MEDHA KOTWAL LELE AND OTHERS
v.
UNION OF INDIA AND OTHERS
(Writ Petition (Criminal) Nos. 173-177 of 1999 etc.)

OCTOBER 19, 2012

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

SEXUAL HARASSMENT:

Sexual harassment of women at work places - 'Vishaka' guidelines - Implementation of - Further directions given by Court to make amendments in service Rules and Industrial Employment (Standing Orders) Rules and to form adequate number of Complaints Committees at different levels - Report of complaints Committee to be treated as report in the disciplinary proceedings by Inquiry Officer and such report to be acted upon accordingly - State functionaries, private and public sector organizations, Bar Council of India, State Bar Councils, Medical Council of India and all statutory institutions directed to ensure that Vishaka guidelines and the directions issued by the Court subsequently and in the instant judgment are followed by all registered/affiliated bodies - Constitution of India, 1950 - Art.141 - Public interest litigation.

LEGISLATION:

Secure environment for women - Held: Even after 15 years of judgment in Vishaka, the statutory law is not in place - The existing laws, if necessary, be revised and appropriate new laws be enacted by Parliament and State Legislatures to protect women from any form of indecency, indignity and disrespect at all places to prevent all forms of violence i.e. domestic violence, sexual assault, sexual harassment at the workplace, etc. and provide new initiatives for education and advancement of women and girls in all spheres of life.

The instant group of matters were filed in the nature of public interest litigation highlighting individual cases of sexual harassment of women at work places and lack of effective implementation of *'Vishaka'*[1] guidelines . The Court passed orders from time to time and issued notices to all the State Governments. In view of the fact that even after several years of the judgment statutory law was not in place, the Court, on 26.4.2004, directed that the Complaints Committee as envisaged in *Vishaka's* case would be deemed to be an inquiry authority for the purpose of Central Civil Services (Conduct) Rules, 1964 and the report of the Complaints Committee would be deemed to be an inquiry report, and the disciplinary authority would act on the report in accordance with the Rules. The Court further directed that similar amendments be carried out in the Industrial Employment (Standing Orders) Rules. On 17.1.2006, the Court directed the Chief Secretaries of the States to ensure appointment of a nodal agent to collect the details and to give suitable directions. The Labour Commissioner was directed to take steps to ensure that the directions were fully complied with as regards factories, shops and commercial establishments. Details of the steps taken were directed to be furnished. The State Governments filed affidavits.

Disposing of the matters, the Court

HELD: 1.1 From the affidavits filed by the State Governments, it transpires that some States have amended the Rules relating to duties, public rights and obligations of the government employees but have not made amendments in Civil Services (Conduct) Rules. Similarly, some States/Union Territories have not carried out amendments in the Standing Orders. The said States/ Union Territories appear to have not implemented the

1. *Vishaka and Ors. vs. Stateof Rajasthan and Ors.* 1997 (3) Suppl. SCR 404.

order passed by this Court on 26.4.2004. The States which have carried out amendments in the Civil Services (Conduct) Rules and the Standing Orders have not provided that the report of the Complaints Committee shall be treated as a report in the disciplinary proceedings by an Inquiry Officer. What has been provided by these States is that the inquiry, findings and recommendations of the Complaints Committee shall be treated as a mere preliminary investigation leading to a disciplinary action against the delinquent. Further, some States and Union Territories seem to have not formed Complaints Committees as envisaged in the Vishaka guidelines. Some States have constituted only one Complaints Committee for the entire State. [para 9-10] [914-B-G]

Vishaka and Ors. vs. Stae of Rajasthan and Ors. **1997 (3) Suppl. SCR 404 = (1997) 6 SCC 241 - referred to.**

Beijing Declaration and Platform for Action **- referred to.**

1.2 The implementation of the guidelines in Vishaka has to be not only in form but also in substance and spirit so as to make available safe and secure environment to women at the workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect. There is still no proper mechanism in place to address the complaints of sexual harassment of women lawyers in Bar Associations, lady doctors and nurses in the medical clinics and nursing homes, women architects working in the offices of the engineers and architects and so on and so forth. [para 13] [915-D-F]

Seema Lepcha v. State of Sikkim & Ors. **2012 (2) Scale 635 - referred to**

1.3 Although Vishaka judgment came on 13.8.1997, yet 15 years after the guidelines were laid down by this

Court for the prevention and redressal of sexual harassment and their due compliance under Art.141 of the Constitution of India until such time appropriate legislation was enacted by the Parliament, many women still struggle to have heir most basic rights protected as workplaces. The statutory law is not in place. This Court is of the considered view that the existing laws, if necessary, be revised and appropriate new laws be enacted by Parliament and the State Legislatures, to protect women from any form of indecency, indignity and disrespect at all places (in their homes as well as outside), prevent all forms of violence - domestic violence, sexual assault, sexual harassment at the workplace, etc. - and provide new initiatives for education and advancement of women and girls in all spheres of life. [para 1 and 15] [901-G; 902-A-B; 916-D-F]

1.4 This Court is of the considered view that guidelines in Vishaka should not remain symbolic and the following further directions are necessary until legislative enactment on the subject is in place:

(i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services (Conduct) Rules (by whatever name these Rules are called) shall do so within two months by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services (Conduct) Rules. The disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary

action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

(ii) The States and Union Territories which have not carried out amendments in the Industrial Employment (Standing Orders) Rules shall now carry out amendments on the same lines, as noted in clause (i) above within two months.

(iii) The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Those States and/or Union Territories which have formed only one Committee for the entire State shall now form adequate number of Complaints Committees within two months. Each of such Complaints Committees shall be headed by a woman and as far as possible in such Committees an independent member shall be associated.

(iv) The State functionaries and private and public sector undertakings/ organisations/bodies/ institutions etc. shall put in place sufficient mechanism to ensure full implementation of the Vishaka guidelines and further provide that if the alleged harasser is found guilty, the complainant-victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that the harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action.

(v) The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered

Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. To achieve this, necessary instructions/circulars shall be issued by all the statutory bodies such as Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months. On receipt of any complaint of sexual harassment the same shall be dealt with by the statutory bodies in accordance with the Vishaka guidelines and the guidelines in the present order. [para 16] [916-G-H; 917-A-H; 918-A-D]

1.5 If there is any non-compliance or non-adherence to the Vishaka guidelines, orders of this Court following Vishaka and the above directions, it will be open to the aggrieved persons to approach the respective High Courts, which would be in a better position to effectively consider the grievances raised in that regard. [para 17] [918-E]

Case Law Reference:

1997 (3) Suppl. SCR 404	**referred to**	**para 1**
2012 (2) Scale 635	**referred to**	**para 1**

ORIGINAL CRIMINAL JURISDICTION : Writ Petition (Crl.) Nos. 173-177 of 1999 etc.

Under Article 32 of the Constitution of India.

WITH

T.C. (C) No. 21 of 2001, C.A. Nos. 5009 and 5010 of 2006.

A. Mariarputham, AG, Colin Gonsalves, T.S. Doabia, Dr. Manish Singhvi, AAG, Jayshree Satpute, Jyoti Mendiratta,

Aparna Bhat, S. Uday Kr. Sagar, Krishna Kumar Singh, Praseena E. Joseph (for Lawyer's Knit & Co.), Sunita Sharma, Sadhana Sandhu, B.V. Balram Das, Sushma Suri, M.S. Doabia, Asha G. Nair, S.S. Rawat, Rashmi Malhotra, D.S. Mahra, B. Balaji, J.M. Khanna, Anil Shrivastav, Rituraj Biswas, Hemantika Wahi, Shail Kumar Dwivedi, Tara Chandra Sharma, Ashok Mathur, Abhijit Sengupta, Riku Sarma, Navnit Kumar (for Corporate Law Group), Milind Kumar, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Sushil Kumar Jain, A. Subhashini, Guntur Prabhakar, Rajeev Sharma, Sanjay R. Hegde, V.G. Pragasam, S.J. Aristotle, Praburamsubramanian, Anuvrat Sharma, G. Prakash, T.V. George, Meenakshi Arora, Vasav Anantharaman, Naresh K. Sharma, Khwairakpam Nobin Singh, S. Biswajit Methei, Shreekant N. Terdal, V.D. Khanna, Aruna Mahtur, Novita (for Arputham, Aruna & Co.), Rachana Srivastava, B.S. Banthia, Kamakshi S. Mehlwal, D.P. Mohanty (for Parekh & Co.), V.N. Raghupathy, Hari Shankar K., Abhinav Mukherji, Pramod Dayal, Ardhendumauli Kumar Prasad, Madhu Sikri, Chiraranjan Addey, Shrish Kumar Misra, Praveen Swarup, Akshay Verma, Sushma Verma, Rameshwar Prasad Goyal, Pragati Neekhra, Mukul Singh, Aruneshwar Gupta, H.S. Parihar, Gopal Prasad, P.V. Yogeshwaran, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, Arun K. Sinha, Ratan Kumar Choudhuri, Sunil Fernandes, Shashank Kumar Lal, S. Thananjayan, P.V. Dinesh, Mitter & Mitter Co., Gopal Singh, Dinesh Kumar Garg, Chandan Ramamurthi, Shivaji M. Jadhav, Sunil Kumar Verma, Bina Madhavan, Jogy Scaria, E. Enatoli Sema, Amit Kumar Singh, D. Mahesh Babu, Mayur R. Shah, Amit K. Nain for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The *Vishaka*[1] judgment came on 13.8.1997. Yet,15 years after the guidelines were laid down by this Court for the prevention and redressal of sexual harassment and their due compliance under Article 141 of the Constitution

1. *Vishaka and Ors. vs. Stateof Rajasthan and Ors.* 1997 (3) Suppl. SCR 404.

of India until such time appropriate legislation was enacted by the Parliament, many women still struggle to have their most basic rights protected at workplaces. The statutory law is not in place. The Protection of Women Against Sexual Harassment at Work Place Bill, 2010 is still pending in Parliament though Lok Sabha is said to have passed that Bill in the first week of September, 2012. The belief of the Constitution framers in fairness and justice for women is yet to be fully achieved at the workplaces in the country.

2. This group of four matters – in the nature of public interest litigation – raises principally the grievance that women continue to be victims of sexual harassment at workplaces. The guidelines in Vishaka1 are followed in breach in substance and spirit by state functionaries and all other concerned. The women workers are subjected to harassment through legal and extra legal methods and they are made to suffer insult and indignity.

3. Beijing Declaration and Platform for Action, inter alia, states, "Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms……. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture".

4. Vishaka guidelines require the employers at workplaces as well as other responsible persons or institutions to observe them and ensure the prevention of sexual harassment to women. These guidelines read as under :

> "1. Duty of the employer or other responsible persons in workplaces and other institutions: It shall be the duty of the employer or other responsible persons in workplaces or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual

harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) physical contact and advances;

(b) a demand or request for sexual favours;

(c) sexually-coloured remarks;

(d) showing pornography;

(e) any other unwelcome physical, verbal or nonverbal conduct of sexual nature.

Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive steps:

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the

generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

(b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary action:

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time-bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them.

The employers and person-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. Workers' initiative:

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employeremployee meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third-party harassment:

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person-in-charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993."

5. In these matters while highlighting few individual cases of sexual harassment at the workplaces, the main focus is on the lack of effective implementation of Vishaka guidelines. It is stated that the attitude of neglect in establishing effective and comprehensive mechanism in letter and spirit of the Vishaka guidelines by the States as well as the employers in private and public sector has defeated the very objective and purpose of the guidelines.

6. In one of these matters, Medha Kotwal Lele, this Court has passed certain orders from time to time. Notices were

issued to all the State Governments. The States have filed their responses. On 26.4.2004, after hearing the learned Attorney General and learned counsel for the States, this Court directed as follows :

> "Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka's case will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the complaints Committee shall be deemed to be an inquiry report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules."

This Court further directed in the order dated 26.4.2004 that similar amendment shall be carried out in the Industrial Employment (Standing Orders) Rules. As regards educational institutions and other establishments, the Court observed that further directions would be issued subsequently.

7. On 17.1.2006, this Court in couple of these matters passed the following order:

> "These matters relate to the complaints of sexual harassment in working places. In *Vishaka vs. State of Rajasthan,* (1997) 6SCC 241, this Court issued certain directions as to how to deal with the problem. All the States were parties to that proceedings. Now, it appears that the directions issued in Vishaka case were not properly implemented by the various States/Departments/Institutions. In a rejoinder affidavit filed on behalf of the petitioners, the details have been furnished. The counsel appearing for the States submit that they would do the needful at the earliest. It is not known whether the Committees as suggested in Vishaka case have been constituted in all the Departments/Institutions having members of the staff 50 and above and in most of the District level offices in all the States members of the staff

> working in some offices would be more than 50. It is not known whether the Committees as envisaged in the Vishaka case have been constituted in all these offices. The number of complaints received and the steps taken in these complaints are also not available. We find it necessary to give some more directions in this regard. We find that in order to co-ordinate the steps taken in this regard, there should be a State level officer, i.e., either the Secretary of the Woman and Child Welfare Department or any other suitable officer who is in charge and concerned with the welfare of women and children in each State. The Chief Secretaries of each State shall see that an officer is appointed as a nodal agent to collect the details and to give suitable directions whenever necessary.
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> As regards factories, shops and commercial establishments are concerned, the directions are not fully complied with. The Labour Commissioner of each State shall take steps in that direction. They shall work as nodal agency as regards shops, factories, shops and commercial establishments are concerned. They shall also collect the details regarding the complaints and also see that the required Committee is established in such institutions.
>
> Counsel appearing for each State shall furnish the details as to what steps have been taken in pursuance of this direction within a period of eight weeks. Details may be furnished as shown in the format furnished by the petitioners in the paperbooks. A copy of this format shall form part of the order. The above facts are required at the next date of hearing. A copy of this order be sent to the Chief Secretary and Chief Labour Commissioner of each State for taking suitable action."

