FIR and the version of PW-1 and PW-2 before the Court with regard to the exact role of the accused no.7 in the assault on the deceased, the accused No.7 cannot be convicted under Section 302 read with Section 34 of the IPC. He cited *Anil Prakash Shukla v. Arvind Shukla* [(2007) 9 SCC 513] in which this Court has taken a view that where the witnesses have improved their version given in the FIR after coming to know of the medical report, benefit of doubt must be given to the accused. He also relied on *Kalyan and Others v. State of U.P.* [(2001) 9 SCC 632] where benefit of doubt has been given to the accused on account of variance between the FIR and the deposition made in the court.

6. Mr. Sanyal next submitted that PW-11, who conducted the post mortem on the dead body of the deceased, is clear in his opinion that the injury on the head of the deceased was a 'contusion' and medical dictionary by P.H. Collin describes 'contusion' as a bruise, a dark painful area on the skin, where blood has escaped into the tissues, but not through the skin,

following a blow. He submitted that PW-11 has also stated in her crossexamination that she did not see any incised injuryduring the examination of the dead body. He submitted that as a matter of fact the deceased died in the hospital after several days of the incident. According to Mr. Sanyal, this was therefore not a case where accused no. 7 could be said to have any intent to cause the death of the deceased and therefore he was not guilty of the offence of murder under Section 302 of the IPC. In support of this submission, he relied on *B.N. Kavatakar and Another v. State of Karnataka* [1994 Supp.(1) SCC 304] in which this Court has held after considering the opinion of the medical officer and after considering the fact that the deceased died after five days of the occurrence that the offence would be punishable under Section 326 read with Section 34 of the IPC. He also cited *Abani K. Debnath and Another v. State of Tripura* [(2005) 13 SCC 422] where the deceased succumbed to injuries after lapse of seven days of the occurrence and this Court has converted the sentence as against accused no.1 from one under Section 302, IPC to one under Section 304 Part-II, IPC, and sentenced him to suffer rigorous imprisonment for five years.

7. Mr. Sanyal finally submitted that the High Court has in the impugned judgment treated the case of the accused no.7 in parity with accused nos. 1 and 6, but the facts of the case clearly establish that the role of the accused no.7 was different from that of accused nos. 1 and 6 in the occurrence and the accused no.7 should have been awarded lesser punishment than accused Nos. 1 and 6.

8. Mr. K. K. Mani, learned counsel appearing for the accused nos. 1 and 6 in Criminal Appeal arising out of S.L.P. (Crl.) Nos.575-576 of 2010, adopted the arguments of Mr. Sanyal. He further submitted that both PW-1 and PW-2 had deposed that accused no.1 and accused no.6 had given cut injuries on the deceased by aruval, but the medical evidence of PW-11 is clear that a blunt weapon had been used in assaulting the deceased. He submitted that this is, therefore,

a case where the ocular evidence cannot be believed because of its inconsistency with the medical evidence.

9. Mr. B. Balaji, learned counsel appearing for the State, in reply, submitted that PW-1 and PW-2 are injured eyewitnesses and cannot be disbelieved by the Court. He submitted that the contention of learned counsel for the appellants that the version given by PW-1 in the FIR and the version given before the Court are at variance is misconceived. He argued that in the FIR, PW-1 has stated that accused no.7 and others assaulted 'us' with stick and by the word 'us', PW-1 meant not only himself but also the deceased. He submitted that the evidence of PW-1 and PW-2 clearly establish that accused nos.1, 6 and 7 delivered the injuries on the head of the deceased, on account of which he fell unconscious and ultimately died. He submitted that the presence of accused nos.1, 6 and 7 at the spot and their role in assaulting the deceased are not in doubt and they are all liable for the offence under Section 302 read with Section 34, IPC. He finally submitted that this is not a fit case in which this Court should interfere with the concurrent findings of facts of the Trial Court and the High Court.

10. We have considered the submissions of learned counsel for the parties and we find that the difference in the version in the FIR and the version in the evidence of PW-1 and PW-2 is not very material so as to create a reasonable doubt with regard to the participation of accused nos.1, 6 and 7 in the assault on the deceased. In the FIR, it has been alleged that the accused nos.1 and 6 delivered a cut on the deceased. In his evidence, PW-1 has stated that accused no.1 had delivered a cut on the centre of the head of the deceased and accused no.6 delivered a cut on the head of the deceased. Similarly, in his evidence PW-2 has stated that accused no.1 delivered a cut on the centre of the head of the deceased and accused no.6 snatched the aruval from accused no.1 and delivered a cut on the centre of the head of the deceased. The FIR and the

evidence of PW-1 and PW-2 are, thus, clear that accused no.1 and accused no.6 delivered a cut injuries on the deceased. Regarding the participation of the accused no.7 in the assault, in the FIR it is alleged that accused no.7 assaulted on 'us' with a stick. The evidence of PW-1 and PW-2 is that accused no.7 assaulted on the left side of the head of the deceased with a stick. The word 'us' in the FIR cannot mean to exclude the deceased inasmuch as the deceased was the brother of PW-1 and was the son of PW-2. There is evidence to show that besides the deceased, PW-1 and PW-2 were also injured and were treated at the hospital. Hence, accused no.7 has used the stick not just against PW-1 and PW-2, but also against the deceased. We, therefore, do not find any material difference between the version in FIR and in the evidence of PW-1 and PW-2 on the role of accused No.7 in the assault.

11. The evidence of PW-1 and PW-2, in our opinion, establishes beyond reasonable doubt that accused no.1 used the aruval to strike at the head of the deceased. From the evidence of PW-1 and PW-2, it is also established beyond reasonable doubt that accused no.6 snatched the aruval from accused no.1 and struck on the head of the deceased. The evidence of PW-1 and PW-2 also establish that accused no.7 struck the head of the deceased by a stick. The result of all these acts of accused nos.1, 6 and 7 is the death of the deceased. Section 34, IPC, states that 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. Section 33, IPC, states that the word "act" denotes as well a series of acts as a single act. Thus, even though accused nos.1, 6 and 7 may have committed different acts, they have cumulatively committed the criminal act which has resulted in the death of the deceased and are liable for the criminal act by virtue of Section 34, IPC. We, therefore, do not find any merit in the submission that accused No.7 was not liable for the same punishment as accused Nos. 1 and 6.

12. The next question which we have to decide is whether the criminal act committed by accused nos.1, 6 and 7 amounts to murder under Section 300, IPC, or some other offence. The medical evidence of PW-11 is clear that all the injuries of the deceased were most probably as a result of an assault by a blunt weapon and in the opinion of PW-11, the deceased appears to have died due to head injuries. PW-11 has also admitted in her cross-examination that she did not see any incised injuries during the post mortem examination and had a sickle been used it would have caused incised wounds. Thus, it appears that accused no.1 and accused no.6 had used not the sharp side but the blunt side of the aruval and accused no.7 had used the stick in the assault on the deceased. The fact that the blunt side of the aruval and a stick was used in the assault on the deceased would go to show that accused nos.1, 6 and 7 did not have any intention to cause the death of the deceased. Nonetheless, the injuries caused by accused nos.1, 6 and 7 were all on the head of the deceased, including his parietal and temporal regions. Accused nos.1, 6 and 7, thus, had the intention of causing bodily injury as is likely to cause death and were liable for punishment for culpable homicide not amounting to murder under Section 304 Part I, IPC.

13. On similar facts, where injuries were caused by a blunt weapon, this Court in *State of Punjab v. Tejinder Singh & Anr.* [1995 Supp (3) SCC 515] held in para 8:

> "8. In view of our above findings we have now to ascertain whether for their such acts A-1 and A-2 are liable to be convicted under Section 302 read with Section 34 IPC. It appears from the evidence of PW 4 and PW 5 that the deceased was assaulted both with the sharp edge and blunt edge of the gandasas and the nature of injuries also so indicates. If really the appellants had intended to commit murder, they would not have certainly used the blunt edge when the task could have been expedited and assured with the sharp edge. Then again we find that except one injury on the head, all other injuries were on nonvital parts of the body. Post-mortem report further shows that even the injury on the head was only muscle-deep. Taking these facts into consideration we are of the opinion that the offence committed by the appellants is one under Section 304 (Part I) IPC and not under Section 302 IPC."

14. In this case, the assault on the deceased was on 16.11.2006 and the deceased died in the hospital after nine days on 25.11.2006. In *Abani K. Debnath and Another v. State of Tripura* (supra) this Court, after considering the nature of the injuries as well as the fact that the deceased succumbed to the injury after a lapse of seven days, took the view that the conviction of the accused in that case cannot fall under Section 302, IPC.

15. After considering the evidence of PW-1 and PW-2, the medical evidence of PW-1 and the fact that the deceased died after nine days of the assault, we are of the considered opinion that the Trial Court and the High Court were not right in convicting the appellants under Section 302, IPC, and the appellants should have been convicted instead under Section 304 Part-I read with Section 34, IPC. We accordingly allow these appeals in part, modify only the conviction and sentence on the appellants under Section 302, IPC, and instead order that the appellants (namely, accused nos.1, 6 and 7) are convicted under Section 304 Part-I read with Section 34, IPC, and sentenced to rigorous imprisonment for seven years. The fine amount imposed by the Trial Court and affirmed by the High Court is affirmed.

R.P. Appeals partly allowed.

GEETA MEHROTRA & ANR.

v.

STATE OF U.P. & ANR.
(Criminal Appeal No. 1674 of 2012)

OCTOBER 17, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 - ss. 498A/323/504/506 - Dowry Prohibition Act, 1961 - ss.3/4 - Matrimonial dispute - Quashing of criminal proceedings - Duty of the Court - Complaint by wife against husband and in-laws - Prayer for quashing of criminal proceedings against unmarried sister-in-law and elder brother-in-law i.e. the appellants - Held: The courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute - Mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them - On facts, the FIR did not disclose specific allegation against the appellants except casual reference of their names - In view thereof, criminal proceedings quashed insofar as they were concerned.

Code of Criminal Procedure, 1973 - s.482 - Petition under - Manner of disposal - Propriety - Matrimonial dispute -Complaint by wife - Prayer for quashing of criminal proceedings against unmarried sister-in-law and elder brother-in-law i.e. the appellants inter alia on grounds of malafide intention on the part of complainant-wife and also lack of territorial jurisdiction - High Court disposed of petition u/s.482 CrPC observing that the question of territorial jurisdiction could not be properly decided by it for want of adequate facts, and permitting the appellants to move the trial court for dropping the proceedings on ground of lack of territorial jurisdiction - Held: The plea of territorial jurisdiction was just one of the grounds raised to quash the proceedings initiated against the appellants u/s.482 CrPC - The High Court,

therefore, ought to have considered that even if the trial court had the jurisdiction to hold the trial, the question still remained as to whether the trial against the appellants was fit to be continued and whether that would amount to abuse of the process of the court - It is apparent that the High Court had not applied its mind on that question - It further overlooked the fact that during the pendency of this case, the complainant-wife had obtained an ex-parte decree of divorce against her husband - The same could have weighed with the High Court to consider whether proceeding initiated prior to the divorce decree was fit to be pursued in spite of absence of specific allegations at least against the appellants - High Court did not examine these aspects carefully and side-tracked all these considerations merely on the ground that the plea of lack of territorial jurisdiction could be raised only before the magistrate conducting the trial.

Remand - Practice & Procedure - Matrimonial dispute - Criminal proceedings initiated by wife against husband and in-laws - Petition by sister-in-law and brother-in-law i.e. the appellants for quashing of proceedings - Disposed of, by High Court - Appeal before Supreme Court - Question as to whether the matter merited fresh consideration by the High Court - Held: Respondent no.2-wife had lodged the complaint after seven years of delay, and yet the complaint lacked ingredients constituting the alleged offences against the appellants and their involvement in the whole incident appears only by way of a casual inclusion of their names - Hence, on facts, it would be total abuse of the process of law if the matter is remanded to the High Court to consider whether there were still any material to hold that the trial should proceed against them in spite of absence of prima facie material constituting the offence alleged against them - Matter adjudicated by Supreme Court itself - Criminal proceedings quashed insofar as the appellants were concerned - Penal Code, 1860 - ss. 498A/323/504/506 - Dowry Prohibition Act, 1961 - ss.3/4.

Respondent no.2 lodged FIR at Allahabad under Sections 498A/323/504/506 IPC read with Section 3/4 of the Dowry Prohibition Act, 1961 alleging that there was bickering at her matrimonial home at Faridabad, Haryana which made her life miserable and compelled her to leave it to live with her father at Allahabad. On the basis of the complaint, police submitted charge-sheet against the husband and in-laws of respondent no.2.

Appellant no.1 and appellant no.2, the unmarried sister-in-law and elder brother-in-law of respondent no.2 respectively, filed petition under Section 482 CrPC for quashing of the charge-sheet and the entire proceedings pending in the court of Judicial Magistrate, Allahabad (which took cognizance against the appellants), inter-alia, on grounds that FIR was lodged with malafide intentions and that the incident having been alleged to have taken place at Faridabad, investigation should have been done there only and the arrest warrant could not have been issued from Allahabad.

The High Court disposed of the application under Section 482 CrPC observing that the question of territorial jurisdiction could not be properly decided by it for want of adequate facts, and accordingly permitting the appellants to move the trial court for dropping the proceedings on the ground of lack of territorial jurisdiction. The appellants inspite of the liberty granted to them to move the trial court, filed the instant appeal for quashing the proceedings.

Allowing the appeal, the Court

HELD: 1.1. It is apparent that the High Court has not applied its mind on the question as to whether the case was fit to be quashed against the appellants and has merely disposed of the petition granting liberty to the appellants to move the trial court and raise contentions

on the ground as to whether it has territorial jurisdiction to continue with the trial in the light of the averment that no part of the cause of action had arisen at Allahabad and the entire incident even as per the FIR had taken place at Faridabad. [Para 13] [653-H; 654-A-B]

1.2. The High Court further overlooked the fact that during the pendency of this case, the complainant-respondent No.2 has obtained an ex-parte decree of divorce against her husband. When respondent no.2 and her husband are divorced, the same could have weighed with the High Court to consider whether proceeding initiated prior to the divorce decree was fit to be pursued in spite of absence of specific allegations at least against the brother and sister of the complainant's husband i.e. the appellants and whether continuing with this proceeding could not have amounted to abuse of the process of the court. The High Court, however, seems not to have examined these aspects carefully and have thus side-tracked all these considerations merely on the ground that the territorial jurisdiction could be raised only before the magistrate conducting the trial. [Paras 14, 22] [654-C; 658-E-G]

1.3. The plea of territorial jurisdiction was just one of the grounds raised to quash the proceedings initiated against the appellants under Section 482 CrPC. It was also alleged that no prima facie case was made out against the appellants for initiating the proceedings under the Dowry Prohibition Act and other provisions of the IPC. The High Court, therefore, ought to have considered that even if the trial court at Allahabad had the jurisdiction to hold the trial, the question still remained as to whether the trial against the appellants was fit to be continued and whether that would amount to abuse of the process of the court. [Para 18] [656-D-E, F-G]

1.4. It is apparent from the contents of the FIR that there are no allegations against the appellants except casual reference of their names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding. [Para 19] [656-H; 657-A-B]

1.5. If the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the court to take cognizance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. If the FIR does not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding. [Para 24] [659-G-H; 660-A-D]

1.6. Respondent no.2 had lodged the complaint after seven years of delay, and yet the complaint as it stands lacks ingredients constituting the offence under Section 498A and Section 3/4 Dowry Prohibition Act against the appellants and their involvement in the whole incident appears only by way of a casual inclusion of their names. Hence, it would be total abuse of the process of law if the matter is remanded to the High Court to consider whether there were still any material to hold that the trial should proceed against them in spite of absence of prima facie material constituting the offence alleged against them. [Para 23] [659-C-E]

1.7. As the contents of the FIR does not disclose specific allegation against the appellants except casual reference of their names, it would not be just to direct them to go through protracted procedure by remanding for consideration of the matter all over again by the High Court and make the appellants to suffer the ordeal of a criminal case pending against them specially when the FIR does not disclose ingredients of offence under Sections 498A/323/504/506, IPC and Sections 3/4 of the Dowry Prohibition Act. [Para 26] [661-B-D]

1.8. It is, therefore, deemed just and legally appropriate to quash the proceedings initiated against the appellants as the FIR does not disclose any material which could be held to be constituting any offence against these two appellants. In view of the mere general allegation that they were also involved in physical and mental torture of the complainant-respondent No.2 without mentioning even a single incident against them as also the fact as to how they could be motivated to demand dowry when they are only related as brother and sister of the complainant's husband, the criminal proceedings insofar as these appellants are concerned are quashed and set aside and consequently the order passed by the High Court shall stand overruled. [Para 27]

[661-E-G]

Ramesh v. State of Tamil Nadu **(2005) SCC (Crl.) 735;** *G.V. Rao v. L.H.V. Prasad & Ors.* **(2000) 3 SCC 693: 2000 (2) SCR 123 and** *B.S. Joshi & Ors. v. State of Haryana & Anr.* **AIR (2003) SC 1386: 2003 (2) SCR 1104 - referred to.**

Case Law Reference:

(2005) SCC (Crl.) 735	**referred to**	**Para 15**
2000 (2) SCR 123	**referred to**	**Para 20**
2003 (2) SCR 1104	**referred to**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1674 of 2012.

From the Judgment & Order dated 06.09.2010 of the High Court of Judicature at Allahabad in Misc. Application No. 22714 of 2007.

Anoop G. Chowdhary, KB Rohatgi, Aparna Rohatgi Jain, Sanjay Kumar Singhal for the Appellants.

Ajay Kumar Misra, Sobha Dixit, Anuradha D. Misra, Tulika Mukherjee, Bharat Dubey, Anuradha & Associates, Pradeep Misra, Malvika Trivedi, Manoj Kr. Sharma for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal by special leave in which we granted leave has been filed by the appellants against the order dated 6.9.2010 passed by the High Court of Judicature at Allahabad in Crl. Miscellaneous Application No.22714/2007 whereby the High Court had been pleased to dispose of the application moved by the appellants under Section 482 Cr.P.C. for quashing the order of the Magistrate taking cognizance against the appellants under Sections 498A/ 323/504/506 IPC read with Section 3/4 of the Dowry Prohibition

Act with an observation that the question of territorial jurisdiction cannot be properly decided by the High Court under Section 482 Cr.P.C. for want of adequate facts. It was, therefore, left open to the appellants to move the trial court for dropping the proceedings on the ground of lack of territorial jurisdiction. The High Court however granted interim protection to the appellants by directing the authorities not to issue coercive process against the appellants until disposal of the application filed by the appellants with a further direction to the trial court to dispose of the application if moved by the appellants, within a period of two months from the date of moving the application. The application under Section 482 Cr.P.C. was thus disposed of by the High Court.

2. The appellants in spite of the liberty granted to them to move the trial court, have filed this appeal for quashing the proceedings which had been initiated on the basis of a case lodged by the respondent No.2 Smt. Shipra Mehrotra (earlier known as Shipra Seth) against her husband, father-in-law, mother-in-law, brother-in-law and sister-in-law. This appeal has been preferred by the sister-in-law, who is appellant No.1 and brother-in-law of the complainant, who is appellant No.2.

3. The case emerges out of the first information report lodged by respondent No.2 Smt. Shipra Mehrotra under Sections 498A/323/504/506 IPC read with Section 3/4 of the Dowry Prohibition Act bearing F.I.R.No. 52/2004. The F.I.R. was registered at Mahila Thana Daraganj, Allahabad wherein the complainant alleged that she was married to Shyamji Mehrotra s/o Balbir Saran who was living at Eros Garden, Charmswood Village, Faridabad, Suraj Kund Road at Faridabad Haryana as per the Hindu marriage rites and customs. Prior to marriage the complainant and her family members were told by Shyamji Mehrotra and his elder brother Ramji Mehrotra who is appellant No.2 herein and their mother Smt. Kamla Mehrotra and her sister Geeta Mehrotra who is appellant No.1 herein that Shyamji is employed as a Team Leader in a top I.T. Company in

Chennai and is getting salary of Rs.45,000/- per month. After negotiation between the parents of the complainant and the accused parties, the marriage of the complainant Shipra Seth (later Shipra Mehrotra) and Shyamji Mehrotra was performed after which the respondent-complainant left for the house of her in-laws.

4. It was stated that the atmosphere in the house was peaceful for sometime but soon after the wedding, when all the relatives left, the maid who cooked meals was first of all paid-off by the aforesaid four persons who then told the complainant that from now onwards, the complainant will have to prepare food for the family. In addition, the above mentioned people started taunting and scolding her on trivial issues. The complainant also came to know that Shyamji was not employed anywhere and always stayed in the house. Shyamji gradually took away all the money which the complainant had with her and then told her that her father had not given dowry properly, therefore, she should get Rupees five lakhs from her father in order to enable him to start business, because he was not getting any job. When the complainant clearly declined and stated that she will not ask her parents for money, Shyamji, on instigation of other accused-family members, started beating her occasionally. To escape every day torture and financial status of the family, the complainant took up a job in a Call Centre at Convergys on 17.2.2003 where the complainant had to do night shifts due to which she used to come back home at around 3 a.m. in the morning. Just on her return from work, the household people started playing bhajan cassettes after which she had to getup at 7'o clock in the morning to prepare and serve food to all the members in the family. Often on falling asleep in the morning, Shyamji, Kamla Devi and Geeta Mehrotra tortured the complainant every day mentally and physically. Ramji Mehrotra often provoked the other three family members to torture and often used to make the complainant feel sad by making inappropriate statements about the complainant and her parents. Her husband Shyamji also took

away the salary from the complainant.

5. After persistent efforts, Shyamji finally got a job in Chennai and he went to Chennai for the job in May, 2003. But, it is alleged that there was no change in his behaviour even after going to Chennai. The complainant often called him on phone to talk to him but he always did irrelevant conversation. He never spoke properly with the complainant whenever he visited home and often used to hurl filthy abuses. The complainant states that she often wept and tolerated the tortures of the accused persons for a long time but did not complain to her family members, as that would have made them feel sad. At last, when the complainant realized that even her life was in danger, she was compelled to tell everything to her father on phone who was very upset on hearing her woes. On 15.7.2003 complainant heard some conversation of her mother-in-law and sister-in-law from which it appeared to her that they want to kill the complainant in the night only. Thereupon the complainant apprised her father of the situation on phone to which her father replied that he will call back her father-in-law and she should go with him immediately and he will come in the morning. The father-in-law Satish Dhawan and his wife who were living in NOIDA thereafter came in the night and somehow took the complainant to their home who also came to know of everything. The complainant's father and brother later went to her matrimonial home on 16.7.2003. On seeing her father and brother, Kamla Mehrotra and Geeta Mehrotra started speaking loudly and started saying that Shyamji would be coming by the evening and so he should come in the evening for talking to them. Her father and brother then went away from there. That very day, her husband Shyamji and brother-in-law Ramji also reached home. On reaching there, Shyamji abused her on phone and told her to send her father.

6. When father and brother of the complainant went home in the evening, they were also insulted by all the four and video camera and tape were played and in the end they were told

that they should leave from here. Insulted, they came back from there and then came back to Allahabad with the complainant. For many days the complainant and her family members hoped that the situation would improve if the matter was resolved. Many times other people tried to persuade the in - laws but to no avail. Her brother went to their house to talk to her in - laws but it came to his knowledge that the in - laws had changed their house. After much effort, they came to know that the father-in-law and mother-in-law started living at B-39, Brahma cooperative group housing society, block 7, sector-7, Dwarka, Delhi. On 19.09.04 evening, her father talked to Kamla Mehrotra and Geeta Mehrotra regarding the complainant using bad words and it was said that if her daughter came there she will be kicked out. After some time Shyamji rang up at complainant's home but on hearing the complainant's voice, he told her abusively that now she should not come his way and she should tell her father not to phone him in future. At approximately 10:30 pm in the night Ramji's phone came to the complainant's home. He used bad words while talking to her father and in the end said that he had got papers prepared in his defence and he may do whatever he could but if he could afford to give Rs.10 lakhs then it should be conveyed after which he will reconsider the matter. If the girl was sent to his place without money, then even her dead body will not be found.

7. On hearing these talks of the accused, the complainant believed that her in-laws will not let the complainant enter their home without taking ten lakhs and if the complainant went there on her own, she will not be safe. Hence, she lodged the report wherein she prayed that the SHO Daraganj should be ordered to do the needful after registering the case against the accused Shyam Mehrotra, Ramji Mehrotra, Kamla Mehrotra and Geeta Mehrotra. Thus, in substance, the complainant related the bickering at her matrimonial home which made her life miserable in several ways and compelled her to leave her in-law's place in order to live with her father where she lodged a police case as stated hereinbefore.

8. On the basis of the complaint, the investigating authorities at P.S. Daraganj, Allahabad started investigation of the case and thereafter the police submitted chargesheet against the appellants and other family members of the complainant's husband.

9. Hence, the appellants who are sister and brother of the complainant's husband filed petition under Section 482 Cr.P.C. for quashing of the chargesheet and the entire proceedings pending in the court of learned Judicial Magistrate, Court No.IV, Allahabad, inter-alia, on the ground that FIR has been lodged with mala fide intentions to harass the appellants and that no case was made out against the appellants as well as other family members. But the principal ground of challenge to the FIR was that the incident although was alleged to have taken place at Faridabad and the investigation should have been done there only, the complainant with mala fide intention in connivance with the father of the complainant, got the investigating officer to record the statements by visiting Ghaziabad which was beyond his territorial jurisdiction and cannot be construed as legal and proper investigation. It was also alleged that the father of the complainant got the arrest warrant issued through George Town Police Station, Allahabad, in spite of the cause of action having arisen at Allahabad.

10. This appeal has been preferred by Kumari Geeta Mehrotra i.e. the sister of the complainant's husband and Ramji Mehrotra i.e. the elder brother of the complainant's husband assailing the order of the High Court and it was submitted that the Hon'ble High Court ought to have appreciated that the complainant who had already obtained an ex-parte decree of divorce, is pursuing the present case through her father with the sole purpose to unnecessarily harass the appellants to extract money from them as all efforts of mediation had failed.

11. However, the grounds of challenge before this Court to the order of the High Court, inter alia is that the High Court had failed to appreciate that the investigation had been done

by the authority without following due process of law which also lacked territorial jurisdiction. The relevant documents/parcha diary for deciding the territorial jurisdiction had been overlooked as the FIR has been lodged at Allahabad although the cause of action of the entire incident is alleged to have taken place at Faridabad (Haryana). It was, therefore, submitted that the investigating authorities of the Allahabad have traversed beyond the territorial limits which is clearly an abuse of the process of law and the High Court has failed to exercise its inherent powers under Section 482 Cr.P.C. in the facts and circumstances of this case and allowed the proceedings to go on before the trial court although it had no jurisdiction to adjudicate the same.

12. It was further averred that the High Court had failed to examine the facts of the FIR to see whether the facts stated in the FIR constitute any prima facie case making out an offence against the sister-in-law and brother-in-law of the complainant and whether there was at all any material to constitute an offence against the appellants and their family members. Attention of this Court was further invited to the contradictions in the statement of the complainant and her father which indicate material contradictions indicating that the complainant and her father have concocted the story to implicate the appellants as well as all their family members in a criminal case merely with a mala fide intention to settle her scores and extract money from the family of her ex-husband Shyamji Mehrotra and his family members.

13. On a perusal of the complaint and other materials on record as also analysis of the arguments advanced by the contesting parties in the light of the settled principles of law reflected in a catena of decisions, it is apparent that the High Court has not applied its mind on the question as to whether the case was fit to be quashed against the appellants and has merely disposed of the petition granting liberty to the appellants to move the trial court and raise contentions on the ground as

to whether it has territorial jurisdiction to continue with the trial in the light of the averment that no part of the cause of action had arisen at Allahabad and the entire incident even as per the FIR had taken place at Faridabad.

14. The High Court further overlooked the fact that during the pendency of this case, the complainant-respondent No.2 has obtained an ex-parte decree of divorce against her husband Shyamji Mehrotra and the High Court failed to apply its mind whether any case could be held to have been made out against Kumari Geeta Mehrotra and Ramji Mehrotra, who are the unmarried sister and elder brother of the complainant's ex-husband. Facts of the FIR even as it stands indicate that although a prima facie case against the husband Shyamji Mehrotra and some other accused persons may or may not be constituted, it surely appears to be a case where no ingredients making out a case against the unmarried sister of the accused Shyamji Mehrotra and his brother Ramji Mehrotra appear to be existing for even when the complainant came to her in-law's house after her wedding, she has alleged physical and mental torture by stating in general that she had been ordered to do household activities of cooking meals for the whole family. But there appears to be no specific allegation against the sister and brother of the complainant's husband as to how they could be implicated into the mutual bickering between the complainant and her husband Shyamji Mehrotra including his parents.

15. Under the facts and circumstance of similar nature in the case of *Ramesh vs. State of Tamil Nadu* reported in (2005) SCC (Crl.) 735 at 738 allegations were made in a complaint against the husband, the in-laws, husband's brother and sister who were all the petitioners before the High Court wherein after registration of the F.I.R. and investigation, the charge sheet was filed by the Inspector of Police in the court of Judicial Magistrate III, Trichy. Thereupon, the learned magistrate took cognizance of the offence and issued warrants against the appellants on 13.2.2002. Four of the accused-appellants were arrested and

released on bail by the magistrate at Mumbai. The appellants had filed petition under Section 482, Cr.P.C. before the Madras High Court for quashing the proceedings in complaint case on the file of the Judicial Magistrate III, Trichy. The High Court by the impugned order dismissed the petition observing that the grounds raised by the petitioners were all subject matters to be heard by the trial court for better appreciation after conducting full trial as the High Court was of the view that it was only desirable to dismiss the criminal original petition and the same was also dismissed. However, the High Court had directed the Magistrate to dispense with the personal attendance of the appellants.

16. Aggrieved by the order of the Madras High Court dismissing the petition under Section 482 Cr.P.C., the special leave petition was filed in this Court giving rise to the appeals therein where threefold contentions were raised viz., (i) that the allegations are frivolous and without any basis; (ii) even according to the FIR, no incriminating acts were done within the jurisdiction of Trichy Police Station and the court at Trichy and, therefore, the learned magistrate lacked territorial jurisdiction to take cognizance of the offence and (iii) taking cognizance of the alleged offence at that stage was barred under Section 468(1) Cr.P.C. as it was beyond the period of limitation prescribed under Section 468(2) Cr.P.C. Apart from the subsequent two contentions, it was urged that the allegations under the FIR do not make out any offence of which cognizance could be taken.

17. Their Lordships of the Supreme Court in this matter had been pleased to hold that the bald allegations made against the sister in law by the complainant appeared to suggest the anxiety of the informant to rope in as many of the husband's relatives as possible. It was held that neither the FIR nor the charge sheet furnished the legal basis for the magistrate to take cognizance of the offences alleged against the appellants. The learned Judges were pleased to hold that looking to the

allegations in the FIR and the contents of the charge sheet, none of the alleged offences under Section 498 A, 406 and Section 4 of the Dowry Prohibition Act were made against the married sister of the complainant's husband who was undisputedly not living with the family of the complainant's husband. Their Lordships of the Supreme Court were pleased to hold that the High Court ought not to have relegated the sister in law to the ordeal of trial. Accordingly, the proceedings against the appellants were quashed and the appeal was allowed.

18. In so far as the plea of territorial jurisdiction is concerned, it is no doubt true that the High Court was correct to the extent that the question of territorial jurisdiction could be decided by the trial court itself. But this ground was just one of the grounds to quash the proceedings initiated against the appellants under Section 482 Cr.P.C. wherein it was also alleged that no prima facie case was made out against the appellants for initiating the proceedings under the Dowry Prohibition Act and other provisions of the IPC. The High Court has failed to exercise its jurisdiction in so far as the consideration of the case of the appellants are concerned, who are only brother and sister of the complainant's husband and are not alleged even by the complainant to have demanded dowry from her. The High Court, therefore, ought to have considered that even if the trial court at Allahabad had the jurisdiction to hold the trial, the question still remained as to whether the trial against the brother and sister of the husband was fit to be continued and whether that would amount to abuse of the process of the court.

19. Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance

against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding.

20. It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of *G.V. Rao vs. L.H.V. Prasad & Ors.* reported in (2000) 3 SCC 693 wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that:

> "there has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts."

The view taken by the judges in this matter was that the courts would not encourage such disputes.

21. In yet another case reported in AIR 2003 SC 1386 in the matter of *B.S. Joshi & Ors. vs. State of Haryana & Anr.* it

was observed that there is no doubt that the object of introducing Chapter XXA containing Section 498A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punish the husband and his relatives who harass or torture the wife to coerce her relatives to satisfy unlawful demands of dowry. But if the proceedings are initiated by the wife under Section 498A against the husband and his relatives and subsequently she has settled her disputes with her husband and his relatives and the wife and husband agreed for mutual divorce, refusal to exercise inherent powers by the High Court would not be proper as it would prevent woman from settling earlier. Thus for the purpose of securing the ends of justice quashing of FIR becomes necessary, Section 320 Cr.P.C. would not be a bar to the exercise of power of quashing. It would however be a different matter depending upon the facts and circumstances of each case whether to exercise or not to exercise such a power.

22. In the instant matter, when the complainant and her husband are divorced as the complainant-wife secured an ex-parte decree of divorce, the same could have weighed with the High Court to consider whether proceeding initiated prior to the divorce decree was fit to be pursued in spite of absence of specific allegations at least against the brother and sister of the complainant's husband and whether continuing with this proceeding could not have amounted to abuse of the process of the court. The High Court, however, seems not to have examined these aspects carefully and have thus side-tracked all these considerations merely on the ground that the territorial jurisdiction could be raised only before the magistrate conducting the trial.

23. In the instant case, the question of territorial jurisdiction was just one of the grounds for quashing the proceedings along with the other grounds and, therefore, the High Court should have examined whether the prosecution case was fit to be

quashed on other grounds or not. At this stage, the question also crops up whether the matter is fit to be remanded to the High Court to consider all these aspects. But in matters arising out of a criminal case, fresh consideration by remanding the same would further result into a protracted and vexatious proceeding which is unwarranted as was held by this Court in the case of *Ramesh vs. State of Tamil Nadu* (supra) that such a course of remand would be unnecessary and inexpedient as there was no need to prolong the controversy. The facts in this matter on this aspect was although somewhat different since the complainant had lodged the complaint after seven years of delay, yet in the instant matter the factual position remains that the complaint as it stands lacks ingredients constituting the offence under Section 498A and Section 3/4 Dowry Prohibition Act against the appellants who are sister and brother of the complainant's husband and their involvement in the whole incident appears only by way of a casual inclusion of their names. Hence, it cannot be overlooked that it would be total abuse of the process of law if we were to remand the matter to the High Court to consider whether there were still any material to hold that the trial should proceed against them in spite of absence of prima facie material constituting the offence alleged against them.

24. However, we deem it appropriate to add by way of caution that we may not be misunderstood so as to infer that even if there are allegation of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the court to take cognisance of the offence alleged against the relatives of the main accused

who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding.

25. In the case at hand, when the brother and unmarried sister of the principal accused Shyamji Mehrotra approached the High Court for quashing the proceedings against them, inter-alia, on the ground of lack of territorial jurisdiction as also on the ground that no case was made out against them under Sections 498A,/323/504/506 including Sections 3/4 of the Dowry Prohibition Act, it was the legal duty of the High Court to examine whether there were prima facie material against the appellants so that they could be directed to undergo the trial, besides the question of territorial jurisdiction. The High Court seems to have overlooked all the pleas that were raised and rejected the petition on the solitary ground of territorial jurisdiction giving liberty to the appellants to approach the trial court.

26. The High Court in our considered opinion appear to have missed that assuming the trial court had territorial jurisdiction, it was still left to be decided whether it was a fit case to send the appellants for trial when the FIR failed to make out a prima facie case against them regarding the allegation of inflicting physical and mental torture to the

complainant demanding dowry from the complainant. Since the High Court has failed to consider all these aspects, this Court as already stated hereinbefore, could have remitted the matter to the High Court to consider whether a case was made out against the appellants to proceed against them. But as the contents of the FIR does not disclose specific allegation against the brother and sister of the complainant's husband except casual reference of their names, it would not be just to direct them to go through protracted procedure by remanding for consideration of the matter all over again by the High Court and make the unmarried sister of the main accused and his elder brother to suffer the ordeal of a criminal case pending against them specially when the FIR does not disclose ingredients of offence under Sections 498A/323/504/506, IPC and Sections 3/4 of the Dowry Prohibition Act.

27. We, therefore, deem it just and legally appropriate to quash the proceedings initiated against the appellants Geeta Mehrotra and Ramji Mehrotra as the FIR does not disclose any material which could be held to be constituting any offence against these two appellants. Merely by making a general allegation that they were also involved in physical and mental torture of the complainant-respondent No.2 without mentioning even a single incident against them as also the fact as to how they could be motivated to demand dowry when they are only related as brother and sister of the complainant's husband, we are pleased to quash and set aside the criminal proceedings in so far as these appellants are concerned and consequently the order passed by the High Court shall stand overruled. The appeal accordingly is allowed.

B.B.B. Appeal allowed.

SATISH BATRA

v.

SUDHIR RAWAL

(Civil Appeal No. 7588 of 2012)

OCTOBER 18, 2012

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

Contract – Agreement to sell – Payment of earnest money – Agreement stipulating forfeiture of earnest money by the seller on failure on the part of purchaser to pay the sale amount before specified date – Failure on the part of purchaser in payment of sale amount as per the agreement – Forfeiture of earnest money by seller – Propriety of – Held: Part payment of purchase price cannot be forfeited unless it is guarantee for the due performance of contract – Forfeiture of entire amount of earnest money depends on the terms of the agreement – On facts, the earnest money was a security for the due performance of contract and hence the forfeiture thereof in its entirety was justified.

Appellant (seller) entered into an agreement for sale of an immovable property with the respondent (purchaser). The seller paid Rs. 7,00,000/- as earned money. As per the relevant clause of the agreement, the balance amount was required to be paid before a particular date and on failure to do so on the part of the purchaser, the seller would forfeit the earnest money. The purchaser could not pay the balance amount before the specified date. Therefore, the sale deed was not executed and the seller forfeited the earnest money.

The purchaser filed suit for recovery of the earnest money. The suit was dismissed. In appeal, High Court took the view that the seller was entitled to forfeit only a nominal amount and not the entire amount. Hence the present appeal by the seller.

Allowing the appeal, the Court

HELD: 1. The question whether the seller can retain the entire amount of earnest money depends upon the terms of the agreement. To justify the forfeiture of advance money being part of 'earnest money', the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract, the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money, then the forfeiture clause will not apply. [Paras 8 and 17] [666-E-F; 673-H; 674-A-C]

2. On examination of the clauses in the instant case, it is amply clear that the clause stipulating forfeiture of earnest money was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against that clause. Therefore, the seller was justified in forfeiting the amount of Rs.7,00,000/- as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The High Court has, therefore, committed an

error in reversing the judgment of the trial court. [Paras 18 and 19] [674-C-F]

(Kunwar) Chiranjit Singh v. Har Swarup **AIR 1926 P.C. 1;** *Fateh Chand v. Balkishan Dass* **AIR 1963 SC 1405: 1964 SCR 515 ;** *Shree Hanuman Cotton Mills and Ors. v. Tata Air Craft Limited* **1969 (3) SCC 522: 1970 (3) SCR 127;** *Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd.* **1995 Supp (1) SCC 751:1995 (2) SCR 115;** *V. Lakshmanan v. B.R. Mangalgiri and Ors.* **(1995) Suppl. (2) SCC 33: 1994 (6) Suppl. SCR 561 ;** *Housing Urban Development Authority and Anr. v. Kewal Krishan Goel and Ors.* **(1996) 4 SCC 249: 1996 (2) Suppl. SCR 587;** *Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories and Ors.* **(2004) 3 SCC 711: 2003 (6) Suppl. SCR 1197 – relied on.**

Case Law Reference:

AIR 1926 P.C. 1	**Relied on**	**Para 9**
1964 SCR 515	**Relied on**	**Para 9**
1970 (3) SCR 127	**Relied on**	**Para 12**
1995 (2) SCR 115	**Relied on**	**Para 13**
1994 (6) Suppl. SCR 561	**Relied on**	**Para 14**
1996 (2) Suppl. SCR 587	**Relied on**	**Para 15**
2003 (6) Suppl. SCR 1197	**Relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7588 of 2012.

From the Judgment & Order dated 4.11.2011 of the High Court of Delhi at New Delhi in RFA No. 137 of 2010.

Keshav Kaushik, Vibhuti Sushant Gupta (For Dr. Kailash Chand) for the Appellant.

Yunus Malik, Aman Malik, Sanjeev Agarwal for the Respodent.

The Judgment of the Court was delivered by

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

2. The question that has come up for consideration in this appeal is whether the seller is entitled to forfeit the earnest money deposit where the sale of an immovable property falls through by reason of the fault or failure of the purchaser.

3. An Agreement for Sale of property bearing No. 14/11, 2nd Floor, Punjabi Bagh, New Delhi was entered into between the appellant (Seller) and the respondent (Purchaser) on 29.11.2005 for a total consideration of Rs.70,00,000/- to be paid on or before 5.3.2006 and, towards earnest money, an amount of Rs.4,00,000/- was paid on 29.11.2005 and another Rs.3,00,000/- on 30.11.2005, that means, altogether Rs.7,00,000/- was paid, being 10% of the total sale consideration. The purchaser, however, could not pay the balance amount of Rs.63,00,000/- before 5.3.2006, consequently, the sale deed could not be executed. Seller, therefore, did not return the earnest money to the purchaser.

4. Consequently, the purchaser, as plaintiff, instituted a suit No. 764/08/06 before the Additional District Judge, Delhi for recovery of Rs.7,00,000/- from the seller-defendant of the earnest money paid by him. Defendant contested the suit stating that, as per the agreement, he is entitled to forfeit the amount of earnest money, if there was a failure on the part of the purchaser-plaintiff in paying the balance amount of Rs.63,00,000/-.

5. The trial Court dismissed the suit holding that the defendant is entitled to retain the amount of earnest money

since the plaintiff had failed to pay the balance amount of Rs.63,00,000/- before 5.3.2006.

6. Aggrieved by the judgment of the Additional District Judge, Delhi, plaintiff took up the matter in appeal before the High Court of Delhi by filing R.F.A. No. 137 of 2010. The High Court, placing reliance on the judgment of this Court in *Fateh Chand v. Balkishan Dass* AIR 1963 SC 1405, took the view that the seller is entitled to forfeit only a nominal amount and not the entire amount of Rs.7,00,000/-. The High Court further held that the seller can forfeit an amount of Rs.50,000/- out of the amount of Rs.7,00,000/- and he is bound to refund the balance amount of Rs.6,50,000/- to the purchaser. To this extent, a decree was also passed in favour of purchaser against the seller. It was also held that the purchaser is also entitled to interest @ 12% per annum from 29.11.2005 till the amount is paid.

7. Aggrieved by the said judgment of the High Court, the seller has come up with this appeal.

8. We have heard the learned counsel on either side at length. Facts are undisputed. The only question is whether the seller is entitled to retain the entire amount of Rs.7,00,000/- received towards earnest money or not. The fact that the purchaser was at fault in not paying the balance consideration of Rs.63,00,000/- is also not disputed. The question whether the seller can retain the entire amount of earnest money depends upon the terms of the agreement. Relevant clause of the Agreement for Sale dated 29.11.2005 is extracted hereunder for easy reference:

> "(e) If the prospective purchaser fail to fulfill the above condition. The transaction shall stand cancelled and earnest money will be forfeited. In case I fail to complete the transaction as stipulated above. The purchaser will get the DOUBLE amount of the earnest money. In the both condition, DEALER will

get 4% Commission from the faulty party."

The clause, therefore, stipulates that if the purchaser fails to fulfill the conditions mentioned in the agreement, the transaction shall stand cancelled and earnest money will be forfeited. On the other hand, if the seller fails to complete the transaction, the purchaser would get double the amount of earnest money. Indisputedly the purchaser failed to perform his part of the contract, then the question is whether the seller can forfeit the entire earnest money.

9. The question raised is no more *res integra*. In *(Kunwar) Chiranjit Singh v. Har Swarup* AIR 1926 P.C. 1, it has been held that the earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. In *Fateh Chand* (supra), this Court was interpreting the conditions of an agreement dated 21.3.1949. By that agreement, the plaintiff contracted to sell his rights in the land and the building to Seth Fateh Chand (defendant). It was recited in the agreement that the plaintiff agreed to sell the building together with 'pattadari' rights appertaining to the land admeasuring 2433 sq. yards for Rs.1,12,500/- and that Rs.1,000/- was paid to him as earnest money at the time of the execution of the agreement. The conditions of the agreement were as follows:

"(1) I, the executant, shall deliver the actual possession, i.e. complete vacant possession of kothi (bungalow) to the vendee on the 30th March, 1949, and the vendee shall have to give another cheque for Rs. 24,000/- to me, out of the sale price.

(2) Then the vendee shall have to get the sale (deed) registered by the 1st of June, 1949. If, on account of any reason, the vendee fails to get the said sale-deed registered by June, 1949, then this sum of Rs. 25,000/- (twenty-five thousand) mentioned above shall be deemed

to be forfeited and the agreement cancelled. Moreover, the vendee shall have to deliver back the complete vacant possession of the kothi (bungalow) to me, the executant. If due to certain reason, any delay takes place on my part in the registration of the sale-deed, by the 1st June 1949, then I, the executant, shall be liable to pay a further sum of Rs. 25,000/- as damages, apart from the aforesaid sum of Rs. 25,000/- to the vendee, and the bargain shall be deemed to be cancelled."

Plaintiff, on 25.3.1949, received Rs.24,000/- and delivered possession of the building and the land in his occupation to the defendant.

10. Alleging that the agreement was rescinded because the defendant committed default in performing the agreement and the sum of Rs.25,000/- paid by the defendant stood forfeited. Plaintiff instituted a suit. The defendant resisted the claim contending *inter alia* that the plaintiff having committed breach of the contract could not forfeit the amount of Rs.25,000/- received by him. The matter ultimately came to this Court. This Court considered as to whether the plaintiff could forfeit the amount. Noticing that the defendant had conceded that the plaintiff was entitled to forfeit the amount which was paid as earnest money, the Court held as follows:

"(16) …….The contract provided for forfeiture of Rs. 25,000/- consisting of Rs. 1000/-paid as earnest money and Rs. 24,000/- paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1,000/- which was paid as earnest money. We cannot however agree with the High Court that 10 per cent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant, and we are unable to find any

principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs. 1,000/-which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs. 24,000/-, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract we are of opinion that the amount of Rs. 1,000/- (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs. 24,000/-during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out of possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken into account in determining damages for this purpose.' The decree passed by the High Court awarding Rs. 11,250/- as damages to the plaintiff must therefore be set aside."

11. We are of the view that the High Court has completely misunderstood the dictum laid down in the above mentioned judgment and came to a wrong conclusion of law for more than one reason, which will be more evident when we scan through the subsequent judgments of this Court.

12. In *Shree Hanuman Cotton Mills and Others v. Tata Air Craft Limited* 1969 (3) SCC 522, this Court elaborately discussed the principles which emerged from the expression "earnest money". That was a case where the appellant therein entered into a contract with the respondent for purchase of aero scrap. According to the contract, the buyer had to deposit with the company 25% of the total amount and that deposit was to remain with the company as the earnest money to be adjusted in the final bills. Buyer was bound to pay the full value less the deposit before taking delivery of the stores. In case of default

by the buyer, the company was entitled to forfeit unconditionally the earnest money paid by the buyer and cancel the contract. The appellant advanced a sum of Rs.25,000/- (being 25% of the total amount) agreeing to pay the balance in two installments. On appellant's failure to pay any further amount, respondent forfeited the sum of Rs.25,000/-, which according to it, was earnest money and cancelled the contract. Appellant filed a suit for recovery of the said amount. The trial Court held that the sum was paid by way of deposit or earnest money which was primarily a security for the performance of the contract and that the respondent was entitled to forfeit the deposit amount when the appellant committed a breach of the contract and dismissed the suit. The High Court confirmed the decision taken by the trial Court. This Court, considering the scope of the term "earnest", laid down certain principles, which are as follows:

"21. From a review of the decisions cited above, the following principles emerge regarding "earnest""

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

13. In *Delhi Development Authority v. Grihstrapana Cooperative Group Housing Society Ltd.* 1995 Supp (1) SCC

751, this Court following the judgment of the Privy Council in *Har Swaroop* and *Shree Hanuman Cotton Mills* (supra), held that the forfeiture of the earnest money was legal.

14. In *V. Lakshmanan v. B.R. Mangalgiri and others* (1995) Suppl. (2) SCC 33, this Court held as follows:

> "The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount."

15. In *Housing Urban Development Authority and another v. Kewal Krishan Goel and others* (1996) 4 SCC 249, the question that came up for consideration before this Court was, where a land is allotted, the allottee deposited some installments but thereafter intimated the authority about his incapacity to pay up the balance installments and requested for refund of the money paid, was the allotting authority entitled to forfeit the earnest money deposited by the allottee or could be only entitled to forfeit 10% of the total amount deposited by the allottee till the request is made? Following the judgment in *Shree Hanuman Cotton Mills* (supra), this Court held that the allottee having accepted the allotment and having made some payment on installments basis, then made a request to surrender the land, has committed default on his part and, therefore, the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited, as held by the High Court. In that case, this Court took the view that the earnest money represented the guarantee that the contract would be fulfilled.

16. This Court, again, in *Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories and others* (2004) 3 SCC 711, dealt with a case of sale of immovable property. It was a case where

the plaintiff-appellants had entered into an agreement with the respondents-defendants on 13.5.1994 to sell the landed property owned by the respondents and a sum of Rs.38,00,000/- was paid by the appellants as deposit or earnest money on the execution of the agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the words used in the agreement alone would not be determinative of the character of the "earnest money" but really the intention of the parties and surrounding circumstances. The Court held that the earnest money serves two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned. In that case, on facts, after interpreting various clauses of the agreement, the Court held as follows:

> "15. Coming to the facts of the case, it is seen from the agreement dated 13.5.1994 entered into between parties - particularly Clause 1, which specifies more than one enumerated categories of payment to be made by the purchaser in the manner and at stages indicated therein, as consideration for the ultimate sale to be made and completed. The further fact that the sum of Rs. 38 lakhs had to be paid on the date of execution of the agreement itself, with the other remaining categories of sums being stipulated for payment at different and subsequent stages as well as execution of the sale deed by the Vendors taken together with the contents of the stipulation made in Clause 2.3, providing for the return of it, if for any reason the Vendors fail to fulfill their obligations under Clause 2, strongly supports and strengthens the claim of the appellants that the intention of the parties in the case on hand is in effect to treat the sum of Rs. 38 lakhs to be part of the prepaid purchase-money and not pure and simple earnest money deposit of the restricted sense and tenor, wholly unrelated to the purchase price as such in any manner. The mention made in the agreement or description of the same otherwise as "deposit or earnest money" and not merely as

earnest money, inevitably leads to the inescapable conclusion that the same has to and was really meant to serve both purposes as envisaged in the decision noticed supra. In substance, it is, therefore, really a deposit or payment of advance as well and for that matter actually part payment of purchase price, only. In the teeth of the further fact situation that the sale could not be completed by execution of the sale deed in this case only due to lapses and inabilities on the part of the respondents - irrespective of bonafides or otherwise involved in such delay and lapses, the amount of rupees 33 lakhs becomes refundable by the Vendors to the purchasers as of the prepaid purchase price deposited with the Vendors. Consequently, the sum of rupees 38 lakhs to be refunded would attract the first limb or part of Section 55(6)(b) of the Transfer of Property Act itself and therefore necessarily, as held by the learned Single Judge, the defendants prima facie became liable to refund the same with interest due thereon, in terms of Clause 2.3 of the agreement Therefore, the statutory charge envisaged therein would get attracted to and encompass the whole of the sum of rupees 38 lakhs and the interest due thereon……."

In the above mentioned case, the Court also held as follows:

> "14. ……Further, it is not the description by words used in the agreement only that would be determinative of the character of the sum but really the intention of parties and surrounding circumstances as well, that have to be baked into and what may be called an advance may really be a deposit or earnest money and what is termed as 'a deposit or earnest money' may ultimately turn out to be really an advance or part of purchase price. Earnest money or deposit also, thus, serves two purposes of being part payment of the purchase money and security for the performances of the contract by the party concerned, who paid it."

17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

18. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, 'earnest' is given to bind the contract, which is a part of the purchase price when the transaction is carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011.

19. We are, therefore, of the view that the seller was justified in forfeiting the amount of Rs.7,00,000/- as per the relevant clause, since the earnest money was primarily a security for the due performance of the agreement and, consequently, the seller is entitled to forfeit the entire deposit. The High Court has, therefore, committed an error in reversing the judgment of the trial court.

20. Consequently, the appeal is allowed and the impugned

judgment of the High Court is set aside. However, there will be no order as to costs.

K.K.T. Appeal allowed.

SATBIR @ LAKHA
v.
STATE OF HARYANA
(Criminal Appeal No. 1718 of 2009)

OCTOBER 18, 2012

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

Penal Code, 1860 - ss. 307 and 324 r/w 34 - Attempt to murder - Voluntary causing hurt by dangerous weapon or means - Common intention - A-2 was responsible for collection and spending of the donation amount for celebration of the temple festival - Members of the complainant party who were also involved in the said celebration felt that entirety of the donation amount collected should be spent out and it should not go to the personal benefit of any one individual with whom the collection was entrusted - Quarrel ensued between the complainant party and the accused party led by A-2 which allegedly led to an armed assault by the accused party - Knife injuries caused to PW5-complainant and two others PWs 6 and 7 - Courts below acquitted A-3 but convicted A-1 u/s.307 and 324 and A-2 and A-4 u/ss. 307 and 324 r/w s.34 - Conviction of A-2 under challenge before Supreme Court - Held: Apparently appellant/A-2 was enraged by the questioning of his authority about the collection made and the balance amount available with him, and feeling insulted he threw a challenge to the complainant party which ended in the fateful occurrence - No fault in the action of injured witnesses in throwing brickbats which caused some minor injuries on the appellant/A-2 and the other

accused - It is quite natural that when the injured witnesses were attacked and A-1 had come there with a knife by which he caused the injuries and the remaining accused other than A-3 aided him to cause such injuries which intention was gathered at the moment of the occurrence, the injured witnesses made every attempt to save themselves by throwing brickbats available on the road - On overall consideration of the evidence available on record- ocular as well as documentary, it is clear that the conviction of appellant/A-2 under ss.307, 324 r/w 34 was justified.

The appellant/A-2 and A-3 were in charge of the collection of donations for celebration of the religious/ temple festival 'Ravi Dass Jayanti'. After the celebration was over, members of the complainant party questioned about the donation collected by the appellant/A-2 and A-3, the amounts spent for the celebration and demanded for spending the balance amount for the benefit of the temple.

It is the case of the prosecution that the accused party was enraged by the same and subsequently, one evening, when PW-5(complainant), PWs 6 and 7 along with others were assembled in a tailor shop, the accused party led by the appellant/A-2 questioned the authority of the complainant party in having raised an issue about the balance amount collected by way of donation; that thereafter quarrel ensued between the complainant party and the accused party and in the course thereof, A-1 inflicted knife injuries first on PW-5 and thereafter on PW-6 and PW-7 after their mobility was restricted by the other accused.

The trial Court acquitted A-3, however, as far as the other three accused, it held that on their part there was a pre-meditated intention in common to injure the members of the complainant party with a weapon, and therefore

convicted them - A-1 under Sections 307 and 324 IPC; and the appellant/A-2 and A-4 under Sections 307 and 324 r/w 34 IPC. In appeal, the conviction of A-1, appellant/A-2 and A-4 was confirmed by the High Court. The appellant/A-2 challenged his conviction before this Court by filing the instant appeal.

Dismissing the appeal, the Court

HELD: 1. The trial Court rightly ventured to examine which party was the real aggressor in order to find out whether the fault lay on the appellant party or the complainants. While examining the said issue, the trial Court made an honest attempt and noted certain important features. No contra evidence or material was placed before the Court to take a different view than what was held by the trial Court. [Paras 12, 13 and 14] [685-B-C; 687-E-F]

2. Though it was claimed that the knife injury sustained by the appellant/A-2 was at the hands of PW6, it was for the appellant/A-2 to have led necessary evidence in support of the said claim. Except the ipse dixit of the appellant/A-2 throwing the blame on PW-6, there was nothing on record to support the said stand. On the other hand it has come out in evidence that the responsibility of collecting the donations was entrusted to the appellant/A-2 and the said stand of the prosecution was not in dispute. The happening of occurrence in question over the issue relating to collection of donation, the available balance of such collection and the suggestion of one of the members of the complaining party to use the said available balance amount for the benefit of the temple were never disputed. If that be so, when indisputably the appellant/A-2 was responsible for the collection and the spending of the donation amount for the temple celebrations, it was quite natural that the complainant and the accused party who were

youngsters and who were stated to be fully involved in the celebrations of the Temple festival felt that entirety of the donation amount collected should be spent out and it should not go to the personal benefit of any one individual with whom the collection was entrusted. Apparently the appellant/A-2 who was enraged by the questioning of his authority about the collection made and the balance amount available with him, felt insulted who apparently threw a challenge to the complaining party which unfortunately ended in the fateful occurrence of causing injuries on PWs-5,6 and 7 who had to ultimately face the wrath of the appellant/A-2 and his supporters. Apart from the simple knife injuries sustained by appellant/A-2 and A-4, the other injuries were admittedly by a blunt weapon which could have been caused by the throwing of the brickbats at the instance of injured witnesses which was also admitted. It is quite natural that when the injured witnesses were attacked and A-1 had come there with a knife by which he caused the injuries and the other accused other than A-3 aided him to cause such injuries which intention was gathered at the moment of the occurrence, the injured witnesses could have made every attempt to save themselves by throwing brickbats which would have been available on the road against the accused in order to save themselves from any further attack. Therefore, no fault can be found with the said action of the injured witnesses which would have caused some minor injuries on the appellant/A-2 and the other accused. [Para 15] [687-G-H; 688-A-H; 689-A]

3. Taking an overall consideration of the evidence available on record both ocular as well as documentary, the reasoning of the trial Court as well as that of the High Court, it is clear that the conviction and sentence imposed on the appellant/A-2 for the offences under Sections 307, 324 read with Section 34 IPC was fully

made out and there are no good grounds to interfere with the same. [Para 16] [689-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1718 of 2009.

From the Judgment & Order dated 30.04.2009 of the High Court of Punjab and Haryana at Chadigarh in Crl. Appeal No. 488-SB of 1995.

Rishi Malhotra for the Appellant.

Abhishek Kr. Singh, Anubha Agarwal, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The second accused is the appellant before us. The challenge is to the common judgment of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos.488-SB/1995 and 580-SB/1995 dated 30.04.2009. By the impugned judgment, learned Single Judge of the High Court confirmed the conviction and sentence imposed on all the accused. The facts relating to the filing of this appeal, briefly stated, are that on 18.02.1992, Ravi Dass Jayanti was being celebrated in the village Saniana from donations collected from public. One Joginder Singh asked the appellant and Dalbir to spend the excess amount for the upkeep of the temple. At about 8 p.m. on that day, one Subhash s/o Nafe Singh (complainant), Jasbir Singh (PW-7), Kashmir Singh (PW-6), Joginder Singh and Surender Singh were present in the shop of one Kitab Singh, a tailor master. At that point of time, accused came to the spot and the appellant stated to have questioned Subhash (complainant) and others as to on what authority they were demanding for the accounts of the donation collections. When exchange of words took place between the complainant party and the accused party, the tailor Kitab Singh asked them not to indulge in such

quarrel inside his shop and to get out of the shop. Thereafter all of them went out and came down to the public street and in the course of their continued quarrel, the first accused also by name Subhash s/o Ram Kumar stated to have inflicted a knife blow on the back of the complainant Subhash s/o Nafe Singh (PW-5) while Ram Das (A-4) caught hold of Kashmir Singh and Dalbir Singh (A-3) caught hold of one Joginder Singh. Accused No.1, Subhash s/o Ram Kumar stated to have inflicted knife injuries to Jasbir Singh and Kashmir Singh. The tailor master Kitab Singh, Surender Singh and Joginder Singh tried to pacify both the groups and in that process Surender Singh also stated to have suffered knife injuries.

2. According to the complainant party, by way of private defence, they threw brickbats on the accused and that the accused stated to have fled away from the scene of occurrence. It was specifically alleged that two of the accused, namely, the appellant and Ram Das (A-4) also received injuries at the hands of Subhash s/o Ram Kumar (A-1) while he was giving knife blows to Jasbir Singh and Kashmir Singh PWs-6 and 7 respectively. The injured complainants stated to have gone to CHC Uklana in the vehicle belonging to one Baldev Singh where Subhash s/o Nafe Singh was admitted and given treatment while PWs-6 and 7, namely, Kashmir Singh and Jasbir Singh were referred to civil hospital, Hisar as the injuries sustained by them were serious injuries. Surender Singh stated to have gone to CHC Uklana, Saniana on the next day where he was also given treatment.

3. On receipt of the memo from the hospital, the sub-Inspector L.R. Sharma, PW-9 recorded the statement of Subhash s/o Nafe Singh pursuant to which the case was registered under Sections 324, 323 read with Section 34 IPC. Subsequently, after the receipt of report from the G.H., Hisar of the injuries sustained by Kashmir Singh PW-6, which were noted as serious injuries and were dangerous to life, the offence under Section 307 IPC was also added. PW-9 stated to have recovered a knife from the possession of Subhash s/o Ram

Kumar (A-1) based on his disclosure statement. Since the said knife was a spring actuated knife, a separate case under the Arms Act was also registered against him.

4. Based on the investigation and after its conclusion the final report was lodged and a specific charge under section 307, IPC was framed against the first accused Subhash s/o Ram Kumar and a charge under Section 307 read with Section 34 IPC was framed against the appellant Dalbir (A-3) and Ram Das (A-4). A charge under Section 323 IPC read with Section 34 IPC was made against all the accused persons. PW-1 was the doctor J.S. Bhatia who was examined to prove the X-ray report Exhibits PD and PE relating to PWs-6 and 7 Kashmir Singh and Jasbir Singh respectively. As per the said Exhibit, it was stated that air was found under the diaphragm of both the injured. PW-2 Dr. Sukhdev proved the MLRs Ex.PF and Exhibit PG of Subhash s/o Nafe Singh and Surender Singh respectively. He found one incised wound on the back of Subhash s/o Nafe Singh and two incised wounds near the chest and two simple injuries of blunt weapon on the person of Surender Singh. He also proved in cross-examination the MLRs Exhibit DA, of Satbir, Exhibit DE of Dalbir and also deposed about the injuries of Ram Das. He found one incised wound on the back of Satbir Singh and one incised wound on the back of Ram Das. Two injuries on the person of Satbir, two injuries on the person of Dalbir and one injury on the person of Ram Das were found to be simple injuries caused with blunt weapons. PW.3 Dr. C.R. Garg proved the MLRs Exhibit PL and Exhibit P.M. according to which five injuries caused with sharp edged weapon, one of which consisted of two incised wounds, were found on the person of Kashmir Singh and two incised wounds were found on the person of Jasbir Singh. Injury No.5 on the person of Kashmir Singh which consisted of two incised wound in the left axillary midline was declared to be dangerous to life.

5. PW-8 Ram Niwas was a Panch witness who confirmed Exhibit PS, the disclosure statement made by Subhash (A-1)

about the concealment of knife and the recovery memo Exhibit PS/2 at his instance pursuant to which the knife was taken into possession. The recovery of knife Exhibit PS/2 based on the disclosure statement of Subhash was produced to support the case of the prosecution that A-1 caused the knife injuries on PW6 Jasbir. Exhibit PY and PY/1 were the reports of FSL and Serologist marked in the trial Court. In the 313 questioning, while the first accused denied his involvement in the offence, the other accused took up the defence that it was Kashmir Singh who gave knife blows to the appellant and Ram Das (A-4) while complainant-Subhash, Joginder Singh and Surender threw brickbats at the accused while Jasbir Singh (PW-7) alleged to have caught hold of Ram Das A-4. The trial Court recorded that no evidence was led on the defence side.

6. The trial Court, on a detailed analysis of the entire evidence and after making a thorough discussion of the respective contentions made on behalf of the accused including that of the appellant found that no offence was made out as against Dalbir Singh (A-3) inasmuch as he did not effectively participate in the occurrence and the knife blows were inflicted by A-1 Subhash s/o Ram Kumar to the members of the complainant party. The trial Court also found that the allegation that Dalbir Singh (A-3) caught hold of Joginder to whom A-1 alleged to have inflicted the knife injuries was not proved inasmuch as no injury was found on the person of Joginder Singh. The trial Court, therefore, acquitted Dalbir Singh (A-3).

7. As far as others were concerned, the trial Court reached the conclusion that the accused party were the aggressors, that it was the appellant who was responsible for the aggression and that there was a pre-meditated intention in common to injure the complainant party with the weapon, such common intention was deliberately displayed in the course of committing the crime and, therefore, the accused No.1- Subhash s/o Ram Kumar, A-2, Satbir @ Lakha and Ram Das (A-4) were found guilty of the offence alleged against them.

8. The trial Court, therefore, imposed the sentence of three years' rigorous imprisonment on the appellant and Ram Das (A-4) for the offence under Section 307 read with Section 34 IPC along with fine of Rs. 1000/- and also rigorous imprisonment of 1 ½ years each for the offence under Section 324 read with Section 34 IPC. The sentences awarded to the accused under different sections were directed to run concurrently and in default of payment of fine each of the accused were to undergo further rigorous imprisonment for a period of three months each. As far as A-1 was concerned, he was imposed with a rigorous imprisonment for a period of four years along with fine of Rs. 1000/- under Section 307 IPC and rigorous imprisonment of two years for the offence under Section 324 IPC, in default of payment of fine he was to under go default sentence of three months.

9. The appellant along with Ram Das preferred Criminal Appeal No.488-SB/1995 while A-1 Subhash s/o Ram Kumar preferred Criminal Appeal No. 580-SB/1995 and by the common order impugned in this appeal, the learned Single Judge of the High Court of Punjab & Haryana at Chandigarh confirmed the conviction and sentence imposed on the appellant as well as the other convicted accused persons. The appellant has come forward with this appeal against that order of the High Court.

10. We heard Mr. Rishi Malhotra, learned counsel for the appellant and learned counsel for the State. We also perused the judgment of the trial Court as well as the High Court and all other material papers placed before us. In the course of his submissions, counsel for the appellant contended that the injuries sustained by the appellant on his back which were three in number as proved by examination of the concerned doctor, and having regard to the nature of injuries sustained by him the theory of such injuries sustained by him at the hands of A-4 ought not have been accepted. It was contended that there was nothing in evidence to show that the appellant was aware of

the possession of knife by A-1, that the role attributed to the appellant was holding of Jasbir Singh (PW-7) and that there was no clinching evidence to show that he shared the common intention with A-1 or other accused in the infliction of injuries on the complainant party. The learned counsel lastly contended that the appellant has suffered six months behind the bars and the imposition of three years sentence was on the higher side.

11. As against the above submissions, learned counsel for the State after referring to the evidence of PWs-5, 6 and 7 as well as that of the doctor (PW-3) who testified the medical report Exhibit PL of PW-6 Kashmir Singh which disclosed that the incised wound in the left axillary midline was declared to be a dangerous one to the life of PW-6 and the evidence which was elaborately led before the trial Court disclose that but for the overt act of the appellant in having held PW-6, there would have been no scope for A-1 Subhash s/o Ram Kumar to have inflicted the said serious injury. The learned counsel contended that the conviction and sentence imposed on the appellant was well justified and the same does not call for interference.

12. Having heard learned counsel for the respective parties and having perused the judgments of the courts below we are also convinced and find force in the submission of learned counsel for the State. At the very outset, it will have to be stated that the occurrence has happened on 18.02.1992/19.02.1992 was not disputed. It is also not in dispute that the appellant and Dalbir A-3 were in charge of the collection of donations for the celebrations of Ravi Dass Jayanti on 18.02.1992. There was an uncontroverted version of the prosecution side that after the celebration was over, there was a suggestion to the appellant and other accused party to spend the balance amount for the benefit of the temple. It is the case of the prosecution that enraged by the questioning by the members of the complainant party about the donation collected by the appellant and A-3, the amounts spent for the celebration and demand for spending the balance amount for the benefit of the temple, on the evening of

19.02.1992 at 8 p.m. when PWs-5, 6 and 7 along with others were assembled in the tailor shop of one Kitab Singh, the accused party led by the appellant questioned the authority of the complainant party in having raised an issue about the availability of the balance amount collected by way of donation. The said fact about the quarrel relating to the said issue is also not in dispute. The further fact relating to the injuries sustained in that occurrence both by the complainant party as well as the accused is also not in dispute. Therefore, the trial Court rightly ventured to examine to find out which party was the real aggressor in order to find out whether the fault lie on the appellant party or the complainants.

13. While examining the said issue, the trial Court made an honest attempt and noted certain important features namely:

a) That PWs 5, 6 and 7 gave a detailed and convincing version of the prosecution story.

b) Their version amply proved their presence as well as the presence of accused at the place of occurrence on 19.02.1992.

c) As per the direction of the tailor Kitab Singh when both the groups came out of his shop to the street, A-1 Subhash s/o Ram Kumar wielded a knife and started inflicting injuries first on Subhash s/o Nafe Singh (PW-5) and thereafter on Kashmir Singh (PW-6) and Jasbir Singh (PW-7) whose mobility was restricted at the instance of the appellant and Ram Das (A-4).

d) Though Dalbir Singh (A-3) stated to have held Joginder Singh no injury was found on the body of Joginder Singh.

e) In the scuffle appellant and Ram Das (A-4) also received injuries at the hands of Subhash Singh s/o Ram Kumar (A-1).

f) Admittedly the injured witnesses threw brickbats by way of self-defence against the accused.

g) The medical evidence through Dr. C.R. Garg (PW-3) disclosed five incised wounds on the person of Kashmir Singh (PW-6) and two incised wounds on the person of Jasbir Singh (PW-7).

h) The injury No.5 on the person of Kashmir Singh PW-6 consisted of two incised wounds in the left axillary midline which was declared to be dangerous to life by PW-3, the doctor who examined him.

i) The X-ray examination of the injury sustained by Jasbir Singh (PW-7) as well as Kashmir Singh (PW-6) disclosed that air was found in the diaphragm of each of the injured as per the version of PW-1, Dr. J.S. Bhatia.

j) The causing of knife injuries on the person of PWs-5, 6 and 7 was at the instance of Subhash s/o Ram Kumar (A-1) and the appellant and that the injury in the body of Jasbir Singh was by virtue of the overt act of the appellant in having made him immobile which facilitated Subhash Singh s/o Ram Kumar (A-1) to inflict the injuries on him.

k) Similar overt act was attributed to Ram Das (A-4) which caused severe injuries on Kashmir Singh (PW-6).

l) The injury sustained by appellant and Ram Das was also at the instance of A-1 Subhash s/o of Ram Kumar only as stated by prosecution witnesses.

m) While the injuries sustained by PW-5 Subhash s/o Nafe Singh, PW-6 Kashmir Singh and PW-7 Jasbir Singh were severe, some of the injuries sustained

by PWs-6-7 were proved to be serious in nature.

n) The injuries sustained by the accused party including that of the appellant were minor in character.

o) The very fact that immediately after the aggression started the appellant and other accused namely, A-3 and A-4 caught hold of PWs-6, 7 and Surender Singh while A-1 Subhash s/o Ram Kumar inflicted the injuries on the witnesses made it clear that the common intention was formulated then and there to indulge in the crime, though there would not have been a pre-meditation or any conspiracy on the part of the accused.

p) Having regard to the serious and dangerous injuries suffered by PW-6 Kashmir Singh, as well as the other injuries sustained by all the three of them namely, PWs-5 6 and 7, offence falling under Sections 307,323 and 324 IPC read with Section 34 IPC was made out.

14. When we consider the above conclusion of the trial Court, which was also affirmed by the learned Judge of the High Court, we find that there was no contra evidence or material placed before the Court to take a different view than what has been held by the trial Court. Though in the 313 questioning on behalf of the appellant and other accused other than A-1, it was contended that Kashmir Singh (PW-6) only gave knife blows to the appellant and Ramdas (A-4) while Subhash s/o Nafe Singh (PW-5) and Joginder along with Surender threw brickbats and that Jasbir Singh (PW-7) caught hold of Ram Das (A-4), as rightly noted by the trial Court no evidence was led in support of the said stand.

15. Though it was claimed that the knife injury sustained by the appellant was at the hands of Kashmir Singh, it was for

the appellant to have led necessary evidence in support of the said claim. Except the ipse dixit of the appellant throwing the blame on PW-6 Kashmir Singh, there was nothing on record to support the said stand. On the other hand it has come out in evidence that the responsibility of colleting the donations was entrusted to the appellant and the said stand of the prosecution was not in dispute. As stated earlier the happening of occurrence on 19.02.1992 at 8 p.m. over the issue relating to collection of donation, the available balance of such collection and the suggestion of one of the members of the complaining party to use the said available balance amount for the benefit of the temple were never disputed. If that be so, when indisputably the appellant was responsible for the collection and the spending of the donation amount for the temple celebrations, it was quite natural that the complainant and the accused party who were youngsters and who were stated to be fully involved in the celebrations of the Temple festival felt that entirety of the donation amount collected should be spent out and it should not go to the personal benefit of any one individual with whom the collection was entrusted. Apparently the appellant who was enraged by the questioning of his authority about the collection made and the balance amount available with him, felt insulted who apparently threw a challenge to the complaining party on 19.02.1992 at 8 p.m. which unfortunately ended in the fateful occurrence of causing injuries on PWs-5,6 and 7 who had to ultimately face the wrath of the appellant and his supporters. Apart from the simple knife injuries sustained by appellant and A-4 Ram Das, the other injuries were admittedly by a blunt weapon which could have been caused by the throwing of the brickbats at the instance of injured witnesses which was also admitted. It is quite natural that when the injured witnesses were attacked and A-1 had come there with a knife by which he caused the injuries and the other accused other than A-3 aided him to cause such injuries which intention was gathered at the moment of the occurrence, the injured witnesses could have made every attempt to save themselves by throwing brickbats

which would have been available on the road against the accused in order to save themselves from any further attack. Therefore, no fault can be found with the said action of the injured witnesses which would have caused some minor injuries on the appellant and the other accused.

16. Taking an overall consideration of the evidence available on record both ocular as well as documentary the reasoning of the trial Court as well as that of the High Court we are also convinced that the conviction and sentence imposed on the appellant for the offences under Sections 307, 324 read with Section 34 IPC was fully made out and we do not find any good grounds to interfere with the same. The appeal fails and the same is dismissed.

17. The appellant is on bail. The bail bond stands cancelled and he shall be taken into custody forthwith to serve out the remaining part of sentence, if any.

B.B.B. Appeal dismissed.

RATNAGIRI GAS & POWER PVT. LTD.

v.

RDS PROJECTS LTD. & ORS.

(Civil Appeal No. 7593 of 2012)

OCTOBER 18, 2012

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

CONSTITUTION OF INDIA, 1950:

Art.226 - Second writ petition - Maintainability - Breakwater contract - Successful bidder (respondent) subsequently found ineligible as it did not meet the basic qualifying conditions of offshore breakwater - Fresh tenders invited - Writ petition by respondent challenging annulment of tender process and rejection of its bid - Dismissed as not pressed, with liberty to seek redress if respondent was excluded from consideration in fresh tender - Second writ petition involving the same issues as in earlier writ petition, as also challenging the fresh tender notice - Allowed by High Court - Held: Liberty granted to file a fresh petition was limited to any such fresh challenge being laid by the respondent to its exclusion in terms of any fresh tender notice - The order passed by the High Court did not permit the respondent to re-open and re-agitate issues regarding rejection of its bid pursuant to the earlier tender notice and the annulment of the entire tender process, even if the second tender notice sought to disqualify it from competition by altering the conditions of eligibility to its disadvantage - To that extent, the subsequent writ petition was not maintainable - There is no finding by the High Court on the eligibility of the respondent - The question regarding eligibility of respondent cannot be resolved in the

absence of any conclusive evidence, and in the absence of a specific finding from the High Court, on the question - Matter remanded to High Court for decision afresh in accordance with the directions given in the judgment - Contract - Administrative Law - Malice in law and malice in fact.

ADMINISTRATIVE LAW:

Malice in fact - Administrative action - Findings recorded by High Court as regards malafides - Held: The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same - This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision maker - Vague and general allegations unsupported by requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity - Further, as and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge - In the case at hand, there was no allegation of "malice in fact" against any individual, nor was any individual accused of bias, spite or ulterior motive, impleaded as a party to the writ petition - High Court named the officers concerned and concluded that the integrity of the entire process was suspect, which was wholly unjustified in the circumstances of the case.

Malice in law - Held: If on an interpretation of a clause in the tender notice by the legal department concerned, the officers review their decision or reverse the recommendations made earlier, the same does not tantamount to malice in law so as to affect the purity of the entire process or render it suspect even assuming that the opinion is on a more thorough and seasoned consideration found to be wrong -

Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions.

The appellant, a joint venture company of Gas Authority of India Ltd. (GAIL) and National Thermal Power Corporation (NTPC), was entrusted the project of completing the balance work at LNG Terminal of Dabhol Power Project and of commissioning and operating the same. The appellant engaged GAIL, as its engineer and the latter appointed Engineers India Ltd. (EIL) as their Project Management Consultant. EIL, in terms of international competitive bidding notice dated 26.6.2009 invited tenders for completion of "Breakwater" at LNG Terminal which had been left incomplete by a previous contractor. The price bid of the respondent (RDS) having been found to be lowest, it was recommended by GAIL, with certain reservations, to the appellant for award of the contract. Meanwhile one of the bidders, namely 'HRB' filed a writ petition before the High Court contending that 'RDS' did not satisfy the qualified criteria and the writ petitioner had been wrongly disqualified. CAG also forwarded to the appellant a report containing adverse observations regarding the completion of break-water in Andaman and Nicobar project. Certain documents under RTI Act regarding Andaman Project were also received. On the basis of the documents so received, EIL re-examined the matter and submitted its observations by letter dated 18.9.2010 stating that 'RDS' did not meet the basic qualifying conditions of offshore break-water of a minimum length of 400 meters. Accordingly, a resolution was passed by the Board of Directors of the appellant-company on 4.10.2010 whereby it decided to annul the Breakwater tender on the ground that 'RDS' did not qualify the BQC criteria, and opted to go for fresh tenders. By communication dated 6.10.2010, 'RDS' was conveyed the reasons for rejection of its tender. Consequently, the

writ petition of 'HRB' was dismissed as not pressed, as the tender process had been scrapped and a decision to invite fresh tenders had been taken. Subsequently, W.P. No. 8252 of 2010 was filed by 'RDS' challenging the order of annulment dated 4.10.2010 and the letter dated 6.10.2010 rejecting its bid. However, the said writ petition was also dismissed as withdrawn reserving liberty to 'RDS' to seek redress in accordance with law if it was excluded from consideration in the fresh tender. 'RDS' filed another writ petition (W.P. No. 534 of 2011), which was assailed by the appellant on the ground that the second writ petition was not maintainable as it sought to question the validity of the decision of the Board of Directors of the appellant company taken on 4.10.2010 cancelling the tender process, and the consequent communication dated 6.10.2010. The High Court allowed the writ petition and directed the appellant-company to take a fresh decision on the subject.

In the instant appeal, the questions for consideration before the Court were: (i) Whether Writ Petition No.534 of 2011 filed by RDS challenging the rejection of its tender and annulment of the entire tender process was maintainable in the light of the withdrawal of Writ Petition No.8252 of 2010 previously filed by it?; (ii) Whether the rejection of the tender submitted by 'RDS' and the decision to annul the entire tender process was vitiated by mala fides?; (iii)Whether the condition of eligibility stipulated in the second tender notice issued by the appellant unfairly excluded 'RDS' from bidding for the allotment of the work in question? and; (iv) Whether 'RDS' was eligible in terms of the first tender notice to compete for the works in question having executed a minimum breakwater length of 400 meters in a single project required vide Clause 8.1.1.1?