8. From the affidavits filed by the State Governments the following position emerges in respect of each of these States:

GOA

The amendments in the Civil Services Conduct Rules and the Standing Orders have not been made so far.

GUJARAT

No amendments in the Civil Services Conduct Rules and the Standing Orders have been made so far. It is not stated that all Complaints Committees are headed by women. There is no information given whetherin such committees NGO members have been associated.

NCT OF DELHI

The amendments in the Civil Services Conduct Rules have been made. The position about amendments in the Standing Orders has not been clarified. It has not been specified that all Complaints Committees are headed by women.

HIMACHAL PRADESH

There is nothing to indicate that the State of Himachal Pradesh has made amendments in the Civil Services Conduct Rules and the Standing Orders. No details of formation of Complaints Committees have been given.

HARYANA

The amendments in the Government Employees (Conduct) Rules, 1966 have been made. However, it is not specified that the amendments in Standing Orders have been made.

MAHARASHTRA

Necessary amendments in Maharashtra Civil Services (Conduct) Rules, 1974 have been made. The Labour Commissioner has taken steps for amending Mumbai Industrial Employment (Permanent Orders) Rules, 1959.

MIZORAM

The State of Mizoram has amended Civil Services Conduct Rules and also constituted Central Complaints Committee to look into complaints pertaining to cases of sexual harassment of working women at all workplaces for preservation and enforcement. A notification has been issued giving necessary directions to all private bodies.

SIKKIM

The amendments in the Civil Services Conduct Rules have been carried out and a notification has been issued for constitution of complaints committees by departments/ institutions with 50 or above staff to look into sexual harassment of women at workplaces.

UTTARANCHAL

The State of Uttaranchal has carried out amendments in Civil Services Conduct Rules as well as the Standing Orders. The District Level and State Level Complaints Committees have been constituted.

WEST BENGAL

The amendments in the Rules relating to duties, rights and obligations of government employees have been made. The amendments in the Standing Orders have been carried out. Out of 56 departments of Government of West Bengal, Complaints Committees have been formed in 48 departments and out of 156 Directorates under the Government, Complaints Committees have been formed in 34 Directorates. Of 24 institutions under the Government, Complaints Committees have been formed in 6.

MADHYA PRADESH

Although State of Madhya Pradesh has made

amendments in the Civil Services Conduct Rules but no amendments have been made in the Standing Orders. The Complaints Committees have been constituted in every office of every department right from the Head of the Department level to the District and Taluka level. The District Level Committees have been constituted under the chairmanship of the District Collector. The steps taken by the District Committees are monitored by the nodal departments.

PUNJAB

The State of Punjab has carried out amendments in the Civil Services Conduct Rules as well as the Standing Orders. 70 Complaints Committees have been constituted at the headquarters of different Directorates and 58 Complaints Committees have been constituted in various Field Offices.

ORISSA

No amendments in the Civil Services Conduct Rules and the Standing Orders have been made.

ANDHRA PRADESH

Amendments in the Civil Services Conduct Rules and in the Standing Orders have been made.

KARNATAKA

The amendments in the Civil Services Conduct Rules have been made by the State of Karnataka but no amendments have been made in the Standing Orders. It is stated that in most of the committees, the number of women members is above 50%. The Chairpersons are women and in most of the committees, an outside member, i.e., an NGO has been associated.

RAJASTHAN

The State of Rajasthan has carried out amendments in the

Civil Services Conduct Rules but no amendments have been carried out in the Standing Orders.

BIHAR

The State of Bihar has made amendments in the Civil Services Conduct Rules but there is nothing to show that amendments in Standing Orders have been made. However, only one Complaints Committee has been constituted for the entire State.

MEGHALAYA

The State of Meghalaya has neither carried out amendments in the Civil Services Conduct Rules nor in the Standing Orders.

TRIPURA

The State of Tripura has carried out the amendments in the Civil Services Conduct Rules. There are no Standing Orders applicable in the State. 97 Complaints Committees have been constituted in most of the state government departments and organisations.

ASSAM

Amendments in the Civil Services Conduct Rules have been made but no amendments have been carried out in the Standing Orders.

MANIPUR

The State of Manipur has carried out amendments in the Civil Services Conduct Rules, but no definite information has been given regarding amendments in the Standing Orders. Only one Complaints Committee has been formed for the entire State.

UTTAR PRADESH

Amendments both in the Civil Services Conduct Rules and the Standing Orders have been carried out.

JAMMU AND KASHMIR

The State of Jammu and Kashmir has carried out amendments in the Civil Services Conduct Rules. It is stated that steps are being taken for amendments in the Standing Orders.

NAGALAND

The amendments have been carried out in the Civil Services Conduct Rules by the State of Nagaland but no amendments have been carried out in the Standing Orders.

ARUNACHAL PRADESH

The State of Arunachal Pradesh has neither carried out amendments in the Civil Services Conduct Rules nor in the Standing Orders. There is only one State Level Committee for the entire State of Arunachal Pradesh.

KERALA

Amendments in the Civil Services Conduct Rules and in the Standing Orders have been carried out. There are 52 Complaints Committees in the State. All such committees are headed by women and 50% members of these committees are women and there is representation of NGO members in these committees.

TAMILNADU

The State of Tamil Nadu has carried out amendments in the Civil Services Conduct Rules. However, no amendments in the Standing Orders have been made so far.

JHARKHAND

The State of Jharkhand has carried out amendments in the Civil Services Conduct Rules. However, no amendments in the Standing Orders have been made so far.

9. From the affidavits filed by the State Governments, it transpires that the States of Orissa, Meghalaya, Himachal Pradesh, Goa, Arunachal Pradesh and West Bengal have amended the Rules relating to duties, public rights and obligations of the government employees but have not made amendments in Civil Services Conduct Rules. Similarly, the States of Sikkim, Madhya Pradesh, Gujarat, Mizoram, Orissa, Bihar, Jammu & Kashmir, Manipur, Karnataka, Rajasthan, Meghalaya, Haryana, Himachal Pradesh, Assam, NCT of Delhi, Goa, Nagaland, Arunachal Pradesh, Jharkhand and Tamil Nadu have not carried out amendments in the Standing Orders. These States appear to have not implemented the order passed by this Court on 26.4.2004 quoted above. The States which have carried out amendments in the Civil Services Conduct Rules and the Standing Orders have not provided that the report of the Complaints Committee shall be treated as a report in the disciplinary proceedings by an Inquiry Officer. What has been provided by these States is that the inquiry, findings and recommendations of the Complaints Committee shall be treated as a mere preliminary investigation leading to a disciplinary action against the delinquent.

10. The States like Rajasthan, Meghalaya, Himachal Pradesh, Assam and Jammu and Kashmir seem to have not formed Complaints Committees as envisaged in the Vishaka guidelines. Some States have constituted only one Complaints Committee for the entire State.

11. The Union Territories of Andaman and Nicobar Islands, Daman and Diu, Lakshadweep, Dadra and Nagar Haveli and Puducherry have not made amendments in the Standing Orders. The Union Territory of Chandigarh does not seem to have carried out amendments in the Civil Services Conduct Rules. Some of the Union Territories like Dadra and Nagar

Haveli and Chandigarh are reported to have not yet formed Complaints Committees. Daman and Diu have formed one Complaints Committee for the Union Territory.

12. While we have marched forward substantially in bringing gender parity in local self-governments but the representation of women in Parliament and the Legislative Assemblies is dismal as the women represent only 10-11 per cent of the total seats. India ranks 129 out of 147 countries in United Nations Gender Equality Index. This is lower than all South-Asian Countries except Afghanistan. Our Constitution framers believed in fairness and justice for women. They provided in the Constitution the States' commitment of gender parity and gender equality and guarantee against sexual harassment to women.

13. The implementation of the guidelines in *Vishaka* has to be not only in form but substance and spirit so as to make available safe and secure environment to women at the workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect. There is still no proper mechanism in place to address the complaints of sexual harassment of the women lawyers in Bar Associations, lady doctors and nurses in the medical clinics and nursing homes, women architects working in the offices of the engineers and architects and so on and so forth.

14. In *Seema Lepcha*[2] this Court gave the following directions:

> "(i) The State Government shall give comprehensive publicity to the notifications and orders issued by it in compliance of the guidelines framed by this Court in Vishaka's case and the directions given in Medha Kotwal's case by getting the same published in the newspapers having maximum circulation in the State after every two months.
>
> (ii) Wide publicity be given every month on Doordarshan Station, Sikkim about various steps taken by the State Government for implementation of the guidelines framed in Vishaka's case and the directions given in Medha Kotwal's case.
>
> (iii) Social Welfare Department and the Legal Service Authority of the State of Sikkim shall also give wide publicity to the notifications and orders issued by the State Government not only for the Government departments of the State and its agencies/instrumentalities but also for the private companies."

2. *Seema Lepcha v. State of Sikkim & Ors.* [Petition for Special Leave to Appeal (Civil) No. 34153/2010 decided on 3.2.2012.

15. As a largest democracy in the world, we have to combat violence against women. We are of the considered view that the existing laws, if necessary, be revised and appropriate new laws be enacted by Parliament and the State Legislatures to protect women from any form of indecency, indignity and disrespect at all places (in their homes as well as outside), prevent all forms of violence – domestic violence, sexual assault, sexual harassment at the workplace, etc; — and provide new initiatives for education and advancement of women and girls in all spheres of life. After all they have limitless potential. Lip service, hollow statements and inert and inadequate laws with sloppy enforcement are not enough for true and genuine upliftment of our half most precious population – the women.

16. In what we have discussed above, we are of the considered view that guidelines in Vishaka should not remain symbolic and the following further directions are necessary until legislative enactment on the subject is in place.

(i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their

respective Civil Services Conduct Rules (By whatever name these Rules are called) shall do so within two months from today by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services Conduct Rules. In other words, the disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

(ii) The States and Union Territories which have not carried out amendments in the Industrial Employment (Standing Orders) Rules shall now carry out amendments on the same lines, as noted above in clause (i) within two months.

(iii) The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Those States and/or Union Territories which have formed only one Committee for the entire State shall now form adequate number of Complaints Committees within two months from today. Each of such Complaints Committees shall be headed by a woman and as far as possible in such Committees an independent member shall be associated.

(iv) The State functionaries and private and public sector undertakings/organisations/bodies/institutions etc. shall put in place sufficient mechanism to ensure full implementation of the Vishaka guidelines and further provide that if the alleged harasser is found guilty, the complainant – victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of

witnesses and the complainants shall be met with severe disciplinary action.

(v) The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. To achieve this, necessary instructions/circulars shall be issued by all the statutory bodies such as Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months from today. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with the Vishaka guidelines and the guidelines in the present order.

17. We are of the view that if there is any non-compliance or nonadherence to the Vishaka guidelines, orders of this Court following Vishaka and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard.

18. Writ petitions (including T.C.) and appeals are disposed of as above with no orders as to costs.

R.P. Matters disposed of.

RAMACHANDRAN
v.
STATE OF KERALA
(Criminal Appeal No. 732 of 2008)

OCTOBER 30, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

PENAL CODE, 1860:

s.302 - Murder - Circumstantial evidence - Accused causing murder of his wife by forcibly administering poison to her and smothering - Conviction and sentence of life imprisonment awarded by trial court affirmed by High Court - Held: There is ample evidence of prosecution witnesses that the deceased was subjected to physical violence almost on a daily basis - There was motive for the offence - The clinching evidence establishing that the death was caused in the matrimonial house by forcible administering of poison to deceased and by smothering - Thus, there is no break in the chain of evidence which could through up some other possibility - There is no exceptional circumstance or reason to disturb the concurrent finding of fact recorded by courts below and to interfere with the conviction and sentence - Circumstantial evidence.

The appellant was prosecuted for committing the murder of his wife. The couple had married four years before the incident and had two children, the younger one being aged about 3 months. The prosecution case was that there was a history of matrimonial discord between the couple, as the appellant was stated to have illicit relations with the wife of his elder brother. On the intervening night of 10th and 11th March, 1998 at about 1.00 A.M. there was a quarrel between the couple. Thereafter the appellant forcibly administered a strong

pesticide to his wife, and when she ran out of the house and fell down, the appellant smothered her nose and mouth, which resulted in her death. The trial court convicted the appellant u/s 302 IPC and sentenced him to imprisonment for life. The appeal of the accused was dismissed by the High Court.

Dismissing the appeal, the Court

HELD: 1.1 This Court upholds the view taken by the trial court and affirmed by the High Court that the case was one of murder and not of suicide. [para 1] [922-A]

1.2 There is ample evidence on record not only from the immediate family of the deceased (PWs 1, 2 and 3, father, mother and sister, respectively of the deceased) but also from her neighbour (PW-7) that she was subjected to physical violence almost on a daily basis. The cause of discord between the appellant and the deceased appears to be her belief that the appellant had illicit relations with the wife of his elder brother. The strained relations, coupled with the allegations made by the deceased, provided a motive for the appellant to murder her. [para 29] [928-E-G]

1.3 What is clinching in the instant case is the medical evidence. The High Court noted that the unnatural death of the victim was not in dispute. The High Court placed great emphasis on the unambiguous evidence of the doctor (PW 10) to the effect that death of the victim was caused by smothering and administration of toxic Furadan which was found in her mouth and pharynx. As testified by the doctor, the various injuries on the deceased, though minor, indicated that the administration of Furadan was forcible and that she had resisted this. No person other than her husband could have possibly caused her death, especially considering the motive or grudge that he harboured against her. [para 22 and 31]

[925-H; 926-A-B; 928-H; 929-B]

1.4 The trial court discounted the theory that the appellant and his father had gone to the temple to witness 'Koothu'. It was noted that there was nothing to support such a statement. [para 18] [925-C]

1.5 It is true that the case is one of circumstantial evidence but there is no break in the chain of evidence which could possibly throw up some other possibility. Under the circumstances, there is no exceptional circumstance or reason to disturb the concurrent finding of fact recorded by both the courts below and to interfere with the conviction and sentence awarded to the appellant by the trial court and confirmed by the High Court. [para 27 and 34] [928-B; 929-F]

Sudama Pandey v. State of Bihar, **2001 (5) Suppl. SCR 465 = (2002) 1 SCC 679;** *Dalbir Kaur v. State of Punjab,* **1977 (1) SCR 280 = (1976) 4 SCC 158- relied on.**

Case Law Reference:

2001 (5) Suppl. SCR 465	**relied on**	**para 24**
1977 (1) SCR 280	**relied on**	**para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 732 of 2008.

From the Judgment & Order dated 30.11.2004 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 663 of 2003.

P.V. Dinesh for the Appellant.

Ramesh Babu M.R., R. Sathish for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question before us is whether the appellant murdered his wife Remani or whether she committed suicide. We are in agreement with the view taken by the Trial Judge and affirmed by the High Court that the case was one of murder and not of suicide.

The facts:

2. The appellant and Remani had been married for about four years. They had two children, the second child having been born just about three months before the murder of Remani.

3. There was a history of matrimonial discord between the parties. Remani believed that the appellant was having illicit relations with the wife of his elder brother which seems to have been the cause of conflict. At one stage Remani had even left the matrimonial home. However, on an application having been filed by the appellant for restitution of conjugal rights, the matter was settled between the parties and Remani went back to the matrimonial home. Unfortunately, it appears that even thereafter, matrimonial disputes took place between the parties.

4. According to the prosecution, on the intervening night of 10th and 11th March, 1998 at about 1.00 a.m. there was a quarrel between the appellant and Remani. Subsequent to the quarrel, the appellant forcibly administered to Remani a highly toxic carbonate compound called Furadan which is a strong pesticide used for plantain cultivation and was kept in a bottle in the house.

5. On being forcibly administered the poison, Remani ran out of her house and fell down on the eastern side where it is alleged that the appellant smothered her by closing her nose and mouth with his hands. The poison and smothering of Remani resulted in her death.

6. Early morning, Remani's parents were called and her father lodged a First Information Report at about 12.30 p.m. in

which he stated that the appellant used to inflict physical torture on Remani and due to the continuous harassment she consumed poison and committed suicide.

7. After investigations, the police filed a report in which it was concluded that the appellant had murdered Remani. On committal, the appellant denied the charge, pleaded not guilty and claimed trial.

8. The prosecution examined as many as 16 witnesses and produced several documents and material objects in support of its case including a bottle containing Furadan.

Decision of the Trial Court:

9. The material witnesses for the prosecution before the Trial Court were PW-1, PW-2, PW-3, PW-7 and PW-10.

10. PW-1 Bhaskaran stated that Remani was his daughter and that her husband used to beat her up everyday and scold her. Remani had told him that the appellant was having illicit relations with the wife of his elder brother. The witness was not specifically questioned about the FIR given by him in which he had stated that Remani had committed suicide by consuming poison. He, however, stated that he had informed the police that Remani was administered poison by her husband, that is, the appellant.

11. PW-2 Thankamalu, mother of Remani, confirmed that there were frequent and daily quarrels between the appellant and Remani. She stated that Remani told her that the appellant would get drunk and beat her up. She also stated that Remani told her that the appellant was having illicit relations with the wife of his elder brother. According to this witness, Remani was capable of doing some typing jobs and bringing up her children. As such, there was no doubt that, if need be, Remani could look after herself and would not commit suicide.

12. PW-3 Ragini is the sister of Remani. She also

confirmed the frequent if not daily physical abuse inflicted by the appellant on Remani.

13. PW-7 Hamza is a neighbour of the appellant and Remani. He too confirmed the physical abuse that Remani was subjected to by the appellant.

14. PW-8 Kumhadi is the father of the appellant. He stated that on the intervening night of 10th and 11th March, 1998 he and the appellant had gone to the temple to watch a 'Koothu' program. They came back at about 5 or 5.30 a.m. in the morning and that is when they discovered the body of Remani. This witness was declared hostile and cross-examined. The Trial Court did not give much credence to the testimony of this witness and did not accept the alibi.

15. The most important witness is PW-10 Dr. Rajaram. He is an Associate Professor of Forensic Medicine, Medical College, Kozhikode and he conducted the post mortem examination on the body of Remani. He stated that she had as many as 22 abrasions and contusions on various parts of her body. He stated, on the basis of the chemical examination report, that Remani died due to the combined effect of smothering and carbofuran poisoning. He was cross-examined and asked whether the abrasions on Remani's body could have been caused on her falling down on a hard surface and struggling for existence. He replied that in view of the injuries on the back of her body, the possibility was highly remote. He also stated that if her back had come in contact with a hard object, her clothes would have had a tear. He further stated that the nature of injuries including one on the back of the elbow clearly suggested that Remani had offered some resistance.

16. On the above material, the Trial Court was of the opinion that even though the case was one of circumstantial evidence, there was enough material on record to show that it was only the appellant who had murdered Remani by forcibly administering Furadan and then smothering her. It may be

mentioned that Furadan is a carbofuran and its ingestion can cause death within 10 minutes.

17. The Trial Court was also of the view that the appellant had a motive for murdering Remani in as much as they would have frequent quarrels on the suspicion of Remani that the appellant had illicit relations with the wife of his elder brother who was residing in the same house.

18. The Trial Court discounted the theory that the appellant and his father had gone to the temple to witness 'Koothu'. It was noted that there was nothing to support such a statement. In this context, it was observed by the Trial Court that Remani was in hospital from 08.03.1998 till 10.03.1998 due to some vomiting and illness and it was very unlikely that immediately after her discharge from hospital on 10.03.1998 the appellant would have left her alone in the house and gone to the temple where he stayed overnight, if indeed he cared for her.

19. On the basis of the above facts, the Trial Court held the appellant guilty of having committed the murder of Remani and sentenced him to imprisonment for life.

Decision of the High Court:

20. Feeling aggrieved, by the conviction and sentence awarded by the Trial Court, the appellant preferred Criminal Appeal No. 663 of 2003 which was dismissed by a Division Bench of the High Court of Kerala by Judgment and Order dated 30.11.2004.

21. The High Court took into consideration the evidence of the witnesses, the strained matrimonial relations between the appellant and Remani as also the medical evidence for affirming the conviction and sentence.

22. The High Court noted that the unnatural death of Remani was not in dispute. The principal question before the High Court was whether her death was due to homicide or suicide. In this regard, the High Court placed great emphasis

on the unambiguous evidence of Dr. Rajaram to the effect that Remani's death was caused by smothering and administration of toxic Furadan which was found in her mouth and pharynx. As testified by the doctor, the various injuries on Remani, though minor, indicated that the administration of Furadan was forcible and that she had resisted this.

23. In view of the fact that the appellant had a motive to murder Remani and there was clear medical evidence suggesting smothering and poisoning of Remani, the High Court upheld the conviction and sentence.

Discussion and conclusions:

24. In *Sudama Pandey v. State of Bihar,* (2002) 1 SCC 679 this Court considered the scope of interference in a criminal appeal with concurrent findings of fact. It was observed as follows:

> We are not unmindful of the fact that this Court under Article 136 of the Constitution seldom interferes with the factual findings recorded by two concurring Courts but if this Court is satisfied that the High Court has committed a serious error of law and that there was substantial miscarriage of justice, this Court could interfere with the concurring findings of the High Court and that of the Trial Court. This Court also does not normally enter into a reappraisal or review of the evidence unless the assessment of the evidence by the High Court is vitiated by an error of law or procedure or there was misreading of evidence."

25. Similarly in *Dalbir Kaur v. State of Punjab,* (1976) 4 SCC 158 the principles for interference were culled out and stated by S. Murtaza Fazal Ali, J as follows:

> "Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:

(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;

(2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;

(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence."

26. In the same decision, A.C. Gupta, J concurred but cautioned as follows:

"The decisions of this Court referred to in the Judgment of my learned brother lay down that this Court does not interfere with the findings of fact unless it is shown that "substantial and grave injustice has been done". But whether such injustice has been done in a given case depends on the circumstances of the case, and I do not think one could catalogue exhaustively all possible circumstances in which it can be said that there has been

grave and substantial injustice done in any case."

27. Keeping these principles in mind, we have considered the evidence on record and find no exceptional circumstance or reason to disturb a concurrent finding of fact by both the Courts.

28. However, we need to deal with the contentions urged by learned counsel for the appellant. His first contention was that even though there may have been strained matrimonial relations between the appellant and Remani, those differences were patched up when Remani came back to live with the appellant in the matrimonial home. His second contention was that the appellant had no ill will towards Remani in as much as when she was hospitalized from 8.03.1998 to 10.03.1998, he had looked after and paid the medical bills. Under these circumstances, there was no reason for him to have murdered Remani.

29. We are of the view that there is no substance in either of the submissions made by learned counsel. There is ample evidence on record not only from the immediate family of Remani but also from her neighbour that she was subjected to physical violence almost on a daily basis. The cause of discord between the appellant and Remani appears to be her belief that the appellant had illicit relations with the wife of his elder brother. This may or may not be true but the fact of the matter is that relations between the parties were terribly strained and Remani was subjected to physical abuse almost on a daily basis. These strained relations, coupled with the allegations made by Remani, provided a motive for the appellant to murder her.

30. The fact that the appellant may have looked after Remani during her illness for a couple of days is neither here nor there. He was expected to do so.

31. However, what is clinching in the present case is the medical evidence which clearly indicates that Remani was

forcibly administered Furadan; she had resisted this forcible administration; as a result of her resistance, she received several minor injuries on her body. Eventually, with a view to overcome her resistance, she was smothered and ultimately she died as a result of the forcible administration of Furadan and smothering. No person other than her husband could have possibly caused Remani's death, especially considering the motive or grudge that he harboured against her.

32. Learned counsel for the appellant also submitted that Remani's father had himself stated in the FIR that she had committed suicide by consuming poison. This seems to have been the first impression gathered by Bhaskaran. Learned counsel for the State pointed out that the reason could possibly have been to save the appellant from imprisonment keeping the welfare of their two children in mind. It is not necessary for us to make any guesses in this regard.

33. The fact is that investigations into the matter, particularly the injuries suffered by Remani and presence of Furadan in her mouth suggested that the case was not one of suicide. When the matter was taken to trial the truth eventually came out, which is that Remani had not committed suicide but had in fact been murdered. Bhaskaran's hypothesis proved to be only an assumption.

34. We are conscious that the case is one of circumstantial evidence but we are not able to find any break in the chain of evidence which could possibly throw up some other possibility. Under these circumstances, we find no reason to interfere with the conviction and sentence awarded to the appellant by the Trial Court and confirmed by the High Court.

35. There is no merit in the appeal and it is accordingly dismissed.

R.P. Appeal dismissed.

M/S THAKKER SHIPPING P. LTD.
v.
COMMISSIONER OF CUSTOMS (GENERAL)
(Civil Appeal No. 7696 of 2012)

OCTOBER 30, 2012

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

Customs Act, 1962 - s. 129A(5) - Condonation of delay under - For delay in filing an application u/s. 129D(4) - Permissibility - Held: Customs, Excise and Service Tax Appellate Tribunal is competent to invoke s.129A (5) for condoning the delay - Provisions of s. 129A(1) to (7) have been mutatis mutandis made applicable to the applications u/s. 129D(4) - Legislative intent was to make entire s. 129A supplemental to s. 129D(4) - s. 129A(5) stands incorporated in s. 129D(4) by way of legal fiction - Interpretation of Statutes - Legislative intent - Legal Fiction.

The question for consideration in the present appeal was whether it is competent for the Customs, Excise and Service Tax Appellate Tribunal to invoke Section 129A(5) of the Customs Act, 1962, where an application u/s. 129D(4) of the Act was not made by the Commissioner within the prescribed time, and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period.