Allowing the appeals, the Court

HELD:

Question No.1:

1.1 The order dismissing W.P. 8252 of 2010 as withdrawn has two distinct features: (a) The writ petition specially questioned the validity of the Board resolution dated 4.10.2010 and the rejection of the bid offered by RDS, by letter dated 6.10.2010 meaning thereby that the same squarely related to the issues that were sought to be agitated in subsequently filed Writ Petition No.534 of 2011 in which too RDS had prayed for quashing of the resolution dated 4.10.2010 and communication dated 6.10.2010 rejecting the bid offered by it. There is, thus, almost complete identity of the subject matter and the issues raised in the two writ petitions and the grounds urged in support of the same; and (b) The challenge to the Board resolution dated 4.10.2010 and communication dated 6.10.2010 was withdrawn in toto, with liberty reserved to RDS to file a fresh petition for redress only in case the fresh tender to be floated by the appellant for allotment of the works in any manner sought to exclude it from participating in the same. This necessarily implies that if RDS was allowed to participate in the fresh tender process it would have had no quarrel with the annulment of the entire tender process based on the first tender notice. Conversely, if the fresh tender notice sought to disqualify RDS from bidding for the works, it could seek redress against such exclusion. Thus, the liberty granted by the High Court to file a fresh petition was limited to any such fresh challenge being laid by RDS to its exclusion in terms of any fresh tender notice. The order passed by the High Court did not permit RDS to re-open and re-agitate issues regarding rejection of its bid pursuant to the earlier tender notice and the annulment of the entire tender process, even if the second tender notice sought to disqualify it from competition by altering

the conditions of eligibility to its disadvantage. [Para 22] [711-C-H; 712-A-B]

1.2 In subsequent Writ Petition No.534 of 2011 filed by RDS not only were the amended conditions of the tender notice assailed but the validity of the resolution dated 4.10.2010 and letter dated 6.10.2010 was also sought to be re-opened no matter the same was already concluded with the withdrawal of Writ Petition No.8252 of 2010. RDS sought to use the liberty to challenge the amended terms of eligibility to re-open what it could and indeed ought to have taken to a logical conclusion in Writ Petition No.8252 of 2010. Besides, the withdrawal of the earlier writ petition was a clear acknowledgment of the fact that the grievance made by RDS regarding the rejection of its bid had been rendered infructuous as the works in question remained available for allotment in a fresh tender process with everyone otherwise eligible to compete for the same being at liberty to do so. Inasmuch as and to the extent Writ Petition No.534 of 2011 filed by RDS challenged the rejection of the tender and the annulment process in a second round despite withdrawal of the earlier writ petition filed for the same relief, it was not maintainable. The scope of Writ Petition no.534 of 2011 was and had to be limited to the validity of the amendment in the conditions of eligibility introduced by the appellant in the second tender notice issued by it. [Para 22] [712-B-G]

Question No. 2

2.1 Since Writ Petition No. 534 of 2011 could not have re-agitated issues touching the validity of annulment of the tender process, there was no occasion for the High Court to go into the question whether or not the decision to refer to the bid and annul the process was vitiated by malice in law or fact. The findings recorded by the High Court on the question of mala fides are, therefore, liable

to be set aside on that ground alone. [Para 23] [713-A-B]

2.2 Even otherwise, the findings recorded by the High Court on the question of mala fides do not appear to be factually or legally sustainable. The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity. [Para 24] [713-C-E]

State of Bihar v. P.P. Sharma **1991 (2) SCR 1 =1992 Supp. (1) SCC 222;** *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Ors.* **2005 (3) Suppl. SCR 314 = (2005) 7 SCC 764 - referred to**

2.3 Further, as and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the case at hand, there was no allegation of "malice in fact" against any individual nor was any individual accused of bias, spite or ulterior motive impleaded as a party to the writ petition. What was stated to have been alleged was malice in law. But the High Court had in the absence of any assertion in the writ petition and in the absence of the officers concerned recorded a finding suggesting that the officers had acted mala fide. The High Court named the officers concerned and concluded that the integrity of the entire process was suspect, which was wholly unjustified in the circumstances of the case. [Para 26 and 29] [715-B; 717-E, G-H; 718-A]

State of M.P. and Ors. v. Nandlal Jaiswal and Ors. **1987 (1) SCR 1 (1986) 4 SCC 566;** *Smt. Swaran Lata v. Union of India & Ors.* **(1979) 3 SCC 165;** *Nirmal Jeet Singh Hoon v. Irtiza Hussain & Ors.* **2010 (14) SCR 109 = (2010) 14 SCC 564 and** *All India State Bank Officers' Federation v. Union of India* **1996 (6) Suppl. SCR 255 = (1997) 9 SCC 151- relied on.**

2.4 In cases involving malice in law, the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. In the case at hand, the final decision to reject the tender submitted by RDS was taken by the appellant in its capacity as the owner of the project. GAIL and EIL performed only an advisory role whose opinions were recommendatory and meant to assist the owner to take a final call. From the correspondence exchanged between the appellant and GAIL and EIL, it is evident that the appellant had from the date of receipt of the recommendations made to it by EIL and GAIL till the end maintained a consistent stand and expressed reservations about the capacity of RDS to undertake the work. In the earlier Writ Petition No. 8252 of 2010, the appellant had no doubt filed a short affidavit supporting its decision holding RDS eligible but in view of the discovery of material in proceedings under the RTI Act and an adverse CAG report, the appellant, as owner of the project that was being executed at a colossal cost running into hundreds of crores of rupees, was perfectly justified in adopting a careful approach to ensure that those found eligible by its technical experts and consultants were indeed so qualified and possessed the necessary wherewithal, experience and expertise to execute the project. It was also well within its right to demand documentary proof from RDS to support its claim. In the course of the hearing before this Court, the

records produced on behalf of RDS did not show that it had indeed executed the breakwater Project of 400 meters length in Car Nicobar. More importantly, there is nothing to disclose the basis on which the certificates, which RDS had produced to prove its eligibility, were issued by the engineers concerned. The files that were produced did not bear any testimony to issuing of any such certificates or the basis on which the same were issued. There was, therefore, no justification for either RDS or the High Court to raise an accusing finger against the appellant simply because it had demanded proof regarding the claim of eligibility from RDS or collected relevant information under RTI Act and referred the material so collected to GAIL and EIL for evaluation and opinion. The final decision to scrap the project being within appellant's powers under the terms of the tender notice, invocation of that power was not in the facts and circumstances vulnerable to challenge on the ground of malice in fact or law, on the grounds set out by the High Court even assuming that Writ Petition No.534/2011 was maintainable notwithstanding the withdrawal of Writ Petition No. 8252 of 2010. [Para 30 and 33] [718-C-D; 720-D-H; 721-A-E; 722-A-C]

Shearer v. Shields **(1914) A.C. 808;** *Additional District Magistrate, Jabalpur v. Shivkant Shukla* **1976 Suppl. SCR 172 = (1976) 2 SCC 521;** *State of AP & Ors. v. Goverdhanlal Pitti* **2003 (2) SCR 908 = (2003) 4 SCC 739;** *Ravi Yashwant Bhoir v. District Collector, Raigad and Ors* **(2012) 2 SCC 407 - referred to**

2.5. Besides, the High Court erred in recording its finding on mala fides on the sole basis that EIL had reviewed its earlier opinion regarding eligibility of RDS. If on an interpretation of a clause in the tender notice by the legal department concerned, the officers review their decision or reverse the recommendations made earlier,

the same does not tantamount to malice in law so as to affect the purity of the entire process or render it suspect even assuming that the opinion is on a more thorough and seasoned consideration found to be wrong. In the absence of any other circumstances suggesting that the process was indeed vitiated by consideration of any inadmissible material or non-consideration of material that was admissible or misdirection on issues of vital importance, fresh recommendations made in tune with the legal opinion could not be held to have been vitiated by malice in law. Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions. [Para 35] [723-E, G-H; 724-A-B-E-F]

2.6. Therefore, the findings recorded by the High Court to the effect that the process of annulment of the tender process or the rejection of the tender submitted by RDS was vitiated by mala fides is unsustainable and is set aside. [Para 35] [724-F-H]

Question No.3:

3.1. A statement has been made on behalf of the appellant that in order to show its bona fides and to prove that it had no intention to deliberately target or exclude RDS, Clause 8.1.1.1 of the second tender notice shall not be enforced and the corresponding clause as it appeared in the first tender notice shall govern matters stipulated therein. [Para 39] [726-E-H; 727-A]

Air India Ltd. v. Cochin International Airport Ltd. and Ors. **2000 (1) SCR 505 = (2000) 2 SCC 617 - cited**

Question No.4:

4.1. It is true that RDS cannot be excluded from

competition based on Clause 8.1.1.1 in the second tender notice. But that does not automatically make RDS eligible for allotment of the works even under the first tender notice. The appellant's case is that RDS was techno commercially ineligible for allotment, and in its communication dated 6.10.2010, it had given the reasons for that view. A careful reading of the communication dated 06.10.2010 would show that the rejection of the bid offered by RDS was based on three distinct grounds namely: (i) RDS had claimed the qualifying project to have been awarded in its favour in November, 2000. The length of the project so allotted was 290 meters only as against 400 meters required under the BQC; (ii) The breakwater at Mus (chainage 22m to 200m and 200 meters to 330/490 meters) were awarded and executed as two separate Projects, whereas Clause 8.1.1.1 required that the single bidder should have executed the required length of Breakwater in a Single Project; (iii) The award of the above project was made on EHL or M/s Reacon International, for different phases and RDS was not responsible for the execution of the total scope of the work in any one of the two projects. [Para 40 and 42] [727-D-E; 728-F-H; 729-A-B]

4.2. On the question whether the Breakwater constructed at Mus in Car Nicobar comprised one or two projects, a fair and unqualified concession has been made on behalf of the appellant that for purposes of determining the eligibility of RDS the breakwater at Mus Car Nicobar could be treated as a single project. With that concession, what remains to be determined is whether RDS had limited its claim to eligibility only on the award made in its favour in November, 2000. If so, whether it is debarred or stopped from claiming that it had executed the project from chainage 22 meters to 200 meters also. More importantly, whether RDS had actually executed the Breakwater Project at Mus Car Nicobar with a length of

400 meters. However, there is no finding on these questions in the impugned judgment. The question regarding eligibility of RDS cannot be resolved in the absence of any conclusive evidence, and in the absence of a specific finding from the High Court, on the question. A remand to the High Court, therefore, became inevitable which part was conceded on behalf of both the parties. [Para 45, 48] [729-H; 730-A-B; 731-F-G]

5. The judgment and order passed by the High Court is set aside and the matter is remanded back for decision in accordance with the directions contained in the instant judgment. [para 49] [731-H; 732-A]

Case Law Reference:

1991 (2) SCR 1	**referred to**	**Para 24**
2005 (3) Suppl. SCR 314	**referred to**	**Para 25**
1987 (1) SCR 1	**relied on**	**Para 26**
(1979) 3 SCC 165	**relied on**	**Para 27**
2010 (14) SCR 109	**relied on**	**Para 28**
1996 (6) Suppl. SCR 255	**relied on**	**Para 28**
(1914) A.C. 808;	**referred to**	**Para 30**
1976(0) Suppl. SCR 172	**referred to**	**Para 30**
2003 (2) SCR 908	**referred to**	**Para 31**
(2012) 2 SCC 407	**referred to**	**Para 32**
2000 (1) SCR 505	**cited**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7593 of 2012.

From the Judgment & Order dated 17.10.2011 of the High

Court of Delhi at New Delhi in Writ Petition (Civil) No. 534 of 2011.

WITH

C. A. No. 7594 and 7595 of 2012

R.F. Nariman, SG, Indira Jaisingh, Sidharth Luthra, ASG's, Sudhir Chandra, Jagdeep Dhankar, Bindu Saxena, Shailendra Swarup, Aparjita Swarup, K.K. Patra, Neha Khattar, Kanika Singh, Ashok Mathur, Ajit Pudussery, Joanne Pudussery, K. Vijayan, Dinesh Khurana, Asha Jain Madan, Bhagbati Prasad, R.K. Rathore, Kavin Gulati, Gargi Khanna, Devina Saghal, S. Sinha for the Appearing Parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. These appeals arise out of a common judgment and order dated 17th October, 2011 passed by the High Court of Delhi whereby Writ Petition (C) No.534 of 2011 filed by the respondent has been allowed and the rejection of the tender submitted by it quashed with a mandamus to the appellant-company to take a fresh decision on the subject in the light of the observations made by the High Court.

3. The factual matrix leading to the filing of the writ petition by RDS Project Ltd. (hereinafter referred to as 'RDS' for short) has been set out at considerable length in the order passed by the High Court. We do not, therefore, consider it necessary to re-count the same all over again except to the extent the same is absolutely necessary for the disposal of these appeals. Suffice it to say that Government of India has entrusted the task of reviving and restructuring of the Dabhol Project to Gas Authority of India Ltd. (GAIL) and National Thermal Power Corporation ('NTPC' for short) both Government of India undertakings who have in turn formed a joint venture company

in the name and style of Ratnagiri Gas & Power Pvt. Ltd., the appellant in this appeal, for short referred to as 'RGPPL'. The appellant-RGPPL is charged with the duty of completing the balance work at LNG Terminal of the Dabhol Power project and of commissioning and operating the same. The appellant has, for that purpose, engaged GAIL as its Engineer who has in turn appointed Engineers India Limited (EIL) as their Primary Project Management Consultant. Scott Wilson a U.K. based entity was also kept in the loop as a backup consultant for marine works.

4. In terms of an international competitive bidding notice, issued by it on 26th June, 2009, EIL invited tenders from eligible parties for completion of, what is called "Breakwater" at LNG Terminal at RGPPL site, Dabhol, Maharashtra. The construction of the breakwater was left incomplete by a previously employed contractor appointed for the purpose on account of the stoppage of the work by the Dabhol Power Company. The earlier contractor had, according to the appellant, constructed only 500 meters of breakwater length leaving the balance of nearly 1800 meters incomplete and a certain length thereof untouched.

5. Apart from stipulating other terms and conditions, Clause 8.1.1.1 of the tender required that Single Bidders responding to the invitation should have experience of successfully completing as a single bidder or "as a lead of a Consortium/ Joint Venture", at least one project of a breakwater in an offshore location with a minimum length of 400 meters. Clause 8.1.1.1 of the Tender document was in the following words:

> "The bidder shall have experience of having successfully completed, as a single bidder or as a lead of a Consortium/Joint Venture, at least one project of a breakwater in an offshore location (as defined at Clause No.8.1.2.5 below) of minimum length of 400m during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the proposed qualifying project work should comprise of the design, engineering, project management and construction of the breakwater."

6. In response to the notice inviting tenders, EIL received five tenders from five different entities viz. RDS the respondent in this appeal, M/s ESSAR Construction Ltd., M/s Afcons Infrastructure Ltd., joint venture of M/s Higgard Punj Lloyd Ltd. and joint venture of M/s Hung-Hua/Ranjit Buildcon Ltd.

7. With the tender submitted by it RDS enclosed the requisite documents such as Form-B in which details of specific work experience, on the basis whereof it claimed to be satisfying the Bid Qualification Criteria ('BQC' for short), were also given. It also enclosed along with its tender, completion certificate dated 5th April, 2008 issued by Deputy Chief Engineer-IV, Andaman Harbour Works under the Ministry of Shipping, Road Transport and Highway, Government of India certifying that RDS had completed breakwater of 500 meters against a tender dated 26th May, 1999. Completion certificate dated 30th June, 2003 issued by the Senior Executive Manager of Ellen Hinengo Ltd. a Tribal Society (EHL) and letter dated 10th November, 2000 addressed by the said Ellen Hinengo Ltd. to RDS asking it to commence work for construction of breakwater at Mus in Car Nicobar Island pursuant to tender dated 3rd November, 2000 were also produced by RDS apart from a certificate issued by EHL about the offshore location of the breakwater.

8. Tenders received from different parties were techno commercially evaluated by EIL all of whom were found to be technically qualified except Hung-Hua & Ranjit Buildcon Ltd. who went out of the reckoning at that stage itself. Names of only four bidders found techno commercially eligible were recommended by EIL for the approval of GAIL the owner's engineer. The price bids of the four bidders were pursuant to the said recommendation opened on 11th February, 2010 in

which RDS was found to be the lowest bidder having quoted a price of Rs.390 crores only, which was less than the estimated cost of the project by Rs.160 crores. GAIL accordingly recommended RDS to the appellant-company for award of the contract. Recommendation received from GAIL notwithstanding the appellant-company appears to have expressed apprehensions about the capability of RDS to complete the project in time having regard to the fact that RDS had taken three years to complete a breakwater with a length of mere 500 meters whereas the appellant-company's breakwater project stretched over a length of 1800 meters and had to be completed within a period of 33 months only. Reservations about the viability of the rates quoted by RDS which were found to be abnormally low were also expressed.

9. While a final decision regarding award of the contract had yet to be taken, Hung-Hua/Ranjit Buildcon Ltd. who was one of the bidders and whose bid was not found to be techno-commercially qualified, filed a writ petition in the Delhi High Court, inter alia, alleging that while they had been wrongly disqualified, RDS who did not satisfy the qualifying criteria had been wrongly held to be qualified. Questions regarding validity of certificates submitted by RDS were also raised in the writ petition.

10. In response to the above writ petition filed by Hung-Hua, the appellant company filed a short affidavit in which it disputed the averments made in the writ petition and took the stand that the documents filed by RDS along with its bid showed that breakwater at Mus in Car Nicobar Island was built at an offshore location and that RDS had completed the entire work as a single entity on behalf of M/s Ellen Hinengo Ltd.

11. While the writ petition filed by Hung-Hua was pending before the High Court, the appellant sought from GAIL the work order issued to RDS in respect of the qualifying project at Car Nicobar to verify the credentials of the RDS. RDS was accordingly asked by EIL to produce the documents in support

of its qualification such as the work order for the Andaman Harbour works. The appellant-company also sought the details about the contracts to verify the correctness of the certificates submitted by RDS along with its bid in response to the tender notice.

12. A further development in the meantime took place in the form of the CAG forwarding a report in which certain adverse observations regarding the completion of the breakwater at chainage 22M to chainage 200 M in the Andaman and Nicobar Project were made. The report revealed that in January, 1998 the contractor had completed only 15 to 47 percent of the work and that in April, 1998 the Executive Engineer had taken out a part of the unexecuted work for awarding it to another contractor. The CAG found that due to delay in the construction of a portion of the breakwater coupled with non-compliance of contractual terms, the department had suffered a loss of Rs.2.61 crores, apart from increase in cost of the work by Rs.3.55 crores.

13. The report of the CAG was forwarded by the appellant to GAIL with the request to arrange copies of work order, and satisfactory evidence of the credentials of RDS. GAIL was also informed that in the absence of satisfactory evidence furnished by RDS, the appellant was not in a position to place the matter for award of contract before the Board of Directors.

14. While correspondence between RGPPL, GAIL and EIL was being exchanged on the subject the appellant received certain documents under RTI Act including the work order placed by Andaman Harbour Works on EHL and those placed on M/s Recon International for a part of the Andaman Project for chainage 22-200 meters. These documents were quickly sent to EIL for review who examined the matter again and submitted its observations in terms of letter dated 18th September, 2010 stating that RDS did not meet the basic qualifying conditions of offshore breakwater of a minimum length of 400 meters. GAIL then forwarded that opinion to the

appellant to take appropriate action on the subject.

15. On receipt of the letters aforementioned, the appellant requested GAIL to forward its own recommendations. GAIL, however, reiterated that since all the relevant information on the subject was available with the appellant, it could take an appropriate decision in the matter in its capacity as the owner of the project.

16. A resolution was accordingly passed by the Board of Directors of the appellant company on 4th October, 2010, whereby it decided to annul the Breakwater tender in exercise of its power under Clause 28.1 of the Bidding Document on the ground that RDS did not qualify the BQC criteria which fact had, according to the appellant, come to light only after the opening of the price bids. From the minutes of the meeting of the Board of Directors it is further evident that the Board had taken note of the CVC guidelines and declined to award the contract to the next lowest tenderer in view of the huge price difference between L1 & L2 and opted to go for fresh tenders. By a separate communication dated 6th October, 2010 the appellant-company conveyed to RDS the reasons for rejection of its tender.

17. With the annulment of the entire tender process Writ Petition No.2142 of 2010 filed by Hung-Hua/Ranjit Buildcon Ltd. inter alia challenging the acceptance of the technical bid submitted by RDS was dismissed as withdrawn by the High Court in terms of order dated 30th November, 2010. That order came to be passed on an application filed by the appellant-RGPPL stating that the entire tender process having been scrapped with a decision to invite fresh tenders Writ Petition No.2142 of 2010 did not survive for consideration. The High Court took note of the subsequent events and dismissed the writ petition as not pressed in view of the fact that the tender process had been scrapped and a decision to invite fresh tenders had been taken.

18. In Writ Petition (C) No.8252 of 2010 which was filed by RDS to challenge the annulment of the tender process and the rejection of its techno commercial bid as non-responsive a similar order was made by which the writ petition was dismissed as withdrawn reserving liberty to the respondent-RDS to take recourse to seek redress in accordance with law if it was excluded from consideration in the fresh tender which RGPPL had decided to issue. We shall presently refer to the writ petition and the effect of its withdrawal in greater detail. Suffice it to say that the maintainability of Writ Petition No.534 of 2011 filed by RDS out of which the appeal arises was assailed by the appellant herein on the ground that the earlier petition filed by it having been withdrawn the second petition filed by RDS was not according to the appellant maintainable insofar as the same sought to question the validity of the decision taken by the Board of Directors on 4th October, 2010 cancelling the tender process and the communication of the said decision with reasons for rejection of the bid submitted by RDS on 6th October, 2010. The High Court has in the judgment under appeal rejected that contention and not only held that the writ petition filed by RDS was maintainable but also that the decision to reject the tender submitted by it was not legally valid nor was the annulment of the entire tender process. The High Court found that the action taken by the appellant on both counts was vitiated by mala fides especially when the fresh tender notice issued by the appellant made an attempt to exclude RDS from competing for the works in question.

19. We have heard learned counsel for the parties at considerable length. The following questions, in our opinion, fall for our determination:

(1) Whether Writ Petition No.534 of 2011 filed by RDS challenging the rejection of its tender and annulment of the entire tender process was maintainable in the light of the withdrawal of writ petition No.8252 of 2010 previously filed

by it?

(2) Whether the rejection of the tender submitted by RDS and the decision to annul the entire tender process was vitiated by mala fides?

(3) Whether the condition of eligibility stipulated in the second tender notice issued by the appellant-RGPPL unfairly excluded the appellant from bidding for the allotment of the work in question? and;

(4) Whether respondent-RDS was eligible in terms of the first tender notice to compete for the works in question having executed a minimum breakwater length of 400 meters in a single project required vide Clause 8.1.1.1.

We propose to deal with the questions ad-seriatim.

In Re: Question No.1

20. Writ Petition (C) No.8252 of 2010 questioned the validity of the appellant-Board's decision dated 4th October, 2010 regarding rejection of the bid submitted by RDS in terms of the former's letter dated 6th October, 2010 as also the annulment of the entire tender process for the completion of the "Breakwater" at LNG Terminal at RGPPL site, Dabhol, Maharashtra. It also prayed for a mandamus directing the appellant to formalise the award of contract for the Dabhol project to RDS. For the sake of clarity it is useful to extract the prayer made by RDS in the said writ petition:

"In the premises mentioned above it is most respectfully prayed that this Hon'ble Court be pleased to:-

(A) Issue an appropriate writ, order or direction, quashing the action of the Respondents, and in particular the decision dated 4.10.2010 of the Respondent No.1, as communicated to the Petitioner vide letter dated 6.10.2010 whereby bid

of the Petitioner has been rejected and the entire bidding process for the completion of the breakwater of LNG Terminal of Dabhol Power Project, Maharashtra, has been annulled; and

(B) Issue a Writ of Mandamus or any other appropriate writ, order or direction, directing the Respondent No.1 to formalise the awarding of the contract for the DABHOL PROJECT to the Petitioner; and

(C) Issue any other appropriate writ, order or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

21. When the above petition came up before the High Court on the 14th December, 2010 learned counsel for RDS withdrew the writ petition and the accompanying application reserving liberty to seek redress in case the tender which is floated sought to exclude RDS in any manner from competing for the allotment of the work in question. Since the answer to question No.1 above depends on the interpretation of the said order we may extract the same in extenso:

"Learned senior counsel for the petitioner submits that though the tender process has been scrapped on 4.10.2010, the same was followed up by a letter dated 6.10.2010 of the respondents setting out the reasons why the petitioner was held not to meet the BQC requirements of having completed at least one project of breakwater in an offshore location of a minimum length of 400 mtrs; which was a stipulation in the contract. Learned senior counsel for the petitioner has serious objection to the contents of this letter and thus submits that the objection was only to somehow ensure that the petitioner does not get the contract because the petitioner had made the technical qualifications and thereafter the price bid was opened in which the petitioner was L-1.

The learned counsel for respondents No.1, on the other hand, disputes the aforesaid and submits that on analysis of the matter it was deemed proper to scrap the tender process itself exercising the rights of an owner under article 28.1 of the terms & conditions of the tender.

In view of the aforesaid, taking into consideration the fact that the tender process now stands scrapped, learned counsel for the petitioner fairly states that he would like to withdraw the writ petition and the application at this stage but that in case the tender which is floated seeks to exclude the petitioner, in any manner, so as to prevent the participation in the tender, the petitioner should have leave and liberty to take recourse to legal remedy in accordance with law. Liberty granted.

Dismissed as withdrawn."

22. Two distinct features of the above order may be noticed immediately. These are (a) The writ petition specially questioned the validity of the Board resolution dated 4th October, 2010 and the rejection of the bid offered by RDS, by letter dated 6th October, 2010 meaning thereby that the same squarely related to the issues that were sought to be agitated in the subsequently filed writ petition No.534 of 2011 in which too RDS had prayed for quashing of the resolution dated 4th October, 2010 and communication dated 6th October, 2010 rejecting the bid offered by RDS. There is thus almost complete identity of the subject matter and the issues raised in the two writ petitions and the grounds urged in support of the same, and (b) The challenge to the Board resolution dated 4th October, 2010 and communication dated 6th October, 2010 was withdrawn in toto, with liberty reserved to RDS to file a fresh petition for redress only in case the fresh tender to be floated by the appellant for allotment of the works in any manner sought to exclude RDS from participation in the same. This necessarily implies that if RDS was allowed to participate in the fresh tender process it would have had no quarrel with the

annulment of the entire tender process based on the first tender notice. Conversely if the fresh tender notice sought to disqualify RDS from bidding for the works it could seek redress against such exclusion. Liberty granted by the High Court to file a fresh petition was in our considered opinion limited to any such fresh challenge being laid by RDS to its exclusion in terms of any fresh tender notice. The order passed by the High Court did not permit RDS to re-open and re-agitate issues regarding rejection of its bid pursuant to the earlier tender notice and the annulment of the entire tender process, even if the second tender notice sought to disqualify it from competition by altering the conditions of eligibility to its disadvantage. In fresh Writ Petition No.534 of 2011 filed by RDS not only were the amended conditions of the tender notice assailed but the validity of the resolution dated 4th October, 2010 and letter dated 6th October, 2010 was also sought to be re-opened no matter the same was already concluded with the withdrawal of Writ Petition No.8252 of 2010. RDS sought to use the liberty to challenge the amended terms of eligibility to re-open what it could and indeed ought to have taken to a logical conclusion in Writ Petition No.8252 of 2010. If the intention behind withdrawal of the Writ Petition No.8252 of 2010 was to come back on the issues raised therein there was no need for any such withdrawal, which could if taken to their logical conclusion have given to RDS the relief prayed for in the latter writ petition without even going into the question whether exclusion of RDS in the second tender notice was legally valid. Besides, the withdrawal of the earlier writ petition was a clear acknowledgment of the fact that the grievance made by RDS regarding the rejection of its bid had been rendered infructuous as the works in question remained available for allotment in a fresh tender process with everyone otherwise eligible to compete for the same being at liberty to do so. Inasmuch as and to the extent writ petition No.534 of 2011 filed by RDS challenged the rejection of the tender and the annulment process in a second round despite withdrawal of the earlier writ petition filed for the same relief, it was not maintainable. The scope of writ petition no.534 of 2011 was and had to be limited

to the validity of the amendment in the conditions of eligibility introduced by RGPPL in the second tender notice issued by it. Question no.1 is answered accordingly.

In Re: Question No.2

23. This question no longer survives for consideration in view of what has been observed by us while answering question no.1 above. If writ petition no. 534 of 2011 could not have re-agitated issues touching the validity of annulment of the tender process, there was no occasion for the High Court to go into the question whether or not the decision to refer to the bid and annul the process was vitiated by malice in law or fact. The findings recorded by the High Court on the question of mala fides are, therefore, liable to be set aside on that ground alone.

24. Even otherwise the findings recorded by the High Court on the question of mala fides do not appear to us to be factually or legally sustainable. While we do not consider it necessary to delve deep into this aspect of the controversy, we may point out that allegations of mala fides are more easily made than proved. The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity. The legal position in this regard is fairly well-settled by a long line of decisions of this Court. We may briefly refer to only some of them. In *State of Bihar v. P.P. Sharma* 1992 Supp. (1) SCC 222, this Court summed up the law on the subject in the following words:

> "50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose.

> The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.
>
> 51. *The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient.* It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand."
>
> (emphasis supplied)

25. We may also refer to the decision of this Court in *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Ors.* (2005) 7 SCC 764 where the Court declared that allegations of mala fides need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The Court observed:

> 56. … … … It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". (vide *E.P. Royappa v. State of T.N.* (1974) 4 SCC 3) There is every presumption in favour of

the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra* (1976) 1 SCC 800 (SCC p. 802, para 2): "It (mala fide) is the last refuge of a losing litigant."

26. There is yet another aspect which cannot be ignored. As and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding. Decisions of this Court have repeatedly emphasised this aspect, which is of considerable importance. In *State of M.P. and Ors. v. Nandlal Jaiswal and Ors.* (1986) 4 SCC 566, speaking for the Court, P.N. Bhagwati, J., as His Lordship then was, disapproved the observations made by the High Court attributing mala fides and corruption to the State Government without there being any foundation in the pleadings for such observations. The Court declared that wherever allegations of mala fides are made, it is necessary to give full particulars of such allegations and to set out material facts specifying the

particular person against whom such allegations are made so that he may have an opportunity to controvert such allegations. The following observations of the Court are apposite:

> "39. Before we part with this case we must express our strong disapproval of the observations made by B.M. Lal, J. in para 1, 9, 17, 18, 19 and 34 of his concurring opinion. The learned Judge made sweeping observations attributing mala fides, corruption and underhand dealing to the State Government. These observations are in our opinion not at all justified by the record. In the first place it is difficult to appreciate how any such observation could be made by the learned Judge without any foundation for the same being laid in the pleadings. It is true that in the writ petitions the petitioners used words such as "mala fide", "corruption" and "corrupt practice" but the use of such words is not enough. What is necessary is to give full particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. The requirement of law is not satisfied insofar as the pleadings in the present case are concerned and in the absence of necessary particulars and material facts, we fail to see how the learned Judge could come to a finding that the State Government was guilty of factual mala fides, corruption and underhand dealing."

27. To the same effect is the decision of this Court in *Smt. Swaran Lata v. Union of India & Ors.* (1979) 3 SCC 165, where the Court emphasized the need for particulars supporting the allegations of mala fides, in order that the Court may hold an inquiry with the same. Absence of such particulars was held to be sufficient for the Court to refuse to go into the allegations. The Court said:

> "57. ……. The Court would be justified in refusing to carry on investigation into allegations of mala fides, if

necessary particulars of the charge making out a prima facie case are not given in the writ petition. The burden of establishing mala fides lies very heavily on the person who alleges."

28. The above was reiterated in a recent decision of this Court in *Nirmal Jeet Singh Hoon v. Irtiza Hussain & Ors.* (2010) 14 SCC 564 and *All India State Bank Officers' Federation v. Union of India* (1997) 9 SCC 151. In the latter case this Court observed:

"22. *There is yet another reason why this contention of the petitioners must fail. It is now settled law that the person against whom mala fides are alleged must be made a party to the proceeding.* The allegation that the policy was amended with a view to benefit Respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour Respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fides, which allegations, in fact, are without merit."

(emphasis supplied)

29. In the case at hand there was no allegation of "malice in fact" against any individual nor was any individual accused of bias, spite or ulterior motive impleaded as a party to the writ petition. Even Mr. Sudhir Chandra and Jagdeep Dhankar, learned Senior Counsels appearing for RDS fairly conceded that RDS had not alleged malice in fact against any individual who had played any role in the decision making process. What according to them was alleged and proved by RDS was malice in law, which did not require impleading of individual officers associated with the decision making process. We will presently examine whether a case of malice in law had been made out

by the respondent-RDS. But before we do so we wish to point out that the High Court had in the absence of any assertion in the writ petition and in the absence of the officers concerned recorded a finding suggesting that the officers had acted mala fide. The High Court named the officers concerned and concluded that the integrity of the entire process was suspect. We shall subsequently extract the passage from the impugned judgment where the High Court has even without an assertion of any malice against the officers named in the judgment, recorded a finding which was wholly unjustified in the circumstances of the case especially when the High Court was making out a case for RDS which it had not pleaded when nor were the officers concerned arrayed as parties to the writ petition, in their individual capacities.

30. Coming then to the question whether the action taken by the appellant-RGPPL was vitiated by malice in law, we need hardly mention that in cases involving malice in law the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. The conceptual difference between the two has been succinctly stated in the following paragragh by Lord Haldane in *Shearer v. Shields* (1914) A.C. 808 quoted with approval by this Court *Additional District Magistrate, Jabalpur v. Shivkant Shukla* (1976) 2 SCC 521 :

"410.

Between 'malice in fact' and 'malice in law' there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the flaw and can only act within the law. He may, therefore, be guilty of 'malice in law', although., so far as the state of ins mind was concerned he acted ignorantly,

and in that sense innocently. 'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act."

31. Reference may also be made to the decision of this Court in *State of AP & Ors. v. Goverdhanlal Pitti* (2003) 4 SCC 739 where the difference between malice in fact and malice in law was summed up in the following words:

"11. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'. [See Words and Phrases legally defined in Third Edition, London Butterworths 1989].

12. *Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with a oblique or indirect object..."*

(emphasis supplied)

32. To the same effect is the recent decision of this Court in *Ravi Yashwant Bhoir v. District Collector, Raigad and Ors* (2012) 2 SCC 407 where this Court observed:

"MALICE IN LAW:

37. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice- in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something

done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See: *Addl. Distt. Magistrate, Jabalpur v. Shivkant Shukla,* AIR 1976 SC 1207; Union of India thr. *Govt. of Pondicherry and Anr. v. V. Ramakrishnan and Ors.*,2005) 8 SCC 394; and *Kalabharati Advertising v. Hemant Vimalnath Narichania and Ors.,* AIR 2010 SC 3745)."

33. In the case at hand the final decision to reject the tender submitted by RDS was taken by the appellant-RGPPL in its capacity as the owner of the project. GAIL and EIL performed only an advisory role whose opinions were recommendatory and meant to assist the owner to take a final call. The appellant-RGPPL had from the date of receipt of the recommendations made to it by EIL and GAIL till the end maintained a consistent stand and expressed reservations about the capacity of RDS to undertake the work. Correspondence exchanged between RGPPL and GAIL and EIL bears testimony to that fact. In the challenge mounted before the High Court by Hung Hua/Ranjit Buildcon Ltd. to the decision holding RDS techno commercially responsive, RGPPL had no doubt filed a short affidavit supporting its decision holding RDS eligible but discovery of material in proceedings under the RTI Act and an adverse CAG report instead of clearing the mist had created further confusion in the process, supporting what may have been a mere hunch or apprehension in the beginning about the capacity of RDS

to handle a major project having regard to the fact that it had overshot the time schedule for completion of a much lesser project in Car Nicobar. In that backdrop and as owner of a project being executed at a colossal cost running into hundreds of crores of rupees, RGPPL was perfectly justified in adopting a careful approach to ensure that those found eligible by its technical experts and consultants were indeed so qualified and possessed the necessary wherewithal, experience and expertise to execute the project at Dabhol. It was also well within its right to demand documentary proof from RDS to support its claim that it had indeed executed the project at Mus in Car Nicobar area so as to make it eligible for claiming award of the works in question. In the course of the hearing we had on several occasions asked learned counsel for RDS to furnish documentary evidence to probabilize if not conclusively establish that RDS had indeed undertaken the execution of the work involving construction of 400 meters of breakwater which it claimed to have executed. Besides, we had directed the Central Government Counsel to produce before us the relevant record relating to the project at Car Nicobar in response to which Mr. Gulati had produced a few files. These files, according to Mr. Gulati, did not show that RDS had indeed executed the breakwater Project of 400 meters length in Car Nicobar. More importantly Mr. Gulati was unable to disclose the basis on which the certificates, which RDS had produced to prove its eligibility, were issued by the engineers concerned. The files that were produced did not bear any testimony to the issue of any such certificates or the basis on which the same were issued. Our effort to resolve the issue regarding the eligibility of RDS in these proceedings, therefore, remained fruitless, no matter we were keen to give a quietus to the controversy which is delaying indefinitely a project of national importance. The task of finding an answer to the question of eligibility was rendered all the more difficult by the fact that the High Court has not adverted to and resolved that issue on merits and by reference to the available material. We will advert to this aspect in some detail a little later. Suffice it to say for

the present that RGPPL as the owner acting as a prudent and responsible public authority discharging public trust obligations was well within its rights to raise questions and seek answers on an important matter like the eligibility of RDS to participate, no matter EIL and GAIL had on the basis of the certificates produced before them recommended RDS as an eligible bidder. There was in that view no justification for either RDS or the High Court to raise an accusing finger against RGPPL simply because it had demanded proof regarding the claim of eligibility from RDS or collected relevant information under RTI Act and referred the material so collected to GAIL and EIL for evaluation and opinion. The final decision to scrap the project being within its powers under the terms of the tender notice RGPPL's invocation of that power was not in the facts and circumstances vulnerable to challenge on the ground of malice in fact or law, on the grounds set out by the High Court even assuming that writ petition No.534/2012 was maintainable notwithstanding the withdrawal of the earlier petition filed by RDS.

34. Independent of what has been said above we may point out that the High Court has rested its finding on malafides entirely on the conflict between recommendations made by EIL in its letter dated 8th March, 2010 holding RDS to be techno commercially responsive and letter dated 1st December, 2010 by which the said recommendation has been reversed. The High Court has while dealing with the change in the view taken by the EIL, inspired as it was by the legal opinion tendered to it on the subject, observed:

> "It was submitted before us that this opinion became the edifice for the change of view that the EIL took on 1.9.2010. We may note at the outset that the opinion is completely converse to the stand taken by the EIL up to 11.8.2010. It is pertinent to note (a fact we were told in the hearing) that the said legal opinion bears the endorsement of Mr. Grover, Director (Projects) calling upon Mr. R.K. Bhandari,

General Manager (Project), EIL to simply comply with the view taken by the legal department. As noticed here in above by us, Mr. R.K. Bhandari was the same gentleman, who on 10.6.2010 had opined that no revision in the award recommendation in favour of RDS was called for. The crucial question which arises, is that, was Mr. R.K. Bhandari given a chance to express his view on the opinion rendered by the legal department. This is a pertinent aspect of matter to our minds since Mr. R.K. Bhandari, followed by Mr. Ravi Saxena, in EIL and Mr. M.B. Gohil in GAIL were people who would have dealt with such like contact on a number of occasions. Being experts in their respective fields, they would know what was intended when terms like "single project" and "single bidder" were put in Clause 8.1.1.1 Therefore, for the legal department of EIL to take contrary, though "absurd" and "harsh" view, required at least a modicum of response from the expert, which was none other than Mr. R.K. Bhandari dealing with the issue till 10.6.2010. Mr. Grover Director (Projects) did not deem it fit to even ask for his comments. Therefore, the integrity of entire process is suspect to say the least. In any event, in our view, the opinion is completely contrary to the plain language of clause 8.1.1.1."

35. The above clearly shows that the High Court has recorded its finding on mala fides on the sole basis that EIL had reviewed its earlier opinion regarding eligibility of RDS. The High Court, in our opinion, was wrong in doing so. While the High Court could find fault with the interpretation which EIL placed on the provisions of clause 8.1.1.1 on the basis of the legal opinion tendered to it, it went too far in dubbing the entire process as mala fide. The High Court appears to have taken the view as though Mr. R.K. Bhandari, Mr. Ravi Saxena and Mr. M.B. Gohil were experts, even in the matter of interpretation of the terms and conditions of the tender document, who could sit in judgment over the legal opinion tendered to them. If on an interpretation of a clause in the tender notice by the legal

department concerned the officers review their decision or reverse the recommendations made earlier, the same does not tantamount to malice in law so as to affect the purity of the entire process or render it suspect even assuming that the opinion is on a more thorough and seasoned consideration found to be wrong. In the absence of any other circumstances suggesting that the process was indeed vitiated by consideration of any inadmissible material or non-consideration of material that was admissible or misdirection on issues of vital importance, fresh recommendations made in tune with the legal opinion could not be held to have been vitiated by malice in law. The High Court, it appears, felt that since the officers referred to above were senior officers they ought to have known what was meant by terms like 'single project' and 'single bidder' appearing in clause 8.1.1.1. We need hardly point out that in cases where the decision making process is multi-layered, officers associated with the process are free and indeed expected to take views on various issues according to their individual perceptions. They may in doing so at time strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision that is most appropriate under the circumstances shaped. If every step in the decision making process is viewed with suspicion the integrity of the entire process shall be jeopardized. Officers taking views in the decision making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for mala fides reasons which would in turn affect public interest. Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions. We have, therefore, no hesitation in holding that the findings recorded by the High Court to the effect that the process of annulment of the tender process or the rejection of the tender submitted by RDS was vitiated by mala fides is unsustainable and is hereby set aside. Question no. 2 is accordingly answered in the negative.

In Re: Question No.3

36. The withdrawal of Writ Petition No.8252 of 2010 with permission to petitioner-RDS to file a fresh Writ Petition No.534 of 2011 was followed by the issue of a fresh tender notice in which Clause 8.1.1.1 of the first tender document was modified. Clause 8.1.1.1 as it appeared in the second tender notice was as under:

> "The bidder must have completed in a single contract, as a single bidder or as a leader of a consortium, at least one breakwater (using marine spread-refer Note 1) of minimum length of 400 m located in sea during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the above referred qualifying job should comprise of design, engineering, construction and project management of the breakwater. Land connected breakwater having a minimum length of 400m located in sea is also acceptable provided construction has been carried out using marine spread as mentioned above."

37. Even when RDS claimed to have completed the project of 400 meters length in Mus-Car Nicobar, it was ineligible to compete for the works at Dabhol under the above clause as the work in Car Nicobar was executed under two contracts and not a 'single contract' which was added to the conditions of eligibility under the above clause. The said modification in the BQC was, according to the RDS, meant to unfairly exclude RDS from competing. The modified clause was, therefore, assailed on the ground that it was tailor made to suit the requirement of other tenderers who had lost out on the "financial bid" front in relation to the first tender. The High Court accepted that contention and declared that the modification in the BQC by which RDS was rendered ineligible was not justified and unfairly eliminated it from competing for the allotment of the works.

38. Assailing the above finding of the High Court Mr. Nariman, learned Solicitor General, argued that if the annulment of the tender process pursuant to the first tender notice was held to be valid and beyond challenge at the instance of RDS, the conditions on which fresh tenders are invited including the conditions of eligibility stipulated in the tender notice was not open to challenge by a prospective tenderer. Relying upon the decision of this Court in *Air India Ltd. v. Cochin International Airport Ltd. and Ors.* (2000) 2 SCC 617, Mr. Nariman argued that the High Court went wrong in declaring the provisions of Clause 8.1.1.1 of the second tender notice to be legally bad. The following passage from the above decision is apposite:

> "7. ….. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny…."

39. Having said that we must say to the credit of Mr. Nariman that he made a statement on instructions that in order to show its bona fides and to prove that it had no intention to deliberately target or exclude RDS, RGPPL would not apply the modified Clause 8.1.1.1 of the second tender notice to fresh tenders while evaluating them for techno commercial purposes. RGPPL would, according to Mr. Nariman, treat Clause 8.1.1.1. in the first tender notice as the applicable clause and the second tender process shall be carried forward on the Clause 8.1.1.1 as it stood in the first tender document. The statement of Mr. Nariman makes it unnecessary for us to examine whether or not RGPPL was justified in amending the BQC and whether such amendment was meant to exclude RDS or any other similarly situated tenderers from competing for the works. In the light of the statement made by Mr. Nariman we do not consider

it necessary to go into the juristic aspect relevant to the validity of the clause extracted above. All that we need say is that Clause 8.1.1.1 of the second tender notice shall not be enforced by RGPPL and that the corresponding clause as it appeared in the first tender notice shall govern matters stipulated therein. Question No.3 is answered accordingly.

In Re: Question No.4

40. We have while answering Question No.1 held that W.P. No.534 of 2011, out of which this appeal arises, was maintainable only in so far as the same questioned the exclusion of RDS from competing for the work in question. That exclusion could be on account of a change in the conditions of eligibility as was sought to be introduced by Clause 8.1.1.1 of the second tender notice or by reason of RDS being found ineligible even under the unamended/original Clause 8.1.1.1 of the first tender notice. In so far as the amended Clause 8.1.1.1 of the second tender notice is concerned Mr. Nariman's statement which we have noticed while answering question no.3 above, has put an end to the controversy. RDS cannot, therefore, be excluded from competition based on Clause 8.1.1.1 in the second tender notice. But that does not automatically make RDS eligible for allotment of the works even under the first tender notice. The appellant's case is that RDS was techno commercially ineligible for allotment, and in its communication dated 6th October, 2010 it had given the reasons for that view. We shall presently examine the said reasons but before we do so we need to point out that the High Court had quashed the communication and held RDS to be eligible. That finding has not yet attained finality, as the appellant has questioned the judgment of the High Court in the present appeal. Whether or not RDS is eligible, therefore, remains relevant not for the purpose of taking the tender process initiated with the issue of the first tender notice forward but for purposes of finally determining whether RDS will be eligible to participate in any fresh tender notice issued in future, in which Clause 8.1.1.1 remains, the touch stone for determining the

eligibility of the tenderers. It is in the above background that we need to examine whether RDS was eligible to compete for the works based on the first tender notice.

41. In its communication dated 6th October, 2010 the appellant had summed up the reasons for declaring RDS to be techno commercially non-responsive in the following words:

> "From perusal of the various documents, it can be concluded that the qualifying project claimed by you to have been awarded in November 2000 had the maximum length of 290 m and not 400 m required under BQC. The breakwater(s) at Mus (chainage 22 m to 200 m and chainage 200m to 330m/490m) was awarded as two separate projects by the project authority and also executed accordingly by the respective agencies.
>
> Further, award for different phases of the project was made on EHL or M/s Reacon International and you were also not responsible for the execution of total scope of work in any of the two projects.
>
> In the light of the above, it is concluded that RDS does not meet the BQC requirement of having completed at least one project of a breakwater in an offshore location of minimum length of 400, during the last 20 (twenty) years to be reckoned from the last date of submission of bids."

42. A careful reading of the above would show that the rejection of the bid offered by RDS was based on three distinct grounds. These are:

(i) RDS had claimed the qualifying project to have been awarded in its favour in November, 2000. The length of the project so allotted was 290 meters only as against 400 meters required under the BQC.

(ii) The breakwater at Mus (chainage 22m to 200m and 200 meters to 330/490 meters) were awarded and

executed as two separate Projects, whereas Clause 8.1.1.1 required that the single bidder should have executed the required length of Breakwater in a Single Project.

(iii) The award of the above project was made on EHL or M/s Reacon International, for different phases and RDS was not responsible for the execution of the total scope of the work in any one of the two projects.

43. RDS has before the High Court and even before us, claimed that the Breakwater at Mus in Car Nichobar was a single project and not two projects as contended by the appellant-RGPPL. It has further claimed that the entire project has been executed by it on behalf of EHL, no matter a part of the work like quarrying of stones/boulders and shipping the same from the quarry site to the place of construction was handled by EHL. These works were performed by the above two agencies for monetary consideration on behalf of RDS who was entitled to associate them with the execution of the project work in terms of the conditions of contract; under which EHL had engaged RDS.

44. The case of the appellant on the other hand is that the only purpose behind stipulating that the tenderer should have executed a breakwater project as a single tenderer with a minimum length of 400 meters was to ensure that only such tenderers are held eligible as have executed a "single project" of that length 'single handledly' without associating any other agency with the execution of the work. It was important for the appellant to do so because the breakwater length in the present case is more than four times the length stipulated as a condition of eligibility. It is the further case of the appellant that apart from Recon International one Surya Rao was also associated with the execution of the project, which fact is according to the appellant evident from the government files produced by Mr. Gulati appearing for the Central Government.

45. On the question whether the Breakwater constructed at Mus in Car Nicobar comprised one or two projects, also there was some debate which was rendered academic, by Mr. Nariman, making a fair and unqualified concession that for purposes of determining the eligibility of RDS the breakwater at Mus Car Nicobar could be treated as a single project. With that concession, what remains to be determined is whether RDS had limited its claim to eligibility only on the award made in its favour in November, 2000. If so, whether it is debarred or stopped from claiming that it had executed the project from chainage 22 meters to 200 meters also. More importantly, whether RDS had actually executed the Breakwater Project at Mus Car Nicobar with a length of 400 meters.

46. We looked in vain for a finding on the above questions in the impugned judgment leave alone one that satisfactorily dealt with the material placed by the parties on record in support of their respective cases. What we found was a concession attributed to Ms. Indra Jai Singh, learned Additional Solicitor General to which the High Court referred in Para 30.2 of its order, and which by far is the only reason given by the High Court for holding that RDS had executed the Breakwater Project at Mus in Car Nicobar. The High Court observed:

"30.2

We may note at this stage that we had had pointedly put to the ASG Ms. Indra Jai Singh during the course of hearing, as to whether there was any doubt or dispute that RDS had not executed the qualifying work at Mus Car Nicobar Island equivalent to the contracted length of 500 meters. Ms. Indra Jai Singh, on instructions, categorically informed us that this aspect of the matter was not in issue. She, however, submitted that what was in issue, was the fact, that since it had not emerged that RDS had completed the project in two (2) phases; according to EIL, it was not eligible. With EIL having taken this stand, which

was not contradicted by GAIL at the hearing; it quite surprised us when Mr. Chandiok appearing on behalf of RGPPL took the stand that RDS had not even constructed the required minimum 400 meters length of qualifying work."

47. Ms. Indra Jai Singh appearing for the Central Government argued that the High Court had misconstrued her statement, in as much as no concession as attributed to her was made or could be made when the relevant record did not bear any evidence of RDS having been associated with the project in question. Mr. Nariman contended that the concession even if made did not bind the appellant RGPPL, who as a separate legal entity was entitled to argue, as it indeed argued, before the High Court that RDS had not been associated with or executed the entire project, at Mus Car Nicobar, hence was not eligible to compete.

48. There is considerable merit in the submission made by the learned counsel for the appellants and Ms. Jai Singh. A concession even if made by one of the parties could not prevent the other parties from arguing that it did not bind them or that the same was contrary to the facts. The High Court ought to have examined the issue on merits, rather than taking a short cut. The High Court has incidentally taken support from the certificate dated 5th April, 2008 and clarification issued on 5th June, 2010 to hold that the RDS had indeed executed the qualifying project at Car Nicobar. We had in the course of the hearing asked Mr. Gulati, learned counsel for the Central Government, to disclose to us the basis on which the certificate and the clarification had been issued by the officers concerned. We got no satisfactory answer to the query. We even asked the parties to produce the relevant record including the government files, so that we could ourselves answer the question regarding eligibility of RDS but in the absence of any conclusive evidence, and in the absence of a specific finding from the High Court, on the question, we remained

handicapped. A remand to the High Court, therefore, became inevitable which part we must say in fairness to learned counsel for both sides, was conceded even by them.

49. In the result we allow these appeals, set aside the judgment and order passed by the High Court and remand the matter back to the High Court with the following directions:

(1) The High Court shall examine and decide afresh the limited issue whether RDS was eligible to compete for the works in question in terms of the first tender notice based on the works which it claims to have executed at Mus in Car Nicobar.

(2) If the High Court comes to the conclusion that RDS is not eligible in terms of Clause 8.1.1.1 of the first tender notice as it had not executed a breakwater of the requisite length, Writ Petition No. 534 of 2011 filed by the respondent-RDS shall stand dismissed in toto. Resultantly, the appellant-RGPPL shall be free to carry forward and finalize the process of allotment of works started by it in terms of the second tender notice.

(3) In case, however, the High Court comes to the conclusion that RDS was eligible to compete for the works in question on the basis of the first tender notice, subject to that finding attaining finality in any further appeal filed by the aggrieved party, the appellant-RGPPL shall be free to issue a fresh tender notice without altering the conditions of eligibility as stipulated in Clause 8.1.1.1 and finalise the said process on such other terms and conditions as it may deem fit and proper to incorporate in the tender notice.

(4) Keeping in view that the tender process relates to a project of national importance, the High Court is requested

to dispose of the matter at an early date and as far as possible within a period of four months from the date a copy of this order is received by it.

50. Parties are left to bear their own costs.

R.P. Appeals allowed.

KISHORE SAMRITE
v.
STATE OF U.P. & ORS.
(Criminal Appeal No.1406 of 2012)

OCTOBER 18, 2012

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

CONSTITUTION OF INDIA, 1950:

Art.226 - Petitions for a writ of habeas corpus - Allegation that a political leader had illegally detained a girl and her parents - Held: From the specific averments made in both the writ petitions filed in 2011, it is clear that the so-called next friends in both the writ petitions have approached the court with falsehood, unclean hands and have misled the courts by showing urgency and exigencies in relation to an incident of 3.12.2006, which according to all the three petitioners and the police was false, and have thus abused the process of court and misused the judicial process - They maliciously and with ulterior motives encroached upon the valuable time of the court and wasted public money - The false allegations made in the writ petitions have damaged and diminished the public image of the political leader concerned - The girl and her parents have been used by the persons who filed the writ petitions - Their reputation has suffered a serious set back and they were exposed to inconvenience of being dragged to court - Exemplary costs of Rs. 5 lacs each is imposed upon the

next friends in both the writ petitions - Costs to be paid to the affected persons - Order of High Court imposing cost of Rs. 50 lacs on next friend in WP No. 111 of 2011 set aside - CBI shall continue the investigation in furtherance to the direction of the High Court against the next friend in Writ Petition No. 111/2011 and all other persons responsible for the abuse of the process of court, making false statement in pleadings, filing false affidavits and committing such other offences as the investigating agency may find during investigation - Administration of justice - Abuse of process of court - Administrative law - Natural justice.

Art. 226 - Petition for a writ of habeas corpus - Locus standi - 'Person aggrieved' - Explained.

ADMINISTRATION OF JUSTICE:

Abuse of process of court - Principles enumerated in the judgment - Held: Court must ensure that its process is not abused.

ALLAHABAD HIGH COURT RULES:

Roster of Judges and listing of cases - Division Bench of High Court transferring a writ petition on the Board of single Judge, to its own Board - Held: The roster and placing of cases before different Benches of the High Court is unquestionably the prerogative of the Chief Justice of that Court - In absence of the Chief Justice, the senior most Judge would pass directions in regard to the roster of Judges and listing of cases - In the instant case, no order was passed by the Chief Justice of the High Court or even the senior-most Judge, administratively In-charge of the Lucknow Bench, transferring Writ Petition No. 111/2011 for hearing from a Single Judge before which it was pending, to the Division Bench of that Court - On the basis of the allegations made in Writ Petition No. 111/2011, it had been listed before Single

Judge - Transfer of Writ Petition No. 111/2011 by Division Bench, suo motu, to its own Board was an order lacking administrative judicial propriety - Further, it has not been specifically recorded nor is it implicitly clear that a notice was directed to petitioners in W.P. No. 111/2011 and they were given opportunity to address the court - Natural justice - Maxim 'Audi alteram partem'.

COST:

False and frivolous writ petitions - Imposition of costs and disbursement of - Maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem - Explained,

The appellant, an ex-MLA of Madhya Pradesh filed writ petition No. 111 of 2011 before the Lucknow Bench of the Allahabad High Court stating that he came to know from certain websites to the effect that respondent no. 6, while on a tour of his Parliamentary constituency in U.P., along with six others committed rape on a girl in 2006 and the said girl, her mother and father were kept in illegal detention by respondent no. 6. Invoking the right to life and liberty of the three named petitioners, as enshrined in Art. 21 of the Constitution, it was prayed that a writ of habeas corpus be issued commanding the opposite parties, particularly, respondent no. 6, to produce the petitioners before the Court. The writ petition was listed before a single Judge of the High Court. Meanwhile another Writ Petition No. 125 of 2011 was filed by respondent no. 8, acting as the next friend of the three petitioners, stating that a false Writ Petition No. 111 of 2011 was filed by the appellant as next friend of the petitioners, which was publically motivated to harm the reputation of the opposite party. This petition was listed before a Division Bench of the High Court, which directed transfer of W.P. No. 111 of 2011 and tagging of the same

with W.P. No. 125 of 2011, and issued notice to the Director General of Police to file a personal affidavit. During investigation, it was revealed that the three named petitioners had shifted to a village in a different district. It was stated that they never instructed any person to filed any writ petition on their behalf. The three petitioners named in the writ petition were produced before the Court. On 7.3.2011, the Division Bench passed a detailed order in Writ Petition No. 125 of 2011, disposing of Writ Petition No. 111 of 2011 with a cost of Rs.50,00,000/- and partly disposing of writ petition No. 125 of 2011. The High Court directed that out of the said amount, Rs.25,00,000/- would be paid to the girl, Rs.20,00,000/- to respondent no. 6 and Rs 5,00,000/- to the Director General of Police for producing the alleged detenues within the time frame as directed in the order. Further, the Director, CBI was directed to register a case against the appellant and all other persons involved in the plot. Aggrieved, the next friend in W.P. No. 111 of 2011 filed the appeal.

Disposing of the appeal, the Court

HELD:

1. Whether transfer of Writ Petition No. 111/2011 was in accordance with law, and whether there was violation of Principles of Natural Justice?

1.1. In terms of proviso to Rule 1 of Chapter XXI of the Allahabad High Court Rules, it is provided that an application under Art. 226 of the Constitution in the nature of habeas corpus directed against private custody shall be made to the Single Judge appointed by the Chief Justice to receive such an application. The clear analysis of the Rule shows that habeas corpus against a private custody has to be placed before a Single Judge while in the case of custody other than private custody, the matter has to be placed before a Division Bench. It appears that

on the strength of this Rule, Writ Petition No. 111/2011 was listed before the Single Judge of High Court. The roster and placing of cases before different Benches of the High Court is unquestionably the prerogative of the Chief Justice of that Court. In absence of the Chief Justice, the senior most Judge would pass directions in regard to the roster of Judges and listing of cases. Primarily, it is the exclusive prerogative of the Chief Justice and does not admit any ambiguity or doubt in this regard. [para 24] [765-B-H]

State of Rajasthan v. Prakash Chand & Ors., **1997 (6) Suppl. SCR 1 = (1998) 1 SCC 1;** *State of Uttar Pradesh & Ors. v. Neeraj Choubey and Ors.* **2010 (11) SCR 542 = (2010) 10 SCC 320**

1.2. In the instant case, there is no dispute to the fact that no order was passed by the Chief Justice of the High Court or even the senior-most Judge, administratively Incharge of the Lucknow Bench, transferring Writ Petition No. 111/2011 for hearing from a Single Judge before which it was pending, to the Division Bench of that Court. On the basis of the allegations made in Writ Petition No. 111/2011, that matter had been listed before the Single Judge. It does not appear to be apt exercise of jurisdiction by the Division Bench to suo motu direct transfer of Writ Petition No. 111/2011 without leave of the Chief Justice, as such action would ex facie amount to dealing with matters relating to constitution and roster of Benches. [para 28] [769-B-E]

1.3. Transfer of a petition may not necessarily result in lack of inherent jurisdiction. It may be an administrative lapse but normally would not render the Division Bench or court of competent jurisdiction as lacking inherent jurisdiction and its orders being invalid ab initio. Such an order may necessarily not be vitiated in law, particularly,

when the parties participate in the proceedings without any objection and protest. This, however, always will depend on the facts and circumstances of a given case. In the instant case, suffices it to note that transfer of Writ Petition No. 111/2011 by the Division Bench to its own Board was an order lacking administrative judicial propriety. [para 28] [769-F-H; 770-A]

1.4. Compliance with the principle of audi alteram partem and other allied principles of natural justice is the basic requirement of rule of law. In fact, it is the essence of judicial and quasi-judicial functioning and, particularly, the courts would not finally dispose of a matter without granting notice and adequate hearing to the parties to the lis. From the record, i.e. in the orders dated 4.3.2011 as well as 7.3.2011 passed by the High Court, it has not been specifically recorded nor is it implicitly clear that a notice was directed to the petitioners in Writ Petition No.111/2011 and they were given opportunity to address the court. Lack of clarity in this behalf does raise a doubt in the mind of the court that the appellant did not get a fair opportunity to put forward his case before the Division Bench. [para 23] [764-B-E]

<u>Abuse of the process of Court :</u>

2.1. The cases of abuse of the process of court and such allied matters have been arising before the courts consistently. Some of the principles, emerging from various decisions are enumerated as follows:

(i) The people, who approach the court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant. [para 29(ii)] [770-D, G-H; 771-A]

(ii) The obligation to approach the court with clean hands is an absolute obligation and has repeatedly been reiterated by this court. [para 29(iii)] [771-B]

(iii) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final. [para 29(v)] [771-D]

(iv) The court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the court would be duty bound to impose heavy costs. [para 29(vi)] [771-E]

(v) Wherever a public interest is invoked, the court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants. [para 29(vii)] [771-F]

(vi) The court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [para 29(viii)] [771-G-H; 772-A]

2.2. It is the bounden duty of the court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the court must ensure

that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the court. One way to curb this tendency is to impose realistic or punitive costs. The legal maxim *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem,* **means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands. [para 32 and 34] [773-F; 774-E-G]**

P.S.R. Sadhanantham v. Arunachalam & Anr. **(1980) 3 SCC 141;** *K.D. Sharma v. Steel Authority of India Ltd. & Ors.* **2008 (10) SCR 454 = (2008) 12 SCC 481; and** *Buddhi Kota Subbarao (Dr.) v. K. Parasaran,* **1996 (4) Suppl. SCR 574 = (1996) 5 SCC 530 - relied on**

Dalip Singh v. State of U.P. & Ors. **2009 (16) SCR 111 = (2010) 2 SCC 114;** *Amar Singh v. Union of India & Ors.* **2011 (6) SCR 403 = (2011) 7 SCC 69 and** *State of Uttaranchal v Balwant Singh Chaufal & Ors.* **2010 (1) SCR 678 = (2010) 3 SCC 402;** *Tilokchand H.B. Motichand & Ors. v. Munshi & Anr.* **1969 (1) SCC 110;** *A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr.* **(2012) 6 SCC 430;** *Chandra Shashi v. Anil Kumar Verma* **1994 (5) Suppl. SCR 465 = (1995) SCC 1 421;** *Abhyudya Sanstha v. Union of India & Ors.* **2011 (7) SCR 611 = (2011) 6 SCC 145;** *State of Madhya Pradesh v. Narmada Bachao Andolan & Anr.* **2011 (6) SCR 443 = (2011) 7 SCC 639; and** *Kalyaneshwari v. Union of India & Anr***. 2011 (1) SCR 894 = (2011) 3 SCC 287) - referred to.**

2.3. In the instant case, from the specific averments

made in both the writ petitions i.e. W.P. No. 111 of 2011 and W.P. 125 of 2011, it is clear that next friends in both the petitions are guilty of suppressing material facts, approaching the court with unclean hands, filing petitions with ulterior motive and finally for abusing the process of the court. They have misled the courts by showing urgency and exigencies in relation to an incident of 3.12.2006 which, in fact, according to the three petitioners and the police was false. They maliciously and with ulterior motives encroached upon the valuable time of the court and wasted public money. The privilege of easy access to justice has been abused by these persons by filing frivolous and misconceived petitions. On the basis of incorrect and incomplete allegations, they had created urgency for expeditious hearing of the petitions, which never existed. Even this Court had to spend days to reach at the truth. Prima facie it is clear that both these persons have mis-stated the facts, withheld true facts and even gave false and incorrect affidavits. They knew well that Courts are going to rely upon their pleadings and affidavits while passing appropriate orders. The Director General of Police, U.P., was required to file an affidavit and CBI was directed to conduct investigation. Truth being the basis of justice delivery system, it was important for this Court to reach at the truth, which it has been able to reach at with the able assistance of all the counsel. [para 37 and 45] [775-D; 779-G-H; 780-A-D]

2.4. The alleged incident which, according to the petitioners, police and the CBI, never happened and illegal detention of the petitioners has been falsified by the petitioners themselves in the writ petitions. It is a matter of regret that the process of the court has been abused by unscrupulous litigants just to attain publicity and adversely affect the reputation of another politician, respondent No.6. One of the obvious reasons which can reasonably be inferred from the peculiar facts and

circumstances of the case is the political rivalry. It is said to be a case of political mudslinging. It has been rightly pointed out that the websites information was nothing but secondary evidence, but not even an iota of evidence has been placed on record of the writ petitions before the High Court or even in the appeal before this Court, which could show even the remotest possibility of happening of the alleged rape incident on 3.12.2006. The methodology adopted by the next friends in the writ petitions before the High Court was opposed to political values and administration of justice. If such petitions are not properly regulated and abuse averted, it becomes a tool in unscrupulous hands to release vendetta and wreak vengeance as well. [para 51] [786-G-H; 787-A-G; 788-E-F]

Samant N. Balkrishna & Anr. v. V. George Fernandez and Ors. **1969 (3) SCR 603 = (1969) 3 SCC 238 - relied on**

Gosu Jayarami Reddy & Anr. v. State of Andhra Pradesh **2011 (9) SCR 503 = (2011) 11 SCC 766;** *Smt. Kiran Bedi v. The Committee of Inquiry & Anr.* **1989 (1) SCR 20 = (1989) 1 SCC 494;** *Nilgiris Bar Association v. T.K. Mahalingam & Anr.* **1997 (6) Suppl. SCR 246 = AIR 1998 SC 398;** *Kusum Lata v. Union of India* **2006 (3) Suppl. SCR 462 = (2006) 6 SCC 180 - referred to.**

2.5. This Court holds that the cases of both the petitioners suffered from falsehood, were misconceived and were patent misuse of judicial process. Abuse of the process of the court and not approaching the court with complete facts and clean hands, has compelled this Court to impose heavy and penal costs on the persons acting as next friends in the writ petitions before the High Court. This Court cannot permit the judicial process to become an instrument of oppression or abuse or to subvert justice by unscrupulous litigants like the appellant and

respondent no. 8 in the instant case. [para 45] [780-D-F]

3.1. The question of *locus standi* would normally be a question of fact and law both. Ordinarily, the party aggrieved by any order has the right to seek relief by questioning the legality, validity or correctness of that order. There could be cases where a person is not directly affected but has some personal stake in the outcome of a petition. In such cases, he may move the court as a guardian or next friend for and on behalf of the disabled aggrieved party. Normally, a total stranger would not act as next friend. There could be cases where a public spirited person bonafidely brings petition in relation to violation of fundamental rights, particularly in habeas corpus petitions, but even in such cases, the person should have some demonstrable interest or relationship to the involved persons, personally or for the benefit of the public at large, in a PIL. But in all such cases, it is essential that the petitioner must exhibit bonafides, by truthful and cautious exercise of such right. The courts would be expected to examine such requirement at the threshold of the litigation in order to prevent abuse of the process of court. [para 46, 47 and 49] [780-G; 781-D-E; 784-B-D]

Simranjit Singh Mann v. Union of India **(1992) 4 SCC 653;** *S.P. Gupta v. Union of India* **AIR 1982 SCR 365 = (1982) SC 149;** *Karamjeet Singh v. Union of India* **1992 (1) Suppl. SCR 898 = (1992) 4 SCC 666;** *Janata Dal v. H.S. Chowdhary,* **1992 (1) Suppl. SCR 226 = (1992) 4 SCC 305;** *R & M Trust v. Koramangala Residents Vigilance Group* **2005 (1) SCR 582 = (2005) 3 SCC 91 - referred to.**

3.2. In the instant case, both the appellant and respondent No.8 are total strangers to the three mentioned petitioners. The appellant, in fact, is a resident of Madhya Pradesh, belonging to a political party and was

elected an MLA in Madhya Pradesh. He has no roots in Amethi and, in fact, he was a stranger to that place. The appellant as well as respondent No.8 did not even know that the persons on whose behalf they have acted as next friend had shifted their residence in the year 2010 to another district. They have made false averments in the petition and have withheld true facts from the court. The issue could be decided with reference to the given facts and not in isolation. They filed their respective writ petitions before the High Court as next friends of the three petitioners whose names have not been stated with complete correctness in both the writ petitions. There has been complete contradiction in the allegations made in the two writ petitions by the respective petitioners. It may also be noticed that in both the writ petitions, baseless allegations in regard to the alleged incident of 3.12.2006, involving respondent no.6, had also been raised. [para 46 and 49] [780-H; 781-A-C; 784-D-F]

Charanjit Lal Chowdhury v. The Union of India & Ors. **1950 SCR 869 = AIR 1951 SC 41 - referred to**

3.3. It is not a case of a mere third person moving the court simpliciter on behalf of persons under alleged detention. It is a case of definite improprietory abuse of process of court, justice and is a motivated attempt based on falsehood to misguide the court and primarily for publicity or political vendetta. More so, the petitioners in the writ petitions have categorically stated that they made no complaint of the alleged incident of 3.12.2006 and never authorised, requested or approached either of the appellant or respondent no. 8 to move the court for redressal of any grievance. The question of filing habeas corpus petitions on their behalf would not arise because they were living at their own house and enjoying all freedoms. According to them, they were detained by none at any point of time either by respondent No.6 or the

Police authorities. In the face of this definite stand taken by these persons, the question of locus standi has to be answered against both the appellant and respondent no. 8. In fact, it is not only abuse of the process of the court but also is a case of access to justice unauthorisedly and illegally. Their whole modus operandi would be unacceptable in law. Thus, this Court holds on the facts of the instant case that both the appellant and respondent no. 8 had no locus standi to approach the High Court in the manner and method in which they did. [para 50] [785-B-G]

4. As regards the plea that a petition for habeas corpus is not struck by the rule of res judicata or constructive res judicata, suffice it to note that the judgment of the Allahabad High Court dated 17.4.2009 in Civil Writ Petition 3719 of 2009 had attained finality as the legality or correctness thereof was not challenged by any person. There can hardly be any doubt that upon pronouncement of this judgment this case squarely fell in the public domain and was obviously known to both the petitioners but they did not even consider it necessary to mention the same in their respective writ petitions. [para 50] [785-G; 786-B-D]

Ghulam Sarwar v. Union of India **1967 SCR 271 = AIR 1967 SC 1335 and** *Kirti Kumar Chaman Lal Kundaliya v. Union of India* **AIR 1981 SC 1621;** *Re: Shri Sham Lal* **1978 (2) SCR 581 = (1978) 2 SCC 479 cited**

5.1. 'Reputation' is an element of personal security and is protected by Constitution equally with the right to enjoyment of life, liberty and property. In light of the legal principles, the appellant and, in fact, to a great extent even respondent No.8 have made an attempt to hurt the reputation and image of respondent no.6 by stating incorrect facts, that too, by abusing the process of court.

[para 51-52] [788-B-C; G]

5.2. However, imposition of such heavy costs upon the petitioner in W.P. No. 111 of 2011 as was imposed by the High Court, was not called for in the facts and circumstances of the case as the Court was not dealing with a suit for damages but with a petition for habeas corpus, even if the petition was not bona fide. Furthermore, the manner in which the costs imposed were ordered to be disbursed to the different parties can also not be approved. Moreover, the question of paying rewards to the Director General of Police does not arise as the police and the Director General of Police were only performing their duties by producing the petitioners in the Court, who, in any case, were living in their own house without restriction or any kind of detention by anyone. In fact, the three petitioners have been compulsorily dragged to the court in Writ Petition No. 125/2011. They had made no complaint to any person and thus, the question of their illegal detention and consequential release would not arise. These three petitioners have been used by both the appellant and respondent no. 8 and it is, in fact, they are the ones whose reputation has suffered a serious setback and were exposed to inconvenience of being dragged to courts for no fault of their own. Certainly, the reputation of respondent no.6 has also been damaged, factually and in law. [para 53] [789-B-F]

5.3. Therefore, the order under appeal cannot be sustained in its entirety and is modified as follows:

(i) Writ petition No. 111/2011 was based upon falsehood, was abuse of the process of court and was driven by malice and political vendetta. The exemplary costs of Rs. 5 lacs is imposed upon the next friend, costs being payable to respondent no.6.

(ii) The next friend in Writ Petition No. 125/2011 had approached the court with unclean hands, without disclosing complete facts and misusing the judicial process. In fact, he filed the petition without any proper authority, in fact and in law. Costs of Rs. 5 lakhs is imposed upon next friend for abuse of the process of the court and/or for such other offences that they are found to have been committed, which shall be payable to the three petitioners produced before the High Court.

(iii) On the basis of the affidavit filed by the Director General of Police, U.P., statement of the three petitioners in the writ petition, CBI's stand before the Court, its report and the contradictory stand taken by the next friend in Writ Petition No.111/2011, this Court is, prima facie, of the view that the allegations against respondent no.6 in regard to the alleged incident of rape on 3.12.2006 and the alleged detention of the petitioners, are without substance and there is not even an iota of evidence before the Court to validly form an opinion to the contrary. In fact, as per the petitioners (allegedly detained persons), they were never detained by any person at any point of time.

(iv) The CBI shall continue the investigation in furtherance of the direction of the High Court against the petitioner in Writ Petition No. 111/ 2011 and all other persons responsible for the abuse of the process of court, making false statement in pleadings, filing false affidavits and committing such other offences as the investigating agency may find during

investigation. The CBI shall submit its report to the court of competent jurisdiction as expeditiously as possible. [para 54] [789-G-H; 790-A-H; 791-A-B]

Case Law Reference:

1997 (6) Suppl. SCR 1	relied on	para 24
2010 (11) SCR 542	relied on	para 26
2009 (16) SCR 111	relied on	para 29
2011 (6) SCR 403	relied on	para 29
2010 (1) SCR 678	relied on	para 29
(1980) 3 SCC 141	relied on	para 30
1969 (1) SCC 110	referred to	para 33
2012 (6) SCC 430	referred to	para 33
1994 (5) Suppl. SCR 465	referred to	para 33
2011 (7) SCR 611	referred to	para 33
2011 (6) SCR 443	referred to	para 33
2011 (1) SCR 894	referred to	para 33
2008 (10) SCR 454	relied on	para 35
1996 (4) Suppl. SCR 574	relied on	para 36
(1992) 4 SCC 653	referred to	para 47
1982 SCR 365	referred to	para 47
1992 (1) Suppl. SCR 898	referred to	para 47
1992 (1) Suppl. SCR 226	referred to	para 48
2005 (1) SCR 582	referred to	para 47
1950 SCR 869	referred to	para 50

1978 (2) SCR 581	**cited**	**para 50**
1967 SCR 271	**cited**	**para 50**
AIR 1981 SC 1621	**cited**	**para 50**
1969 (3) SCR 603	**relied on**	**para 51**
2011 (9) SCR 503	**referred to**	**para 51**
1989 (1) SCR 20	**referred to**	**para 51**
1997 (6) Suppl. SCR 246	**referred to**	**para 51**
2006 (3) Suppl. SCR 462	**referred to**	**para 51**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1406 of 2012.

From the Judgment & Order dated 07.03.2011 of the High Court of Allahabad at Lucknow in WP No. 111of 2011.

Harin P. Raval, ASG, P.P. Rao, Rakesh Diwedi, S.P. Singh, K.T.S. Tulsi, Gaurav Bhatia, AAG, Kamini Jaiswal, Asbhimanue Shrestha, S.M. Royekwar, R.K. Shukla, Ajay Singh, Kr. Prashant, Mahalakshmi Pavani, G. Balaji, Rajiv Nanda, P.K. Dey, B.V. Balram Das, Arvind Kumar, Sharma, Mohd. Fuzail Khan, Gaurav Dhingra, V.K. Biju, Sadhana Sandhu, Sunit Sharma, Anil Katiyar, Subramonium Prasad, Raj Kamal, Kuber Boddh for the Appearing Parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Challenge in the present appeal is to the order dated 7th March, 2011 passed by a Division Bench of the High Court of Judicature at Allahabad (Lucknow Bench). The operative part of the order reads as under :

> "In view of all the aforesaid and particularly for the reasons that the writ petition No.111 (H/C) of 2011 was filed on the instructions of Kishor Samrite (who has also sworn the affidavit in support of the writ petition) which contained wild allegations/insinuation against Shri Rahul Gandhi and questions the virtue and modesty of a young girl of 22 years Km. Kirti Singh, we dismiss this writ petition with a cost of Rs.50,00,000/- (Fifty lacs). Out of the cost amount, Rs.25,00,000/- (Twenty five lacs) shall be paid to Km. Kirti Singh and Rs.20,00,000/- (Twenty lacs) to Shri Rahul Gandhi, opposite part no.6. The cost amount shall bedeposited within a period of one month with the Registrar of this Court, failing which the Registrar shall take necessary action for recovery of the amount as land revenue.
>
> We also record our special note of appreciation for Shri Karamveer Singh,Director General of police, U.P. (a highly decorated police officer), for producing the alleged detenues within the time frame as directed in the order. Thus, for all thepromptness and sincerity shown, in themidst of serious law and order problems all over the State on account of some agitation in obeying and complying with the directions, we direct payment of Rs.5,00,000/- (five lacs) towards a reward to the DGP. We also record our appreciation for Shri Jyotindra Misra, learned Advocate General and the State Government for showing concern in this matter.
>
> We also direct the Director, Central Bureau of Investigation, to register case against Kishor Samrite, the websites referred to in Writ Petition No.111 (H/C) of 2011 and all other persons who are found involved in the plot, if any, hatched in order to frame up Shri Rahul Gandhi, Member of Parliament from Amethi. We also appreciate Shri Gajendra Pal singh, author of Writ Petition No.125(H/C) of 2011 for approaching this Court in order to save the reputation of Shri Rahul Gandhi and the family of alleged detenues at the hands of vested interests responsible for filing Writ Petition No.111 (H/C) of 2011.

Till the investigation continues and the websites in question are not cleared by the CBI, their display in India shall remain banned. The Director, CBI, shall ensure compliance of this order forthwith. He shall also prepare a list of such other websites which are involved in display of scandalous informations about the functionaries holding high public offices and submit a report in respect thereof on the next date of hearing.

Thus, writ petition No.125 (H/C) of 2011 is partly disposed of to the extent insofar as it relates to production of the alleged detenues. However, it shall remain pending in respect of notice issued to the Registrar General Allahabad High Court and for the submission of report by the CBI as directed hereinabove. The matter shall remain part heard.

List the matter on 11.04.2011 for further hearing.

The Registrar of this Court shall issue copy of this order to all the concerned parties including the Director, Central Bureau of Investigation, for immediate compliance."

2. Challenge to the above impugned order, inter alia, but primarily is on the following grounds :

(i) The Court could not have called for the records of Writ Petition No.111 of 2011. Consequently it lacked inherent jurisdiction to deal with and decide the said writ petition. Furthermore, no order was passed by the competent authority, i.e., the Chief Justice of the High Court transferring that writ petition to the Bench dealing with Writ Petition No.125 of 2011.

(ii) The Bench showed undue haste and has not dealt with Writ Petition No.125 of 2011 in accordance

with the prescribed procedure.

(iii) The order was passed without notice and grant of appropriate hearing to the present appellant.

(iv) The orders for imposition of cost and registration of a case against the appellant by the CBI are uncalled for and in any case are unjust and disproportionate as per the known canons of law.

3. Stands on merits is that Writ Petition No.125 of 2011 was, in fact and in law, not a petition for habeas corpus and, thus, could not have been entertained and dealt with by a Division Bench of that Court. The said petition primarily related to transfer of a petition though in the garb of a prayer for production of the corpus. It did not satisfy the pre-requisites of a petition of habeas corpus.

4. Writ Petition No.111 of 2011, even if not complete in its form, was maintainable and the same could not have been dismissed by the Court as the prayer by the appellant in that writ petition for habeas corpus was maintainable in view of the right to life and liberty of the petitioners stated therein, as enshrined in Article 21 of the Constitution of India, was violated. The petition had been filed by the appellant as next friend and had not seen the alleged detenues since 4 th January, 2007 when they were last seen in Amethi. According to the appellant the representations made to various authorities had failed to yield any results. Thus, that petition was not liable to be dismissed.

5. To the contra, it is contended on behalf of the State of Uttar Pradesh that :

(i) The Writ Petition No.111 of 2011 was an abuse of the process of Court. The appellant had not approached the Court with clean hands as the facts as were pleaded by him were not correct to the

knowledge of the appellant.

(ii) The petition was mala fide and even the affidavit of the appellant was not in conformity with the prescribed procedure.

(iii) The averments made in the affidavit and in the other documents were contradictory in terms.

(iv) The appellant was neither the next friend of the stated petitioners (in Writ Petition No.111 of 2011) nor was he competent to institute such a petition. Moreover, the petition itself did not satisfy the basic ingredients of a petition for habeas corpus.

(v) In view of the dismissal of the Writ Petition No.3719 of 2009 by the same High Court and its non-mentioning by the petitioner in Writ Petition No.111 of 2011, besides being suppression of material facts was hit by the principles of res judicata.

(vi) Writ Petition No.111 of 2011 had been rightly transferred by the Division Bench and its dismissal and imposition of costs was in proper exercise of jurisdiction.

(vii) Lastly, it is contended that the next friend had given fictitious addresses of the petitioners which are different than the ones given in the present appeal.

6. On behalf of Respondent No.6, Shri Rahul Gandhi, it was contended that Writ Petition No.111 of 2011 is an abuse of the process of Court and, in fact, is a motivated petition primarily based on 'political mudslinging'. While supporting the stand of Respondent No. 1, the State of Uttar Pradesh, it is also contended that the appellant, Shri Kishore Samrite, was a total stranger, had no knowledge of the facts and, therefore, had no right to file the petition as next friend. It was not a case of private detention and the petition filed by the appellant was not in

conformity with the rules. The petition was primarily aimed at hurting the reputation and image of respondent No.6 out of ulterior motives and political vendetta.

7. According to Respondent No. 7, the Central Bureau of Investigation (for short "CBI"), it had investigated the matter and found that it was not a case of detention and, therefore, petition for habeas corpus was not maintainable. It had, in furtherance to the order of the Court, registered a case on 11th March, 2011 being RC No.219-2011-(E)2002 under Sections 120B, 181, 191, 211, 469, 499 and 500 of the Indian Penal Code, 1860 (IPC). The CBI could not complete the investigation because of the order of stay passed by this Court on 6 th April, 2011. From the limited investigation which was conducted during that period and from the statement of Shri Balram Singh and other witnesses, it came to light that nothing had happened on 3 rd December, 2006 as alleged by the appellant. In fact, the persons and the addresses given in the petition were found to be fictitious and non-existent. Shri Balram Singh had not supported the version advanced by the appellant. On the contrary, he had belied the entire version and categorically denied the allegations and informed that the name of his wife and daughter were incorrectly mentioned as Smt. Sushila and Sukanya Devi. In regard to the website, CBI stated that the three suspected websites were posted outside the geographical limits of our country and the originating IP address could not be traced and further investigation had to be stopped.

It was specifically contended on behalf of the CBI that the appellant had made no enquiry, had no personal knowledge and that the litigation had been funded from sources other than appellant's own sources.

8. Lastly, Respondent No.8 in this appeal, Shri Gajendra Pal Singh, who was the petitioner in Writ Petition No.125 of 2011, has stated that he had filed that petition bona fidely while Writ Petition No.111 of 2011 was based upon a false affidavit,

public justice system has been abused by the petitioner in that case and he has committed perjury. According to Respondent No.8, Writ Petition No.125 of 2011 was necessitated and he had the right to file the habeas corpus petition as next friend of the petitioners stated therein.

9. As is evident from the varied stand taken by the respective parties, they are not ad idem in regard to the factual matrix of the case. The facts as they emerge from the record before this Court can usefully be noticed as follows: -

10. The appellant, Shri Kishore Samrite, an ex-member of legislative assembly of Madhya Pradesh, elected on the ticket of Samajwadi Party from the legislative constituency of Tehsil Langi in District Balaghat, Madhya Pradesh, instituted a Writ Petition in the High Court of Judicature at Allahabad being Writ Petition No. 111/2011 acting as next friend of one Sukanya Devi, Balram Singh and Sumrita Devi. Address of all these three persons was given as 23-12, Medical Chowk, Sanjay Gandhi Marg, Chhatrapati Shahu Ji Mahraj Nagar, Uttar Pradesh. According to the appellant, these three persons were kept in illegal detention by the respondent no.6 and were incapacitated to file the writ petition. It was averred in the petition filed by him before the High Court that he came to know from certain websites viz., www.indybay.org, www.arizona.indymedia.org and www.intellibriefs.blogspot.com, which contained news items stating that on the night of 3 rd December, 2006, while on a tour of his parliamentary constituency in Amethi, respondent no.6, along with six of his friends (two from Italy and four from Britain) committed rape on Sukanya Devi, daughter of Balram Singh. The appellant placed the said news reports on record along with the writ petition.

11. The writ petition also contained the averment that Balram Singh is a congress worker in Amethi constituency and Sukanya Devi along with Sumitra Devi wanted to report the said incident but the concerned authorities did not lodge the

complaint. They approached various other authorities but to no avail. The appellant specifically averred that he had not seen all the three persons in public for a long time, particularly since 4 th January, 2007, when they were last seen in Amethi. He claims to have visited Amethi to verify these facts and also a couple of times thereafter. Lastly, on 12th December, 2010, he visited the place where all the three persons lived, but found the same locked. The incident was reported to various authorities, including the Chief Minister, the Home Minister, Chief Secretary of the State, Governor and the other authorities of the State. The only communication he received was from the office of the Governor wherein it was said that his application had been sent to the State Government for proper action. Invoking the right to life and liberty as enshrined under Article 21 of the Constitution of India on behalf of the three named petitioners in the writ petition and alleging that respondent No.6 would influence any fruitful investigation, the appellant prayed for issuance of a writ of habeas corpus commanding the opposite party particularly respondent No.6 to produce the petitioners before the Court and for passing any other appropriate order or direction.

12. Before we refer to the events subsequent to the filing of the Writ Petition no.111/2011, it must be noticed that a person named Ram Prakash Shukla, a practising advocate at Lucknow, who claimed himself to be a human rights activist and a public spirited person had earlier instituted a writ petition on the same facts being Writ Petition No. 3719/2009 tilted as *Ram Prakash Shukla v. Union of India and Ors.* He also stated that he had got information from the internet website about the rape of Ms. Sukanya Devi in the evening of 3rd December, 2006 and no action was being taken on the basis of the said report. He further stated that congress men had threatened to kill both, Smt. Sumitra Devi and Sukanya Devi, if they raised the issue. According to him they had stayed at Delhi for over a fortnight to meet the authorities which they ultimately could not. It was stated that they are missing since then and were not traceable.

On the basis of the news report, though an offence under Section 376 of the IPC was made out, yet no FIR was being registered by the authorities. In that writ petition, Ram Prakash Shukla had made the following prayers: -

"(i) Issue a writ, order or direction in the nature of Mandamus commanding the opposite parties nos. 1 to 4 to ensure the lodging of the F.I.R. and to refer it for investigation to independent agency like S.I.T or C.B.I.

(ii) Issue a writ, order or direction in the nature of Habeas Corpus commanding the respondents nos. 1 to 4 to search and produce the Ms. Sukanya Devi, her mother Smt. Sumitra Devi, her father Balram Singh as well as Videographer Mr. Drupadh and the CNN-IBN Cameramen before this Hon'ble Court.

(iii) Issue a writ, order or direction in the nature of Mandamus directing the respondents nos. 5 & 6 (the Human Right Commission) and the National Commission for Women) to submit the report of the investigation if any, done by them on the complaint lodged by Ms. Sukanya Devi.

(iv) Issue any other order or directions which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case in favour of the petitioner in the interest of justice.

(v) Allow the cost of the writ petition in favour of the petitioner."

13. This writ petition was heard by a Division Bench of the Allahabad High Court at Lucknow and was dismissed by a detailed judgement dated April 17th, 2009. The Court specifically noticed that before passing a direction for lodging of an FIR, the Court is required to see that the pleadings are absolutely clear, specific and precise and that they make out a charge or criminal offence,, which prima facie is supported by

cogent and reliable evidence and that the State machinery has failed to take appropriate action in accordance with law for no valid reason. In absence thereof, the Court cannot issue such a direction. The Court recorded its complete dissatisfaction about the correctness of the allegations made in the writ petition as they were not supported by any reliable or cogent evidence. The Court, while declining to grant the reliefs prayed for, dismissed the writ petition. The operative part of the judgment reads as under :

"So far the petitioner's plea that the respondents may be required to inform the court, whether any such incident had taken place or not, suffice would be to mention that in the absence of clear and precise pleadings with no supporting evidence, the Court will not make any roving and fishing enquiry.

The writ petition does not make any case for grant of the reliefs claimed.

The writ Petition has not force, which is being dismissed."