Dismissing the appeal, the Court

HELD: 1. It is competent for the Tribunal to invoke Section 129A(5) of Customs Act, 1962, where an application under Section 129D(4) has not been made within the prescribed time and condone the delay in making such application if it is satisfied that there was

sufficient cause for not presenting it within that period. [Para 20] [943-C]

2. Section 129D(4) makes it clear that where an application is made by the Commissioner to the Tribunal in pursuance of an order under sub-section (1) within a prescribed period from the date of communication of that order, such application shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions regarding appeals under Section 129A to the Tribunal, in so far as they are applicable, would be applicable to such application. The crucial words and expressions in Section 129D(4) are, "such application", "heard", "as if such application were an appeal" and "so far as may be". The expression "such application", inter alia, is referable to the application made by the Commissioner to the Tribunal in pursuance of an order under sub-section (1) of Section 129D. The period prescribed in Section 129D for making application does not control the expression "such application". An application made under Section 129D(4) pursuant to the order passed under sub-sections (1) or (2) shall not cease to be "such application" merely because it has not been made within prescribed time. If the construction to the words "such application" is given to mean an application filed by the Commissioner before the Tribunal within the prescribed period only, the subsequent expressions "heard", "as if such an application were an appeal'" and "so far as may be" occurring in Section 129D(4) of the Act may be rendered ineffective. [Para 12] [939-B-G]

3. The clear and unambiguous provision in Section 129D(4) that the application made therein shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions of the Act regarding appeals, so far as may be,

shall apply to such application leaves no manner of doubt that the provisions of Section 129A (1) to (7) have been mutatis mutandis made applicable, with due alteration wherever necessary, to the applications under Section 129D(4). Section 129A has been incorporated in Section 129D. Section 129A(5) has become integral part of Section 129D(4) of the Act. [Paras 12 and 13] [939-G-H; 940-A-B-D]

4. Parliament intended entire Section 129A, as far as applicable, to be supplemental to Section 129D(4) and that is why it provided that the provisions relating to the appeals to the Tribunal shall be applicable to the applications made under Section 129D(4). The expression, "including the provisions of sub-section (4) of Section 129A" is by way of clarification and has been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under Section 129D(4) or else it may be said that provisions relating to appeals to the Tribunal have been made applicable and not the cross objections. The use of expression "so far as may be" is to bring general provisions relating to the appeals to Tribunal into Section 129D(4). Once the provisions relating to the appeals to the Tribunal have been made applicable, Section 129A(5) stands incorporated in Section 129D(4) by way of legal fiction and must be given effect to. Seen thus, it becomes clear that the Act has given express power to the Tribunal to condone delay in making the application under Section 129D(4) if it is satisfied that there was sufficient cause for not presenting it within that period. [Para 14] [940-E-H; 941-A]

Commissioner of Central Excise v. Azo Dye Chem **(2000) 120 ELT201 (Tri-Delhi) - not approved.**

Commissioner of Customs and Central Excise v. Hongo

India Pvt.Ltd. and Anr. **(2009) 5 SCC 791 - held inapplicable.**

Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan and Ors. **(1996) 2 SCC 449: 1996 (1) SCR 518;** *Fairgrowth Investments Ltd.v. Custodian* **(2004) 11 SCC 472: 2004 (5) Suppl. SCR 505;** *UCOBank and Anr. v. Rajinder Lal Capoor* **(2008) 5 SCC 257: 2008 (5) SCR 775 - referred to.**

Case Law Reference:

(2000) 120 ELT 201 (Tri-Delhi)	**Not approved**	**Para 12**
(2009) 5 SCC 791	**held inapplicable**	**Para 16**
1996 (1) SCR 518	**Referred to**	**Para 17**
2004 (5) Suppl. SCR 505	**Referred to**	**Para 18**
2008 (5) SCR 775	**Referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7696 of 2012.

From the Judgment & Order dated 13.08.2010 of the High Court of Judicature at Bombay in Customs Appeal No. 8 of 2009.

Rony O. John, Surti Sabharwal (for Praveen Kumar) for the Appellant.

R.P. Bhatt, K. Swami, Vikas Bansal, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

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

2. The High Court answered in the affirmative the following question:

"Whether the CESTAT has discretionary power under Section 129A (5) of the Customs Act, 1962 to condone the delay caused in filing the appeal under Section 129D(3) [sic, 129D(4)] of the said Act, when there was sufficient cause available to appellant for not filing it within the prescribed period before the Appellate Authority".

3. The facts leading to the present appeal are these. A container was intercepted by M & P Wing of Commissioner of Customs (Preventive), Mumbai on 11.01.2001. It was found to contain assorted electrical and electronic goods of foreign origin. The said goods were imported by M/s Qureshi International and the cargo was cleared from Nhava Sheva. The clearance of the goods was handled by M/s Thakker Shipping P. Ltd., the appellant, referred to as the Custom House Agent ('CHA' for short). On physical verification, the value of seized cargo was estimated at Rs. 77,10,000/- as local market value as against the declared value of Rs. 10,03,690/-. The importer could not be interrogated. On search of premises of CHA, the books relating to import export clearance were not found for verification. In the statement of Vijay Thakker, proprietor of the CHA, recorded under Section 108 of the Customs Act, 1962 (for short, 'the Act'), he accepted that he attended the import clearance work and introduced the importer to the overseas suppliers and bankers for financial assistance; the bill of entry for the clearance of subject goods had been filed without proper description and correct value and he failed to inform the Customs Officers about the subject goods, despite having attended the examination of 5% goods prior to the clearance. Accordingly, the inquiry officer recorded his findings.

4. Initially, the appellant's CHA licence was placed under suspension pending inquiry under Regulation 23 of Custom House Agent Licencing Regulations, 2004 but the suspension order was set aside by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'Tribunal') and CHA licence was restored. The inquiry under Regulation 23, however, proceeded against the CHA on diverse charges. The Commissioner of Customs (General) Mumbai by his order in original dated

21.07.2004 dropped the proceedings under Regulation 23 by rejecting the findings of the inquiry officer.

5. The Committee of Chief Commissioners of Customs (for short, 'the Committee') constituted under sub section (1B) of Section 129A of the Act called for and examined the records of the proceedings leading to order in original dated 21.07.2004 passed by the Commissioner of Customs (General) Mumbai (for short, 'the Commissioner') for satisfying itself as to the legality and propriety of the said order. The Committee on consideration of the entire matter directed the Commissioner to apply to the Tribunal for determination of the following points, namely; (1) whether taking into consideration the facts and circumstances noticed in the order, the order of the Commissioner was legally correct and proper; and (2) whether by an order under Section 129B of the Act, the Tribunal should set aside the order of the Commissioner dropping the proceedings against the CHA.

6. The Commissioner, accordingly, made an application under Section 129D(4) of the Act before the Tribunal. As the said application could not be made within the prescribed period and was delayed by 10 days, an application for condonation of delay was filed with a prayer for condonation. The Tribunal on 28.11.2005, however, rejected the application for condonation of delay and consequently dismissed the appeal by the following brief order:

> "This appeal has been filed by the applicant Commissioner in pursuance of Order of Review passed by a Committee of Chief Commissioners. In the application for condonation of delay filed by the applicant Commissioner, a prayer has been made for condoning delay of 10 days. In the case of *CCEx. Mumbai vs. Azo Dye Chem*-2000 (120) ELT 201 (Tri-LB), Larger Bench of the Tribunal has held that the Tribunal has no power to condone the delay caused in filing such appeals by the Department beyond the prescribed period of three months. Even though the said decision was in a central Excise case, the ratio of this decision is equally applicable to Customs cases since the legal provisions under both the enactments are similar.
>
> 2. Accordingly, following the ratio of Azo Dye Chem (Supra), we have no option but to reject the application for condonation of delay. We order accordingly and consequently, the appeal also stands dismissed".

7. This appeal raises the question, whether it is competent for the Tribunal to invoke Section 129A(5) of the Act where an application under Section 129D(4) has not been made by the Commissioner within the prescribed time and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period.

8. Learned counsel for the appellant submitted that Section 129D(4) of the Act was self contained and if the application contemplated therein was not made within the prescribed period, the Tribunal has no power or competence to condone the delay after expiry of the prescribed period. In support of his arguments he relied upon a larger Bench decision of the Customs, Excise and Gold (Control) Appellate Tribunal ('CEGAT') in *Commissioner of Central Excise v. Azo Dye Chem*[1]. He also placed heavy reliance upon a three-Judge Bench decision of this Court in *Commissioner of Customs and Central Excise v. Hongo India Pvt. Ltd. and Another*[2]. Learned counsel for the appellant also placed reliance upon decisions of this Court in *Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan and Ors.*[3], *Fairgrowth Investments Ltd. v. Custodian*[4] and *UCO Bank and Anr. v. Rajinder Lal Capoor*[5].

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1. (2000) 120 ELT 201 (Tri-Delhi).
2. (2009) 5 SCC 791.
3. (1996) 2 SCC 449.
4. (2004) 11 SCC 472.
5. (2008) 5 SCC 257.

9. On the other hand, Mr. R.P. Bhatt, learned senior counsel for the respondent, supported the view of the High Court in passing the impugned order. He submitted that the answer to the question under consideration was dependent on construction of Sections 129D and 129A of the Act.

10. Section 129D (omitting the parts not relevant) reads:

"S.129D. -Power of Committee of Chief Commissioners of Customs or Commissioner of Customs to pass certain orders. - (1) The Committee of Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner ... to apply to the Appellate Tribunal … for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Customs in its order;

… ………………………………………………………………..

(2)….. ……………………………………………………………

(3) The Committee of Chief Commissioners of Customs … shall make order under sub-section (1) …. within a period of three months from the date of communication of the decision or order of the adjudicating authority;

(4) Where in pursuance of an order under sub-section (1) …. Commissioner of Customs makes an application to the Appellate Tribunal …. within three months from the date of communication of the order under sub-section (1) …. such application shall be heard by the Appellate Tribunal …. as if such applications were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the

provisions of sub-section (4) of Section 129A shall, so far as may be, apply to such application.

(5) ………………………………………………………………….."

We may clarify that sub-sections (3) and (4) of Section 129D have been amended from time to time. What has been reproduced above are the provisions existing at the relevant time.

11. Section 129A (omitting the parts not relevant) reads:

"S.129. - Appellate Tribunal. -

(1) ……………………………………………………………..

(2) ……………………………………………………………..

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Customs, or as the case may be, the other party preferring the appeal.

(4)On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after expiry of the relevant period referred to in sub-section (3) or sub-

section (4), if it is satisfied that there was sufficient cause for not presenting it within that period".

12. Section 129D(4) makes it clear that where an application is made by the Commissioner to the Tribunal in pursuance of an order under sub-section (1) within a prescribed period from the date of communication of that order, such application shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions regarding appeals under Section 129A to the Tribunal, in so far as they are applicable, would be applicable to such application. The crucial words and expressions in Section 129D(4) are, "such application", "heard", "as if such application were an appeal" and "so far as may be". The expression "such application", inter alia, is referable to the application made by the Commissioner to the Tribunal in pursuance of an order under sub-section (1) of Section 129D. The period prescribed in Section 129D for making application does not control the expression "such application". It is difficult to understand how an application made under Section 129D(4) pursuant to the order passed under sub-sections (1) or (2) shall cease to be "such application" merely because it has not been made within prescribed time. If the construction to the words "such application" is given to mean an application filed by the Commissioner before the Tribunal within the prescribed period only, the subsequent expressions "heard", "as if such an application were an appeal'" and "so far as may be" occurring in Section 129D(4) of the Act may be rendered ineffective. The view of the larger Bench of the CEGAT in Azo Dye Chem1 and the reasons in support thereof do not commend to us. We are unable to accept the view adumbrated by the CEGAT. The clear and unambiguous provision in Section 129D(4) that the application made therein shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions of the Act regarding appeals, so far as may be, shall apply to such application leaves

no manner of doubt that the provisions of Section 129A (1) to (7) have been mutatis mutandis made applicable, with due alteration wherever necessary, to the applications under Section 129D(4).

13. From the plain language of Section 129D(4), it is clear that Section 129A has been incorporated in Section 129D. For the sake of brevity, instead of repeating what has been provided in Section 129A as regards the appeals to the Tribunal, it has been provided that the applications made by the Commissioner under Section 129D(4) shall be heard as if they were appeals made against the decision or order of the adjudicating authority and the provisions relating to the appeals to the Tribunal shall be applicable in so far as they may be applicable. Consequentially, Section 129A(5) has become integral part of Section 129D(4) of the Act. In other words, if the Tribunal is satisfied that there was sufficient cause for not presenting the application under Section 129D(4) within prescribed period, it may condone the delay in making such application and hear the same.

14. Parliament intended entire Section 129A, as far as applicable, to be supplemental to Section 129D(4) and that is why it provided that the provisions relating to the appeals to the Tribunal shall be applicable to the applications made under Section 129D(4). The expression, "including the provisions of sub-section (4) of Section 129A" is by way of clarification and has been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under Section 129D(4) or else it may be said that provisions relating to appeals to the Tribunal have been made applicable and not the cross objections. The use of expression "so far as may be" is to bring general provisions relating to the appeals to Tribunal into Section 129D(4). Once the provisions relating to the appeals to the Tribunal have been made applicable, Section 129A(5) stands incorporated in Section 129D(4) by way of legal fiction and must be given effect

to. Seen thus, it becomes clear that the Act has given express power to the Tribunal to condone delay in making the application under Section 129D(4) if it is satisfied that there was sufficient cause for not presenting it within that period.

15. We do not think that any useful purpose will be served in discussing the cases cited by the learned counsel for the appellant in detail. In none of these cases, the question which has come up for decision in the present appeal arose. We shall, however, briefly refer to these decisions.

16. In *Hongo India Pvt. Ltd*[2], the question for consideration before this Court was whether the High Court had power to condone the delay in presentation of the reference application under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period by applying Section 5 of the Limitation Act, 1963. Sub-section (1) of Section 35-H, which was under consideration before this Court, read as follows:

> "35-H. Application to High Court. - (1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under Section 35-C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal".