14. It may be noticed that Writ Petition No. 3719 of 2009 itself was instituted in the year 2009 nearly three years after the alleged news and was dismissed vide order dated 17th April, 2009. It was in the beginning of the year 2011 that the present appellant instituted Writ Petition No.111 of 2011 in the Allahabad High Court. The latter writ petition was filed by the appellant herein as next friend of the three petitioners, namely, Sukanya Devi, Balram Singh and Sumitra Devi, all residents of 23/12, Medical Chowk, Sanjay Gandhi Marg, Chhatrapati Shahu Ji Maharaj Nagar, Uttar Pradesh relying upon the website news relating to the alleged occurrence of 2006 and making the same allegations, including illegal detention of the petitioners by respondent No.6, and praying as follows :

"WHEREFOR, it is most humbly prayed that this Hon'ble

Court may be pleased to

1. Issue a writ of or writ, order or direction in the nature of habeas corpus commanding the opposite parties, particularly opposite party No.6, to produce the petitioners before this Hon'ble Court and set them at liberty.

2. Issue any other order or direction which it deems fit and proper in the present circumstances, in favour of the petitioners, in the interest of justice.

3. Award the cost of Petition to the petitioners."

15. This Writ petition was listed before a Single Judge of the Allahabad High Court who, vide order dated 1 st March, 2011 directed issuance of notice to respondent No.6 to submit his reply. The matter was to be listed before the Court after service of notice. During the pendency of this writ petition, respondent No. 8, Shri Gajendra Pal Singh, again acting as next friend of Sukanya Devi, Shri Balram Singh and Smt. Sumitra Devi @ Mohini Devi, all residents of Ward No.5, near Gurudwara, Town Area Amethi District, Chhatrapati Shahu Ji Maharaj Nagar, Uttar Pradesh filed Writ Petition No.125 of 2011 on 4 th March, 2011 stating that a false writ petition No.111 of 2011 was filed by Shri Kishore Samrite as next friend and that it was politically motivated to harm the reputation of the opposite party. Further that Shri Kishore Samrite was neither the next friend of the petitioners in that petition nor had any interest in the liberty of those petitioners. Respondent No. 8, Shri Gajendra Pal Singh claimed to be a neighbour of Shri Balram Singh, father of Sukanya and husband of Smt. Sumitra @ Mohini Devi. According to him, when the three petitioners in Writ Petition No.125 of 2011 were not seen in their house for some time, he approached the Police Station, Amethi, to lodge a complaint but the police authorities refused to file/register the complaint on the ground that the petitioners were in custody of police as they had committed some wrong. Seeing that right to life and

liberty of the petitioners was involved, he prayed for the following refliefs :

"Wherefor it is most respectfully prayed that this Hon'ble Court may kindly be pleased to :

a. Issue a writ or writ order or direction in the nature of habeas corpus commanding the opposite parties to produce the petitioner before this Hon'ble Court and set them at Liberty.

b. To call the record of Writ Petition No.111 H.C. of 2011 and connect with this present Writ Petition. The order passed in Writ Petition. The order passed in Writ Petition No.111 H.C. of 2011 be reviewed and recalled.

c. To order the investigation by the appropriate agency.

d. Issue any other order or direction which is deemed fit and proper in the present circumstances in favour of the petitioners, in the interest of justice.

e. Award the cost of the petition to the petitioner.

16. This petition was taken up by a Division Bench of the Allahabad High Court and the Court passed the following order on 4th March, 2011 :

"In view of all the aforesaid, we direct that the records of Writ Petition No.111 (H/C) of 2011, said to be pending before a learned Single Judge, shall be connected with this writ petition. Besides, we also direct that the Director General of Police, U.P., shall produce the petitioners, in particular, Sukanya Devi, on the next date of hearing i.e. 7.3.2011. However, we make it clear that this direction to the Director General of Police, U.P., shall not be construed to mean that the detenu is in illegal custody of State

authorities and the Director General of Police, U.P., in this case shall function only as an officer of the Court for the purpose of production of detenu."

17. The Court directed transfer of Writ Petition No.111 of 2011 and directed tagging of the same with Writ Petition No.125 of 2011, besides issuing notice to the Director General of Police, U.P. to produce the petitioners on 7 th March, 2011. In Writ Petition No.125 of 2011, the Director General of Police filed a personal affidavit. According to him, the Superintendent of Police, Chhatrapati Shahu Ji Maharaj Nagar, while noticing the allegations made in both the writ petitions reported that the address mentioned in Writ Petition No.111 of 2011 was wrong and there was no such place in the town of Amethi with the name of Medical Chowk, Sanjay Gandhi Marg and the address mentioned in Writ Petition no.125 of 2011 was the correct address of Shri Balram Singh who lived there in the past. On 3rd December, 2007, Balram Singh had sold the plot, which was in the name of his wife, Smt. Sushila Singh, to one Smt. Rekha and, thereafter he himself shifted to village Hardoia, Police Station Kumar Ganj, District Faizabad. Even the house adjacent to the plot was sold off by Balram Singh to Dr. Vikas Shukla who was residing at the said village with his entire family. It was stated that Balram Singh was living in Village Hardoia with his wife and four children, three daughters and one son. Name of their eldest daughter is Kumari Kirti Singh, aged about 21 years. She had passed her B.Sc. examination in the year 2009-2010. Balram Singh had stated to the police that he knew Gajendra Pal Singh but did not know Kishore Samrite. According to this affidavit, Balram Singh also informed the police that in the year 2006 some men claiming to be media persons had come to his house in Amethi and asked his wife after showing photograph of Sukanya Devi, if she was her daughter. Upon this, his wife produced their daughter before them and told them that the girl in the photograph was different than their daughter. Further, Balram Singh also stated to the police that they had never authorised any advocate or anybody

else to institute any writ petition in the court. In this very affidavit, in regard to the incident of 3rd December, 2006, the DGP has referred to the following statement of Balram Singh :

> "It has also been stated by Sri Balram Singh that neither he nor his wife Sushila Singh nor daughter Kirti Singh has ever made any allegation either on 03.12.2006 or before or after that against Shri Rahul Gandhi or anybody else; nor any writ petition has been preferred in the Hon'ble High Court making any kind of allegations. He has never authorised any Advocate or anybody else to institute any writ petition."

18. The Ration Card and Pan Card of Balram Singh was produced during investigation. It is also noticed that Sukanya and Kirti, the name mentioned in Writ Petition No.125 of 2011 partially matches the particulars of daughter of Balram Singh and they have no relation whatsoever to any of the next friend in either of the writ petition. Shri Balram Singh, Kumari Kirti Singh and Smt. Sushila Singh, all three were produced by the Director General of Police in Court.

19. When the Writ Petition No.125 of 2011 came up for hearing before the Court on 7 th March, 2011, the Division Bench passed the detailed order impugned in the present appeal. Vide this order, Writ Petition No.111 of 2011 was disposed of while Writ Petition No.125 of 2011 was partly disposed of and, as aforenoticed, Director of CBI was directed to register a case against Shri Kishore Samrite and all other persons involved in the plot. The Court also imposed cost of Rs.50,00,000/- which was to be distributed as per the order. The contention raised was that the counsel appearing for the petitioner in Writ Petition No.111 of 2011 was not given the opportunity of hearing by the Bench before passing the impugned order and, in fact, the counsel was standing in the Court when the order was being dictated.

20. At this stage, we may also notice that according to the

appellant, he was not aware of Writ Petition No.3719 of 2009 having been filed or the orders passed by the Bench thereupon. The appellant has also stated that there was no urgency for taking up the matter on that very day and, in any case, Writ Petition No.111/11 could not have been transferred by that Bench. The appellant in the present appeal has even gone to the extent of saying that the girl Kumari Kirti Singh has been implanted in place of Sukanya Devi and even the name of the mother has been wrongly described. No notice is stated to have been given to the petitioner in Writ Petition No.111 of 2011. It is contended that the Writ Petition No.111 of 11 had been filed in consonance with the proviso to Rule 1(2) of Chapter XXI of the Allahabad High Court Rules, 1952 under which habeas corpus against a private person was maintainable and could be listed before a Single Judge. Allegations have been made in Writ Petition No.125 of 11 calling the present appellant, petitioner in Writ Petition No.111 of 2011, as mentally challenged. The Division Bench dealing with Writ Petition No. 125 of 2011 could not have dealt with Writ Petition No.111 of 2011 and could not have exercised its appellate jurisdiction. The cost imposed upon the appellant is exorbitant and without any basis.

21. In the background of the above factual matrix and the stand taken by the respective parties, we shall now proceed to examine the contentions raised before the Court by the learned counsel appearing for the parties. For this purpose, we would deal with various aspects of the case under different heads.

(1) **Whether there was violation of Principles of Natural Justice and whether transfer of Writ Petition No. 111/2011 was in accordance with law ?**

22. It is contended that the impugned order dated 7th March, 2011 has been passed in violation of the principles of natural justice. No adequate opportunity was granted to the

present appellant to put forward his case. The Writ Petition No. 111/2011 had been transferred to the Division Bench without even issuing notice to the appellant. The order dated 4 th March, 2011 had not directed issuance of notice. It is only vide order dated 7th March, 2011 that the Registrar of the High Court was directed to issue copy of the order to all the concerned parties for immediate compliance. Absence of notice and non-grant of adequate hearing has caused serious prejudice to the appellant and the order is liable to be set aside on this sole ground. It is also contended that the appellant's counsel was present only when the order was being dictated and had no notice of the hearing. On the contrary, the contention on behalf of Respondent No. 1, State of Uttar Pradesh, and other parties is that the counsel for the appellant was present and had due notice of hearing of the Writ Petitions No. 125/2011 and 111/2011 and as such there was neither any violation of the principles of natural justice nor has any prejudice been caused to the appellant.

23. Compliance with the principle of audi alteram partem and other allied principles of natural justice is the basic requirement of rule of law. In fact, it is the essence of judicial and quasijudicial functioning, and particularly the Courts would not finally dispose of a matter without granting notice and adequate hearing to the parties to the lis. From the record, i.e. in the orders dated 4th March, 2011 as well as 7th March, 2011 it has not been specifically recorded nor is it implicitly clear that a notice was directed to the petitioners in Writ Petition No.111/2011 and they were given opportunity to address the Court. Lack of clarity in this behalf does raise a doubt in the mind of the Court that the appellant did not get a fair opportunity to put forward his case before the Division Bench. The fact that we have issued notice to all the concerned parties in both the Writ Petitions bearing nos.125/2011 and 111/2011, have heard them at great length and propose to deal with and dispose of both these writ petitions in accordance with law, renders it unnecessary for this Court to examine this aspect of the matter

in any further detail. Suffice it to note that we have heard the counsel appearing for the parties on all aspects including maintainability, jurisdiction as well as merits of both the petitions, which issues we shall shortly proceed to deal with hereinafter. Thus, this submission of the appellant need not detain us any further.

24. From the above narrated facts it is clear that a petition for habeas corpus (Writ Petition No. 111/2011) had been filed by the present appellant while referring to the news on the website in relation to the incident dated 3rd December, 2006 (in paragraphs 3 and 4) to the effect that since the petitioners, because of their illegal detention by private opposite party no.6 are incapacitated to file the instant writ petition and also that those petitioners were in illegal detention of the private opposite party no.6 and they have not been seen since 4th January, 2007. This writ petitionwas treated as private habeas corpus and was listed before a Single Judge of the Allahabad High Court. Rule 1 of Chapter XXI of the Allahabad High Court Rules provided that an application under Article 226 of the Constitution for a writ in the nature of habeas corpus, except against private custody, if not sent by post or telegram, shall be made to the Division Bench appointed to receive applications or on any day on which no such Bench is sitting, to the Judge appointed to receive applications in civil matters. In the latter case, the Judge shall direct that the application be laid before a Division Bench for orders. In terms of proviso to this Rule, it is provided that an application under Article 226 of the Constitution in the nature of habeas corpus directed against private custody shall be made to the Single Judge appointed by the Chief Justice to receive such an application. The clear analysis of the above Rule shows that habeas corpus against a private custody has to be placed before a Single Judge while in the case of custody other than private custody, the matter has to be placed before a Division Bench. It appears that on the strength of this Rule, Writ Petition No. 111/2011 was listed before the Single Judge of Allahabad High Court. The roster and placing of cases

before different Benches of the High Court is unquestionably the prerogative of the Chief Justice of that Court. In the High Courts, which have Principal and other Benches, there is a practice and as per rules, if framed, that the seniormost Judge at the Benches, other than the Principal Bench, is normally permitted to exercise powers of the Chief Justice, as may be delegated to the senior most Judge. In absence of the Chief Justice, the senior most Judge would pass directions in regard to the roster of Judges and listing of cases. Primarily, it is the exclusive prerogative of the Chief Justice and does not admit any ambiguity or doubt in this regard. Usefully we can refer to some judgments of this Court where such position has been clearly stated by this Court. In the case of *State of Rajasthan v.Prakash Chand & Ors.,* (1998) 1 SCC 1, a three-Judge Bench of this Court was dealing with the requirement of constitution of Benches, issuance of daily cause list and the powers of the Chief Justice in terms of the Rajasthan High Court Ordinance, 1949 read with Article 225 of the Constitution of India. The Court held as under: -

> "10. A careful reading of the aforesaid provisions of the Ordinance and Rule 54 (supra) shows that the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial andadministrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted: which Judge is to sitalone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice. That necessarily means that it is not within the competence or domain of any Single or Division Bench of the Court to give any direction to the Registry in that behalf which will run

contrary to the directions of the Chief Justice. Therefore in the scheme of things judicial discipline demands that in the event a Single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice.The puisne Judges are not expected to entertain any request from the advocates of the parties forlisting of case which does not strictly fall within the determined roster. In such cases, it is appropriate to direct the counsel to make a mention before the Chief Justice and obtain appropriate orders. This is essential for smooth functioning of the Court. Though, on the judicial side the Chief Justice is only the "first amongst the equals", on the administrative side in the matter of constitution of Benches and making of roster, he alone is vested with the necessary powers. That the power to make roster exclusively vests in the Chief Justice and that a daily cause list is to be prepared under the directions of the Chief Justice as is borne out from Rule 73, which reads thus:

> "73. *Daily Cause List.*—The Registrar shall subject to such directions as the Chief Justice may give from time to time cause to be prepared for each day on which the Court sits, a list of cases which may be heard by the different Benches of the Court. The list shall also state the hour at which and the room in which each Bench shall sit. Such list shall be known as the Day's List."
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> XXXX XXXX XXXX XXXX
>
> 24.....The correctness of the order of the Chief Justice could only be tested in judicial proceedings in a manner known to law. No Single Judge was competent to find fault with it."

25. In view of the above discussion, the Court amongst

others, stated the following conclusions: -

> "59. .....(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.
>
> (2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted.
>
> (3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.
>
> (4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice."

26. Similarly, in the case of *State of Uttar Pradesh & Ors. v. Neeraj Choubey and Ors.* (2010) 10 SCC 320, the Court had directed appearance of certain persons in the matter of selection to the post of Assistant Professor and treated the matter as a writ petition in the nature of Public Interest Litigation. The Court, while passing widespread orders, in paragraph 10 of the judgment held as under: -

> "10. In case an application is filed and the Bench comes to the conclusion that it involves some issues relating to public interest, the Bench may not entertain it as a public interest litigation but the court has its option to convert it into a public interest litigation and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per the Rules, guidelines or by the roster fixed by the Chief Justice but the Bench cannot convert itself into a PIL and proceed with the matter itself."

27. Judicial discipline and propriety are the two significant facets of administration of justice. Every court is obliged to adhere to these principles to ensure hierarchical discipline on the one hand and proper dispensation of justice on the other. Settled canons of law prescribe adherence to the rule of law with due regard to the prescribed procedures. Violation thereof may not always result in invalidation of the judicial action but normally it may cast a shadow of improper exercise of judicial discretion. Where extraordinary jurisdiction, like the writ jurisdiction, is very vast in its scope and magnitude, there it imposes a greater obligation upon the courts to observe due caution while exercising such powers. This is to ensure that the principles of natural justice are not violated and there is no occasion of impertinent exercise of judicial discretion.

28. In the present case there is no dispute to the fact that no order was passed by the Chief Justice of Allahabad High Court or even the senior-most Judge, administratively Incharge of the Lucknow Bench, transferring Writ Petition No. 111/2011 for hearing from a Single Judge before which it was pending, to the Division Bench of that Court. On basis of the allegations made in the Writ Petition No. 111/2011, that matter had been listed before the Single Judge. If this writ petition was improperly instituted before the Single Judge of the High Court then it was for the Registry of that Court or any of the contesting parties to that petition, to raise an objection in that behalf. The objection could relate to the maintainability and/or jurisdiction on the facts pleaded. If the Writ Petition No. 125 of 2011 was filed with a prayer for transfer of Writ Petition No. 111/2011 on the ground stated in the petition, this power fell within the exclusive domain of the Chief Justice or the Senior Judge Incharge for that purpose. It does not appear to be apt exercise of jurisdiction by the Division Bench to suo moto direct transfer of Writ Petition No. 111/2011 without leave of the Chief Justice of that Court as such action would ex facie amount to dealing with matters relating to constitution and roster of Benches. We have already cited various judgments of this Court where

matters relating to the roster and constitution of the Benches fall within the exclusive domain of the Chief Justice of the concerned High Courts. Transfer of a petition may not necessarily result in lack of inherent jurisdiction. It may be an administrative lapse but normally would not render the Division Bench or Court of competent jurisdiction as lacking inherent jurisdiction and its orders being invalid ab initio. Such an order may necessarily not be vitiated in law, particularly when the parties participate in the proceedings without any objection and protest. This, however,always will depend on the facts and circumstances of a given case. In the present case, suffices it to note that transfer of Writ Petition No. 111/2011 by the Division Bench to its own Board was an order lacking administrative judicial propriety and from the record it also appears that adequate hearing had not been provided to the writ petitioners before dismissal of the Writ Petition No. 111 of 2011 by the Division Bench.

Abuse of the process of Court :

29. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

(ii) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(iv) Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

(v) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

(vi) The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

(vii) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

(vii) The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it.

[Refer : *Dalip Singh v. State of U.P. & Ors.* (2010) 2 SCC 114; *Amar Singh v. Union of India & Ors.* (2011) 7 SCC 69 and *State of Uttaranchal v Balwant Singh Chaufal & Ors.* (2010) 3 SCC 402].

30. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In *P.S.R. Sadhanantham v. Arunachalam & Anr.* (1980) 3 SCC 141, the Court held:

"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:

> "The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic

requirement the most basic 'human-right' of a system which purports to guarantee legal rights."

16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."

31. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

32. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood, must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass

the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

33. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : *Tilokchand H.B. Motichand & Ors. v. Munshi & Anr.* [1969 (1) SCC 110]; *A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr.* [(2012) 6 SCC 430]; *Chandra Shashi v. Anil Kumar Verma* [(1995) SCC 1 421]; *Abhyudya Sanstha v. Union of India & Ors.* [(2011) 6 SCC 145]; *State of Madhya Pradesh v. Narmada Bachao Andolan & Anr.* [(2011) 7 SCC 639]; *Kalyaneshwari v. Union of India & Anr.* [(2011) 3 SCC 287)].

34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated

by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

35. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. {*K.D. Sharma v. Steel Authority of India Ltd. & Ors.* [(2008) 12 SCC 481].

36. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (*Buddhi Kota Subbarao (Dr.) v. K. Parasaran,* (1996) 5 SCC 530).

37. In light of these settled principles, if we examine the facts of the present case, next friends in both the petitions are guilty of suppressing material facts, approaching the court with unclean hands, filing petitions with ulterior motive and finally for abusing the process of the court.

38. In this regard, first of all we may deal with the case of the appellant, Kishore Samrite:

39. Firstly, he filed Writ Petition No. 111/2011 on vague, uncertain and incomplete averments. In fact, he withheld the fact that the earlier Writ Petition No. 3719/2009 had been dismissed by a Division Bench of the Allahabad High Court as back as

on 17th April, 2009, while he instituted Writ Petition No. 111/2011 in the year 2011. The excuse put forward by the appellant was that he did not know about the dismissal of that case. This flimsy excuse is hardly available to the appellant as he claims to be a public person (ex-MLA), had allegedly verified the facts and incidents before instituting the petition and made the desired prayers therein. It is obvious that subject matter of Writ Petition No. 3719/2009 must have received great publicity before and at the time of the dismissal of the writ petition.

40. Secondly, without verification of any facts, the appellant made an irresponsible statement that the petitioners Sukanya Devi, Sh. Balram Singh and Smt. Sumitra Devi were in the illegal detention of Respondent no.6. The averments made in the writ petition were supported by an affidavit filed in the High Court stating that contents of paragraphs 1 and 3 to 15 were true, partly true to knowledge and partly based on record while paragraphs 2 and 16 were believed to be correct as per legal advice received. This stood falsified from the fact that the appellant did not even know the three petitioners, their correct addresses and identity.

41. Thirdly, in the Writ Petition in paragraph 10, it is stated that the petitioners were last seen on 4 th January, 2007 in Amethi and the appellant had not seen them thereafter. The appellant also claims in the same paragraph that the facts came to his knowledge when he, in order to personally verify the facts, visited Amethi a couple of times and also as late as in December, 2010. From this, the inference is that the petition was based upon the facts which the petitioner learnt and believed during these visits. On the contrary, when he filed an affidavit in this Court on 25th July, 2012, in paragraph 6 of the affidavit, he stated as under:

> "....The Petitioner has been the Member of Ruling Party in the State of M.P. and because of his standing in the Society, in 2007 he was called for by the Samajwadi Party Leadership, to contest Legislative Assembly Election from

Constituency Lanji, Dist. Balaghat, Madhya Pradesh, he won the Bye-election and remained MLA, during 03.11.2007 to 08.12.2008. True Copy of the Identity Card is annexed herewith and marked as *ANNEXURE P-8*.

That the Petitioner, from a young age since 1986 he has been involved in Social Activities, in State of Madhya Pradesh being a Social Activist, he has filed several Writ Petitions before Various High Courts, raising serious public and Social issues, and the issues concerning Corruption and Crime in Politics, and the courts have been pleased to entertain his writ petitions and grant reliefs in the several such writ Petitions filed by him. This List of Writ Petitions filed by the Petitioner is annexed herewith and marked as *ANNEXURE P-9*.

That taking into account his standing and antecedent at behest of the leader of his political party the Petitioner was called to C-1/135, Pandara Park, New Delhi in 2010 to meet the other Senior Leaders, who were in Delhi as the Parliament was in Session, where he was appraised about the facts of the serious incident that had been reported from a village in U.P. and in view of the fact that he had taken up several public causes in the past he was requested to file a Writ Petition in the nature of a public interest litigation in the High Court of Judicature at Allahabad Lucknow Bench at Lucknow and thus the Writ Petition came to be filed. Notice was issued in the said Writ Petition."

42. Thus, there is definite contradiction and falsehood in the stand taken by the petitioner in the writ petition and in the affidavit filed before this court, as afore-noticed. This clearly indicates the falsehood in the averments made and the intention of the appellant to misguide the courts by filing such frivolous petitions. No details, whatsoever, have been furnished to state as to how he verified the alleged website news of the incident

of 3rd December, 2006 and from whom. Strangely, he did not even know the petitioners and could not even identify them. The prayer in the writ petition was for issuance of a direction in the nature of habeas corpus to respondent no.6 to produce the petitioners. And lastly, the writ petition is full of irresponsible allegations which, as now appears, were not true to the knowledge of the petitioner, as he claimed to have acted as next friend of the petitioners while he was no relation, friend or even a person known to the petitioners. His acting as the next friend of the petitioners smacks of malice, ulterior motive and misuse of judicial process.

43. The alleged website provides that the girl was missing. It was not reported there that she and her parents were in illegal detention of the respondent no.6. So by no means, it could not be a case of habeas corpus.

44. Now, we would deal with Writ Petition No.125 of 2011 instituted by Sh. Gajender Pal Singh, respondent No.8 in this appeal, being next friend of petitioners Sukanya Devi, Sh. Balram Singh and Sh. Sumitra Devi. The glaring factors showing abuse of process of Court and attempt to circumvent the prescribed procedure can be highlighted, inter alia, but primarily from the following :

(a) Sh. Gajender Pal Singh also had no relationship, friendship or had not even known the three petitioners.

(b) In face of the statements made by the three petitioners before the Police and the CBI, stating that they had never approached, asked or even expected respondent No.8 to act as next friend, he had no authority to act as their next friend before the Court and pray for such relief.

(c) In the garb of petition for habeas corpus, he filed a

petition asking for transfer of Writ Petition No.111 of 2011, to which he was neither a party nor had any interest.

(d) Respondent No.8 intentionally did not appear in writ petition No.111 of 2011 raising the question of jurisdiction or any other question but circumvented the process of Court by filing Writ Petition No.125 of 2011 with the prayers including investigation by an authority against the petitioner in writ petition No.111 of 2011. Respondent No.8, despite being a resident of that very area and town, Amethi, did not even care to mention about the dismissal of Writ Petition No.3719 of 2009.

(e) In the writ petition, he claimed to be a neighbour of the three petitioners but did not even know this much that the petitioners had, quite some time back, shifted to Village Hardoia in district Faizabad. He also stated in paragrah 5 of the writ petition that he was neighbour of the petitioners and having not seen them, had sought to lodge a police report, which the authorities refused to take on the ground that the petitioners were in custody of the police as they had committed some wrong. This averment, to the knowledge of the petitioner, was false inasmuch as the Director General of Police, U.P. had stated in his affidavit that they were never detained or called to the police station. In fact, they had shifted their house to the aforestated Village. Respondent No.8 has, thus, for obvious and with ulterior motive abused the process of the court and filed a petition based on falsehood, came to the Court with unclean hands and even attempted to circumvent the process of law by making motivated and untenable prayers. This petitioner (respondent No.8) also made irresponsible allegations stating that

Kishore Samrite, petitioner in Writ Petition No.111 of 2011, was a mentally challenged person.

45. From the above specific averments made in the writ petitions, it is clear that both these petitioners have approached the Court with falsehood, unclean hands and have misled the courts by showing urgency and exigencies in relation to an incident of 3rd December, 2006 which, in fact, according to the three petitioners and the police was false, have thus abused the process of the court and misused the judicial process. They maliciously and with ulterior motives encroached upon the valuable time of the Court and wasted public money. It is a settled canon that no litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. The privilege of easy access to justice has been abused by these petitioners by filing frivolous and misconceived petitions. On the basis of incorrect and incomplete allegations, they had created urgency for expeditious hearing of the petitions, which never existed. Even this Court had to spend days to reach at the truth. Prima facie it is clear that both these petitioners have mis-stated facts, withheld true facts and even given false and incorrect affidavits. They well knew that Courts are going to rely upon their pleadings and affidavits while passing appropriate orders. The Director General of Police, U.P., was required to file an affidavit and CBI directed to conduct investigation. Truth being the basis of justice delivery system, it was important for this Court to reach at the truth, which we were able to reach at with the able assistance of all the counsel and have no hesitation in holding that the case of both the petitioners suffered from falsehood, was misconceived and was a patent misuse of judicial process. Abuse of the process of the Court and not approaching the Court with complete facts and clean hands, has compelled this Court to impose heavy and penal costs on the persons acting as next friends in the writ petitions before the High Court. This Court cannot permit the judicial process to become an

instrument of oppression or abuse or to subvert justice by unscrupulous litigants like the petitioners in the present case.

Locus Standi

46. Having discussed the abuse of process of Court and misuse of judicial process by both the petitioners, the issue of locus standi would obviously fall within a very narrow compass. The question of locus standi would normally be a question of fact and law both. The issue could be decided with reference to the given facts and not in isolation. We have stated the facts and the stand of the respective parties in some detail. Both, the appellant and respondent No.8, had filed their respective writ petitions before the Allahabad High Court as next friends of the three petitioners whose names have not been stated with complete correctness in both the writ petitions. There has been complete contradiction in the allegations made in the two writ petitions by the respective petitioners. According to the appellant, the three stated petitioners were illegally detained by the respondent no.6 while according to the respondent no.8 they were detained by the authorities. These contradictory and untrue allegations are the very foundation of these writ petitions. It may also be noticed that in both the writ petitions, baseless allegations in regard to the alleged incident of 3rd December, 2006, involving the respondent no.6, had also been raised.

47. Ordinarily, the party aggrieved by any order has the right to seek relief by questioning the legality, validity or correctness of that order. There could be cases where a person is not directly affected but has some personal stake in the outcome of a petition. In such cases, he may move the Court as a guardian or next friend for and on behalf of the disabled aggrieved party. Normally, a total stranger would not act as next friend. In the case of *Simranjit Singh Mann v. Union of India* [(1992) 4 SCC 653], this Court held that a total stranger to the trial commenced against the convicts, cannot be permitted to question the correctness of the conviction recorded against some convicts unless an aggrieved party is under some

disability recognised by law, othewise it would be unsafe or hazardous to allow a third party to question the decision against him. In the case of *S.P. Gupta v. Union of India* [AIR (1982) SC 149], the Court stated, "but we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others." Dealing with the question of the next friend bringing a petition under Article 32 of the Constitution, this Court in the case of *Karamjeet Singh v. Union of India* [(1992) 4 SCC 666], held as under :

> "We are afraid these observations do not permit a mere friend like the petitioner to initiate the proceedings of the present nature under Article 32 of the Constitution. The observations relied upon relate to a minor or an insane or one who is suffering from any other disability which the law recognises as sufficient to permit another person, e.g. next friend, to move the Court on his behalf; for example see : Sections 320(4)(a), 330(2) read with Section 335(1)(b) and 339 of the Code of Criminal Procedure. Admittedly, it is not the case of the petitioner that the two convicts are minors or insane persons but the learned counsel argued that since they were suffering from an acute obsession such obsession amounts to a legal disability which permits the next friend to initiate proceedings under Article 32 of the Constitution. We do not think that such a contention is tenable. The disability must be one which the law recognises."

48. Dealing with public interest litigation and the cases instituted by strangers or busybodies, this Court in the following cases cautioned the courts and even required that they be dismissed at the threshold:

I) *Janata Dal v. H.S. Chowdhary,* (1992) 4 SCC 305, at page 347 :

"Sarkaria, J. in *Jasbhai Motibhai Desai v. Roshan Kumar* expressed his view that the application of the busybody should be rejected at the threshold in the following terms:

> 'It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold'."

II) *R & M Trust v. Koramangala Residents Vigilance Group* (2005) 3 SCC 91]

"25. In this connection reference may be made to a recent decision given by this Court in the case of Dattaraj Nathuji Thaware v. 49Page 50 State of Maharashtra in which Hon'ble Pasayat, J. has also observed as follows:

> '12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity-oriented or founded on personal vendetta'."

49. On the analysis of the above principles, it is clear that a person who brings a petition even for invocation of a fundamental right must be a person having some direct or indirect interest in the outcome of the petition on his behalf or on behalf of some person under a disability and/or unable to have access to the justice system for patent reasons. Still, such a person must act *bonafidely* and without abusing the process of law. Where a person is a stranger/unknown to the parties and has no interest in the outcome of the litigation, he can hardly claim locus standi to file such petition. There could be cases where a public spirited person *bonafidely* brings petition in relation to violation of fundamental rights, particularly in *habeas corpus* petitions, but even in such cases, the person should have some demonstrable interest or relationship to the involved persons, personally or for the benefit of the public at large, in a PIL. But in all such cases, it is essential that the petitioner must exhibit bonafides, by truthful and cautious exercise of such right. The Courts would be expected to examine such requirement at the threshold of the litigation in order to prevent abuse of the process of court. In the present case, both the appellant and respondent No.8 are total strangers to the three mentioned petitioners. Appellant, in fact, is a resident of Madhya Pradesh, belonging to a political party and was elected in constituency Tehsil Lanji in District Balaghat at Madhya Pradesh. He has no roots in Amethi and, in fact, he was a stranger to that place. The appellant as well as respondent No.8 did not even know that the persons on whose behalf they have acted as next friend had shifted their residence

in the year 2010 to Hardoia in District Faizabad. They have made false averments in the petition and have withheld true facts from the Court.

50. This Court, in the case of *Charanjit Lal Chowdhury v. The Union of India & Ors.* [AIR 1951 SC 41], while discussing the distinction between the rights and possibility of invocation of legal remedy of a company and a shareholder, expressed the view that this follows logically from the rule of law that a corporation has a distinct legal personality of its own with rights and capacities, duties and obligations separate from those of its individual members. As the rights are different and inhere in different legal entities, it is not competent to one person to seek to enforce the right of another except where the law permits him to do so. A well known illustration of such exception is furnished by the procedure that is sanctioned in an application for a writ of habeas corpus. Not only the man who is imprisoned or detained in confinement but any person, provided he is not an absolute stranger, can institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment. It is not a case of a mere third person moving the court simpliciter on behalf of persons under alleged detention. It is a case of definite improprietory abuse of process of court, justice and is a motivated attempt based on falsehood to misguide the Court and primarily for publicity or political vendetta. More so, when the petitioners in the writ petitions have categorically stated that they made no complaint of the alleged incident of 3rd December, 2006 and never authorised, requested or approached either of the petitioners to move the court for redressal of any grievance. The question of filing habeas corpus petitions on their behalf would not arise because they were living at their own house and enjoying all freedoms. According to them, they were detained by none at any point of time either by respondent No.6 or the Police authorities. In face of this definite stand taken by these persons, the question of locus standi has to be answered against both the petitioners. In fact,

it is not only abuse of the process of the Court but also is a case of access to justice unauthorisedly and illegally. Their whole modus operandi would be unacceptable in law. Thus, we have no hesitation in holding on the facts of the present case that both the petitioners had no locus standi to approach the High Court of Allahabad in the manner and method in which they did. It was contended on behalf of the appellant as well as respondent No.8 that a petition for habeas corpus is not struck by the rule of res judicata or constructive res judicata. According to them, the decision of the Writ Petition No.3719 of 2009 was in no way an impediment for institution of the writ petition as in the case of habeas corpus every day would be a fresh and a continuing cause of action. For this purpose, reliance has been placed upon the judgment of this Court in the case of *Ghulam Sarwar v. Union of India* [AIR 1967 SC 1335] and *Kirti Kumar Chaman Lal Kundaliya v. Union of India* [AIR 1981 SC 1621]. We do not consider it necessary to decide this question as a question of law in the facts and circumstances of the present case particularly in view of the findings recorded by us on other issues. Suffice it to note that the judgment of the Allahabad High Court dated 17th April, 2009 in Civil Writ Petition 3719 of 2009 had attained finality as the legality or correctness thereof was not challenged by any person. There can hardly be any doubt that upon pronouncement of this judgment this case squarely fell in the public domain and was obviously known to both the petitioners but they did not even consider it necessary to mention the same in their respective writ petitions. Another contention that has been raised on behalf of the appellant is that a petition of habeas corpus lies not only against the Executive Authority but also against private individual. Reliance is placed on the case of In Re: *Shri Sham Lal* [(1978) 2 SCC 479]. As a proposition of law, there is no dispute raised before us to this proposition. Thus, there is no occasion for this Court to deliberate on this issue in any further elaboration.

51. Having dealt with various aspects of this case, now we must revert to the essence of the present appeal on facts. The

petitions instituted by the appellant and respondent No.8 were certainly an abuse of the process of Court. They have encroached upon the valuable time of the courts. The contradictory stands taken before the courts and their entire case being denied by the petitioners themselves clearly show that they have misused the judicial process and have stated facts that are untrue to their knowledge. The alleged incident which, according to the petitioners, police and the CBI, never happened and illegal detention of the petitioners has been falsified by the petitioners themselves in the writ petitions. It is a matter of regret that the process of the court has been abused by unscrupulous litigants just to attain publicity and adversely affect the reputation of another politician, respondent No.6. One of the obvious reasons which can reasonably be inferred from the peculiar facts and circumstances of the case is the political rivalry. According to the counsel appearing for respondent No.6, it is a case of political mudslinging. He has rightly contended that the websites information was nothing but secondary evidence, as stated by this Court in *Samant N. Balkrishna & Anr. v. V. George Fernandez and Ors.* [(1969) 3 SCC 238] but not even an iota of evidence has been placed on record of the writ petitions before the High Court or even in the appeal before this Court, which could even show the remote possibility of happening of the alleged rape incident on 3rd December, 2006. There is an affidavit by the police and report by the CBI to show that this incident never occurred and the three petitioners have specifically disputed and denied any such incident or making of any report in relation thereto or even in regard to the alleged illegal detention. Political rivalry can lead to such ill-founded litigation. In the case of *Gosu Jayarami Reddy & Anr. v. State of Andhra Pradesh* [(2011) 11 SCC 766], this Court observed that political rivalry at times degenerates into personal vendetta where principles and policies take a back seat and personal ambition and longing for power drive men to commit the foulest of deeds to avenge defeat and to settle scores. These observations aptly apply to the facts of the present case particularly the writ petition preferred by the appellant. At one

place, he claims to have acted as a public figure with good conscience but has stated false facts. On the other hand, he takes a somersault and claims that he acted on the directives of the political figures. It is unworthy of a public figure to act in such a manner and demonstrate a behaviour which is impermissible in law. Appellant as well as respondent No.8 filed Habeas corpus petitions claiming it to be a petition for attainment of public confidence and right to life. In the garb of doctrines like the Right to Liberty and access to justice, these petitioners not only intended but actually filed improper and untenable petitions, primarily with the object of attaining publicity and causing injury to the reputation of others. The term 'person' includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. 'Reputation' is an element of personal security and is protected by Constitution equally with the right to enjoyment of life, liberty and property. Although 'character' and 'reputation' are often used synonymously, but these terms are distinguishable. 'Character' is what a man is and 'reputation' is what he is supposed to be in what people say he is. 'Character' depends on attributes possessed and 'reputation' on attributes which others believe one to possess. The former signifies reality and the latter merely what is accepted to be reality at present. {Ref. *Smt. Kiran Bedi v. The Committee of Inquiry & Anr.* [(1989) 1 SCC 494] and *Nilgiris Bar Association v. T.K. Mahalingam & Anr.* [AIR 1998 SC 398]}. The methodology adopted by the next friends in the writ petitions before the High Court was opposed to political values and administration of justice. In the case of *Kusum Lata v. Union of India* [(2006) 6 SCC 180], this Court observed that when there is material to show that a petition styled as a public

interest litigation is nothing but a camouflage to foster personal disputes, the said petition should be dismissed by the Court. If such petitions are not properly regulated and abuse averted, it becomes a tool in unscrupulous hands to release vendetta and wreak vengeance as well.

52. In light of these legal principles, appellant and, in fact, to a great extent even respondent No.8 have made an attempt to hurt the reputation and image of respondent no.6 by stating incorrect facts, that too, by abusing the process of court.

53. Coming to the judgment of the High Court under appeal it has to be noticed that the appellant was deprived of adequate hearing by the High Court, but that defect stands cured inasmuch as we have heard of the concerned parties in both the writ petitions at length. The transfer of Writ Petition No. 111/2011 was not in consonance with the accepted canons of judicial administrative propriety. The imposition of such heavy costs upon the petitioner was not called for in the facts and circumstances of the case as the Court was not dealing with a suit for damages but with a petition for habeas corpus, even if the petition was not bona fide. Furthermore, we are unable to endorse our approval to the manner in which the costs imposed were ordered to be disbursed to the different parties. Moreover, the question of paying rewards to the Director General of Police does not arise as the police and the Director General of Police were only performing their duties by producing the petitioners in the Court. They, in any case, were living in their own house without restriction or any kind of detention by anyone. In fact, the three petitioners have been compulsorily dragged to the court by the petitioner in Writ Petition No. 125/2011. They had made no complaint to any person and thus, the question of their illegal detention and consequential release would not arise. These three persons have been used by both the petitioners and it is, in fact, they are the ones whose reputation has suffered a serious setback and were exposed to inconvenience of being dragged to courts for no fault of their own. We hardly see any

attributes of the Police except performance of their duties in the normal course so as to entitled them to exceptional rewards. Certainly, the reputation of respondent no.6 has also been damaged, factually and in law. Both these petitions are based on falsehood. The reputation of respondent no.6 is damaged and his public image diminished due to the undesirable acts of the appellant and respondent no.8.

54. For these reasons, we are unable to sustain the order under appeal in its entirety and while modifying the judgments under appeal, we pass the following order: -

1. Writ petition No. 111/2011 was based upon falsehood, was abuse of the process of court and was driven by malice and political vendetta. Thus, while dismissing this petition, we impose exemplary costs of Rs. 5 lacs upon the next friend, costs being payable to respondent no.6.

2. The next friend in Writ Petition No. 125/2011 had approached the court with unclean hands, without disclosing complete facts and misusing the judicial process. In fact, he filed the petition without any proper authority, in fact and in law. Thus, this petition is also dismissed with exemplary costs of Rs. 5 lakhs for abuse of the process of the court and/or for such other offences that they are found to have committed, which shall be payable to the three petitioners produced before the High Court, i.e. Ms. Kirti Singh, Dr. Balram Singh and Ms. Sushila @ Mohini Devi.

3. On the basis of the affidavit filed by the Director General of Police, U.P., statement of the three petitioners in the Writ Petition, CBI's stand before the Court, its report and the contradictory stand taken by the next friend in Writ Petition No.111/2011, we, prima facie, are of the view that the

allegations against the respondent no.6 in regard to the alleged incident of rape on 3rd December, 2006 and the alleged detention of the petitioners, are without substance and there is not even an iota of evidence before the Court to validly form an opinion to the contrary. In fact, as per the petitioners (allegedly detained persons), they were never detained by any person at any point of time.

4. The CBI shall continue the investigation in furtherance to the direction of the High Court against petitioner in Writ Petition No. 111/2011 and all other persons responsible for the abuse of the process of Court, making false statement in pleadings, filing false affidavits and committing such other offences as the Inpvestigating Agency may find during investigation. The CBI shall submit its report to the court of competent jurisdiction as expeditiously as possible and not later than six months from the date of passing of this order.

5. These directions are without prejudice to the rights of the respective parties to take such legal remedy as may be available to them in accordance with law. We also make it clear that the Court of competent jurisdiction or the CBI would not in any way be influenced by the observations made in this judgment or even the judgment of the High Court. All the pleas and contentions which may be raised by the parties are left open.

55. The appeal is disposed of in the above terms.

R.P. Appeal disposed of.

DEVINDER @ KALA RAM & ORS.

v.