This Court observed that except providing a period of 180 days for filing reference application to the High Court, there was no other clause for condoning the delay if reference was made beyond the said prescribed period. Sections 5 and 29(2) of the Limitation Act were noted. This Court then held that the

language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order and in the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there was complete exclusion of Section 5 of the Limitation Act. In conclusion this Court held that the time limit prescribed under Section 35-H(1) to make a reference to the High Court was absolute and unextendable by the Court under Section 5 of the Limitation Act. In the present case, as noted above, the provisions relating to the appeals to the Tribunal have been made applicable to an application made under Section 129D(4) and it has been further provided that such application shall be heard as if it was an appeal made against the decision or order of the adjudicating authority. Any delay in presentation of appeal under Section 129A is condonable by the Tribunal by virtue of sub-section (5) thereof. The Tribunal has been invested with the same power for consideration of the applications under Section 129D(4) if it is satisfied that there was sufficient cause for not presenting such application within prescribed period as the provisions relating to the appeals to the Tribunal have been made applicable to such applications. *Hongo India Pvt. Ltd*[2] does not help the appellant at all.

17. In *Delhi Cloth and General Mills Co. Ltd*[3]. the concept of legal fiction has been explained. This Court observed, "the legal consequences cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow".

18. In *Fairgrowth Investments Ltd.*[4], the question raised before this Court was whether the Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short, '1992 Act') has power to condone the delay in filing a petition under Section 4(2) of the Act. Dealing with the said question, the Court

considered various provisions of the Limitation Act, including Sections 5 and 29(2), and ultimately it was held that the provisions of the Limitation Act had no application in relation to a petition under Section 4(2) of the 1992 Act and the prescribed period was not extendable by the Court.

19. In *UCO Bank.*[5], this Court restated, what has been stated earlier with regard to interpretation of statutes, that the court must give effect to purport and object of the enactment.

20. In light of the above discussion, we hold that it is competent for the Tribunal to invoke Section 129A(5) where an application under Section 129D(4) has not been made within the prescribed time and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period.

21. In view of the above, the appeal must fail and it fails and is dismissed with no order as to costs.

K.K.T. Appeal Dismissed.

PURUSHOTTAM DAS BANGUR & ORS.
v.
DAYANAND GUPTA
(Civil Appeal No. 7710 of 2012)

OCTOBER 31, 2012

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

West Bengal Premises Tenancy Act, 1956 - s. 13(1)(b) - Suit for eviction - On the ground of construction of permanent structure without the permission of the land-lord - Decreed by trial court - High Court set-aside the decree - On appeal, held: The alteration made by the tenant was a permanent structure and fell within the mischief of s. 108(p) of Transfer of property Act - Thus constituted a ground for eviction in terms of s. 13(1)(b) - Transfer of Property Act, 1882 - s. 108(p).

Transfer of Property Act, 1882 - s. 108(p) - Permanent structure - Determination of - Held: A structure that lasts till the end of tenancy can be treated as permanent structure - Removability of the structure without causing damage to the building, durability of the structure and the material used for erection and the purpose for which the structure is intended, are the other considerations for deciding whether the structure is permanent.

Words and Phrases - 'Permanent structure'- Meaning of in the context of West Bengal Premises Tenancy Act, 1956 and s. 108(p) of Transfer of Property Act, 1882.

Appellants-landlords filed a suit for ejectment against the respondent-tenant on the ground that the tenant illegally and unauthorisedly, without permission of the land-lord, removed the tin sheet roof and replaced the same by a cement concrete slab and built a permanent brick and mortar passage to roof; and that the same was

violative of s. 108(p) of Transfer of Property Act, 1882 and also the conditions stipulated in the lease agreement executed between the parties and thus the tenant was liable to be evicted u/s. 13(1)(b) of West Bengal Premises Tenancy Act, 1956. Trial court decreed the suit. High Court setting aside the decree, allowed the appeal of the tenant. Hence the present appeal by the land-lord.

Allowing the appeal, the Court

HELD: 1. No hard and fast rule can be prescribed for determining what is permanent or what is not. The use of the word 'permanent' in Section 108 (p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. The term 'permanent' does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108 (p) of the Transfer of Property Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly the purpose for which the structure is intended is also an important factor that cannot be ignored. [Para 17] [957-C-F]

Venkatlal G. Pittie and Anr. v. Bright Bros. Pvt. Ltd. **(1987) 3 SCC 558: 1987 (1) SCR 516 - relied on.**

Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar **AIR1965 Cal 408;** *Surya Properties Private Ltd. and Ors. v.*

Bimalendu Nath Sarkar and Ors. **AIR 1964 Cal 1 - referred to.**

2. In the instant case, the structure was not a temporary structure by any means. The kitchen and the storage space forming part of the demised premises was meant to be used till the tenancy in favour of the respondent-occupant subsisted. Removal of the roof and replacement thereof by a concrete slab was also meant to continue till the tenancy subsisted. The intention of the tenant while replacing the tin roof with concrete slab, obviously was not to make a temporary arrangement but to provide a permanent solution for the alleged failure of the landlord to repair the roof. The construction of the passage was also a permanent provision made by the tenant which too was intended to last till the subsistence of the lease. The concrete slab was a permanent feature of the demised premises and could not be easily removed without doing extensive damage to the remaining structure. Such being the position, the alteration made by the tenant fell within the mischief of Section 108 (p) of the Transfer of Property Act and, therefore, constituted a ground for his eviction in terms of Section 13(1)(b) of the West Bengal Premises Tenancy Act, 1956. [Para 18] [957-G-H; 958-A-C]

*Brijendra Nath Bhargava and Anr. v. Harsh Wardhan and Ors.***(1988) 1 SCC 454:1988 (2) SCR 124 ;** *Om Prakash v. Amar Singhand Ors.* **(1987) 1 SCC 458: 1987 (1) SCR 968;** *Waryam Singh v. Baldev Singh* **(2003) 1 SCC 59;** *G. Reghunathan v. K.V. Varghese* **(2005) 7 SCC 317;** *Om Pal v. Anand Swarup (dead) by Lrs.* **(1988) 4 SCC 545 - distinguished.**

Ratanlal Bansilal and Ors. v. Kishorilal Goenka and Ors. **AIR1993 Cal 144;** *Ranju alias Gautam Ghosh v. Rekha Ghosh and Ors.* **(2007) 14 SCC 81: 2007 (13) SCR 763 - referred to.**

3. Respondent is, however, given one year's time to vacate the premises subject to the condition that the respondent shall either pay directly to the appellants or deposit in the trial court, compensation @ Rs.1500/- p.m. from 1st October, 2012 till the date of vacation. [Para 27] [961-E-G]

Case Law Reference:

1987 (1) SCR 516	**Relied on**	**Para 14**
AIR 1965 Cal 408	**Referred to**	**Para 14**
AIR 1964 Cal 1	**Referred to**	**Para 14**
2007 (13) SCR 763	**Referred to**	**Para 19**
1988 (2) SCR 124	**Distinguished**	**Para 20**
1987 (1) SCR 968	**Distinguished**	**Para 20**
(2003) 1 SCC 59	**Distinguished**	**Para 20**
(2005) 7 SCC 317	**Distinguished**	**Para 20**
(1988) 4 SCC 545	**Distinguished**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7710 of 2012.

From the Judgment and Order dated 29.06.2007 of the High Court of Calcutta in FA No. 290 of 1986.

Rajendra Singhvi, Maitreya Singhvi, K.K.L. Gautam and Surya Kant for the Appellants.

Joydeep Gupta, Joydeep Mazumdar, Soumya Dutta, Samita Sheikh, Rohit Dutta and Chiraranjan Addey for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal arises out of a judgment and order passed by the High Court of Calcutta whereby Civil First Appeal No.290 of 1986 filed by the respondent-tenant has been allowed, the judgment and decree passed by the trial Court set aside and the suit for eviction filed by the plaintiff-appellant against the defendant-respondent dismissed.

3. A residential premise comprising two rooms with a gallery situate at the first floor bearing no.95-A, Chittaranjan Avenue, Calcutta and owned by Gauri Devi Trust of which the appellants are trustees was let out to the respondent-tenant on a monthly rental of Rs.225/-. One of the conditions that governed the jural relationship between the parties was that the tenant shall not make any additions or alterations in the premises in question without obtaining the prior permission of the landlord in writing. Certain differences appear to have arisen between the parties with regard to the mode of payment of rent as also with regard to repairs, sanitary and hygiene conditions in the tenanted property which led the landlord- appellant to terminate the tenancy of respondent in terms of a notice served upon the latter under Section 106 of the Transfer of Property Act read with Section 13 (6) of West Bengal Premises Tenancy Act, 1956. Since the respondent-tenant did not oblige, the plaintiff-appellant instituted Ejectment Suit No.391 of 1976 in the City Civil Court at Calcutta asking for eviction of the former inter alia on the ground that respondent- tenant had illegally and unauthorisedly removed the corrugated tin-sheet roof of the kitchen and the store room without the consent of the appellant-landlord and replaced the same by a cement concrete slab apart from building a permanent brick and mortar passage which did not exist earlier. These additions and alterations were, according to the plaintiff-appellant, without the consent and permission of the Trust and, hence, violative not only of the provisions of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, 1882 but also the conditions stipulated in the lease agreement executed between the parties. Eviction of the respondent was also sought on the ground that the

respondent and his family members were using the passage constructed by them for creating nuisance and peeping into the bedroom of Shri Bharat Kumar Jethi, another tenant living on the second floor of the premises.

4. The defendant-respondent contested the suit primarily on the ground that his tenancy had not been terminated in terms of the notice allegedly issued by the landlord and that there was no violation of the provisions of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. A Court Commissioner deputed by the trial Court carried out a local inspection of the suit premises on 12th July, 1978 in presence of the parties. The Commissioner formulated five different points for local inspection and answered the same in the report submitted to the Court. One of the aspects on which the Commissioner made a report related to the existence of a passage leading to the concrete roof of the kitchen and the store space. The Commissioner appears to have found that the kitchen and store space had a concrete cemented plastered roof with a small window inside the kitchen.

5. Long after the Commissioner's report was submitted to the trial Court, the tenant filed an additional written statement in which he for the first time took the stand that although he was inducted into the premises, comprising two rooms and two small rooms with corrugated tin-sheet for a roof, the latter required replacement on account of the tin-sheet roof getting worn out. It was further submitted that it was only on repeated demands of the defendant-tenant that the landlord had replaced the said corrugated tin-sheet by putting a cement concrete slab over the kitchen and store room. He further alleged that he had not made any alterations or additions or committed any act contrary to clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act.

6. On the pleadings of the parties, the trial Court raised as many as eight issues in the suit and allowed parties to adduce their evidence. In support of his case the plaintiff

examined four witnesses while three witnesses were examined by the defendant-tenant. A careful appraisal of the evidence so adduced led the trial Court to the conclusion that the plaintiff had made out a case for the grant of a decree for ejectment of the respondent-tenant. The trial Court in the process held that the removal of the tin-sheet roof over the kitchen and store room and its replacement with a concrete slab was carried out by the respondent-tenant and not by the plaintiff-trust. In coming to that conclusion, one of the circumstances which the trial Court mentioned was the fact that the defendant had not made any whisper in the first written statement filed by him about the construction of the concrete roof having been undertaken by the landlord. The story that the landlord had replaced the tin roof by a concrete slab was propounded belatedly and for the first time in the supplementary written statement. The trial Court observed:

> "Lastly, it must not be lost sight of that when the defendant first filed the written statement there was no whisper from the side of the defendant that the construction was made by the landlord for the convenience of the tenants. This story was first propounded by the convenience of the tenants. This story was first propounded by the defendant by filing an additional written statement in 1983 i.e. about seven years after the institution of the suit. This belated plea of the defendant should be taken with the grain of salt."

7. The trial Court accordingly held that it was the defendant-tenant who had made a permanent structural change in the premises in violation of the conditions stipulated in the lease agreement and in breach of the provisions of Section 108 of the Transfer of Property Act. The trial Court further held that the tenant had not, while doing so, obtained the written consent of the landlord. The trial Court also found that the legal notice for determining the tenancy of the respondent-tenant had been served upon him and accordingly decreed the suit.

8. Aggrieved by the judgment and decree passed against him, the tenant-respondent herein appealed to the High Court of Calcutta which appeal has been allowed by the Division Bench of that Court in terms of the Order impugned before us. While the High Court has not disturbed the finding of fact recorded by the trial Court that the replacement of the tin-sheet by a concrete slab was undertaken by the respondent-tenant, it has reversed the view taken by the trial Court on the ground that any such replacement of the roof did not tantamount to violation of clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act. The High Court held that since the replacement of the tin-sheet roof by cement concrete slab did not result in addition of the accommodation available to the tenant, the act of replacement was not tantamount to the construction of a permanent structure. The replacement instead constituted an improvement of the premises in question, observed the High Court. In support the High Court placed reliance upon the decisions of this Court in *Om Prakash v. Amar Singh* AIR 1987 SC 617 and *Waryam Singh v. Baldev Singh* (2003) 1 SCC 59 .

9. The High Court also relied upon an earlier decision of that Court in *Ratanlal Bansilal & Ors. v. Kishorilal Goenka & Ors.* AIR 1993 Cal 144 and held that unless a case of waste or damage is proved, there can be no violation of clauses (m), (o), (p) of the Transfer of Property Act. The High Court held that proof of waste and damage because of the construction of a cement concrete roof over the kitchen and store space and the construction of a brick-built passage for reaching the roof of that area was completely absent in the instant case. The High Court, on that basis, set aside the judgment of the trial Court and dismissed the suit filed by the appellant.

10. Section 13 of the West Bengal Premises Tenancy Act 1956, starts with a non-obstante clause and forbids passing of an order or decree for possession of any premises by any Court in favour of the landlord and against the tenant except on one or more of the grounds stipulated therein.

11. Among other grounds stipulated in Section 13 of the Act is the ground that the landlord can sue for eviction of the tenant where the tenant or any person residing in the premises let to the tenant has done any act contrary to the provisions of clauses (m), (o) or (p) of Section 108 of the Transfer of Property Act, 1882. Section 13 (1) (b) reads thus:

"13. Protection of tenant against eviction.-(1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant except on one or more of the following grounds, namely:

(a) * * *

(b) where the tenant or any person residing in the premises let to the tenant has done any act contrary to the provisions of clause (m), clause (o) or clause (p) of Section 108 of the Transfer of Property Act, 1882 (4 of 1882);"

12. Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act referred to in clause 1 (b) of Section 13 (supra) may also be extracted at this stage :

"108. Rights and liabilities of lessor and lessee.-In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

* * *

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear

and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

*   *   *

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;"

13. The appellant has in the case at hand pressed into service clause (p) of Section 108 (supra) inasmuch as, according to the appellant, the respondent-tenant had without his consent erected on the demised property a permanent structure which rendered him liable to eviction under Section 13 (1) (b) extracted above. The question, however, is whether the alterations which the respondent-tenant is found by the Courts below to have made tantamount to erection of a "permanent structure" within the meaning of clause (p) of Section 108 of the Act (supra). The expression "permanent structure" has not been defined either under the West Bengal Premises Tenancy Act, 1956 or in the Transfer of Property Act, 1882. The expression has all the same fallen for interpretation

by the Courts in the country on several occasions. We may briefly refer to some of those pronouncements at this stage.

14. In *Venkatlal G. Pittie & Anr. v. Bright Bros. Pvt. Ltd.* (1987) 3 SCC 558, the landlord alleged that the tenant had without his consent raised a permanent structure in the demised premises. The trial Court as also the first appellate Court had taken the view that the construction raised by the tenant was permanent in nature. The High Court, however, reversed the said finding aggrieved whereof the landlord came up to this Court in appeal. This Court referred to several decisions on the subject including a decision of the High Court of Calcutta in *Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar* AIR 1965 Cal 408 to hold that one shall have to look at the nature of the structure, the purpose for which it was intended to be used and take a whole perspective as to how it affects the enjoyment and durability of the building etc. to come to a conclusion whether or not the same was a permanent structure. This Court approved the view taken in *Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar* AIR 1965 Cal 408 and *Surya Properties Private Ltd. & Ors. v. Bimalendu Nath Sarkar & Ors.* AIR 1964 Cal 1, while referring to the following tests formulated by Malvankar J. in an unreported decision in Special Civil Application No.121 of 1968:

"(1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) The purpose of erecting the structure is another relevant factor. (6) The nature of the materials used for the structure and (7) lastly the durability of the structure".

15. In *Surya Properties Private Ltd. & Ors. v. Bimalendu Nath Sarkar & Ors.* AIR 1964 Cal 1 a Special Bench of the High Court of Calcutta was examining the meaning of the expression "permanent structure" appearing in Clause (p) of Section 108 of the Transfer of Property Act, 1882. The Court held that whether a particular structure is a permanent structure or not is a question that depends on the facts of each case and on the nature and extent of the particular structure as also the intention and purpose for which the structure was erected. No hard and fast rule, declared the Court, could be laid down for determining what would be a permanent structure for the purposes of Section 108 (p) of the Transfer of Property Act. When the very same case came up for final adjudication on merits before a Division Bench of the High Court of Calcutta, the High Court in its order dated 20th March, 1964 reported in *Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar* AIR 1965 Cal 408 held that the expression "permanent structure" did not mean 'everlasting'. The word "permanent" had been used to distinguish it from "temporary" and that while a lessee has the power to raise any type of temporary structure, he has no power to raise a permanent structure. The Court held that on a true construction of Section 108 (p) Transfer of Property Act the words "permanent structure" could only mean a structure that lasts till the end of the term of the lease and does not mean "everlasting" nor does it mean a structure which would last 100 years or 50 years. The Court observed:

> "In all these cases condition (p) will operate. The phrase "permanent structure" does not mean "ever lasting". But the word "permanent" has been used to distinguish it from "temporary". A lessee has the power to raise any type of temporary structure, but he has no power to raise a permanent structure. The word "permanent" is also a relative term, because the absolute meaning of the word "permanent" is "ever lasting". But we cannot accept the meaning if the word "permanent" is a relative term, the question is, - relative of what? The answer immediately is - for purposes of Section 108(p) relative to the term of the issue. Therefore, the word "permanent" means "which lasts till the end of the term of the lease" and does not mean "ever lasting" nor does it mean "which would last 100 years or 50 years". The term, as stated above, is a relative one and the relation here is to the period of the lease. There may be a lease from month to month or from year to year and we do not know when the lease is going to terminate. But the meaning of the words "permanent structure" would be that the lessee intended that he would enjoy the structure that he raises as long as he be continuing in possession. That period may be definite, that period may be indefinite. But that period is the period of the lease and the person, namely, the lessee, who constructs the structure, should have an intention to use it as long as he remains a lessee."

16. Applying the above to the case before it, the High Court held that the tenant in that case had constructed a kitchen which he intended to use till the time he remained in occupation. The Court found that the case before it was not one where the tenant had constructed the structure for a special purpose like a marriage in the family. Any structure which was used for any such limited period or definite event, function or occasion, even if made of bricks and mortar would not amount to building or erecting a permanent structure. The Court observed:

> "A person raises a struct (sic) for the purpose of a marriage in the family. There he intends to use it only during the occasion and has no intention to use it thereafter and intends to remove the structure thereafter. We cannot say that it would be a permanent structure even if it is made of brick and mortar. In the circumstances, of this case, the lessee has said that he wanted to use it as a kitchen. He never says that the kitchen was required for a particular purpose temporarily. Therefore, we get from the evidence of the tenant that the tenant intended to use the structure

as a kitchen during the continuance of the lease, because the tenant requires a kitchen as long as the tenant uses the premises and as he wants, to use it as a kitchen, he sufficiently express his intention to use it as a kitchen during the term of his tenancy which in this case is not definite. Therefore, for purposes of Section108(p) of the Transfer of Property Act, we would hold that the kitchen raised must be considered to be for a permanent purpose."

17. To sum up, no hard and fast rule can be prescribed for determining what is permanent or what is not. The use of the word 'permanent' in Section 108 (p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. The term 'permanent' does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important, for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108 (p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly the purpose for which the structure is intended is also an important factor that cannot be ignored.

18. Applying the above tests to the instant case the structure was not a temporary structure by any means. The kitchen and the storage space forming part of the demised premises was meant to be used till the tenancy in favour of the respondent-occupant subsisted. Removal of the roof and replacement thereof by a concrete slab was also meant to continue till the tenancy subsisted. The intention of the tenant

while replacing the tin roof with concrete slab, obviously was not to make a temporary arrangement but to provide a permanent solution for the alleged failure of the landlord to repair the roof. The construction of the passage was also a permanent provision made by the tenant which too was intended to last till the subsistence of the lease. The concrete slab was a permanent feature of the demised premises and could not be easily removed without doing extensive damage to the remaining structure. Such being the position, the alteration made by the tenant fell within the mischief of Section 108 (p) of the Transfer of Property Act and, therefore, constituted a ground for his eviction in terms of Section 13(1)(b) of the West Bengal Premises Tenancy Act, 1956.

19. We may at this stage refer to the decision of this Court in *Ranju alias Gautam Ghosh v. Rekha Ghosh and Ors.* (2007) 14 SCC 81 where this Court found that cutting of a collapsible gate by 5/6" and replacing the same without the consent and permission of the landlord was tantamount to violation of Section 108 (p) of the Transfer of Property Act read with Section 13 (1)(b) of West Bengal Premises Tenancy Act, 1956. It is thus immaterial whether the structure has resulted in creating additional usable space for the tenant who carries out such alteration and additions. If addition of usable space was ever intended to be an essential requirement under Section 108 (p) of the Act, the Parliament could have easily provided so. Nothing of this sort has been done even in Section 13 (1) (b) of the State Act which clearly shows that addition of space is not the test for determining whether the structure is permanent or temporary.

20. Reliance upon the decisions of this Court in *Brijendra Nath Bhargava and Anr. v. Harsh Wardhan and Ors.* (1988) 1 SCC 454, *Om Prakash v. Amar Singh and Ors.* (1987) 1 SCC 458, *Waryam Singh v. Baldev Singh* (2003) 1 SCC 59 and *G. Reghunathan v. K.V. Varghese* (2005) 7 SCC 317 do not in our opinion advance the case of the respondent. In

Brijendra Nath Bhargava's case (supra) this Court was dealing with a case arising out of Rajasthan Premises (Control of Rent and Eviction) Act, 1950. Section 13 (1) (c) of the said Act required the landlord to prove that the tenant had, without his permission, made or permitted to be made any construction which had in the opinion of the Court, materially altered the premises or was likely to diminish the value thereof. Section 13 (1)(c) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 is to the following effect:

"13(1) (c) that the tenant has without the permission of the landlord made or permitted to be made any such construction as, in the opinion of the court, has materially altered the premises or is likely to diminish the value thereof"

21. The above provision is materially different from the provision of Section 13(1)(b) of the West Bengal Premises Tenancy Act 1956 applicable in the present case which does not require the landlord to prove that there was any material alteration in the premises or that such alteration was likely to diminish the value thereof. The decision in *Brijendra Nath Bhargava's* case (supra), is therefore, distinguishable and would not have any application to the case at hand.

22. In *Om Prakash's* case (supra) this Court was dealing with a case under Section 14 (c) of the U.P. Cantonment Rent Control Act, 1952 which reads as under:

"14. Restrictions on eviction.-No suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds, namely:

(c) that the tenant has, without the permission of the landlord, made or permitted to be made any such construction as in the opinion of the court has materially altered the accommodation or is likely substantially to diminish its value."

23. A perusal of the above would show the language employed therein is materially different from the provision of Section 13(1)(b) of the West Bengal Premises Tenancy Act 1956 with which we are concerned in the present case. In the case at hand the landlord is not required to prove that the construction have been materially altered or is likely to diminish its value as was the position in *Om Prakash's* case (supra).

24. In *Waryam Singh v. Baldev Singh* (2003) 1 SCC 59 this Court was dealing with a case under Section 13(2)(iii) of East Punjab Urban Rent Restriction Act, 1949 which was to the following effect:

"13. Eviction of tenants.-(1) * * *

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-

* * *

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land,

* * *"

25. It is evident from the above that this provision was different from the language employed in Section 13(1)(b) of the West Bengal Premises Tenancy Act 1956. The ratio of that case also, therefore, does not lend any support to the respondent. Same is true even in regard to the decision in G. Reghunathan's case (supra) where this Court was dealing with an eviction petition under Section 11(4)(ii) of the Kerala Buildings (Lease and Rent Control) Act, 1965 which was to the following effect:

"11. (4) A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building-

(i) * * *

(ii) if the tenant uses the building in such a manner as to destroy or reduce its value or utility materially and permanently;"

26. The above provision is also materially different from the provisions with which we are concerned in the present case. The ratio of that case does not, therefore, have any application to the question whether the structure raised by the respondent was a permanent structure within the meaning of Section 108 (p) of the Transfer of Property Act. In *Om Pal v. Anand Swarup (dead) by Lrs.* (1988) 4 SCC 545 also this Court was dealing with a case under the East Punjab Urban Rent Restriction Act, 1949 which makes material impairment of the property an important consideration for purposes of determining whether the tenant has incurred the liability on the premises leased to him.

27. In the result, therefore, we allow this appeal, set aside the order passed by the High Court and restore that of the trial Court. Respondent is, however, given one year's time to vacate the premises in his occupation subject to his filing an undertaking on usual terms within four weeks from today. The grant of time to vacate the premises is further subject to the condition that the respondent shall either pay directly to the appellants or deposit in the trial Court compensation of the premises @ Rs.1500/- p.m. from 1st October, 2012 till the date of vacation. The deposit shall be made by the 15th of every succeeding calendar month failing which the decree shall become executable by the Court.

K.K.T. Appeal allowed.

SUBULAXMI

v.

M.D., TAMIL NADU STATE TRANSPORT CORPORATION & ANOTHER

(Civil Appeal No. 7750 of 2012)

NOVEMBER 01, 2012

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

Motor Vehicles Act, 1988 - s. 166 - Motor accident - Amputation of left leg and right foot of victim - Claim for compensation - Claimant aged 30 years and earning Rs. 18,000 per annum - Tribunal granting Rs. 2,00,000/- as compensation with 9% interest - High Court enhancing the compensation amount to Rs. 2,75,000/- - But did not grant any compensation on the head permanent disability and also denied interest on the enhanced amount - On appeal, held: Denial of compensation on the head permanent disability by the High Court is impermissible - High Court also erred in not granting interest on the enhanced amount - Compensation amount enhanced to Rs. 6,48,640/- with 9% interest on the enhanced amount.