THE STATE OF HARYANA

(Criminal Appeal No. 636 of 2009)

OCTOBER 18, 2012

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

PENAL CODE, 1860:

s.498-A - Married woman - Subjected to cruelty by her husband and his relatives by demanding dowry - Death of the victim by burn injuries in the matrimonial house - Held: Evidence of prosecution witnesses fully supports the prosecution case that the victim, from a few days after the marriage till her death, was subjected to harassment by all the three appellants in connection with demands of dowry - Therefore, the courts below rightly held the appellants guilty of offence punishable u/s 498-A.

s.304-B - Dowry death - Death of a married woman due to burn injuries received by her in the matrimonial home - Held; Section 304-B IPC and s.113B of Evidence Act only provide what the court shall presume if the ingredients of the provisions are satisfied, but if the evidence in any case is such that the presumption stands rebutted, the court cannot hold that the accused was guilty and was punishable for dowry

death - In the instant case, from the evidence of the Medical Officer who examined the victim, and the hospital records, it is proved that he was told by the patient herself that she sustained burn injuries while cooking meals on stove - The statement of deceased is relevant u/s 32 of Evidence Act - Evidence of the doctor with medical records supports the explanation of appellant no. 1 u/s 313 CrPC - Thus, the presumption in s.304-B IPC and 113B of Evidence Act, that the appellants caused dowry death, stood rebutted - Therefore, conviction and sentence of appellants u/s 304-B IPC is set aside - Evidence Act, 1872 - ss. 3, 4, 32 and 113-B.

The wife of appellant no. 1 died in the hospital as a result of burn injuries received by her in her matrimonial home within four years of her marriage. Appellant no. 1, his mother (appellant no.2) and his brother's wife (appellant no. 3) faced trial and were convicted by the trial court u/ss 498-A and 304-B IPC. They were sentenced to three years RI each u/s 498-A and ten years RI each u/s 304-B IPC. The High Court maintained the conviction and the sentence.

Allowing the appeal in part, the Court

HELD: 1. The evidence of PW-2, PW-3, PW-4 and PW-5 fully supports the finding of the High Court that the victm, from a few days after marriage till her death, was subjected to harassment by all the three appellants in connection with the demand of dowry in the form of household articles as also cash. In the lengthy cross-examinations of PW-2, PW-3, PW-4 and PW-5, their evidence with regard to such demands of dowry and harassment has not been shaken. Moreover, there is evidence to show that appellant No.3 (the wife of the brother of deceased's husband), also caused harassment to the deceased in connection with demand of dowry. Therefore, the fact that she was living separately with her

husband, even if true, does not make her not liable for the offence punishable u/s. 498-A, IPC. Therefore, the Court of Session and the High Court have rightly held the appellants guilty of the offence punishable u/s. 498A, IPC. [Para 7] [800-B-F]

2.1 On a plain reading of s.304B IPC, it is clear that where the death of a woman is caused by any burns or bodily injury within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such husband or relative of her husband shall be deemed to have caused dowry death. Thus, where death of a woman has been caused by burns, as in the instant case, the prosecution has to show: (i) that such death has taken place within seven years of her marriage and (ii) that soon before her death she has been subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Once these two facts are established by the prosecution, the husband or the relative shall be "deemed" to have caused the dowry death of the woman. The word "deemed" in s.304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death. [Para 9] [801-F-H; 802-A-B]

2.2 Section 113B of the Evidence Act, 1872 also provides that once it is shown that soon before her death a woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court "shall presume" that such person had caused the dowry death. The expression "shall presume" has been defined in s.4 of the Evidence Act. Thus, s.113B read with s.4 of the Evidence Act would mean that unless and until it is proved otherwise, the court shall hold that

a person has caused dowry death of a woman if it is established before the court that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry. [Para 10] [802-C-D, E-F]

2.3 Section 3 of the Evidence Act states that unless a contrary intention appears from the context, the word "disproved" would mean, a fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exit. Thus, if after considering the matters before it, the court believes that the husband or the relative of the husband has not caused dowry death, the court cannot convict such person or husband for dowry death u/s. 304B of the IPC. Thus, s. 304B IPC, and s.113B of the Evidence Act only provide what the court shall presume if the ingredients of the provisions are satisfied, but if the evidence in any case is such that the presumptions stand rebutted, the court cannot hold that the accused was guilty and was punishable for dowry death. [Para 11] [802-G-H; 803-A-B]

2.4 In the instant case, PW-7, the Medical Officer of the Civil Hospital, examined the case of the deceased on 06.08.1992 at 6.30 A.M. He stated in his evidence that the deceased was brought to the hospital by her husband (appellant no.1). He has proved the bed-head ticket pertaining to the deceased in the hospital (Ext. DD) as well as his endorsement at Point 'A' on Ext. DD, from which it is clear that he was told by the patient herself that she sustained burns while cooking meals on a stove. This statement of the deceased recorded by PWs is relevant u/s. 32 of the Evidence Act as regards the cause of her death. [Para 12] [803-C-F]

2.5 The evidence of PW-7 and the endorsement marked 'A' in Ext. DD are evidence produced by the prosecution before the court, which supports the explanation of appellant no.1 in his statement u/s. 313, Cr.P.C., that the deceased caught fire while she was preparing tea on the stove. The presumption in s.304B, IPC and s.113B of the Evidence Act that the appellants had caused dowry death of the deceased, thus, stood rebutted. The High Court has disbelieved the evidence of PW-7 and the endorsement marked 'A' in Ext. DD merely on suspicion and has ignored the relevant provisions of the Evidence Act. Therefore, the conviction and sentence of the appellants u/s 304B is set aside and their conviction and sentence u/s 498A, IPC sustained. [Para 13-14] [804-B-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 636 of 2009.

From the Judgment & Order dated 28.02.2008 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 157-SB of 1997.

D.B. Goswami, Khwairakpam Nobin Singh for the Appellants.

Kamal Mohan Gupta, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution of India against the judgment dated 28.02.2008 of the High Court of Punjab and Haryana in Criminal Appeal No.157-SB of 1997.

2. The facts very briefly are that an FIR was lodged by Chhotu Ram (the informant) in P.S. Gannaur on 07.08.1992 at 4.45 P.M. In the FIR, the informant stated thus: He got his

daughter Krishna married to Devinder @ Kala Ram of village Rajpur on 19.05.1989. From after a month of thePage 2 marriage, Krishna kept coming to the house of the informant at village Tihar Malik complaining of demands of dowry and harassment by the members of the family of Devinder. On 06.08.1992, Jai Beer Singh informed the informant that Krishna was dead. The informant came straightway to the hospital at Sonepat and found Krishna dead because of burns. A case was registered in P.S. Gannaur under Section 304B/341 of the Indian Penal Code (for short 'the IPC'). Investigation was conducted and charge-sheet was filed against Devinder, his mother Chand Kaur and his brother's wife Roshni. The appellants were put on trial in the Court of learned Sessions Judge, Sonepat. At the trial, amongst other witnesses the informant Chottu Ram was examined as PW-2, his wife Smt. Shanti was examined as PW-3 and his two sons, namely, Balraj and Jai Beer, were examined as PW-4 and PW-5 respectively. By the judgment dated 06.02.1997, the Sessions Court held all the three appellants guilty of the offences under Sections 498A as well as 304B, IPC. By order dated 08.02.1997, the Sessions Court sentenced them to undergo rigorous imprisonment for a period of three years each and to pay a fine of Rs.1,000/- each and in default to undergo rigorous imprisonment for one year for the offence under Section 498A, IPC, and for ten years rigorous imprisonment and a fine of Rs.2,000/- each and in default to undergo rigorous imprisonment for two years for the offence under Section 304B, IPC, and directed that the sentences shall run concurrently. Aggrieved, the appellants filed Criminal Appeal No.157-SB of 1997 before the High Court, but by the impugned order the High Court maintained the convictions and sentences under Sections 498A and 304B, IPC.

3. At the hearing of this appeal, learned counsel for the appellants submitted that Dr. B.D. Chaudhary, the Medical Officer of the Civil Hospital, who was examined as PW-7, has said in his evidence that Krishna was brought to the hospital

by her husband Kala Ram and there was smell of kerosene in the body of Krishna when she was brought to the hospital. He also referred to Ext. DD, which is the bed-head ticket pertaining to Krishna in the hospital in which PW-7 has endorsed that the patient had told him that she has sustained the burns while cooking meals on a stove. He submitted that Devinder has stated in his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') that on the day of the alleged occurrence Krishna caught fire while she was preparing tea and he extinguished the fire and as a result he received burn injuries and he immediately brought her to the hospital. He submitted that this is, therefore, a case of the deceased getting burnt by kerosene from a stove and the appellant no.1 had rushed the deceased to the hospital with a view to save her and this is not a case of an offence under Section 304B, IPC.

4. Learned counsel for the appellants next submitted that PW-1, PW-2, PW-3, PW-4 and PW-5 are all near relatives of the deceased and are interested witnesses and their evidence on the demands of dowry and harassment and cruelty to the deceased ought not to have been believed by the Sessions Court and the High Court. He argued that the evidence of these interested witnesses moreover are only bald statements and are not supported by any material. He submitted that in the absence of any material produced to show that the deceased was subjected to electric shock, the Trial Court and the High Court could not have held that the prosecution has proved beyond reasonable doubt that the appellants had subjected the deceased to cruelty soon before her death. He relied on the decision of this Court in *Durga Prasad & Anr. v. State of M.P.* [2010 CRL. L. J. 3419] in which it has been held that cruelty or harassment soon before death must be proved not just by bald statements, but by concrete evidence to establish the offences under Section 304B and Section 498A, IPC. He submitted that although the prosecution cited Umed Singh, Tara Chand,

Randhir Singh and Dariya Singh as its witnesses in the charge-sheet, these witnesses have not been examined in Court and, thus, an adverse inference should not be drawn by the Court against the prosecution.

5. Learned counsel for the appellants finally submitted that the appellant no.3, Roshni, was the wife of the brother of Devinder, namely, Attar Singh, and the case of the defence before the Sessions Court was that Roshni lived separately with her husband Attar Singh in another house. He submitted that PW-8, the Investigating Officer, has admitted in his evidence that he had come to know that Roshni had been living separately with her husband in another house. He argued that there was absolutely no evidence before the Court that Roshni, appellant no.3, was living in the family house of the appellant nos. 1 and 2 and she has been falsely implicated as an accused in this case.

6. In reply, learned counsel for the State submitted that the High Court has held in the impugned judgment that PW- 7 before making any endorsement was required to certify that Krishna was fit and conscious to make a statement, but PW-7, while making the endorsement in Ext. DD that the patient herself told her that she sustained burn injuries while cooking meals on a stove, has not given this certificate. He submitted that the High Court has, therefore, held that the endorsement was wrongly made so as to ensure that the truth did not come to the surface. He submitted that the High Court has further taken note of the scaled map (Ext. PC) of the place where Krishna was preparing tea on the stove which has an open courtyard and had she caught fire while preparing tea on the stove in the open courtyard, she would have certainly run for safety and the flames of the fire would not have engulfed her to such an extent as to cause 95% burns. He vehemently argued that Section 113B of the Indian Evidence Act, 1872 is clear that when the question as to whether a person has committed dowry death of a woman and it is shown that soon before her death

such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. He argued that in this case, as there was sufficient evidence brought before the Court through PW-2 and PW-3 that Krishna was being subjected to cruelty or harassment for and in connection with demand for dowry, there is a presumption of dowry death caused by the appellants and this presumption has not been rebutted by the appellants. He submitted that the Trial Court and the High Court are, therefore, right in holding the appellants guilty of the offences under Section 498A as well as Section 304B, IPC.

7. The first question that we have to decide is whether the Trial Court and the High Court are right in convicting the appellants under Section 498A of IPC. We have gone through the evidence of PW-2, PW-3, PW-4 and PW-5 and we find that the evidence therein fully support the finding of the High Court that from a few days after marriage till her death, the deceased was subjected to harassment in connection with the demand of dowry by all the three appellants. We find from the evidence of PW-2, PW-3, PW-4 and PW-5 that the deceased was subjected to harassment by the appellants in connection with demands of TV, sofa set, electric press, sewing machine, tables and chairs, utensils and cash of Rs.20,000/- for recruitment of Devinder and Rs.15,000/- for construction of house. In the lengthy cross-examinations of PW-2, PW-3, PW-4 and PW-5, their evidence with regard to such demands of dowry and harassment has not been shaken. Moreover, in this case, there is evidence to show that Roshni, the appellant No.3, also caused harassment to the deceased in connection with demand of dowry. Therefore, the fact that she was living separately with her husband even if true, does not make her not liable for the offence under Section 498-A, IPC. Hence, the Sessions Court and the High Court, in our considered opinion, have rightly held the appellants guilty of the offence under Section 498A, IPC.

8. The second question that we have to decide is whether the Sessions Court and the High Court were right in holding the appellants guilty of the offence under Section 304B, IPC. Section 304B of the IPC and Section 113B of the Indian Evidence Act,1872 are to be read together and are quoted hereinbelow:

> **"304B. Dowry death.**—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> *Explanation*.—For the purpose of this subsection, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extent to imprisonment for life."
>
> **"113B. Presumption as to dowry death.**— When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> *Explanation.*—For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."

9. On a plain reading of Section 304B of the IPC, it is clear that where the death of a woman is caused by any burns or

bodily injury within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such husband shall be deemed to have caused dowry death. Thus, where death of a woman has been caused by burns as in the present case, the prosecution has to show: (i) that such death has taken place within seven years of her marriage and (ii) that soon before her death she has been subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Once these two facts are established by the prosecution, the husband or the relative shall be "deemed" to have caused the dowry death of the woman. The word "deemed" in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death.

10. Section 113B of the Indian Evidence Act, 1872 also provides that once it is shown that soon before her death a woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court "shall presume" that such person had caused the dowry death. The expression "shall presume" has been defined in Section 4 of the Indian Evidence Act, 1872, relevant part of which is extracted hereinbelow:

> **"'Shall presume'**.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

Thus, Section 113B read with Section 4 of the Indian Evidence Act, 1872 would mean that unless and until it is proved otherwise, the Court shall hold that a person has caused dowry death of a woman if it is established before the Court that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry.

11. Section 3 of the Indian Evidence Act, 1872 states that unless a contrary intention appears from the context, the word "disproved" would mean a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exit. Thus, if after considering the matters before it, the Court believes that the husband or the relative of the husband has not caused dowry death, the Court cannot convict such person or husband for dowry death under Section 304B of the IPC. Section 304B, IPC, and Section 113B of the Indian Evidence Act, 1872, in other words, only provide what the Court shall presume if the ingredients of the provisions are satisfied, but if the evidence in any case is such that the presumptions stand rebutted, the Court cannot hold that the accused was guilty and was punishable for dowry death.

12. In the facts of the present case, we find that PW-7, the Medical Officer of the Civil Hospital, examined the case of the deceased on 06.08.1992 at 6.30 A.M. and he has clearly stated in his evidence that on examination she was conscious and that there were superficial to deep burns all over the body except some areas on feet, face and perineum and there was smell of kerosene on her body. He also stated in his evidence that the deceased was brought to the hospital by her husband Kala Ram (appellant no.1). He has proved the bed-head ticket pertaining to the deceased in the hospital (Ext. DD) as well as his endorsement at Point 'A' on Ext. DD, from which it is clear that he was told by the patient herself that she sustained burns while cooking meals on a stove. This statement of the deceased recorded by PWs is relevant under Section 32 of the Indian Evidence Act, 1872 which provides that statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statement is made by a person as to the cause of his death, or as to any of

the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Moreover, the appellant no.1 in his statement under Section 313, Cr.P.C., has stated:

> "On that day of the alleged occurrence Krishna deceased was preparing tea and incidentally caught fire. I extinguished the fire, as a result of which I received burn injuries and immediately brought her to General Hospital, Sonepat, and on the advice of the M.O. I was taking her for better treatment to Delhi but unfortunately she died."

13. The evidence of PW-7 and the endorsement marked 'A' in Ext. DD are evidence produced by the prosecution before the Court and such evidence produced by the prosecution before the Court supports the explanation of the appellant no.1 in his statement under section 313, Cr.P.C., that the deceased caught fire while she was preparing tea on the stove. The presumption in Section 304B of the IPC and Section 113B of the Indian Evidence Act, 1872 that they had caused dowry death of the deceased, thus, stood rebutted by the evidence in this case. We find that the High Court has disbelieved the evidence of PW-7 and the endorsement marked 'A' in Ext. DD merely on suspicion and has ignored the relevant provisions of the Indian Evidence Act, 1872, which we have discussed.

14. In the result, we allow this appeal in part, set aside the conviction and sentences for the offence under Section 304B, IPC, and sustain the conviction and sentences under Section 498A, IPC. The appellant no.2 is already on bail. If appellant nos.1 and 3 have already undergone the sentence under Section 498A, IPC, they shall be released forthwith.

R.P. Appeal partly allowed.

SHREE SHYAM AGENCY
v.
UNION OF INDIA & OTHERS
(Civil Appeal No. 7589 of 2012)

OCTOBER 18, 2012

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

RAILWAY CLAIMS TRIBUNAL ACT, 1987:

ss. 13(1) and 16 - Claim petition - Impleadment of parties - Consignment booked under "Self" basis - Delivered to a third party without authority - Claim petition by consigner against Railways claiming value of goods for non-delivery - Applications for impleadment by appellant claiming to be an interested party - Application for impleadment of three other persons - Held: In the claim petition what the Tribunal has to inquire into and determine is the claim against the Railway Administration for its fault in discharging its responsibilities under the Railways Act, Rules and Regulations and not the inter se disputes between the claimants and third parties - There is no error in the order of the Tribunal rejecting the application for impleadment and the High Court rightly affirmed the order - Railway Claims Tribunal Act, 1987 - ss. 16, 18 - Railways Act, 1989 - ss. 65 and 74 - Railways (Manner of Delivery of Consignments and Sale Proceeds in the Absence of Railway Receipt), Rules, 1990 - Railway Claims

Tribunal (Procedure) Rules, 1989.

The claimant-respondent no. 3, a company having its head office at Chennai was engaged in the business of manufacture and sale of white crystal sugar. It was the case of the claimant that a dealer, namely, 'SAK' placed an order with the claimant for purchase of free sale sugar with payment conditions stipulating that the endorsed railway receipts would be released on receipt of entire sale consideration; that the claimant booked the consignment on 1.2.2010 for transportation from Kumbakonam to Fatuha, Bihar and that the railway receipts were drawn as "Self" and were in the custody of the claimant and that the purchaser was expected to remit the sale price and get the railway receipts endorsed in its favour. The goods reached the destination on 10.2.1010. The buyer failed to pay the sale price and the goods, as stated by the appellant, were kept at the railway godown incurring wharfage charges; that the claimant sent a letter to the Senior DGM/Southern Railway/Trichy on 23.4.2010 and informed that the railway receipts were in the custody of the claimant and requested either to shift the consignment to other destination or bring it back to Kumbakonam. The claimant was, however, informed on 4.5.2010 by the Railways that the consignment was delivered at Fatuha on 10.2.2010 on the strength of Indemnity Note without disclosing the person to whom it was delivered. The claimant-respondent no. 3 filed a claim petition bearing OA No. (1) 2 of 2010, against the Southern and Eastern Central Railways before the Railway Claims Tribunal stating that since the consignments were booked under "Self" basis, the delivery to a third party was without authority and amounted to negligence, misconduct and misappropriation and, therefore, the Railway Administration was legally liable to pay compensation being the value of the goods for non-delivery.

In the claim petition, the appellant filed I.A. 3/2011 for intervention claiming that it was an interested party and its presence was necessary for a proper adjudication of the claim. I.A.4/2011 was preferred by respondent no. 2, the Central Railway, to implead three other parties contending that the Railway Claims Tribunal had no jurisdiction to proceed with the case since it involved contractual disputes, criminal conspiracy, cheating and that a complaint filed by the said parties was pending before the Chief Judicial Magistrate. The Tribunal dismissed both the applications holding that inter se disputes between private parties could not be decided by the Tribunal in a claim petition. The revision petitions filed by the appellant and the Railways were dismissed by the High Court.

In the instant appeal the question for consideration before the Court was: whether the appellant was legally entitled to intervene in a claim petition filed by respondent no. 3 u/s 16 of the Railway Claims Tribunal Act, 1987.

Dismissing the appeal, the Court

HELD: 1.1 It is evident from the preamble that the Claims Tribunal has been established under the Tribunal Act, 1987 for inquiring into and determining the claims against the Railway Administration for loss, destruction, damage, deterioration or non-delivery of animals or the goods entrusted to it to be carried by railway and not for adjudication of any claim or dispute against a third party. Section 13 lays down the jurisdiction, powers and authority of the Claims Tribunal. Section 16 provides for an application to be made to the Claims Tribunal in respect of the matters enumerated in sb-s.(1) and sub-s.(1A) of s.13. Section 18 prescribes the procedure and powers in this regard of the Claims Tribunal. On a conjoint reading of the provisions of the Act, it is clear that the Tribunal has been constituted to adjudicate the claim

made against the Railways and not against a third party. The claim petition, it is seen, is based on the contract of carriage entered into between the claimant and the Railways. The question to be decided by the Tribunal is whether the Railway Administration has caused any loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried by railway or the refund of fares or freight or for compensation for death or injury to the passengers as a result of railway accidents or untoward incidents etc. [para 10-12] [812-E-G-H; 813-A-B; 814-B-C-F; 816-A-D]

1.2 Rule 5 of the Railways (Manner of Delivery of Consignments and Sale Proceeds in the Absence of Railway Receipt), Rules, 1990 deals with delivery of perishable articles when the railway receipt is not forthcoming. Sub-r. (2) of Rule 3 specifically states that, when the railway receipt is not forthcoming and the consignment is addressed to "Self", delivery shall not be made unless Indemnity Note, duly executed in Forms I-A and I-B are produced by the persons claiming delivery of the consignment. The appellant or the Railway administration has no case that the consignee had presented the railway receipt for claiming the goods. On the other hand, it has been the specific stand of the Railway Administration that the consignment was delivered at Fatuha on 10.2.2010 to a third party on the strength of "Indemnity Note" and not on production of the "Railway Receipt". [para 15-16] [819-B-D-H; 820-A; 821-C]

1.4 On going through the Railways Act, 1989, the Tribunal Act as well as the 1990 Rules and the statutory forms, this Court is of the considered view that what the Tribunal has to inquire into and determine is the claim against the Railway Administration, that is, whether the Railway Administration is at fault in discharging its

responsibilities under the Railways Act, Rules and Regulations and not the inter se disputes between the claimants and third parties. In view of the facts and circumstances of the case, there is no error in the view taken by the Tribunal, which has rightly been affirmed by the High Court. [para 18-19] [825-B-D]

CIVIL APPELLATE JURISDICTION :Civil Appeal No. 7589 of 2012.

From the Judgment and Order dated 09.09.2011 of the High Court of Judicature at Madras in C.R.P. (PD) No. 1713 of 2011.

Saurav Agarwal, Vipul Sharda, Gaurav Agrawal for the Appellant.

C.A. Sundram, Pravin H. Parekh, Harish Chandra, Shashank Kumar, Zafar Inayat, E.R. Kumar, Vishal Prasad, Ekansh Mishra, Yogesh, Kshtrashal Raj (For Parekh & Co.), Shalini Kumar, Shreekant N. Terdal, P.S. Parmar, Alok Kumar, Shakeen Parmar for the Respondents.

The Judgment of the Court was delivered by

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

2. We are, in this appeal, concerned with the question whether the appellant is legally entitled to be intervened in a claim petition filed by the 3rd respondent herein under Section 16 of the Railway Claims Tribunal Act, 1987 (for short 'Tribunal Act').

3. The claim petition OA No. (1) 2 of 2010 was preferred by the 3rd respondent against the Southern and Eastern Central Railways before the Railway Claims Tribunal, Chennai Bench claiming an amount of Rs.9,46,85,726/- together with the interest @ 12% per annum from the date of filing of the petition till the date of payment and also for other consequential reliefs.

4. In the claim petition, the appellant herein filed I.A. 3/2011 for intervention claiming to be an interested party stating that its presence is necessary for a proper adjudication of the claim. I.A.4/2011 was also preferred by the 2nd respondent herein Central Railway to implead three other parties, namely Subham Sugar Agencies, Umesh Chaudhary, Ex. Goods Supervisor, Tatuha and Ambika Sugars Ltd., contending that the Railway Claims Tribunal (for short 'Tribunal') has no jurisdiction to proceed with the case since it involved contractual disputes, criminal conspiracy, cheating and that a complaint filed by the above mentioned parties are pending before the Chief Judicial Magistrate, Muzaffarpur, Bihar.

5. The Tribunal heard both the applications, i.e. I.A.3/2011 and I.A.4/2011 and a common order was passed on 15.4.2011, stating that inter se disputes between private parties cannot be decided by the Tribunal in a claim petition. It also took the view that the Railway Administration through those parties is trying to linger on with the proceedings and, under no circumstance, the application for impleading the other three parties can be entertained. Both I.A.3/2011 and I.A.4/2011 were accordingly dismissed.

6. Aggrieved by the order passed by the Tribunal, C.R.P. (PD) No. 1713 of 2011 was preferred by the appellant herein, CRP (PD) No. 2152 of 2011 and CRP (PD) No. 2153 of 2011 by Southern Railway and Central Railway, before the High Court of Judicature at Madras. All the three civil revision petitions were heard and a common order was passed on 9.9.2011 dismissing all the revision petitions and confirming the order passed by the Tribunal, against which the appellant in C.R.P. (PD) No. 1713 of 2011 has come up before this Court with the present appeal. Railway Administration, however, accepted the order passed by the Tribunal which has been affirmed by the High Court by the impugned judgment.

7. For disposal of this appeal, reference to few facts is necessary. Claimant, the third respondent herein a company

having its head office at Chennai, is engaged in the business of manufacturer of white crystal sugar having its factories at Thirumanthankudi village, Papiasam Taluk, Thanjavur District and A. Chittur Village, Virudhachalam Taluk, Cuddalore District. They used to sell free sugar in Northern Indian markets consisting of West Bengal, Bihar, etc. by transporting the consignments in racks through the services provided by the Railways. Railway receipts are made out showing the consignee as "Self" which are thereafter endorsed by the consignor to the buyer on payment of the sale price. The endorsed consignee/buyer takes delivery of goods of the respective destinations by surrender of the Railway Receipts. Claimant states that a dealer, by name Shubham Sugar Agencies, Kolkata, placed an order with the claimant for purchase of 27000 quintal of free sale sugar with payment conditions stipulating that the endorsed railway receipts would be released on receipt of entire sale consideration. Claimant stated that it has booked consignment on 1.2.2010 for transportation from Kumbakonam to Fatuha, Bihar and that the railway receipts were drawn as "Self" and were in the custody of the claimant and that the purchaser was expected to remit the sale price and get the railway receipts endorsed in its favour. The goods reached the destination on 10.2.1010. The buyer failed to pay the sale price and the goods, as stated by the appellant, were kept at the railway godown incurring wharfage charges. Further, it was stated that the claimant then sent a letter to the Senior DGM/Southern Railway/Trichy on 23.4.2010 and informed that the railway receipts were in the custody of the claimant and requested either to shift the consignment to other destination or bring it back to Kumbakonam. The claimant was, however, informed on 4.5.2010 by the Railways that the consignment was delivered at Fatuha on 10.2.2010 on the strength of Indemnity Note without disclosing the person to whom it was delivered. Claimant maintained the stand that since the consignments were booked under "Self" basis, the delivery to a third party was without authority and amounted to negligence, misconduct and misappropriation and hence, the

Railway Administration is legally liable to pay compensation being the value of the goods for non-delivery.

8. Appellant, however, maintained the stand that it was the purchaser of sugar from the claimant through broker Shubham Sugar Agencies, Kolkata and that the entire payment was made by it on instruction through various instruments like cheques/ RTGS etc. which was accepted and acknowledged by the claimant. Further, it was also pleaded that the claimant has suppressed the full facts. It was stated that the appellant had not obtained the delivery of sugar without payment and out of the total consideration of Rs.7,87,52,850/-, it had already paid Rs.7,30,22,052.40 and the balance of a sum of Rs.57,30,797.60 was offered, but the claimant did not accept.

9. We are, in this appeal, primarily concerned with the question whether the appellant has got the right to get itself impleaded in the Claim Petition No. OA(1) No.2 of 2010 pending before the Tribunal and whether the findings recorded by the Tribunal as well as the High Court are legally sustainable or not. Since the claim petition is pending before the Tribunal, we are not expressing any opinion on the merits of the case. But the question whether the Railway Administration and the appellant therein are proper and necessary parties to the claim petition, has to be decided.

10. The Tribunal has been established under the Tribunal Act, 1987. Reference to its preamble would indicate the purpose and object of its creation. The Preamble of the Tribunal Act, 1987 reads as follows:

> "An Act to provide for establishment of a Railway Claims Tribunal for inquiring into and determining claims against a railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried by railway or for the refund of fares or freight or for compensation for death or injury to

passengers occurring as a result of railway accidents or untoward incidents and for matters connected therewith or incidental thereto."

It is evident from the preamble that the Tribunal has been established for inquiring into and determining the claims against the Railway Administration for loss, destruction, damage, deterioration or non-delivery of animals or the goods entrusted to it to be carried by railway and not for adjudication of any claim or dispute against a third party.

11. Chapter III of the Tribunal Act deals with the jurisdiction, powers and authority of the Claims Tribunal. Section 13 of the Tribunal Acts reads as follows:

"13. Jurisdiction, powers and authority of Claims Tribunal.-(1) The Claims Tribunal shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court or a Claims Commissioner appointed under the provisions of the Railways Act,-

(a) relating to the responsibility of the railway administrations as carriers under Chapter VII of the Railways Act in respect of claims for-

(i) compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to a railway administration for carriage by railway;

(ii) compensation payable under section 82A of the Railways Act or the rules made thereunder; and

(b) in respect of the claims for refund of fares or part thereof or for refund of any freight paid in respect of animals or goods entrusted to a railway administration to

be carried by railway.

(1A) The Claims Tribunal shall also exercise, on and from the date of commencement of the provisions of section 124A of the Railways Act, 1989 (24 of 1989), all such jurisdiction, powers and authority as were exercisable immediately before that date by any civil court in respect of claims for compensation now payable by the railway administration under section 124A of the said Act or the rules made thereunder.

(2) The provisions of the Railways Act 1989 (24 of 1989) and the rules made thereunder shall, so far as may be, be applicable to the inquiring into or determining, any claims by the Claims Tribunal under this Act."

Section 16 of the Tribunal Act deals with the application to Claims Tribunal and reads as follows:

"16. Application to Claims Tribunal.- (1) A person seeking any relief in respect of the matters referred to in sub-sections (1) or sub-section (1A) of section 13 may make an application to the Claims Tribunal.

(2) Every application under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee in respect of the filing of such application and by such other fees for the service or execution of processes as may be prescribed :

Provided that no such fee shall be payable in respect of an application under sub-clause (ii) of clause (a) of sub-section (1) or, as the case may be, sub-section (1A) of section 13."

Section 18 of the Tribunal Act deals with the procedure and powers of Claims Tribunal and the same reads as follows:

"18. Procedure and powers of Claims Tribunal.-

(1) The Claims Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of nature justice and, subject to the other provisions of this Act and of any rules, the Claims Tribunal shall have powers to regulate its own procedure including the fixing of places and times of its enquiry.

(2) The Claims Tribunal shall decide every application as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents, written representations and affidavits and after hearing such oral arguments as may be advanced.

(3) The Claims Tribunal shall have, for the purposes of discharging its functions under this Act, the same power as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing an application for default or deciding it

ex parte;

(h) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

(i) any other mater which may be prescribed."

Rule 44 of the Railway Claims Tribunal (Procedure) Rules, 1989 confers inherent powers on the Tribunal to meet the ends of justice. On a conjoint reading of the above mentioned provisions, it is clear that the Tribunal has been constituted to adjudicate the claim made against the Railways and not against a third party. The claim petition, it is seen, is based on the contract of carriage entered into between the claimant and the railways.

12. The question to be decided by the Tribunal is whether the Railway administration has caused any loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried by railway or the refund of fares or freight or for compensation for death or injury to the passengers as a result of railway accidents or untoward incidents etc. Chapter III of the Act deals with the jurisdiction, powers and authority of the Tribunal.

13. Section 13(1)(a) of the Tribunal Act, as already indicated, confers exclusive jurisdiction on the Tribunal to decide the responsibilities of the Railways as carriers under Chapter VII of the Railways Act, 1989 in respect to the above mentioned claims made against the railways. Chapter IX of the Railways Act, 1989 deals with carriage of goods. Section 61 of the Railways Act, 1989 says that every railway administration shall maintain the rate-books etc. for carriage of goods and Section 62 imposes conditions for receiving etc. of goods. Section 65 is also important for the purpose of disposal of this case and hence extracted hereunder:

"65. Railway receipt. (1) A railway administration shall,-

(a) in a case where the goods are to he loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it, issue a railway receipt in such form as may be specified by the Central Government.

(2) A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein:

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee."

Section 74 of the Railways Act, 1989 deals with the passing of property in the goods covered by railway receipt and the same reads as follows:

"74. Passing of property in the goods covered by railway receipt.- The property in the consignment covered by a railway receipt shall pass to the consignee or the endorsee, as the case may be, on the delivery of such railway receipt to him and he shall have all the rights and liabilities of the consignor."

Section 76 of the Railways Act, 1989 deals with the surrender of railway receipt and reads as follows:

"76. Surrender of railway receipt.- The railway administration shall deliver the consignment under a railway receipt on the surrender of such railway receipt:

Provided that in case the railway receipt is not

forthcoming, the consignment may be delivered to the person, entitled in the opinion of the railway administration to receive the goods, in such manner as may be prescribed."

Section 77 deals with the power of railway administration to deliver goods or sale proceeds thereof in certain cases which reads as follows:

"77. Power of railway administration to deliver goods or sale proceeds thereof in certain cases.- Where no railway receipt is forthcoming and any consignment or the sale proceeds of any consignment are claimed by two or more persons, the railway administration may withhold delivery of such consignment or sale proceeds, as the case may be, and shall deliver such consignment or sale proceeds in such manner as may be prescribed."

Section 87 of the Railways Act, 1989 confers rule making power on the Central Government, the relevant portion of which reads as under:

"87. Power to make rules in respect of matters in this Chapter.- (1) The Central Government may, by notification, make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:-

xxx xxx xxx

xxx xxx xxx

(e) the manner in which the consignment may be delivered without a railway receipt under section 76;

(f) the manner of delivery of consignment or the sale proceeds to the person entitled thereto under section 77;

xxx xxx xxx

xxx xxx xxx"

14. The Central Government in exercise of its powers conferred by Clauses (e) and (f) of Section 87(2) of the Railways Act, 1989 read with Section 22 of the General Clauses Act, 1897 has framed the Railways (Manner of Delivery of Consignments and Sale Proceeds in the Absence of Railway Receipt), Rules, 1990 (for short "1990 Rules").

15. The appellant or the Railway administration has no case that M/s Subham Sugar Agencies, Calcutta, the consignee had presented the railway receipt for claiming the goods. On the other hand, it has been the specific stand of the railway administration that the consignment was delivered at Fatuha on 10.2.2010 to a third party on the strength of "Indemnity Note" and not on production of the "Railway Receipt". 1990 Rules, as already indicated, deals with the manner of delivery of consignments and sale proceeds in the absence of railway receipt. Sub-rules (1) and (2) of Rule 3 of 1990 Rules is relevant for our purpose and the same is extracted hereunder:

"3. Delivery of consignments when the railway receipt is not forthcoming:- (1) Where the railway receipt is not forthcoming, the consignment may be delivered to the person, who in the opinion of the railway administration is entitled to receive the goods and who shall receive the same on the execution of any Indemnity Note as specified in Form I:

Provided; however, that if the consignee is a Government official in his official capacity, such delivery may be made on unstamped Indemnity Note).

(2) Where the railway receipt is not forthcoming and the consignment is addressed by the sender to self, delivery shall not be made unless Indemnity Note, duly executed in Forms I-A and I-B are produced by the persons claiming delivery of the consignment."

Rule 5 of the 1990 Rules deals with delivery of perishable articles when the railway receipt is not forthcoming and the same reads as follows:

"(5) Delivery of perishable articles when the railway receipt is not forthcoming:- (1) notwithstanding anything contained in these rules, where the consignment consists of perishable articles and the railway receipt is not forthcoming, such consignment may be delivered to the person who, in the opinion of the railway administration is entitled to receive such consignments, and such person shall take delivery subject to the following conditions, namely:-

(a) if the invoice copy of the railway receipt is available at the time of taking delivery and the booking is to be named consignee who is claiming delivery, such person shall, before taking delivery execute an Indemnity Note specified in Form I; or

(b) (i) if the invoice copy of the railway receipt is not available at the time of taking delivery; or

(ii) if such invoice copy is available and the consignment is booked to "self",

Such person shall, deposit an amount equivalent to the cost of consignment by way of security apart from freight and other charges before taking delivery of such consignment.

(2) If any amount has been deposited by way of security under clause (b) of sub-rule (1), such amount shall

be refunded by the railway administration on production of the original railway receipt within six months from the date of taking such delivery.

(3) In the absence of original railway receipt refund may be granted on execution of an Indemnity Note in Form I or I-A and I-B, as the case may be, provided the invoice copy of the railway receipt is available and the particulars of consignment can be connected with reference to the invoice copy, within six months from the date of taking delivery."

16. Form I under Rule 3(1) of the 1990 Rules deals with the "Indemnity Note" that when the consignment is to be delivered to the 'person', not to 'self'. If it is to a 'person' then he has to furnish an indemnity note signed by the 'consignee'. Sub-rule (2) of Rule 3 specifically states that, when the railway receipt is not forthcoming and the consignment is addressed to "Self", delivery shall not be made unless Indemnity Note, duly executed in Forms I-A and I-B are produced by the persons claiming delivery of the consignment. The relevant portion of Form I-A and I-B are extracted below for easy reference:

"Form I-A

[See Rule 3(2)]
FORM OF INDEMNITY NOTE

_____ RAILWAY

INDEMNITY NOTE

** I/We hereby acknowledge to have received from _____ Railway _____ valued at Rs._____ which was dispatched by ** me/us and booked to self/as value payable, from the _____ Station of the _____ Railway on or about the _____ day of _____ the railway receipt for which has been _____ and ** for myself, my heirs, executors and administrators / and for our Company / Firm, their

assigns, and successors.

** I/We undertake in consideration of such delivery as aforesaid to hold.

* President of India, his agents and servants the _____ railway administration, its agents and servants harmless and indemnified in respect of all claims to the said goods.

** I/We also undertake to pay on demand to the railway administration freight charges, undercharges, wharfage and any other charges that may be subsequently found due in respect of this transaction.

And ** I/We the undersigned, signing below the consignor of these goods certify that the first signor is the bona fide owner of the goods; and that ** I/We undertaken the whole of the said liability equally with the consignor, and for this purpose ** I/We affix ** my/our signature hereto.

Signature of Witness _____Signature of Consignor_____

Father's name _____ **Father's name _____

Age_____ Age_____

Profession_____ Profession_____

Residence_____Residence _____

_____

Designation and Seal of the Co./Form

_____

Registered Office/Place of business"

Signature of witness_____Signature of Surety_____

Father's name_____**Father's name_____

Age_____Age_____

Profession_____ Profession_____"

"Form I-B

[See Rule 3(2)]
FORM OF INDEMNITY NOTE

_____ RAILWAY

INDEMNITY NOTE

** I/We hereby acknowledge to have received from _____ Railway _____ valued at Rs._____ which was dispatched by _____ from _____ Station of the _____ Railway on or about the _____ day of _____ and booked to self/as value payable, the railway receipt for which has been _____ and ** for myself, my heirs, executors and administrators / and for our Company / Firm, their assigns, and successors.

** I/We undertake in consideration of such delivery as aforesaid to hold.

* President of India, his agents and servants the _____ Railway Administration, its agents and servants harmless and indemnified in respect of all claims to the said goods.

** I/We also undertake to pay on demand to the railway Administration freight charges, wharfage and any other charges that may be subsequently found due in respect of this transaction.

** I enclose a copy of a stamp Indemnity Note executed

by the consignor and countersigned by the Station Master of the Forwarding Station which has been duly endorsed by the Consignor in my favour authorizing me to take delivery of the consignments on his behalf.

And ** I/We the undersigned, signing below the person authorized by the consignor to take delivery of the goods. I hereby certify that the first signor is the bona fide owner of the goods and ** I/We undertake the whole of the said liability equally with the signor, and for this purpose **I/We affix ** my/ our signature hereby.

Signature of Witness _____ Signature of Consignor_____

Father's name _____ Father's name _____

Age _____ Age _____

Profession _____ Profession _____

Residence_____ Residence _____

_____

Designation and Seal of the Co./Form

_____

Registered Office/Place of business"

Signature of witness_____Signature of Surety_____

Father's name_____**Father's name_____

Age_____Age_____

Profession_____Profession_____"

17. In Form 1-A, Indemnity Note, the consignor has to sign certifying that his is the bona fide owner of goods. Form 1-B, Indemnity Note, has to be signed by the consignor authorizing the person to take delivery. The copy of a stamped Indemnity Note has to be executed by the consignor and counter signed by the Station Master of the forwarding station. In other words, all the formalities prescribed under Form 1-A and Form 1-B have to be complied with, when the Railway Receipt is not forthcoming and the consignment is addressed by the sender to Self. The Railways cannot effect delivery unless those formalities have been complied with.

18. On going through the Railways Act, 1989, the Tribunal Act as well as the 1990 Rules and the statutory forms, we are of the considered view that what the Tribunal has to inquire into and determine is the claim against the Railway Administration, that is whether the Railway Administration is at fault in discharging its responsibilities under the Railways Act, Rules and Regulations and not the inter se disputes between the claimants and third parties.

19. In view of the above facts and circumstances of the case, we find no error in the view taken by the Tribunal, which was affirmed by the High Court. Consequently, the appeal is dismissed. We, however, make it clear that we are not expressing our opinion on the merits of the case and the same has to be adjudicated by the Tribunal in accordance with law.

R.P. Appeal dismissed.

NAZMA

v.

JAVED @ ANJUM

(Criminal Appeal No. 1693 of 2012)

OCTOBER 19, 2012)

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

Practice and Procedure - Miscellaneous application - Filed in a disposed of criminal writ petition - Entertained by High Court - Propriety of - Held: High Court committed error in entertaining the application - Once the writ petition is disposed of, the High Court becomes functus officio and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors.

High Court - Power of - Under Articles 226 and 227 and s. 482 Cr.P.C. - To interfere with orders granting or rejecting bail - Held: Jurisdiction of High Court under Articles 226 and 227 and u/s. 482 are exceptional in nature and to be used in most exceptional cases - Powers u/s. 439 is also discretionary and required to be exercised with great care and caution - Powers to grant or reject the bail is within the powers of regular criminal court and the High Court not justified in usurping their powers in its inherent jurisdiction - Code of Criminal Procedure, 1973 - s. 439 and 482 - Constitution of India, 1950 - Articles 226 and 227.