The appellant-claimant filed an application u/s. 166 of Motor Vehicles Act, 1988 making a claim of Rs. 6,50,000/- as compensation for the injuries sustained by her in a motor accident. Her case was that the injuries resulted in amputation of her left leg and right foot and that she was earning Rs. 1,500/- per month at the time of accident. The tribunal granted Rs. 2,00,000/- as compensation (Rs. 86,000/- towards permanent disability; Rs. 14,000/- towards pain and suffering, Rs. 66,000/- for loss of future income, Rs. 10,000 for medical expenses, Rs. 15,000 towards extra nourishment, Rs. 5000 for loss of income during treatment period and Rs. 4000/- for transport charges).

Aggrieved by the award, claimant as well as the respondent-Corporation filed cross-appeals. High Court awarded Rs. 1,50,000 on a singular head relating to permanent disability as well as loss of future earning; added Rs. 75,000 for replacement of artificial limb and future medical expenses. It also granted Rs. 20,000/- for pain and suffering, Rs. 10,000/- for loss of amenities and Rs. 10,000/- towards attendant charges. This enhanced the compensation amount to Rs. 2,75,000/-. Hence the present appeal is filed by the claimant for further enhancement of compensation amount.

Partly allowing the appeal, the Court

HELD: 1. The High Court was not justified in awarding compensation on a singular head relating to permanent disability and loss of future earning. Compensation can be granted towards permanent disability as well as loss of future earnings, for one head relates to the impairment of person's capacity and the other relates to the sphere of pain and suffering and loss of enjoyment of life by the person himself. [Para 5] [967-H; 968-A-B]

K. Suresh v. New India Assurance Co. Ltd. and Anr. **2012 (10)SCALE 516;** *Govind Yadav v. New India Insurance CompanyLimited* **(2011) 10 SCC 683;** *R.D. Hattangadi v. Pest Control (India) (P) Ltd.* **(1951) 1 SCC 551;** *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka* **(2009) 6 SCC 1: 2009 (9) SCR 313;** *Reshma Kumari v. Madan Mohan* **(2009) 13 SCC 422: 2009 (11) SCR 305;** *Arvind Kumar Mishra v. New India Assurance Co. Ltd.* **(2010) 10 SCC 254: 2010 (11) SCR 857;** *Raj Kumar v. Ajay Kumar* **(2011) 1SCC 343: 2010 (13) SCR 179 - relied on.**

Ramesh Chandra v. Randhir Singh **(1990) 3 SCC 723:1990 (3)SCR 1;** *B. Kothandapani v. Tamil Nadu State Transport CorporationLtd.* **(2011) 6 SCC 420: 2011 (6) SCR**

791; *Laxman v. DivisionalManager, Oriental Insurance Co. Ltd. and Anr.* **2012 ACJ 191 - referred to.**

2. In the instant case, the tribunal had awarded a sum of Rs.86,000/- towards the permanent disability. The High Court has deleted it. The said deletion is impermissible. Regard being had to the nature of injury suffered and further taking note of the date of accident, a sum of Rs.1,00,000/- on this head would be appropriate. [Para 9] [971-B]

3. The claimant was earning Rs.18,000/- per annum. As she has suffered 86% permanent disability, the future earning may be computed at 14% less and accordingly it is estimated that the multiplicand should be Rs.15,480/- per annum. At the time of accident, she was 30 years of age, and hence, the multiplier of 18 would be applicable. Thus, the loss of future earning by multiplying the multiplicand of Rs. 15,480/- by multiplier of 18, the amount would come to Rs. 2,78,640/-. [Para 10] [971-C-D]

Sarla Verma v. D.T.C **(2009) 6 SCC 121: 2009 (5) SCR 1098 - relied on.**

4. As regards the pain and suffering and loss of amenities, a sum of Rs.1,00,000/- is granted. In respect of other heads, namely, medical expenses, extra nourishment, transport charges and loss of earning during treatment, the amount awarded by the High Court is allowed to remain as such. Thus, the amount on the aforesaid scores would come to Rs.45,000/-. As far as the future replacement of artificial limbs and other medical expenses are concerned, keeping in view the escalation of price, the same is enhanced to Rs.1,25,000/-. [Para 11] [971-E-G]

5. The High Court has erred in not granting interest on the enhanced sum. As is evincible, the tribunal had granted payment of interest at the rate of 9% per annum.

Considering the totality of facts and circumstances, the interest awarded by the tribunal is just and proper and accordingly it is directed that the interest on the differential enhanced sum shall carry interest at the rate 9% per annum from the date of filing of the claim petition till the date of deposit of the same. [Para 15] [972-G; 973-A]

Abati Bezbaruah v. Dy. Director General, Geological Survey of Indiaand Anr. **(2003) 3 SCC 148: 2003 (1) SCR 1229 ;** *Tamil Nadu StateTransport Corporation, Tanjore, represented by its MD v.Natarajan and Ors.* **(2003) 6 SCC 137 - relied on.**

Case Law Reference:

2012 (10) SCALE 516	**Relied on**	**Para 5**
1990 (3) SCR 1	**Referred to**	**Para 5**
2011 (6) SCR 791	**Referred to**	**Para 5**
2012 ACJ 191	**Referred to**	**Para 5**
(2011) 10 SCC 683	**Relied on**	**Para 6**
(1951) 1 SCC 551	**Relied on**	**Para 6**
2009 (9) SCR 313	**Relied on**	**Para 6**
2009 (11) SCR 305	**Relied on**	**Para 6**
2010 (11) SCR 857	**Relied on**	**Para 6**
2010 (13) SCR 179	**Relied on**	**Para 6**
2009 (5) SCR 1098	**Relied on**	**Para 10**
2003 (1) SCR 1229	**Relied on**	**Para 13**
(2003) 6 SCC 137	**Relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7750 of 2012.

From the Judgment & Order dated 14.07.2010 of the High Court of Madras at Madurai in C.M.A. No. 2964 of 2003 and Cross Obj. (MD) No. 45 of 2008.

Prachi Bajpai for the Appellant.

C. Paramasivam, B. Balaji for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The appellant as claimant filed an application under Section 166 of the Motor Vehicles Act, 1988 (for brevity `the Act') before the Motor Accidents Claims Tribunal, Srivilliputtur (for short `the tribunal') forming the subject matter of MCOP No. 244 of 1999, putting forth a claim of Rs.6,50,000/- as compensation for the injuries sustained by her in a motor vehicle accident. Her claim petition was tried along with the petition preferred by one Mrs. Muthammal, the applicant in MCOP No. 245 of 1999.

3. The facts which are essential to be exposited are that on 13th March, 1998, the claimant-appellant, aged about 30 years, a match industry worker while travelling in a bus bearing registration number TN 59-N0912 belonging to the Tamil Nadu State Transport Corporation, Madurai Division (V), the respondent No. 2 before the tribunal, met with an accident with another bus bearing registration number TN 59-N0912 belonging to the Madurai Division (I) of the said Corporation, the respondent No. 1 therein. The accident occurred because of careless and negligent driving of the drivers of both the vehicles. In the accident, the claimant suffered grievous injuries which eventually resulted in the amputation of left leg below knee and abrasion in right shoulder and later amputation of right foot. It was averred that she was earning a sum of Rs.1,500/- per month at the time of accident and remained in the hospital for a period of five and half months. Computing the amount expended, pain and suffering, incapacity to have

any future income and the deprivation of other amenities of life and future comforts she claimed a sum of Rs.6,50,000/- as compensation. The tribunal granted Rs.2,00,000/- as compensation by award dated 22.10.2002 and fastened the liability on both the respondents. It is necessary to state here that the tribunal had awarded Rs.86,000/- towards permanent disability assessing the same at 86%, Rs.14,000/- towards pain and suffering, Rs.66,000/- on the head of loss of future income, Rs.10,000/- for medical expenses, Rs.15,000/- towards extra nourishment, Rs.5,000/- for loss of income during the treatment period and Rs.4,000/- towards transport charges.

4. Being grieved by the award, the Corporation preferred C.M.A. No. 2964 of 2003 and the claimant preferred Cross Objection (MD) No. 45 of 2008 for enhancement of the quantum. The High Court, while computing the amount of compensation, did not grant any amount for permanent disability but enhanced the future income to Rs.1,15,000/- and added Rs.75,000/- for replacement of artificial limb and for future medical expenses. It also granted Rs.10,000/- for loss of amenities and Rs.10,000/- towards attendant charges. On certain heads it also marginally enhanced the amount as a consequence of which the amounts stood enhanced to Rs.2,75,000/-. It is apt to mention here that the High Court came to the conclusion that the claimant was entitled for compensation for loss of earning capacity due to disability and both were to be in compartment. It also did not grant interest on the enhanced sum. In the ultimate eventuate the High Court vide its judgment dated 14.7.2010 rejected the appeal filed by respondent No. 1 and allowed the cross-objection in part. Being dissatisfied, the claimant has preferred the present appeal for enhancement of the amount of compensation.

5. At the outset, it is requisite to be stated that the facts as have been adumbrated are not in dispute. Therefore, first we shall advert to the issue whether the High Court was justified in awarding compensation on a singular head relating to permanent disability and loss of future earning. In *K. Suresh*

v. New India Assurance Co. Ltd. and Another[1], after referring to *Ramesh Chandra v. Randhir Singh*[2] and *B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.*[3], this Court expressed the view that compensation can be granted towards permanent disability as well as loss of future earnings, for one head relates to the impairment of person's capacity and the other relates to the sphere of pain and suffering and loss of enjoyment of life by the person himself. The Bench also relied upon *Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and another*[4], wherein it has been laid down thus: -

> "The ratio of the above noted judgments is that if the victim of an accident suffers permanent or temporary disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earnings and victim's inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

Thus, the view expressed by the High Court on this score is not sustainable.

6. Be it noted, the High Court has granted Rs.20,000/- for pain and suffering and Rs.10,000/- for loss of amenities. In this context, we may profitably refer to *Govind Yadav v. New India Insurance Company Limited*[5], wherein this Court after referring to the pronouncements in *R.D. Hattangadi v. Pest Control (India) (P) Ltd.*[6], *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*[7], *Reshma Kumari v. Madan*

1. 2012 (10) SCALE 516.
2. (1990) 3 SCC 723.
3. (2011) 6 SCC 420.
4. 2012 ACJ 191.
5. (2011) 10 SCC 683.
6. (1951) 1 SCC 551.
7. (2009) 13 SCC 422.

Mohan[8], *Arvind Kumar Mishra v. New India Assurance Co. Ltd.*[9] and *Raj Kumar v. Ajay Kumar*[10] has laid down as under:-

> "In our view, the principles laid down in *Arvind Kumar Mishra v. New India Assurance Co. Ltd.* and *Raj Kumar v. Ajay Kumar* must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident."

Thereafter, the Bench proceeded to state whether in the said case, the compensation awarded to the claimant-victim was just and reasonable or he was entitled to enhanced compensation under certain heads, namely, (i) Loss of earning and other gains due to the amputation of leg; (ii) Loss of future earnings on account of permanent disability; (iii) Future medical expenses; (iv) Compensation for pain, suffering and trauma caused due to the amputation of leg; (v) Loss of amenities including loss of the prospects of marriage; and (vi) Loss of expectation of life.

7. It is seemly to state that in the said case, the tribunal had awarded Rs.2,56,800/- and the High Court had enhanced the same to Rs.3,06,000/-. This Court considering various aspects granted Rs.4,53,600/- in lieu of loss of earning, Rs.2,00,000/- towards future treatment, Rs.1,50,000/- for pain, suffering and trauma and Rs.1,50,000/- towards loss of amenity and enjoyment of life and thereby determined the total amount

8. (2009) 13 SCC 422.

9. (2010) 10 SCC 254.

10. (2011) 1 SCC 343.

to Rs.9,53,600/-. While determining the said sum, the Bench observed as follows: -

> "25. The compensation awarded by the Tribunal for pain, suffering and trauma caused due to the amputation of leg was meager. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the tribunals and the courts to make a precise assessment of the pain and trauma suffered by a person whose limb is amputated as a result of accident. Even if the victim of accident gets artificial limb, he will suffer from different kinds of handicaps and social stigma throughout his life. Therefore, in all such cases, the tribunals and the courts should make a broad guess for the purpose of fixing the amount of compensation.
>
> 26. Admittedly, at the time of accident, the appellant was a young man of 24 years. For the remaining life, he will suffer the trauma of not being able to do his normal work. Therefore, we feel that ends of justice will be met by awarding him a sum of Rs1,50,000 in lieu of pain, suffering and trauma caused due to the amputation of leg.
>
> 27. The compensation awarded by the Tribunal for the loss of amenities was also meager. It can only be a matter of imagination as to how the appellant will have to live for the rest of his life with one artificial leg. The appellant can be expected to live for at least 50 years. During this period he will not be able to live like a normal human being and will not be able to enjoy life. The prospects of his marriage have considerably reduced. Therefore, it would be just and reasonable to award him a sum of Rs1,50,000 for the loss of amenities and enjoyment of life."

8. We have reproduced from the said decision in extenso, as the Court has dwelled upon the fundamental concept of just compensation regard being had to the value of life and limb in our country. Needless to say, the approach in such matters

has to be liberal as well as a balanced one.

9. In the case at hand, the tribunal had awarded a sum of Rs.86,000/- towards the permanent disability. The High Court has deleted it. The said deletion as per our above discussion is impermissible. In our considered opinion regard being had to the nature of injury suffered and further taking note of the date of accident, a sum of Rs.1,00,000/- on this head would be appropriate and, accordingly, we so determine.