Brothers of the appellant lodged FIR against respondent No. 1 and his family which was registered u/ss. 498-A, 323, 324, 504 and 506 IPC and ss. 3 and 4 of Dowry Prohibition Act.

Respondent No. 1 and his family filed separate Criminal Miscellaneous Writ Petition before High Court without making the appellant party to that. Writ petition was disposed of by High Court staying the arrest of the respondent No. 1 and his family members till the conclusion of investigation or submission of report u/s. 173 Cr.P.C. High Court also directed respondent No. 1 to deposit Rs. 2000/- per month to be withdrawn by the appellant.

The police submitted its report closing the investigation. The Chief Judicial Magistrate took cognizance of the offence and issued summons. Respondent No. 1 filed an application in the disposed of writ petition. The High Court allowed the application extending the stay of arrest until the conclusion of trial and continued the direction to deposit Rs. 2000/-. The appellant filed the present petition challenging the order of High Court in the application.

Allowing the appeal, the Court

HELD: 1. The High Court has committed a grave error in entertaining the criminal miscellaneous application in a disposed of criminal writ petition. Once the criminal writ petition has been disposed of, the High Court becomes functus officio and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors. In the instant case, the High Court has entertained a petition in a disposed of criminal writ petition and granted reliefs, which is impermissible in law. In spite of the clear pronouncement of law by this Court, still, the High Courts are passing similar orders, which practice has to be deprecated in the strongest terms. [Paras 11, 12 and 13] [833-D; 834-E; 835-A-B]

2. The High Court has committed a grave error also by passing an order not to arrest 1st respondent till the conclusion of the trial. The High Courts are entertaining writ petitions under Articles 226 and 227 of the Constitution, so also under Section 482 CrPC and passing and interfering with various orders granting or rejecting request for bail, which is the function of ordinary Criminal Court. The jurisdiction vested on the High Court under Articles 226 and 227 of the Constitution as well as Section 482 CrPC are all exceptional in nature and to be used in most exceptional cases. The jurisdiction under Section 439 CrPC is also discretionary and it is required to be exercised with great care and caution. Grant of bail or not to grant, is within the powers of the regular Criminal Court and the High Court, in its inherent jurisdiction, not justified in usurping their powers. [Paras 12 and 13] [834-E-H; 835-A]

Hari Singh Mann v. Harbhajan Singh Bajwa and Ors. **(2001) 1 SCC169: 2000 (4) Suppl. SCR 313 - relied on.**

Case Law Reference:

2000 (4) Suppl. SCR 313	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1693 of 2012.

From the Judgment & Order dated 26.08.2004 of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 13306 of 2004 in Crl. Misc. Writ Petition No. 5877 of 2003.

Shiv Ram Kumar for the Appellant.

Arvind Kumar, Laxmi Arvind, Poonam Prasad, Pradep Kumar Mathur for the Respondent.

The Judgment of the Court was delivered by

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

2. We are, in this appeal, concerned with the legality and propriety of an order passed by the High Court of Allahabad in a disposed of Criminal Miscellaneous Writ Petition.

3. Facts giving rise to this appeal are as follows: The marriage of the appellant and 1st respondent took place in the year 1997 according to the Muslim rites and customs and out of that wedlock three children were born. According to the appellant, 1st respondent married again for a third time. During the subsistence of the appellant's marriage, 1st Respondent kept on harassing the appellant demanding dowry, which resulted in the lodgment of an F.I.R. by the appellant's brother, being F.I.R. No. 72 of 2003, on 5.8.2003 and a case was registered under Sections 498-A, 323, 324, 504, 506 of the Indian Penal Code (IPC) and Sections 3 and 4 of the Dowry Prohibition Act against 1st respondent and his family members. The case was later transferred to the Ladies Police Station, Rakab Ganj, Agra vide an order dated 12.9.2003 of the S.S.P., Agra.

4. Family members of 1st respondent then approached the High Court of Allahabad and filed a Criminal Miscellaneous Writ Petition No. 5426 of 2003 for quashing the F.I.R. In that writ petition, the appellant was not made a party, but only her brother. The family members of 1st respondent had submitted before the High Court that an amount of Rs.2,000/- per month would be deposited in the Court of the Chief Judicial Magistrate, until the conclusion of the trial and the appellant could withdraw the same. The High Court on 17.9.2003 passed the following order:

"Heard ld. Counsel for the petitioner and Ld. A.G.A.

Learned counsel for the petitioner has agreed to deposit Rs.2,000/- (rupees two thousand only) per month on compassionate ground to be withdrawn by the wife of the petitioner Smt. Nazma. The amount shall be deposited in the court of Chief Judicial Magistrate concerned until the conclusion of trial.

In the above said facts and circumstances, since investigation is only with regard to the matter pertaining to the demand of dowry and some ancillary offences under Indian Penal Code, we are inclined to Interfere primarily with an intent to settle the dispute between the parties amicably. *The arrest of the petitioners in case crime No.227 of 2003, under Sections 498-A, 323, 324, 504, 506 IPC and Ss. 3 and 4 of D.P. Act, Police Station Achhnera, District Agra, shall not be effected until the conclusion of investigation or submission of the report under Section 173 Cr.P.C.* with this direction the petition is finally disposed of."

(emphasis added)

The above order is seen passed by the High Court with the intention that the parties would settle their disputes amicably.

5. 1st respondent also filed a Criminal Miscellaneous Writ Petition No. 5877 of 2003 before the High Court of Allahabad seeking identical reliefs. Writ petition was filed without making the appellant or his brother a party. Writ petition was disposed of by the High Court on 25.9.2003 stating that 1st respondent should not be arrested until the conclusion of the investigation or submission of any report under Section 173 of the Code of Criminal Procedure (CrPC), the operative portion of the order reads as follows:

Heard ld. Counsel for the petitioner and ld. A.G.A.

The arrest of other family members has been stayed

in Criminal Misc. Writ Petition No. 5426/2003 (Smt. Amana and others Vs. State of U.P. & others). The said writ petition has been disposed of also with a direction to deposit Rs.2,000/- per month. This petition is on behalf of husband. The offences are under Section 498-A I.P.C. and some other ancillary offence under I.P.C. etc. photo copy of the order passed in the above said writ petition has been produced by learned counsel for the petitioner. It is placed on record.

In this view of the matter, the arrest of the petitioner in case Crime No. 227 of 2003, under Sections 498-A, 323, 324, 504 and 506 IPC and Sections 3 and 4 of DP Act, P.S. Achhnera, district Agra, shall not be effected until the conclusion of investigation or submission of any report under section 173 Cr.P.C.

With this direction this petition is finally disposed of."

6. The Investigating Officer then filed the report closing the investigation. Learned Chief Judicial Magistrate, however, took cognizance of the case and issued summons vide his order dated 15.1.2004. 1st respondent challenged that order before the High Court of Allahabad in Revision Petition No. 694 of 2004 which was dismissed by the High Court on 24.2.2004 by the following order:

"Having heard the learned counsel for the parties, this revision petition is dismissed. However, in the interest of justice, I direct that if revisionist moves objections through counsel within two weeks against the impugned order, the same may be disposed of expeditiously and *till the disposal of the objection the revisionist shall not be arrested.*"

(emphasis added)

7. 1st respondent filed objections before the learned

Magistrate on 5.3.2004 with a prayer for recalling the summoning order dated 15.1.2004.

8. 1st respondent then filed an application, Criminal Miscellaneous Application 133306 of 2004, in the disposed of Criminal Miscellaneous Writ Petition No. 5877 of 2003. The High Court allowed the application and passed the following order on 26.8.2004:

"Application is allowed. The accused was directed to deposit a sum of Rs.2,000/- per month until the conclusion of trial.

Since the payment is to be made till the end of trial. We feel it expedient to stay their arrest until the conclusion of trial."

(emphasis added)

In that application, appellant was not made a party and the Court practically reviewed its earlier order dated 25.9.2003 and extended the stay of arrest until the conclusion of the trial. Earlier, by order dated 25.9.2003, the High Court had directed stay of arrest till the conclusion of the investigation or submission of any report under Section 173 CrPC and later vide order dated 26.8.2004, it was ordered that the 1st respondent should not be arrested until the conclusion of the trial. Against this order of the High Court, this appeal has been preferred by the appellant-wife.

9. Shri Shiv Ram Sharma, learned counsel appearing for the appellant, submitted that the High Court has committed a grave error in entertaining the criminal miscellaneous application in a disposed of criminal miscellaneous writ petition and granting relief to 1st respondent. Learned counsel submitted that the practice of filing miscellaneous application in disposed of writ petitions are on the rise,in spite of the fact that this practice has been deprecated by this Court in various judgments. Reference was made to the judgment of this Court

in *Hari Singh Mann v. Harbhajan Singh Bajwa and Others* (2001) 1 SCC 169. Learned counsel further submitted that the High Court, by granting stay of arrest, is depriving the trial Courts of its power to issue orders under Section 439 CrPC. Learned counsel also submitted that the order of the High Court is also interfering with the powers of the Family Court in passing appropriate orders in the application filed under Section 125 CrPC.

10. Shri Arvind Kumar, learned counsel appearing for the respondent, submitted that the High Court has only granted stay of the arrest of 1st respondent till the conclusion of the trial, consequently, no prejudice has been caused to the appellant. Further, it was also pointed out that 1st respondent is depositing the amount of Rs.2,000/- per month in the Court of Chief Judicial Magistrate, Agra, as directed by the High Court and that appellant has made an application for withdrawal of the said amount as well. Further, it was also stated that since the appellant was not a party to the Criminal Writ Petition No. 5877 of 2003 as well as in Criminal Miscellaneous Application No. 133306 of 2004, this appeal preferred by the appellant is not maintainable.

11. We are of the view that the High Court has committed a grave error in entertaining the criminal miscellaneous application No. 133306 of 2004 in a disposed of Criminal Writ Petition No. 5877 of 2003. Criminal Writ Petition No. 5877 of 2003 was disposed of on 25.9.2003 directing that the 1st respondent should not be arrested until the conclusion of the investigation or submission of any report under Section 173 CrPC. On an application filed by the 1st respondent in that writ petition, the High Court later passed an order on 26.8.2004 stating that the petitioner therein (1st respondent) be not arrested until the conclusion of the trial. The practice of entertaining miscellaneous applications in disposed of writ petitions was deprecated by this Court in *Hari Singh Mann* (supra). Reference to the following paragraph of that judgment

is apposite:

> "8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because Respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court."

12. We are sorry to note that in spite of the clear pronouncement of law by this Court, still, the High Courts are passing the similar orders, which practice has to be deprecated in the strongest terms. Of late, we notice that the High Courts are entertaining writ petitions under Articles 226 and 227 of the Constitution, so also under Section 482 CrPC and passing and interfering with various orders granting or rejecting request for bail, which is the function of ordinary Criminal Court. The jurisdiction vested on the High Court under Articles 226 and 227 of the Constitution as well as Section 482

CrPC are all exceptional in nature and to be used in most exceptional cases. The jurisdiction under Section 439 CrPC is also discretionary and it is required to be exercised with great care and caution.

13. We are of the view that the High Court has committed a grave error in not only entertaining the criminal miscellaneous application in a disposed of writ petition, but also passing an order not to arrest the 1st respondent till the conclusion of the trial. Grant of bail or not to grant, is within the powers of the regular Criminal Court and the High Court, in its inherent jurisdiction, not justified in usurping their powers. Once the criminal writ petition has been disposed of, the High Court becomes functus officio and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors. In the instant case, the High

Court has entertained a petition in a disposed of criminal writ petition and granted reliefs, which is impermissible in law.

14. We are, therefore, inclined to allow this appeal and set aside the impugned order passed by the High Court, with costs of Rs.25,000/- to be paid by 1st respondent to the appellant, within a period of two months.

K.K.T. Appeal allowed.

SAYED MOHD. AHMED KAZMI
v.
STATE, GNCTD & ORS.
(Criminal Appeal Nos. 1695-1697 of 2012)

OCTOBER 19, 2012

[ALTAMAS KABIR, CJI, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Code of Criminal Procedure, 1973 - 167 (2) - Prosecution of accused u/ss. 302, 427 and 120B IPC and ss. 16 and 18 of Unlawful Activities (Prevention) Act - Accused sent to judicial custody by Magistrate - After completion of judicial custody for 90 days, Magistrate extended the period of investigation and custody of the accused by another 90 days - In revision against the order of the Magistrate, Sessions Court held the custody of the accused to be illegal - Accused's application u/s. 167(2) seeking default bail as no charge-sheet was filed within 90 days - The Magistrate instead of hearing the application for bail, kept on renotifying the hearing - In the meantime State filing fresh application seeking further extention of investigation period and the custody of the accused - Magistrate did not consider the bail application and extended the investigation period and custody of the accused for 90 days with retrospective effect i.e. from the date the initial judicial custody for 90 days got over - Thereafter prosecution

filed charge-sheet - Accused further filed application for early hearing which was dismissed by High Court - Appeal against the orders of High Court - Held: The order of the Magistrate extending time of investigation and custody of the accused for 90 days with retrospective effect and the orders of High Court are set aside - The accused acquired the right for statutory bail when his custody was held to be illegal - The Magistrate could not defeat the statutory right which accrued to the accused on the expiry of 90 days from the date he was taken into custody - Unlawful Activities (Prevention) Act, 1967 - Penal Code, 1860.

Sanjay Dutt vs. State through CBI **(1994) 5 SCC 410: 1994 (3) Suppl. CR 263 ;** *Dr. Bipin Shantilal Panchal vs. State of Gujarat* **(1996) 1 SCC 718: 1996 (1) SCR 193 - distinguished.**

Uday Mohanlal Acharya vs. State of Maharashtra **(2001) 5 SCC 453: 2001 (2) SCR 878 - referred to.**

Case Law Reference:

2001 (2) SCR 878	**Referred to**	**Para 19**
1994 (3) Suppl. SCR 263	**Distinguished**	**Para 19**
1996 (1) SCR 193	**Distinguished**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1695-1697 of 2012.

From the Judgment & Order dated 02.07.2012, 06.07.2012 and 06.08.2012 of the High Court of Delhi at New Delhi in Criminal M.C. No. 2180 of 2012.

Mehmood Pracha, Gajinder Kumar, Sheikh Faroz Iqbal, Sneha Singh, Chander Shekhar, Chirag M. Shroff for the Appellant.

Harin P. Raval, ASG Shriniwas Khalap, Anirudh Sharma, Anando Mukharji, Palash Kanwar, D.S. Mahra, B.V. Balram Das for the Respondents.

The Order of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Leave granted.

2. These appeals arise out the judgment and orders dated 2nd July, 2012, 6th July, 2012 and 6 th August, 2012, passed by the Delhi High Court in Crl. M.C. No.2180 of 2012.

3. By virtue of the first order dated 2nd July, 2012, the High Court issued notice on the question whether the Court of the Chief Metropolitan Magistrate was competent to remand the accused beyond 15 days for offences under the provisions of the Unlawful Activities (Prevention) Act, 1967. Notice was also issued to the learned Additional Solicitor General since the case involved interpretation of the provisions of the National Investigation Agency Act, 2008, the Code of Criminal Procedure, 1973 and the abovementioned Unlawful Activities (Prevention) Act, 1967. Proceedings pending before the learned Additional Sessions Judge, Central-II, Delhi, in CR No.86 of 2012, were also stayed till the next date of hearing and the matter was directed to be listed on 9th October, 2012. By a subsequent order dated 6th July, 2012, the High Court modified its earlier order and directed the Chief Metropolitan Magistrate to extend the remand of the accused and to take cognizance of offences under the Unlawful Activities (Prevention) Act, 1967. By yet another order dated 6th August, 2012, the High Court rejected the Appellant's prayer for early hearing of the matter indicating that in view of the heavy board of the Court it was not possible to accommodate the Appellant's request for early hearing.

4. Although, the Special Leave Petition was directed against the said three orders, during the hearing thereof, another question of substantial importance surfaced when on behalf of the Appellant an application, being Crl. M.A.

No.19883-85 of 2012 for grant of statutory bail under Section 167(2) Cr.P.C. was filed, and was taken up for hearing along with the appeal.

5. Appearing in support of the Appeals, Mr. Mehmood Pracha, learned Advocate, urged that on 13th February, 2012, the police registered FIR No.4 of 2012 in respect of offences alleged to have been committed under Sections 307, 427 and 120-B of the Indian Penal Code in connection with an explosion involving an Israeli Embassy vehicle carrying the wife of an Israeli Diplomat which had occurred at about 3.15 p.m. at the Aurangzeb Road/Safdarjung Road crossing. The alleged offences were later amended to cover Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967.

6. On 6th March, 2012, the Appellant, Sayed Mohd. Ahmed Kazmi, was apprehended by some unidentified men in plain clothes from outside the Indian Islamic Culture Centre at Lodhi Road at about 11.30 p.m. He was produced before the learned Chief Metropolitan Magistrate on 7th March, 2012, who remanded him to 20 day police custody, subject to certain conditions. On 25th March, 2012, the Investigating Agency completed its investigation, two days prior to the expiry of the 20 day remand period, and the learned Magistrate was informed that no further custodial interrogation of the Appellant was required. Consequently, the Appellant was sent to judicial custody for a further period of 14 days.

7. On 28th March, 2012, a prayer for bail was made on behalf of the Appellant under Section 437 Cr.P.C. The said application was heard, but the Appellant's prayer for bail was rejected on 3rd April, 2012. In between various other proceedings were taken with regard to the inspection of the damaged car.

8. On 2nd June, 2012, the Appellant was produced before the Chief Metropolitan Magistrate, since his 90 days' period of custody was to expire on 3rd June, 2012, and further custody

of 90 days' was sought for by the prosecution. The learned Magistrate by his order dated 2nd June, 2012, extended the period of investigation and the custody of the Appellant by another 90 days. The said order dated 2nd June, 2012, was challenged by the Appellant by way of CR No.86 of 2012 which came up for consideration before the learned Additional Sessions Judge on 8th June, 2012. The learned Additional Sessions Judge, inter alia, held that it was only the Sessions Court and not the Chief Metropolitan Magistrate which had the competence to even extend the judicial custody of the accused and to entertain cases of such nature.

9. On 22nd June, 2012, the Appellant was produced before the learned Chief Judicial Magistrate for extension of his custody. However, on behalf of the Appellant, an application had been made under Section 167(2) Cr.P.C. on 17th July, 2012, seeking default bail as no charge-sheet had been filed within the 90 day period of the Appellant's custody. The said application was dismissed by the learned Magistrate despite the observations made by the Additional Sessions Judge in his order of 8th June, 2012.

10. The matter was, thereafter, referred by the learned Chief Metropolitan Magistrate to the District and Sessions Judge who directed that the judicial custody of the Appellant be extended till 3rd July, 2012. On 30th June, 2012, without serving any notice to the Appellant, the State filed Crl. M.C. No.2180 of 2012 under Section 482 Cr.P.C. before the High Court questioning the validity of the order passed by the learned Additional Sessions Judge on 8th June, 2012. By its order dated 2nd July, 2012, the High Court stayed the observations of the Additional Sessions Judge, Central II, Delhi, in CR No.86 of 2012. The Appellant's application for grant of statutory bail could not, therefore, be taken up by the Additional Sessions Judge till the High Court on 13th July, 2012, vacated the stay in respect of the proceedings in CR No.86 of 2012, subject to an undertaking to be given that the question of law involved

would not be agitated and the revision would be restricted only to the factual aspects of the case. In that context, on the same date, the counsel for the Appellant moved another application before the learned Chief Metropolitan Magistrate under Section 167(4) Cr.P.C. and the same was listed for consideration on 17th July, 2012. In the meantime, on 16th July, 2012, CR No.86 of 2012 which had been filed by the Appellant came up for final arguments and on 17th July, 2012, the Additional Sessions Judge allowed the application and held that the custody of the Appellant was illegal.

11. In view of the order passed by the Additional Sessions Judge declaring the Appellant's custody to be illegal, on the same day, counsel for the Appellant appeared before the Chief Metropolitan Magistrate and the application under Section 167(2) Cr.P.C. was listed for hearing, but, instead of hearing the application on the said date, the Chief Metropolitan Magistrate renotified the hearing for 18th July, 2012.

12. On 18th July, 2012, the State filed a fresh application before the Chief MetropolitanMagistrate seeking further extension of the Appellant's custody and the investigation period. On receiving the said application, the learned Chief Metropolitan Magistrate directed a copy of the said application to be served on the counsel for the Appellant and renotified the matter for hearing on 20th July, 2012.

13. On 20th July, 2012, the Chief Metropolitan Magistrate took up the application for extension of custody filed on behalf of the prosecution instead of considering the Appellant's application under Section 167(2) Cr.P.C. and by his order of even date, the learned Chief Metropolitan Magistrate extended the time of interrogation and custody of the Appellant for 90 days with retrospective effect from 2nd June, 2012.

14. The aforesaid order of the learned Chief Metropolitan Magistrate was challenged by the Appellant by way of CR No.86 of 2012 in the Sessions Court. The Additional Sessions

Judge in his order of 30th July, 2012, observed that the said revisional application involved mixed questions of law and fact and adjourned the matter till 12th October, 2012. In the meantime, on 31st July, 2012, the prosecution filed charge-sheet. This was followed by the Appellant's application before the High Court in Crl. M.A. No.13484 of 2012 for early hearing, on which the High Court made the observation that on account of the heavy board of the Court it was not possible to accommodate the request for early hearing and the matter was renotified to 9th October, 2012, which is the impugned order in these appeals.

15. Appearing for the Appellant, Mr. Mehmood Pracha, learned Advocate, contended that once the period of 90 days, as stipulated under clause (a) (i) of the proviso to Subsection (2) of Section 167 Cr.P.C., came to an end, the right of a person arrested in connection with the commission of an offence to be released on statutory bail commenced and could not be extinguished by a subsequent application for extension of the period of custody. Mr. Pracha submitted that on 17th July, 2012, the Appellant's custody was held to be illegal by the Additional Sessions Judge in CR No.86 of 2012 and on the same day, the Appellant's application under Section 167(2) Cr.P.C. was pending hearing before the learned Chief Metropolitan Magistrate, who, however, did not hear the application and renotified the hearing for 18th July, 2012. The fact that the application stood renotified for the next day, did not take away the fact that the application was pending on 17th July, 2012, when the period of custody of the Appellant had not only ended, but had been declared to be illegal. Mr. Pracha submitted that the application of 18th July, 2012, filed on behalf of the prosecution for extension of the period of custody, which was allowed by the learned Chief Metropolitan Magistrate on 20th July, 2012, without considering the Appellant's application under Section 167(2) Cr.P.C. and the subsequent extension of time of investigation and custody of the Appellant with retrospective effect from 2nd June, 2012, did not improve the matter to any

extent, as far as the prosecution is concerned, since on the expiry of the first period of custody beyond 90 days, there was no application pending for extension of the period of custody, as contemplated under the amended provisions of Section 167(2) Cr.P.C.

16. At this juncture, it may be useful to indicate that the provisions of Section 167(2) of the Code were modified by virtue of Section 43D of the Unlawful Activities (Prevention) Act, 1967. The modification of the provisions of Section 167(2) Cr.P.C. by virtue of Section 43D of the aforesaid Act is extracted hereinbelow :-

> **"43D. Modified application of certain provisions of the Code. -** (1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.
>
> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-
>
> (a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and
>
> (b) after the proviso, the following provisos shall be inserted, namely:-
>
> Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused

> beyond the said period of ninety days, extend the said period up to one hundred and eighty days:
>
> Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.".

17. By virtue of the aforesaid modification to the provisions of Section 167(2) Cr.P.C., the period of 90 days stipulated for completion of investigation and filing of charge-sheet, was modified by virtue of the amended proviso, which indicated that if the investigation could not be completed within 90 days and if the Court was satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond the period of 90 days, extend the said period upto 180 days. In other words, the custody of an accused could be directed initially for a period of 90 days and, thereafter, for a further period of 90 days, in all a total of 180 days, for the purpose of filing charge-sheet. In the event the charge-sheet was not filed even within the extended period of 180 days, the conditions directing that the accused persons *shall be released on bail if he is prepared to do and does furnish bail,* would become operative.

18. Mr. Pracha submitted that in the instant case on 17th July, 2012, when the Appellant's initial custody was held to be illegal, the right of the Appellant to grant of statutory bail under clause (a)(ii) of Sub-section (2) of Section 167 became operative and the Appellant became entitled to grant of statutory bail and the mere fact that on a subsequent application for extension of the period of custody, such custody was extended, was immaterial and was of no consequence, as had been contended in the High Court on behalf of the prosecution.

19. In support of his submissions, Mr. Pracha referred to

and relied upon a Three-Judge Bench decision of this Court in *Uday Mohanlal Acharya Vs. State of Maharashtra* [(2001) 5 SCC 453], wherein while referring to the earlier decision of this Court in the case of *Sanjay Dutt Vs. State through CBI* [(1994) 5 SCC 410], this Court interpreted the expression "if not already availed of" to mean that the Magistrate has to dispose of an application under Section 167(2) forthwith and on being satisfied that the accused had been in custody for the specified period, that no charge-sheet had been filed and that the accused was prepared to furnish bail, the Magistrate is obliged to grant bail, even if after the filing of the application by the accused a charge-sheet had been filed. Mr. Pracha submitted that so long as an application was pending before a charge-sheet had been filed after the expiry of the stipulated period for filing of charge-sheet, the accused had an indefeasible right to be released on statutory bail, as contemplated under the proviso to Section 167(2) Cr.P.C. Mr. Pracha submitted that the aforesaid decision was ad idem with the facts of the instant case, wherein the Appellant's application for grant of statutory bail was pending on the day when the Appellant's custody was declared to be illegal by the Additional Sessions Judge.

20. Mr. Pracha submitted that the order passed by the learned Chief Metropolitan Magistrate as also the High Court, were not sustainable, having been made in contravention of the provisions of Section 167(2) Cr.P.C. and were, therefore, liable to be set aside and the Appellant was entitled to be released on statutory bail.

21. On the other hand, learned Additional Solicitor General, Mr. Harin P. Raval, contended that there had been no breach of the provisions of Section 167(2) Cr.P.C. as the right of the Appellant for grant of statutory bail stood extinguished once the application for extension of the time for completing investigation had been filed by the prosecution on 18th July, 2012. Mr. Raval contended that it was settled law that if an accused did not avail of the remedy contemplated under Section 167(2) Cr.P.C.

before the charge-sheet was filed, such right was no longer indefeasible and was rendered nugatory upon filing of the charge-sheet.

22. In support of his submissions, the learned Additional Solicitor General referred to the Constitution Bench decision of this Court in the case of *Sanjay Dutt* (supra), wherein the aforesaid proposition of law was considered. The learned Additional Solicitor General submitted that it had been held by the Constitution Bench that in matters relating to the Terrorist and Disruptive Activities (Prevention) Act, 1987, default in completion of investigation within 180 days gave the accused an indefeasible right to bail, but the time of default continues till the filing of the challan, but does not survive thereafter. It was held that after filing of the challan, grant of bail would have to be decided on merit. Reference was also made to the decision of this Court in *Dr. Bipin Shantilal Panchal v. State of Gujarat* [(1996)1 SCC 718], in which the same legal position was reiterated.

23. The learned Additional Solicitor General submitted that once the period for completing investigation was extended on 18.7.2012 and the Appellant's application, if any, for statutory bail remained undecided, by virtue of the ratio of the decisions in the case of *Sanjay Dutt* (supra) and the subsequent case of *Dr. Bipin Shantilal Panchal* (supra), the right, if any, of the Appellant for grant of statutory bail was rendered null and void. The learned Additional Solicitor General, therefore, submitted that no interference was called for in the order passed by the learned Additional Sessions Judge and also of the High Court and the appeal was liable to be dismissed.

24. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General, Mr. Raval. There is no denying the

fact that on 17th July, 2012, when CR No.86 of 2012 was allowed by the Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application under Section 167 (2) Cr.P.C. was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20th July, 2012 extended the time of investigation and the custody of the Appellant for a further period of 90 days with retrospective effect from 2nd June, 2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody. Such right, as has been commented upon by this Court in the case of *Sanjay Dutt* (supra) and the other cases cited by the learned Additional Solicitor General, could only be distinguished once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

25. The circumstances, in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

26. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the Appellant acquired the right for grant of statutory bail on 17th

July, 2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the Appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.

27. We therefore, allow the appeal, set aside the order dated 20th July, 2012, passed by the Chief Metropolitan Magistrate extending the time of investigation and custody of

the accused for 90 days, with retrospective effect from 2nd June, 2012, and the orders of the High Court dated 2nd July, 2012, 6th July, 2012 and 6th August, 2012, impugned in the appeal and direct that the Appellant be released on bail to the satisfaction of the Chief Metropolitan Magistrate, upon such conditions as may be deemed fit and proper, including surrender of passport, reporting to the local police station, and not leaving the city limits where the Appellant would be residing without the leave of the Court, so as to ensure the presence of the accusedAppellant at the time of the trial.

K.K.T Appeal allowed

SAJEESH BABU K.
v.
N.K. SANTHOSH & ORS.
(Civil Appeal No. 7599 of 2012)

OCTOBER 19, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Constitution of India, 1950 - Article 226 - Writ Petition - Challenging selection for LPG distributorship and the genuineness of the experience certificates produced by the selected candidate - Selection done by qualified persons - Genuineness of the certificates also verified by the selector - Single Judge of High Court quashing the distributorship doubting the correctness of the certificates - Division Bench of High Court affirming the order - On appeal, held: In a matter of selection by Expert Committee consisting of qualified persons in a particular field, normally, the courts should be slow to interfere with the opinions expressed by the experts, unless there is allegation of mala fide against the experts - On facts, selection was by experts, no mala fide was alleged against them - Genuineness of the experience certificate was duly verified - On equity also selection was correct as the

selected candidate was unemployed - High Court ought not to have sat as an appellate court on recommendations of the expert committee - Public Distribution - Equity.

Respondent No. 2, a Public Sector Oil Company, engaged in refining of crude oil and marketing of various petroleum products, invited applications fro grant of LPG distributorship. 41 persons, including the appellant and respondent No. 1 and 3 applied for the same. Respondent No. 2 selected the appellant after holding interview and evaluating him as per the procedure prescribed under the guidelines. In order to ascertain the genuineness of the contents of the experience certificates (Exh. Nos. P2 and P3), respondent No. 2 deputed responsible persons.

Respondent No. 1 filed a writ petition, challenging the genuineness of the experience certificates produced by the appellant. Single Judge of the High Court allowed the petition quashing the distributorship. Writ appeal against the same was dismissed by Division Bench of High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. In a matter of appointment/selection by an Expert Committee/Board consisting of qualified persons in the particular field, normally, the Courts should be slow to interfere with the opinions expressed by the experts, unless there is any allegation of mala fides against the experts who had constituted the Selection Committee. There is no allegation of mala fides against the 3 experts in the Selection Committee. In such circumstances, it would normally be wise and safe for the courts to leave the decision of selection of this nature to the experts who are more familiar with the technicalities/nature of the work. In the case on hand, the Expert Committee evaluated the experience certificates produced by the appellant herein, interviewed him by putting specific

questions as to direct sale, home delivered products, hospitality/service industry etc. and awarded marks. In such circumstances, the High Court ought not to have sat as an appellate Court on the recommendations made by the Expert Committee. Interference by the High Court exercising extraordinary jurisdiction under Article 226 of the Constitution of India is not warranted. [Paras 15 and 18] [859-C; 861-F-H; 862-A]

2. In addition to the same, it is also asserted by the Corporation and informed to the High Court as well as to this Court that in order to ascertain the genuineness of the contents of experience certificates Exh. Nos. P2 and P3, respondent No. 2 deputed responsible persons for verification and, in fact, they met the issuing authority and were satisfied with the correctness of their statement. In view of this aspect, the Single Judge as well as the Division Bench committed an error in interfering with the decision of the Selection Committee. [Para 19] [862-B-D]

3. Even on equity, the appellant is an unemployed M.Tech post-Graduate and the contesting respondent No.1 is working as an Assistant Engineer in the State Electricity Board, in other words, he is fully employed on the date of the selection of LPG distributorship. From any angle, the High Court was not justified in upsetting the decision of the Selection Committee, particularly, in the absence of any mala fides against them and there is no warrant for direction to re-assess the marks of the appellant afresh by excluding the marks for certificates (Exh. Nos. P2 and P3), particularly, in the light of the detailed explanation offered by the respondent No. 2 about the mode of selection. [Para 19] [862-D-F]

The University of Mysore etc. vs. C.D. Govinda Rao and Anr. **AIR 1965 SC 491: 1964 SCR 575 - followed.**

Basavaiah (Dr.) vs. Dr. H.L. Ramesh and Ors. **(2010) 8 SCC 372: 2010 (9) SCR 227 - relied on.**

Case Law Rerefence:

1964 SCR 575	**Followed**	**Para 16**
2010 (9) SCR 227	**Relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7599 of 2012.

From the Judgment and Order dated 06.04.2011 of the High Court of Kerala at Ernakulam in W.A. No. 464 of 2011.

V. Giri, Roy Abraham, Mohammed Sadique T.A. (For C.K. Sasi) for the Appellant.

Vikram Ganguly, S.C. Ghosh (For Parijat Sinha), Siddhartha Chowdhury for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is filed against the final judgment and order dated 06.04.2011 passed by the High Court of Kerala at Ernakulam in Writ Appeal No. 464 of 2011 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein.

3. Brief Facts:

a) On 27.12.2007, the Bharat Petroleum Corporation Ltd., a Public Sector Oil Company engaged in refining of crude oil and marketing of various petroleum products (in short "the Corporation")-Respondent No. 2 herein invited applications for grant of LPG distributorship for Edavanna, Malappuram District, Kerala, a distributorship reserved for Scheduled Caste applicants. In total, 41 persons including the appellant and respondent Nos. 1 and 3 herein applied for the grant of licence

for the same.

b) The Corporation, after conducting interviews and evaluating the merits and demerits of the candidates as per the procedure prescribed under the guidelines for the selection of Bharatgas Distributors, selected the appellant herein for grant of licence of LPG distributorship and issued him a Letter of Intent dated 25.06.2009.

c) Challenging the genuineness of the experience certificates produced by the appellant herein, Shri N.K. Santhosh-Respondent No.1 herein filed a petition being W.P.(C) No. 7622 of 2010 before the High Court of Kerala. Learned single Judge of the High Court, by judgment dated 16.03.2011, allowed the petition and quashed the distributorship granted to the appellant herein.

d) Against the said judgment, the appellant herein filed a Writ Appeal being No. 464 of 2011 before the High Court. The Division Bench of the High Court, by impugned judgment dated 06.04.2011, dismissed the said appeal.

e) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. V. Giri, learned senior counsel for the appellant and Mr. Siddhartha Chowdhury, learned counsel for respondent No.1 and Mr. Vikram Ganguly, learned counsel for respondent No.2-Corporation. None appeared for respondent No.3.

5. It is the claim of the appellant that the Corporation, after conducting interviews and evaluating the merits and demerits of the candidates as per the procedure prescribed under the guidelines for selection of Bharatgas Distributors, selected him for grant of licence of LPG distributorship for Edavanna, Malappuram District, Kerala. It is also pointed out that as per the tabulation sheet, the appellant had scored highest marks than the other candidates with reference to qualification,

experience, age, business ability and personality and was placed in the first position whereas Respondent No.3 herein was placed in the second and respondent No.1 herein was placed in the third position.

6. Respondent No.1 herein, who is working in the Kerala State Electricity Board as Assistant Engineer, challenged the selection of the appellant herein before the High Court of Kerala by filing a petition being W.P.(C) No. 7622 of 2010 alleging the genuineness of the experience certificates (Exh. Nos. P2 and P3) produced by him and awarding of more marks on the basis of the same. He further claimed that the Selection Committee ought to have preferred his application for LPG distributorship. Learned single Judge allowed the said writ petition holding that the experience certificates submitted by the appellant appear to be totally unacceptable as the appellant while studying M.Tech could not have been possible to work as part-time Marketing Manager and an Insurance Consultant. On this ground, the learned single Judge quashed the grant of licence of LPG distributorship to the appellant and directed the Corporation to re-assess his marks afresh excluding the marks for the experience certificates. The very same decision was affirmed by the Division Bench of the High Court.

7. In order to ascertain the correctness of the decision of the Selection Committee, the order of the learned single Judge setting aside the same and remitting it for fresh consideration as affirmed by the Division Bench, it is desirable to refer the relevant guidelines for selection of Bharatgas Distributors. It is pointed out by the Corporation, in their counter affidavit ,before the High Court as well as in this Court that as per Clause 14 of the guidelines, the LPG distributor will be selected on the basis of evaluation of all eligible applicants on the following parameters:

a) Capability to provide infrastructure - 35 marks

b) Capability to provide finance - 35 marks

c)	Educational qualifications	- 15 marks
d)	Age	- 4 marks
e)	Experience	- 4 marks
f)	Business ability/acumen	- 5 marks
g)	Personality	- 2 marks
	Total	100 marks

It is also stated in their counter affidavit that the selection of the appellant was in accordance with the guidelines and norms governing the matter and there is no extraneous consideration in selecting him as an empanelled candidate. It is further explained that the evaluation on the parameters 'a' to 'd' will be done on the basis of the information given in the application and the evaluation on parameters 'e' to 'g' will be done on the basis of the interview.

8. As per the guidelines, the maximum marks for experience in direct sale/home delivered products (including LPG distributorship), other petroleum products and for any other trade are 4, 3 and 2 respectively. It has been further elaborated in the guidelines that marks for the parameter 'Experience' are awarded based on the information furnished in the application for experience of running or working in an establishment for minimum one year and that too on the quality rather than amount of experience. It is the case of the Corporation that the quality of experience will be judged based on the response to the questions relating to experience in direct sale, home delivered products, trade of petroleum products, hospitality/ service industry etc. by the candidates in the interview. In the counter affidavit, it is also specifically stated that the appellant has been awarded with 4 marks for the parameter 'Experience' by the Selection Committee comprising of 3 senior officials of the Corporation who are well qualified and experienced in assessing the required experience for an LPG distributor. It is further explained that 4 marks were awarded to the appellant strictly in accordance with the guidelines for the distributorship of LPG and based on the response to the questions relating

to the above in the interview.

9. Before proceeding further, it is relevant to note the decision by the learned single Judge with reference to Exh. Nos. P2 and P3 and the ultimate selection by the Committee. The learned single Judge, in paragraph 4 of his judgment, arrived at the following conclusion:

> "……..First of all, in Exts. P2 and P3 there is no mention that the second respondent was working part-time. Secondly, ordinarily, it would be very difficult for a M.Tech student to work part-time as a Marketing Manager of a gas distributor and an Insurance consultant. Thirdly, as per Ext.P2 certificate the second respondent was working as Marketing Manager in Malappuram from December 2005 to March 2007. Ext. P3 certificate certifies that the second respondent worked as an Insurance consultant with Bajaj Allianz Life Insurance Company Ltd. since August 2006. The period of Exts. P2 and P3 overlaps. Respondents 1 and 2 have not been able to give a satisfactory explanation for the same. Lastly, and more importantly as proved by Ext. P4, the second respondent was a M.Tech student of CUSAT which is at Ernakulam. The fairly tale that a student studying for M.Tech in Cochin was working part-time as Marketing Manager and Insurance Consultant at Malappuram is totally unbelievable……."

When this conclusion was challenged by the appellant herein before a Division Bench of the High Court, the Division Bench without much discussion merely affirmed the same. In view of the decision by the learned single Judge and the Division Bench, it is worthwhile to refer the contents of Exh. Nos. P2 and P3 and to see whether it would be possible for the appellant to have this experience while studying M.Tech., the assessment and the decision of the Selection Committee.

10. We have already quoted Clause 14 which deals with norms for evaluating the candidates. Before proceeding further, it is relevant to note that as per the guidelines, in case of LPG distributorship reserved for SC category, there will be no evaluation on land and financial capabilities as mentioned in sub-clauses (a) and (b) of Clause 14. It is not in dispute that the present distributorship has been reserved for Scheduled Caste applicants. In that event, the Selection Committee has to concentrate other clauses, namely, clauses (c) to (g) and select a suitable candidate based on their assessment.

11. The Selection Committee relied on the Experience Certificate issued by M/s Sree Agencies, ELF Gas Distributor, Malappuram, Kerala, which reads as under:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that Mr. Sajeesh Babu, Kavalappara, S/o Balan residing at Kavalapara house, Padinhattumuri P.O. Malappuram Dist. Was worked in this office as marketing Manager from December 2005 to March 2007. He performed very well and his conduct was also good.

Place : Malappuram Stamp Yours faithfully
Date : 05.04.2007 sd/-
Manager"

12. The other certificate relied on by the Selection Committee is the Experience Certificate issued by Bajaj Allianz Life Insurance Company Limited which reads as under:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that Mr. Sajeesh Babu, Kavalappara, S/o Balan K. residing at Kavalappra (House), Padinhattumuri (Post), Malappuram (Dist.) is being worked with us since August 2006 as an Insurance Consultant at our branch office Malappuram. His conduct during this period has been good.

OFFICAL SEAL

Sd/-
Senior Branch Manager
Bajaj Allianz
Up Hill, Malappuram"

13. The Degree Certificate issued by Cochin University of Science and Technology, Faculty of Technology dated 23.12.2008 shows that the appellant has been awarded the degree of Master of Technology in Software Engineering and the appellant qualified with First class distinction at the examination held in June, 2008.

14. The experience certificates issued by M/s Sree Agencies and M/s Bajaj Allianz Life Insurance Company Ltd. were evaluated by the Selection Committee. It has already been stated in the counter affidavit filed by the Corporation that the quality of experience will be judged on the basis of the response to the questions related to experience in direct sale, home delivered products, hospitality/service industry etc. by the candidates in the interview. It has also been informed to this Court that the appellant has been awarded 4 marks for experience by the Selection Committee consisting of 3 senior officials of the Company who are well qualified and experienced in assessing the required experience for LPG distributorship. It is further asserted that after the interview, field verification had been done by the Corporation to verify the genuineness and veracity of the documents submitted by the candidate as contemplated in clause 16 of the guidelines. It is further stated that the field verification had been conducted by a team comprising of 2 officers of the Corporation and that the team had met the Proprietor as well as Manager of M/s Sree Agencies, who confirmed that Mr. Sajeesh Babu K. (appellant herein) worked with them on a part-time basis. It is the stand of the Corporation that since the persons who have issued the experience certificate admitted its issuance, the Corporation

treats the same as genuine. They also reiterated and verified that the certificates of experience have no relevance in granting marks under the parameter 'experience' as the same has been awarded on the basis of the response to the questions related to experience in the relevant field. The marks awarded by the Selection Committee are as follows:-

Name	Edu. Quali.	Ag	Expe-rience	Business ability	Perso-nality	Total Marks
Santhosh N.K.	15	2	3	3.17	1.83	25.00
Sajeesh Babu K.	15	2	4	3.83	2.00	26.83

15. From the above discussion, it is clear that in terms of the guidelines, the Selection Committee consisting of 3 experienced persons assessed the ability of the candidates with reference to the answers for their questions and awarded marks. In the absence of any allegation as to mala fide action on the part of the selectors or disqualification etc., interference by the High Court exercising extraordinary jurisdiction under Article 226 of the Constitution of India is not warranted.

16. To strengthen the above proposition, it is useful to refer a decision of the Constitution Bench of this Court in *The University of Mysore etc. vs. C.D. Govinda Rao & Anr.,* AIR 1965 SC 491. The issue therein relates to one Anniah Gowda to show cause as to under what authority he was holding the post of a Research Reader in English in the Central College, Bangalore. After considering the pleadings of both the parties, consultation by an expert and the stand of the University, this Court set aside the order of the High Court and dismissed the writ petition filed by the respondent therein. While considering the said issue, the following conclusion of the Constitution Bench as to the opinions expressed by the experts and interference by the Court is relevant. It is seen that in paragraph 13 of the judgment, the Constitution Bench has noted that the High Court has criticized the report made by the Board and rejecting the criticism of the High Court in such academic matters, held as

under:

> ".....We are unable to see the point of criticism of the High Court in such academic matters. Boards of Appointments are nominated by the Universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about mala fides against the experts who constituted the present Board; and so, we think it would normally be wise and safe for the courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than the courts generally can be....."

17. In a recent decision of this Court in *Basavaiah (Dr.) vs. Dr. H.L. Ramesh & Ors.,* (2010) 8 SCC 372 wherein similar issue, namely, recommendations of Expert Committee and evaluation as well as judicial review under Art. 226 of the Constitution was considered by this Court. A short question involved in that case was that whether the appellants therein (Dr. Basavaiah and Dr. Manjunath) were qualified to be appointed as Readers in Sericulture? One Dr. H.L. Ramesh, respondent in both the appeals therein challenged the appointments of both the appellants on the ground that they were not qualified for the post of Readers in Sericulture. Learned single Judge, on 11.10.2004, after examining the pleadings and scrutinizing the arguments of the parties dismissed the writ petition filed by Dr. H.L. Ramesh - respondent in W.P. No. 24300 of 1999. Dr. H.L. Ramesh, aggrieved by the said judgment, preferred a writ appeal before the Division Bench of the High Court. The writ appeal was allowed and the appointments of the appellants therein were set aside leaving it open to the University of Mysore to make fresh selection in accordance with the law. The appellants, aggrieved by the said judgment, filed special leave petitions before this Court. In the High Court as well as in this Court, the University filed affidavit stating that the Expert Committee

consisting of highly qualified 5 distinguished experts evaluated the qualification, experience and the published works of the appellants and found them eligible and suitable. In such circumstance, this Court observed in paragraph Nos. 20 & 21 as under:

> "20. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinised the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinised the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.
>
> 21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture."

18. It is clear that in a matter of appointment/selection by an Expert Committee/Board consisting of qualified persons in the particular field, normally, the Courts should be slow to interfere with the opinions expressed by the experts, unless there is any allegation of mala fides against the experts who had constituted the Selection Committee. Admittedly, in the case on hand, there is no allegation of mala fides against the 3

experts in the Selection Committee. In such circumstances, we are of the view that it would normally be wise and safe for the courts to leave the decision of selection of this nature to the experts who are more familiar with the technicalities/nature of the work. In the case on hand, the Expert Committee evaluated the experience certificates produced by the appellant herein, interviewed him by putting specific questions as to direct sale, home delivered products, hospitality/service industry etc. and awarded marks. In such circumstances, we hold that the High Court ought not to have sat as an appellate Court on the recommendations made by the Expert Committee.

19. In addition to the same, it is also asserted by the Corporation and informed to the High Court as well as to this Court that in order to ascertain the genuineness of the contents of experience certificates Exh. Nos. P2 and P3, the Corporation deputed responsible persons for verification and, in fact, they met the issuing authority and satisfied with the correctness of their statement. In view of this aspect, we are satisfied that the learned single Judge as well as the Division Bench committed an error in interfering with the decision of the Selection Committee. We have already noted that there is no allegation of mala fides against the members of the Selection Committee. Even on equity, the appellant is an unemployed M.Tech post-Graduate and the contesting respondent No.1 is working as an Assistant Engineer in the Kerala State Electricity Board, in other words, he is fully employed on the date of the selection of LPG distributorship. Looking at from any angle, the High Court was not justified in upsetting the decision of the Selection Committee, particularly, in the absence of any mala fides against them and there is no warrant for direction to re-assess the marks of the appellant afresh by excluding the marks for certificates (Exh. Nos. P2 and P3), particularly, in the light of

the detailed explanation offered by the Corporation about the mode of selection.

20. In the light of the above discussion, we set aside the judgment of the learned single Judge of the High Court dated 16.03.2011 in W.P.(C) No. 7622 of 2010 as well as the judgment of the Division Bench dated 06.04.2011 in W.A. No. 464 of 2011 and confirm the decision of the Selection Committee.

21. The civil appeal is allowed. There shall be no order as to costs.

K.K.T. Appeal allowed

PRADEEP KUMAR SHARMA
v.
U.P.F.C. RAJPUR ROAD, DEHRADUN & ORS
(Civil Appeal No. 7597 of 2012 etc.)

OCTOBER 19, 2012.

[P SATHASIVAM AND RANJAN GOGOI, JJ.]

STATE FINANCIAL CORPORATION ACT, 1951:

s.29 - Default in repayment of loan -Property mortgaged by borrower, sold by State Financial Corporation - Held: By virtue of sub-s. (2) of s. 29 of the Act such transfer of property by the Corporation will vest in the transferee all rights in the property as if the transfer had been made by the owner thereof.

CONSTITUTION OF INDIA, 1950:

Art. 226 - Writ petition - Maintainability of - Held: In the instant case, essence of the dispute between the parties denuded the lis of a public law character - The issues raised by the writ petitioner before the High Court really pertained to the claim of better title of the writ petitioner to the property in question on the basis of the sale deed which was executed in favour of the writ petitioner by his vendors during the

subsistence of the mortgage in favour of the Corporation and the rights of the appellant to the said property on the basis of the sale made in his favour by the Corporation - The writ petition did not involve any issue arising out of public law functions of the State or its authorities - In such a situation resort to the public law remedy should not have entertained by High Court - Order of High Court set aside.

The subject property was mortgaged by the borrower, by deposit of title deed, with respondent no. 1, U.P. Financial Corporation (Corporation), in security of the loan obtained by the borrower from the Corporation. When the borrower defaulted in payment, the Corporation invoked its powers u/s 29 of the State Financial Corporation Act, 1951 and issued an advertisement on 22.9.1996 for sale of the mortgaged property. As no suitable offer was received, the Corporation again issued another advertisement on 20.10.2002. Meanwhile, the borrower executed a sale deed in favour of two persons, who in turn sold the property to one 'VDS' by sale deed dated 29.8.2001. Pursuant to the advertisement dated 20.10.2002, the appellant in C.A. No. 7597 of 2012 (the appellant) submitted his offer, which was ultimately approved and the appellant deposited the entire amount with the Corporation. 'VDS' filed a writ petition before the High Court for quashing of the sale made in favour of the appellant. The High Court by an interim order directed the writ petitioner to deposit Rs. 5 lacs and by the final order while disposing of the writ petition directed the Corporation to withdraw the said amount of Rs. 5 lacs and out of it to repay the appellant the amount paid by him to the Corporation. The High Court held that the sale made in favour of the appellant stood cancelled.

Allowing the appeals, the Court

HELD: 1.1 Under the provisions of s. 29 of the State

Financial Corporation Act, 1951, the default in re-payment of any loan by an industrial undertaking vests in the Financial Corporation the right to take over the management or possession or both of the industrial concern along with the right to transfer the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. By virtue of sub-s. (2) of s. 29 of the Act, such transfer of property by the Corporation will vest in the transferee all rights in the property as if the transfer had been made by the owner thereof. In the instant case, the property in question was duly advertised for sale. The appellant had offered the highest amount. The entire amount was paid and the sale was confirmed by the Corporation, though no sale deed was executed. The sale made by the Corporation in favour of the appellant was in exercise of the statutory powers vested in it. [para 12-13] [869-H; 870-A-B, E-G]

1.2 The issues raised by the writ petitioner before the High Court really pertained to the claim of better title of the writ petitioner to the property in question on the basis of the sale deed dated 29.08.2001 executed in his favour by his vendors during the subsistence of the mortgage in favour of the Corporation and the rights of the appellant to the said property on the basis of the sale made in his favour by the Corporation pursuant to the advertisement dated 20.10.2002. The essence of the dispute between the parties denuded the lis of a public law character. Nor was any issue arising out of public law functions of the State or its authorities involved. Neither the exercise of the statutory power under the Act by the Corporation in the matter of the sale of the property nor the process of the sale transaction was questioned in the writ petition either on account of lack of jurisdiction or abuse of authority. In such a situation resort to the public

law remedy should not have entertained by the High Court and, instead, it ought to have required the aggrieved parties to seek their remedies in an appropriate manner and before the competent civil forum. The order dated 05.12.2006 passed by the High Court is set aside. [para 15, 16-17] [871-C-E-G; 872-B-D]

Godavari Sugar Mills Ltd. vs. State of Maharashtra **2011 (2) SCR 180 = 2011 (2) SCC 439; and** *Kisan Sahkari Chini Mills Ltd. and ors. vs. Vardan Linkers and others* **2008 (6) SCR 528 = 2008 (12) SCC 500 - relied on.**

Case Law Reference:

2011 (2) SCR 180	**relied on**	**para 16**
2008 (6) SCR 528	**relied on**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7597 of 2012.

From the Judgment & Order dated 05.12.2006 of the High Court of Uttaranchal at Nainital in Writ Petition No. 196 of 2003 (M/B).

WITH

C.A. No. 7598 of 2012.

Madhu Tewatia, Chander Shekhar Ashri, Shrish Kumar Misra, Naresh Kaushik, Sanjeev Kumar Bhardwaj, Rishi Jain, Lalita Kaushik, Akshay Verma, Sushma Verma, Prashant Chaudhary, for the Appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. Both the appeals are directed against the judgment and final order dated 05.12.2006 passed by the High Court of

Uttaranchal in Crl. Misc. Writ Petition No. 196 of 2003 (M/B).

3. A recital of the facts stated by the appellant Uttar Pradesh Finance Corporation (UPFC) in the appeal filed by it would suffice for the purpose of the adjudication that is required to be made in the present appeals.

4. A term loan of Rs. 4.55 lacs was sanctioned by the UPFC to one M/s. Sangam Ice Cream (hereinafter shall be referred to as the borrower), a proprietorship concern owned by one, Smt. Nisha Devi Jaiswal. To secure the repayment of the aforesaid loan together with the interest due thereon, the borrower had created an equitable mortgage, by deposit of title deeds, of land measuring 192.34 sq. meter or 0.048 acres bearing Khasra No. 496 along with the constructions standing thereon located at Mauza Niranjanpur, Pargana Kendriya Doon Tehsil and District Dehradun.

5. After sanction of the aforesaid loan, the borrower availed a part thereof but defaulted in payment of the installments due. As such default became chronic and persistent, the UPFC invoking its power under Section 29 of the State Financial Corporation Act, issued notice dated 20.12.1994, calling upon the borrower to clear all the dues failing which recovery of proceedings including sale of mortgaged property was contemplated. As despite the said Notice the dues of the Corporation remained unpaid an advertisement was issued in the newspaper "Doon Darpan" on 22.09.1996 for sale of the mortgaged property. The Corporation, however, did not receive any suitable offer pursuant to the advertisement issued. The fresh second advertisement, nevertheless, came to be issued only in the edition of "Amar Ujala" on 20.10.2002. It appears that, in the meantime, the sole proprietor of the borrower firm, Smt. Nisha Devi Jaiswal, executed a sale deed in respect of the land in favour of two other persons, i.e. Deepak Kumar Bishnoi and Smt. Sarita Rani, who, in turn, sold the said property to one Vishnu Dutt Sharma by sale deed dated 29.08.2001.

6. Pursuant to the second advertisement dated 20.10.2002 published in the edition of Amal Ujala, one Pradeep Kumar Sharma submitted his offer of Rs. 4.50 lacs along with a bank draft of Rs. 50,000/- as earnest money. The UPFC issued another advertisement in the edition of "Dainik Jagaran" dated 01.11.2002 indicating a price offered by Pradeep Kumar Sharma for the property in question and calling upon the borrower / members of the public to submit their better offer, if any. Evidently, there was no response to the aforesaid advertisement dated 01.11.2002 published in the "Dainik Jagaran". Therefore on 31.12.2002, the Corporation accorded its approval for the sale of the land in favour of Shri Pradeep Kumar Sharma and on 14.01.2003, a deposit of another sum of Rs. 1.75 lacs was made by the aforesaid Pradeep Kumar Sharma. On 27.02.2003, the balance amount of the offered price i.e. Rs.2.25 lacs was tendered to the Corporation.

7. While the matter was so situated, Vishnu Dutt Sharma who had purchased the property by the sale deed dated 29.08.2001 instituted a suit, i.e. O.S. 75/2003 contending that on 06.02.2003, while he and his family members were away, possession of the property in question was taken over by the Corporation. Restoration of possession was the principal relief prayed for in the aforesaid suit. Thereafter, stating that from the written statement filed in the suit by the Corporation it transpired that the property purchased by him (Vishnu Dutt Sharma) stood mortgaged in favour of the Corporation on account of a loan taken by the original owner thereof and that pursuant to the said Notice published in the newspaper "Dainik Jagaran" dated 20.10.2002, the property had been purchased by one Pradeep Kumar Sharma, a Writ Petition was filed impleading the UPFC and its Managing Director as the first and second respondents, Deepak Kumar Bisnoi and Sarita Rani as the third and fourth respondents and the purchaser Pradeep Kumar Sharma as the fifth respondent.

8. In the said Writ Petition, the prayer made was for quashing of the sale made in favour of the fifth respondent and for transfer of the property to the writ petitioner and further for restoration of possession of the same. The High Court while entertaining the Writ Petition passed an interim order dated 28.05.2003 permitting the writ petitioner Vishnu Dutt sharma to make a deposit of Rs. 5 lacs in which event it was directed that the "accommodation in question shall be handed over to the petitioner subject to further orders of this court." By the said order, the High Court also directed that the sale deed will not be executed in favour of the fifth respondent Pradeep Kumar Sharma.

9. The writ proceeding before the High Court of Uttaranchal was contested by the UPFC as well as by the purchaser i.e. the fifth respondent, Pradeep Kumar Sharma. The Corporation had taken a specific stand before the High Court that the sale in favour of fifth respondent was finalized by the Corporation and the entire offered price was tendered by the fifth respondent. The Corporation had also contended that the property being subject to an equitable mortgage by deposit of title deeds could not have been validly transferred by the mortgager/ original owner i.e. Nisha Devi Jaiswal to the third and fourth respondents in the Writ Petition and in turn the said respondents could not have transferred the property in favour of the fifth respondent so long as the mortgage subsisted.

10. Thereafter, by the impugned final order of the High Court dated 05.12.2006, the Writ Petition was disposed of by directing the UPFC to withdraw the amount of Rs. 5 lacs deposited in the High Court by the writ petitioner, Vishnu Dutt Sharma, and out of the said amount to repay the fifth respondent, Pradeep Kumar Sharma, the amount of Rs.4.50 paid by him to the Corporation along with 9% interest thereon. Specifically, the High Court in its order dated 05.12.2006 had ordered that the sale made in favour of fifth respondent, which had not been confirmed, stood cancelled. Aggrieved by the

aforesaid order, two separate appeals have been filed by the UPFC and the fifth respondent in the Writ Petition i.e. Pradeep Kumar Sharma. The writ petitioner, Vishnu Dutt Sharma, is the principal respondent in both the appeals.

11. We have heard Ms. Madhu Tewatia, learned counsel for the appellant - fifth respondent and Mr. Shrish Kumar Misra, learned counsel for the appellant Corporation. We have also heard Shri Naresh Kaushik and Shri Akshay Verma, learned counsel for the respondents.

12. The detailed recital made hereinabove clearly indicates that the property in question was duly advertised for sale pursuant whereto the fifth respondent had offered the highest amount. On acceptance of the said offer by the UPFC, the entire amount was paid and the sale was confirmed by the Corporation. No sale deed was however executed by the Corporation in favour of the fifth respondent. It also appears that before the property was put up for sale by the Corporation, the original owner, Smt. Nisha Devi Jaiswal had sold the same to the third and fourth respondents, who, in turn, had sold the same to the writ petitioner by sale deed dated 29.08.2001. The aforesaid sale by the original owners to the vendors of the writ petitioner and, thereafter, by said vendors to the petitioner himself was made when the property stood mortgaged in favour of the UPFC. It is in the above circumstances, that the writ petitioner had approached the High court seeking interference with the sale of the property made in favour of the fifth respondent pursuant to the advertisement dated 20.10.2002 issued by the UPFC and further for transfer of the property in favour of the writ petitioner besides restoration of possession thereof which was taken over by the Corporation.

13. The sale made by the UPFC in favour of the fifth respondent was in exercise of the statutory powers vested in the Corporation by Section 29 of the State Financial Corporation Act, 1951. Under the aforesaid provisions of the

Act default in re-payment of any loan by an industrial undertaking vests in the Financial Corporation the right to take over the management or possession or both of the industrial concern along with the right to transfer the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation. By virtue of sub-section (2) of Section 29 of the Act such transfer of property by the Corporation will vest in the transferee all rights in the property as if the transfer had been made by the owner thereof.

14. No serious issue either with regard to the validity of the exercise of the power under the Act or the manner of sale of the property by the Corporation pursuant to the advertisement dated 20.10.2002 had been raised in the Writ Petition. What was contended before the High Court is that the Writ Petitioner, Vishnu Dutt Sharma, had purchased the property by sale deed dated 29.08.2001 without any knowledge or information of the mortgage created by the original owner, Smt. Nisha Devi Jaiswal in favour of the Corporation and that the sale pursuant to the advertisement was also without notice to him. A right to the property based on certain equitable principles was also claimed to strengthen which, the offer covered by the interim order of the High Court dated 28.05.2003 was made by the writ petitioner.

15. The issues raised by the writ petitioner before the High court really pertained to the claim of better title of the writ petitioner to the property in question on the basis of the sale deed dated 29.08.2001. The validity of the sale deed dated 29.08.2001 executed in favour of the writ petitioner by his vendors during the subsistence of the mortgage in favour of the Corporation and the rights of the fifth respondent to the said property on the basis of the sale made in his favour by the Corporation pursuant to the advertisement dated 20.10.2002 are the issues that arose in the Writ Petition. Broad and expansive though the powers of the High Court under Article

1. (2011) 2 SCC 439 [para 8(vi)]

226 may be, adjudication of the aforesaid questions, some of which also required proof of certain basic facts, in our view, was not appropriate in the domain of public law. Though the High Court in its order dated 05.12.2006 did not expressly say so, the affect of the several directions issued by it, in fact, amounts to an adjudication of the issues outlined above.

16. The essence of the dispute between the parties denuded the lis a public law character. Nor was any issue arising out of public law functions of the State or its authorities involved. In such a situation resort to the public law remedy should not have entertained by the High Court. (Vide *Godavari Sugar Mills Ltd. vs. State of Maharashtra*[1]). Even if the vindication of the writ petitioner's rights under the sale deed dated 29.08.2001 is ignored and we are to proceed on the basis that the writ petitioner questioned the sale made by the Corporation, the writ petitioner would not be entitled to an adjudication of the rights of the parties inter se but at best to a judicial review of the administrative action of the Corporation with regard to the sale made (Vide *Kisan Sahkari Chini Mills Ltd. and ors. vs. Vardan Linkers and others*[2]) But as already

2. 2008 12 SCC 500 - para 23.

noticed neither the exercise of the statutory power under the Act by the Corporation in the matter of the sale of the property nor the process of the sale transaction was questioned in the Writ Petition either on account of lack of jurisdiction or abuse of authority. In the above facts, the High Court should have refused an adjudication of the Writ Petition and, instead, ought to have required the aggrieved parties to seek their remedies in an appropriate manner and before the competent civil forum.

17. In view of the above discussions, we allow both the appeals and set aside the order dated 05.12.2006 passed by the High Court of Uttarakhand at Nainital.

R.P. Appeals allowed.

THE STATE OF MAHARASHTRA
v.
VISHWANATH MARANNA SHETTY
(Criminal Appeal No. 1689 of 2012)

OCTOBER 19, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

MAHARASHTRA CONTROL OF ORGANIZED CRIME ACT, 1999:

ss. 21(4) and 10 of MCOCA read with s.439 CrPC - Bail - Prosecution of respondent along with other accused persons for offences punishable u/s 3 of MCOCA and ss. 302, 452 read with s.34 and s.120-B, IPC - Bail declined by Special Judge, but granted by High Court - Held: Section 21(4) of MCOCA, interdicts grant of bail to the accused against whom there are reasonable grounds for believing him to be guilty of offence under MCOCA - In the instant case, High Court failed to appreciate the fact that the materials placed against the respondent consist of the confession made by the co-accused which was recorded u/s 18 of MCOCA, the statement

of the employee of the respondent which indicates that the respondent handed over cash to him and that the money received by the respondent and handed over to the main accused were part of the illegal transactions - The act of the respondent, prima facie, is of abetment of the offence enumerated in MCOCA - A person accused of having committed the offence under MCOCA is not only subject to the limitations imposed u/s 439 CrPC but also subject to the restrictions placed by clauses (a) and (b) of sub-s. (4) of s. 21 of MCOCA - Impugned order of High Court granting bail to respondent having been passed ignoring the mandatory requirements of s. 21(4) of MCOCA, is set aside and the order of the Special Judge restored.

Respondent-accused no. 9 in a MCOC Special Case pending before the Special Court under the Maharashtra Control of Organised Crime Act, 1999, was alleged to be a member of an "organized crime syndicate" involved in the murder of one 'FT', and was stated to have been managing funds of the said syndicate. The prosecution case was that through the respondent, money changed hands from accused no. 7, a builder, to accused nos. 1 and 2, who killed 'FT'. The MCOCA Special Court denied bail to the respondent, but the High Court granted him bail. Aggrieved, the State Government filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 It is relevant to note that MCOCA was enacted to make special provisions for prevention and control of and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto. Section 21(4) of MCOCA interdicts grant of bail to the accused against whom there are reasonable grounds for believing him to be guilty of offence under MCOCA. Section 21(4) bars the court from releasing the accused of an offence punishable under the said Act subject to the conditions

prescribed in clauses (a) and (b) therein. Apart from giving an opportunity to the prosecutor to oppose the application for such release, the other twin conditions, viz., (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The satisfaction contemplated in clauses (a) and (b) of sub-s. (4) of s.21 regarding the accused being not guilty, has to be based on "reasonable grounds". Though the expression "reasonable grounds" has not been defined in the Act, it is presumed that it is something more than prima facie grounds. The recording of satisfaction on both the aspects mentioned in clauses (a) and (b) of sub-s. (4) of s.21 is sine qua non for granting bail under MCOCA. It is also further made clear that a bare reading of the non-obstante clause in sub-s. (4) of s.21 of MCOCA that the power to grant bail to a person accused of having committed offence under the said Act is not only subject to the limitations imposed u/s 439 of the Code of Criminal Procedure, 1973 but also subject to the restrictions placed by clauses (a) and (b) of sub-s. (4) of s. 21. [para 10, 13, 18 and 21] [885-G-H; 887-G-H; 892-C; 893-F-H; 894-A-C]

1.2 In the instant case, the materials placed by the prosecution show that wanted accused 'VS' and the respondent are members of wanted accused 'BN's "organized crime syndicate". It is also the definite stand of the prosecution that the said 'BN as well as 'VS', who murdered the deceased are said to be out of India and are indulging into the organized crime through the members of the syndicate. The materials placed further show that A-7, a builder, was doing a project and some members of the Co-operative Housing Society had some dispute with him, therefore, they approached the deceased, who agreed to help them in their dispute with

the builder. On knowing this, A-7 contacted wanted accused 'BN' and 'VS' for eliminating the deceased for a sum of Rs.90 lakhs which was paid to the said wanted accused persons through the arrested accused persons. The substance of the allegation against the respondent is that part of the amount, which was given to the shooter for killing the deceased, had been passed on through him to the actual shooter. It is not in dispute that sanction u/s 23(2) of MCOCA had been accorded by the Commissioner of Police on 25.09.2010. The material placed by the prosecution also indicates that the respondent has been working for the wanted accused 'VS' and he used to receive ill-gotten money for him. From the materials placed, prima facie, it is clear that the respondent-accused had association with the wanted accused 'VS' and 'BN', who are notorious criminals and the act of the respondent comes within the definition of 'abet' as defined in s.2(1)(a) of MCOCA. The High Court failed to appreciate the fact that the materials placed against the respondent consist of the confession made by the co-accused which has been recorded u/s 18 of MCOCA, the statement of the employee of the respondent which indicates that the respondent handed over cash to him in the third week of June, 2010 and that the money received by the respondent and handed over to the main accused were part of the illegal transaction. The act of the respondent, prima facie, is well within the definition and also the statement of object and reasons of the MCOCA. Considering the materials, particularly, in the light of the bar u/s 21(4) of MCOCA, the Special Court rightly rejected the application for bail filed by the respondent. [para 16-19] [890-F-H; 891-A-B, D-E, F-G; 892-B-C, D-G]

1.3 Since the respondent has been charged with offence under MCOCA, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the offences under the IPC, the

relevant provision in the said statute, namely, sub-s. (4) of s.21 has to be kept in mind. In view of the materials placed in the case on hand, this Court holds that the High Court has not satisfied the twin tests while granting bail. The impugned order of the High Court granting bail to the respondent having been passed ignoring the mandatory requirements of s. 21(4) of MCOCA, is set aside and the order of the special Judge is restored. [para 21-23] [893-E-F; 894-E-G]

Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr. **2005 (3) SCR 345 = (2005) 5 SCC 294; and** *Union of India vs. Rattan Mallik Alias Habul* **2009 (1) SCR 533 = (2009) 2 SCC 624 - relied on**

Case Law Reference:

2005 (3) SCR 345	**relied on**	**para 9**
2009 (1) SCR 533	**relied on**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1689 of 2012.

From the Judgment & Order dated 10.08.2011 of the High Court of Judicature at Bombay in Criminal Bail Application No. 872 of 2011.

Chinmoy Khaladkar, Sanjay V. Kharde, Asha Gopalan Nair for the Appellant.

U.U. Lalit, A. Mariarputam, Ashwin C. Thod, Sushil Karanjkar, Ratnakar Singh, K.N. Rai for the Respodent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 10.08.2011 passed by the High Court of Judicature at Bombay in Criminal Bail Application No. 872 of 2011 whereby learned single Judge of the High Court granted bail to the

respondent herein - Accused No.9 in MCOC Special Case No. 10 of 2010 pending before the Special Court under the Maharashtra Control of Organised Crime Act, 1999 for Greater Bombay.

3. **Brief facts**:

(a) According to the prosecution, an "organised crime syndicate" headed by wanted accused Bharat Nepali and Vijay Shetty is operating overseas. The said syndicate has indulged in various continuous unlawful activities in the nature of extortion and contract killings in Mumbai and other places through their members. All the accused persons pending on the file before the MCOC Special Court, Greater Bombay are alleged to be the members of the said syndicate.

(b) On 03.06.2010, one Farid Tanasha, known criminal, was shot dead at his residence at Tilaknagar, Chembur, Mumbai. On the same day, an FIR being No. 122 of 2010 was registered against the accused persons under Sections 302 and 452 read with Section 34 and Section 120-B of the Indian Penal Code, 1860 (in short 'IPC') and under Sections 3, 25 and 27 of the Arms Act, 1959 at Tilaknagar Police Station.

(c) During investigation, DCB, CID, Unit No. 6, Mumbai learnt that the murder was committed on the instructions of Bharat Nepali and Vijay Shetty (wanted accused). Further, it was revealed in the investigation that one Dattatray Bhakare (Accused No. 7 therein) - a builder, had contracted Bharat Nepali and Vijay Shetty for eliminating Farid Tanasha (since deceased), who agreed to help the members of a Co-op. Housing Society in order to settle their dispute with the builder. It was also revealed in the investigation that the said builder allegedly financed a sum of Rs. 90 lakhs for the said killing.

(d) It was further revealed during investigation that the respondent herein was an active member of the "organised crime syndicate" and was managing funds of the syndicate and through him the money changed hands from co-accused

Dattatray Bhakare to Jafar Razialam Khan @ Abbas and Mohd. Sakib Shahnawaz Alam Khan, Accused Nos. 1 & 2 respectively, who killed Farid Tanasha.

(e) On 25.09.2010, Commissioner of Police, Greater Bombay, accorded sanction for prosecution of the arrested accused persons including the respondent herein under Section 3(1)(i), (2) and (4) of the Maharashtra Control of Organised Crime Act, 1999 (in short 'the MCOCA') and hence the respondent is alleged to have committed the offences provided hereinabove along with the offence under Section 302 read with Section 120B of the IPC.

(f) The respondent herein preferred an application for bail in Special Case No. 10 of 2010 before the MCOC Special Court, Greater Bombay. By order dated 07.05.2011, the Special Court dismissed the said application.

(g) Being aggrieved, the respondent herein preferred Criminal Bail Application No. 872 of 2011 before the High Court. By impugned order dated 10.08.2011, the High Court accepted the case of the respondent and granted him bail by imposing certain conditions.

(h) Questioning the order granting bail to the respondent, the State of Maharashtra has filed the present appeal by way of special leave.

4. Heard Mr. Chinmoy Khaladkar, learned counsel for the appellant-State and Mr. U.U. Lalit, learned senior counsel for the respondent-accused.

5. The only point for consideration in this appeal is whether in the light of the allegations made and materials placed by the prosecution, the High Court was justified in granting bail, particularly, in the light of restriction imposed under Section 21(4) of MCOCA?

6. Learned counsel for the State, after taking us through the averments in the FIR, confessional statement of Mohd. Rafiq

Abdul Samad Shaikh @ Shankar (Accused No. 6 therein), relevant provisions of MCOCA and other materials, submitted that the Special Court was fully justified in rejecting the application for bail filed by the respondent, who is arrayed as Accused No. 9. On the other hand, according to him, the High Court, having failed to notice the involvement of the respondent and his role in passing of the amount from Dattatray Bhakare - a builder to the actual killers, A-1 and A- 2, granted bail to him.

7. Percontra, Mr. U.U. Lalit, learned senior counsel for the respondent, by pointing out the confessional statement of coaccused, who retracted later, and in the light of the provisions of MCOCA, submitted that the High Court was fully justified in granting bail to the respondent.

8. In order to appreciate the rival contentions, it is useful to refer the relevant provisions of MCOCA which are extracted hereinbelow. There is no dispute that apart from Section 302 read with Section 120-B of IPC, the respondent was charged with Section 3(1)(i), 3(2) and 3(4) of MCOCA. The relevant provisions of MCOCA read as under:

Section 2 of MCOCA deals with various definitions:

"2. Definitions. (1) In this Act, unless the context otherwise requires,—

(a) **'abet'**, with its grammatical variations and cognate expressions, includes,—

(i) the communication or association with any person with the actual knowledge or having reason to believe that such person is engaged in assisting in any manner, an organised crime syndicate;

(ii) the passing on or publication of, without any lawful authority, any information likely to assist the organised crime syndicate and the passing on or publication of or distribution of any document or matter obtained from the organised crime

syndicate; and

(iii) the rendering of any assistance, whether financial or otherwise, to the organised crime syndicate;

* * *

* * *

(d) **'continuing unlawful activity'** means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate *in respect of which more than one charge-sheets have been filed* before a competent court *within the preceding period of ten years* and that court has taken cognizance of such offence;

(e) *'organised crime'* means *any continuing* unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

(f) *'organised crime syndicate'* means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;

(g)……."

"3. Punishment for organised crime- (1) Whoever commits an offence of organised crime shall,

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall

also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived of obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with a term which, shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

"4. Punishment for possessing unaccountable wealth on behalf of member of organised crime syndicate.

If any person on behalf of a member of an organised crime syndicate is, or, at any time has been, in possession of movable or immovable property which he cannot satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also liable for attachment and forfeiture, as provided by section 20."

"21. Modified application of certain provisions of the Code.-

(1)…

(2)…

(3)…

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

9. The very same provisions have been considered by this Court in *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr.* (2005) 5 SCC 294. In this case, the provisions of MCOCA were invoked against one Telgi who was arrested and proceeded against for alleged commission of offence of printing counterfeit stamps and forgery in various States including the State of Maharashtra. He was figured as Accused No. 23 and one Shabir Sheikh as Accused No.25.

After narrating all the details, this Court posed the following question:

"36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?"

In an answer to the same, this Court held as under:

"38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that

which he ought to have done. The court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

"44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence."

"46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials

collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."

10. It is relevant to note that MCOCA was enacted to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang, and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons for enacting the said Act is as under:

"Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fuelled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering etc. The illegal wealth and black money generated by the organised crime being very huge, it has had serious adverse effect on our economy. It was seen that the organised criminal syndicates made a common cause with terrorist gangs and foster terrorism which extend beyond the national boundaries. There was reason to believe that organised criminal gangs have been operating in the State and, thus, there was immediate need to curb their activities.

It was also noticed that the organised criminals have been making extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission would be an indispensable aid to law enforcement and the

administration of justice.

2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system were found to be rather inadequate to curb or control the menace of organised crime. Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.

It is the purpose of this Act to achieve these objects." We have already mentioned the relevant definitions including the definition of 'abet', 'continuing unlawful activity', 'organised crime' and 'organised crime syndicate'.

11. Keeping the above Objects and Reasons and various principles in mind, statutory provisions of MCOCA, restrictions for the grant of bail and the materials placed by the prosecution, let us consider whether the respondent has made out a case for bail?

12. Considering the arguments advanced by both the sides, we have meticulously analysed the reasoning of the special Court rejecting the application for bail filed by the respondent herein and impugned order of the High Court granting him bail. The materials placed indicate that the respondent ishaving an association with the overseas base wanted accused Nos. 1 and 2. It also indicates that the respondent knowingly handled the funds of the syndicate. The statement of one of the witnesses indicates that the respondent had asked the said witness to collect a sum of Rs.25 lakhs from the co-accused – Ravi Warerkar, however, the same was not materialized. In addition to the same, there is a statement of co-accused – Mohd. Rafiq that he collected Rs.15 lakhs from co-accused – Dattatray Bhakare and delivered it to the respondent. The confessional statement further indicates that the wanted accused - Vijay Shetty used to make calls using cell phone no. 0061290372184 to the respondent. The confessional

statement also reveals that Accused No. 6 received Rs. 6 lakhs from the man of the respondent-accused. On perusal of the materials relied on by the prosecution, the special Judge concluded that the respondent had been working for the wanted accused, Vijay Shetty, and he used to receive ill-gotten money for him and prima facie the ingredients of the offence punishable under Section 4 of MCOCA attracts against the respondent-accused.

13. In the earlier part of our judgment, we extracted Section 21(4) of MCOCA which bars the Court from releasing the accused of an offence punishable under the said Act subject to the conditions prescribed in clauses (a) and (b) therein. We are of the view that sub-section (4) of Section 21 mandates that it is incumbent on the part of the Court before granting of bail to any person accused of an offence punishable under MCOCA that there are reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence while on bail.

14. In the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the NDPS Act'), similar provision, namely, Section 37, corresponding to Section 21(4) of the MCOCA has been substituted by Act 2 of 1989 with effect from 29.05.1989 with further amendment by Act 9 of 2001 which reads as under:

"37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to

oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause

(b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

Sub-clause (2) also makes it clear that the limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, on granting of bail.

15. The above provision was considered by this Court in *Union of India vs. Rattan Mallik Alias Habul,* (2009) 2 SCC 624. In this case, Union of India filed an appeal before this Court challenging the order of the Allahabad High Court suspending the sentence awarded by the trial Court to the respondent/accused therein for having committed offences under Sections 8/27-A and 8/29 of the NDPS Act and granting him bail. Considering the limitation imposed in sub-section (1) (b) of Section 37 of the NDPS Act, this Court held thus:

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable

grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide *Union of India v. Shiv Shanker Kesari*). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

After saying so, on going into the materials placed and the reasoning of the High Court for grant of bail, this Court has concluded that the order passed by the High Court clearly violates the mandatory requirement of Section 37 of the NDPS

Act and set aside the same with a liberty to decide afresh in the light of the limitations imposed. In the case on hand, we have already extracted the limitation/restrictions imposed in Section 21(4) of MCOCA for granting bail.

16. It is relevant to point out that the materials placed by the prosecution show that one Vijay Shetty and the respondent are members of Bharat Nepali's "organized crime syndicate". It is also the definite stand of the prosecution that the said Bharat Nepali as well as Vijay Shetty, who murdered Farid Tanasha are said to be out of India and are indulging into the organized crime through the members of the syndicate. The materials placed further show that Dattatray Bhakare-a builder, was doing a project at Chembur, Mumbai and some members of the Co-operative Housing Society had some dispute with him, therefore, they had approached Farid Tanasha, who had a criminal background and he also agreed to help those persons in their dispute with the builder. On knowing this, Dattatray Bhakare contacted Bharat Nepali and Vijay Shetty for eliminating Farid Tanasha and for that he allegedly financed a sum of Rs.90 lakhs which was paid to the said wanted accused persons through the arrested accused persons. The investigation also reveals that about Rs. 9 lakhs were given to the main shooter – Mohd. Sakib Shahnawaz Alam Khan (Accused No.2) through Mohd. Rafiq (Accused No. 6). The said Accused No.6 made a confessional statement as far as the respondent herein is concerned. It was alleged that Accused No.6, on the instructions of the wanted accused - Vijay Shetty,used to collect money from the respondent and on several occasions, he handed over the same to Accused No. 2. It was also alleged that on the instructions of the wanted accused – Vijay Shetty, Accused No. 6 paid a sum of Rs. 15 lakhs to the respondent herein on 28.05.2011. It is the further case of the prosecution that in the third week of June, 2010, Accused No.6 received an amount of Rs. 6 lakhs from an employee of the respondent. The substance of the allegation against the respondent is that part of the amount, which was

given to the shooter for killing Farid Tanasha, had been passed on through him to the actual shooter. It is not in dispute that sanction under Section 23(2) of MCOCA had been accorded by the Commissioner of Police on 25.09.2010.

17. Considering the materials, particularly, in the light of the bar under Section 21(4) of MCOCA, the Special Court rightly rejected the application for bail filed by the respondent herein. From the materials placed, prima facie, it is clear that the respondent-accused had association with the wanted accused, Vijay Shetty and Bharat Nepali, who are notorious criminals and the act of the respondent comes within the definition of 'abet' as defined in Section 2(1)(a) of MCOCA.

18. As rightly pointed out by the learned counsel for the State that the High Court ought to have appreciated the statement of the co-accused-Mohammad Rafiq that on 28.05.2010, he collected Rs. 15 lakhs from co-accused-Dattatray Bhakare and delivered it to the respondent. The confessional statement further indicates that the wanted accused, Vijay Shetty used to make calls from cell phone no. 0061290372184 and call records also indicate that the cell phone that was being used by the respondent did receive overseas calls. The confessional statement further indicates that he received Rs. 6 lacs from the man of the respondent. The material placed by the prosecution also indicate that the respondent has been working for the wanted accused-Vijay Shetty and he used to receive ill-gotten money for him. We have already extracted Section 21(4) which interdict grant of bail to the accused against whom there are reasonable grounds for believing him to be guilty of offence under MCOCA.

19. We are satisfied that the High Court failed to appreciate the fact that the materials placed against the respondent consist of the confession made by the co-accused – Mohd. Rafiq which has been recorded under Section 18 of MCOCA, the statement of the employee of the respondent which indicates that the respondent handed over cash to him

in the third week of June, 2010 and that the money received by the respondent and handed over to the main accused were part of the illegal transactions. The act of the respondent, prima facie, is well within the definition and also the statement of object and reasons of the MCOCA which we have already extracted. The act of the respondent is of the abetment of the offence enumerated in MCOCA. At any rate, the materials placed by the prosecution show that the respondent had received illgotten money for the wanted accused – Vijay Shetty and, therefore, ingredients of Section 4 of MCOCA were attracted against him. We are satisfied that all these aspects have been correctly appreciated by the Special Court.

20. Though the High Court has adverted to all the abovementioned aspects and finding that all those aspects have to be considered during the trial and even after finding that "it cannot be said that there are no reasonable grounds for believing that the applicant (respondent herein) has not committed an offence punishable under the MCOCA", on an erroneous view, granted him bail which runs contrary to Section 21(4) of MCOCA.

21. While dealing with a special statute like MCOCA, having regard to the provisions contained in sub-section (4) of Section 21 of this Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organized crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. In view of the above, we also reiterate that when a prosecution is for offence(s) under a special statute and that statute contains specific provisions for

dealing with matters arising there under, these provisions cannot be ignored while dealing with such an application. Since the respondent has been charged with offence under MCOCA, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the offences under the IPC, the relevant provision in the said statute, namely, sub-section (4) of Section 21 has to be kept in mind. It is also further made clear that a bare reading of the non obstante clause in sub-section (4) of Section 21 of MCOCA that the power to grant bail to a person accused of having committed offence under the said Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 but also subject to the restrictions placed by clauses (a) and (b) of sub-section (4) of Section 21. Apart from giving an opportunity to the prosecutor to oppose the application for such release, the other twin conditions, viz., (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The satisfaction contemplated in clauses (a) and (b) of sub-section (4) of Section 21 regarding the accused being not guilty, has to be based on "reasonable grounds". Though the expression "reasonable grounds" has not been defined in the Act, it is presumed that it is something more than prima facie grounds. We reiterate that recording of satisfaction on both the aspects mentioned in clauses (a) and (b) of sub-section (4) of Section 21 is sine qua non for granting bail under MCOCA.

22. The analysis of the relevant provisions of the MCOCA, similar provision in the NDPS Act and the principles laid down in both the decisions show that substantial probable cause for believing that the accused is not guilty of the offence for which he is charged must be satisfied. Further, a reasonable belief provided points to existence of such facts and circumstances as are sufficient to justify the satisfaction that the accused is not guilty of the alleged offence. We have already highlighted the materials placed in the case on hand and we hold that the High Court has not satisfied the twin tests as mentioned above