10. Presently, we shall proceed to compute the loss of earning capacity. The claimant was earning Rs.1,500/- per month and thereby Rs.18,000/- per annum. As she has suffered 86% permanent disability, the future earning may be computed at 14% less and accordingly it is estimated that the multiplicand should be Rs.15,480/- per annum. At the time of accident, she was 30 years of age, and hence, the multiplier of 18 would be applicable, as has been held in *Sarla Verma v. D.T.C.*[11]. Thus, the loss of future earning by multiplying the multiplicand of Rs.15,480/- by multiplier of 18, the amount would come to Rs.2,78,640/-.

11. As far as the pain and suffering and loss of amenities are concerned, we think it is appropriate to grant a sum of Rs.1,00,000/-. In respect of other heads, namely, medical expenses, extra nourishment, transport charges and loss of earning during treatment, the amount awarded by the High Court is allowed to remain as such. Thus, the amount on the aforesaid scores would come to Rs.45,000/-. As far as the future replacement of artificial limbs and other medical expenses are concerned, keeping in view the escalation of price, we think it seemly to enhance it Rs.1,25,000/-.

12. Presently to the grant of interest. The High Court has declined to award interest on the enhanced sum. No reason has been ascribed therefor. Section 171 of the Act deals with award of interest. It reads as follows: -

11. (2009) 6 SCC 121.

"171. Award of interest where any claim is allowed. - Where any Claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."

13. In *Abati Bezbaruah v. Dy. Director General, Geological Survey of India and Another*[12], S.B. Sinha, J. in his opinion after referring to the earlier decisions opined that the question as to what should be the rate of interest would depend upon the facts and circumstances of each case and award of interest would normally depend on the bank rate prevailing at that time. A.R. Laxmanan, J. in his concurring opinion stated as follows: -

"The rate of interest must be just and reasonable depending upon the facts and circumstances of each case and taking all relevant factors including inflation, change of economy, policy being adopted by Reserve Bank of India from time to time, how long the case is pending, permanent injuries suffered by the victim, enormity of suffering loss of future income, loss of enjoyment of life etc., into consideration."

14. In *Tamil Nadu State Transport Corporation, Tanjore, represented by its MD v. Natarajan and others*[13], this Court awarded interest at the rate of 9% per annum from the date of filing of claim petition on the amount of compensation.

15. Thus analysed, we are disposed to think that the High Court has erred in not granting interest on the enhanced sum. As is evincible, the tribunal had granted payment of interest at the rate of 9% per annum. Considering the totality of facts and circumstances, we find that the interest awarded by the tribunal

12. (2003) 3 SCC 148.

13. (2003) 6 SCC 137.

is just and proper and accordingly we direct that the interest on the differential enhanced sum shall carry interest at the rate 9% per annum from the date of filing of the claim petition till the date of deposit of the same before the tribunal. The respondent corporation is directed to deposit the differential amount before the tribunal within a period of eight weeks from today.

16. Consequently, the appeal is allowed to the extent indicated above. In the facts and circumstances of the case, there shall be no order as to costs.

K.K.T. Appeal partly allowed.

GWALIOR SUGAR CO. LTD. & ANR.
v.
ANIL GUPTA AND ORS.
(Civil Appeal No. 7760 of 2012)

NOVEMBER 2, 2012.

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

MADHYA PRADESH LAND REVENUE CODE, 1959:

s. 165(1) - Transfer of land by 'Bhumiswami' - Company owning a sugar factory was granted pattas of subject land in the year 1941-42 - Transfer of a part of the subject land challenged in a writ petition under public interest litigation - Held: The company having acquired the status of a "pucca tenant", with the coming into force of the Land Revenue Code, became 'Bhumiswami' of the land - Rights of a bhumiswami enumerated u/s 165 encompass right to transfer - Right to transfer being a statutory right and the bar imposed on the right to transfer not being applicable to non-agricultural land, a clause in a patta granted in the year 1940-41 cannot restrict such a right - Nor is there any material to indicate that under terms of the lease granted u/s101 of Tenancy Act and s.39 of Abolition of Zamindari Act any restriction or bar had been imposed on the appellant-Company from making such a transfer - Provisions of Urban Ceiling Act and Ceiling on Agricultural Holding Act, ex-facie, do not apply to the case of appellant-company - Urban Ceiling Act, 1976 - Madhya Pradesh Ceiling on Agricultural Holding Act, 1960 - Madhya Pradesh Zamindar Abolition Act, 1951 - Madhya Bharat Land Revenue and Tenancy Act (Samvat, 2007) - s.54(vii) - Public Interest Litigation.

The appellant-company was, in the year 1941, granted 215 bighas of land, under 6 pattas issued by the Zamindar for setting up the sugar factory with a

prohibition of any kind of agricultural operations thereon. After setting up the sugar factory, the company, due to financial reasons sold about 9 bighas of surplus land. A writ petition was filed as a public interest litigation contending that the surplus land was transferred contrary to terms of the patta in connivance and collusion with officials of State Government. The stand of the appellant-company was that the original pattas of the subject land were granted to it by the Zamindar in the year 1941-42; that in the year 1950, the status of the appellant in respect of the said land was recorded as 'Gair Maurusi;" and that with the coming into force of the Tenancy Act by virtue of s.54 (viii) of the Tenancy Act the appellant became a "pucca tenant" and on coming into force of the M.P. Land Revenue Code, the appellant became 'bhumiswami' with a right of transfer u/s165(1) of the Code. The initial stand of the officials of the State was also that the appellant being "pucca tenant" had acquired the status of 'bhumiswami' and the appellant was exempted from the operation of the provisions of Ceiling on Agricultural Holding Act by an order dated 8.1.1976. However, in the additional return dated 7.8.2007 filed on behalf of the State the right of the appellant to transfer the land contrary to terms of pattas was questioned. The High Court directed for demarcation of surplus land of the appellant-company under the provisions of both the Urban Land Ceiling Act, 1976 as well as the Madhya Pradesh Ceiling on Agricultural Holding Act, 1960 and held that the excess land so demarcated would vest in the Government. The company was further restrained from effecting any transfer of urban land allotted to it and any transfer made were declared null and void. Aggrieved, the company filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The rights of a 'bhumiswami' are clearly enumerated by s.165 of the MP Land Revenue Code

which encompasses a right to transfer. The bar imposed on the right to transfer does not apply to non-agricultural lands and, therefore, would not be relevant to the instant case. If the right of transfer has been conferred on the appellant by the provisions of a statute and the bar contemplated does not apply to the appellant, then a clause or a condition in the original patta granted by the Zamindar in the year 1940-41 cannot restrict such a right. In any case, there is no specific clause or condition in any of the original pattas prohibiting or even restricting the right of the appellant to transfer any part of the land allotted to it that may be lying vacant. Neither any material has been placed before this Court to enable it to take the view that under terms of the lease granted u/s101 of Tenancy Act and s.39 of Abolition of Zamindari Act any restriction or bar had been imposed on the appellant-Company from making such a transfer. [para 13] [985-C-G]

1.2 The provisions of the Zamindari Abolition Act, 1951, have been pressed into service for the first time in the instant appeal. Neither in the pleadings nor in the arguments made before the High Court on behalf of the State, the facts asserted and the legal issues raised before this Court had been urged. In the absence of any pleading that the procedure for grant of a fresh lease contemplated u/s 39 of the Zamindari Abolition Act had not been followed by the appellant by making the requisite application as contemplated by s.101 of the Tenancy Act, no adverse consequence can be attributed to the appellant. Rather, the status of the appellant as a 'bhumiswami' recorded in the revenue records of the later years, in the absence of any contrary material, will have to be understood to be pursuant to the grant of a fresh lease u/s 39 of the Zamindari Abolition Act read with the provisions of s.101 of the Tenancy Act. Infact, acceptance of the acquisition of the status of

'bhumiswami' by the appellant will render it unnecessary to go into the basis of the acquisition of the said status, which, in any case, appears to be contrary to the provision of s. 1(2) of the Tenancy Act. The said provision clearly excludes the villages settled under the Zamindari system from the purview of the operation of Part II of the Tenancy Act, which part of the Act, inter alia, also deals with the acquisition of the status of "pucca tenant" and 'Bhumiswami' by a tenant. However obliteration of Part II of the Tenancy Act by operation of s.1(2) thereof does not extinguish the different denominations of tenancy including the status of Bhumiswami which can very well be acquired by grant of such status by a fresh lease u/s 101 of the Tenancy Act read with s. 39 of the M.B. Zamindari Abolition Act. [para 12] [984-D-H; 985-A-C]

1.3 The provisions of either of the two Acts, namely, the Urban Land Ceiling Act ad the Ceiling on Agricultural Holding Act, ex-facie, do not apply to the case of the appellant-Company. [para 14] [985-H; 986-A]

1.4 The judgment of the High Court as well as the directions contained therein are set aside. [para 15] [986-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7760 of 2012.

From the Judgment & Order dated 01.12.2007 of the High Court of Madhya Pradesh at Gwalior in Writ Petition No. 1773 of 2006 (PIL).

Ranjit Kumar, Dhruv Mehta, Abhay A. Jena, Sarthak Mehrotra, Bina Gupta, B.S. Banthia, Pranab Kumar Mullick, Ashish Rana for the Appearing Parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 01.12.2007 passed by the High Court of Madhya Pradesh in a Public Interest Litigation registered and numbered as Writ Petition No.1773/2006. By the order impugned in the present appeal, directions have been issued by the High Court for demarcation of the surplus land of the appellant - Company both under the provisions of the Urban Land Ceiling Act, 1976 (since repealed) (hereinafter referred to as 'the Urban Land Ceiling Act') as well as the provisions of the Madhya Pradesh Ceiling on Agriculture Holding Act, 1960 (hereinafter referred to as "the Ceiling on Agricultural Holding Act). After the demarcation of the excess land in terms of the directions issued by the High Court, further directions have been issued for vesting of the excess land, both urban and agricultural, in the Government. Furthermore, the appellant - Company has been restrained from affecting any transfers of the urban land allotted to it and all such transfers as may have been made have been declared as null and void by the High Court.

3. A brief resume of the relevant facts in which the above noted directions have been issued by the High Court may now be set out:

The appellant, a private limited company, is the owner of a sugar mill located at Dabra, district Gwalior in the State of Madhya Pradesh. A total of 215 bighas (approximately) of land was allotted to the appellant - Company in Samvat 1998 (corresponding to English Calender year 1941) on the basis of 6 pattas issued by Zamindar in whom the land had come to be vested. The pattas specified that the land was meant for setting up of the sugar factory and any kind of agricultural operations therein was prohibited. The pattas also specified that the same would be valid till the existence of the factory. After setting up of the sugar mill the Company appears to have run into certain financial difficulties and for the upkeep of the sugar mill and for modernization thereof the Company by a Resolution decided to sell/transfer some parts of the vacant land allotted

to it. In fact some surplus land stood transferred by way of sale to certain individuals and the area so transferred is roughly about 9 bighas. In these circumstances, the Writ Petition in question was filed as a Public Interest Litigation contending that surplus land has been transferred contrary to the terms of the patta in connivance and collusion with the officials of the State Government. According to the petitioner more such transfers were contemplated.

4. The stand of the officials - respondents, initially, was that land measuring about 178 bighas stood recorded in the name of the appellant - Company in the revenue record of Samvat 2013. In the said records the name of the appellant was recorded as a "pucca tenant" under Section 54 (vii) of the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 (hereinafter referred to as 'the Tenancy Act'). Thereafter with the coming into force of the MP Land Revenue Code in the year 1959 the name of the appellant - Company was recorded as a 'bhumiswami' in respect of the aforesaid land. The revenue records in support of the above facts were in fact enclosed to the return filed before the High Court on behalf of the State. A report dated 2.5.2003 of the primary revenue authority i.e. Naib Tehsildar reciting the above facts and the fact that the appellant Company was exempted from the operation of the provisions of the Ceiling on Agricultural Holding Act by an order dated 8.1.1976 passed by the competent authority was also enclosed to the said return. Subsequently, however, an additional return dated 7.8.2007 was filed on behalf of the state wherein the right of the appellant to transfer the land contrary to the terms of the pattas issued to it was questioned, notwithstanding, its status as a Bhumiswami under the Land Revenue Code, 1959.

5. The appellant - Company and its principal Director who were impleaded respondent Nos.12 and 13 in the PIL, in their return, placed before the High Court copies of the original pattas granted by the then Zamindar in Samvat 1997-98 (English Calender year 1941-42). It was claimed that on the

basis of the entries in the revenue records, namely, Khasra of village Dabra, Samvat 2007 (equivalent to English calendar year 1950) the status of the appellant - Company in respect of the land in question was recorded as 'Gair Mairusi'. The appellant - Company had contended that with the coming into force of the Tenancy Act, w.e.f. 15.8.50, by virtue of the provisions of Section 54 (vii), the status of the appellant - Company became that of a "pucca tenant". Thereafter, on the coming into force of the Land Revenue Code in the year 1959, the status of the appellant - Company was that of a bhumiswami which vested in the appellant - Company a right of transfer of the land under Section 165 (1) of the Code. The bar imposed on such transfer by sub-section (4) of section 165 did not apply to the case of the appellant - Company in view of the fact that the land that it was holding was non-agricultural land. The appellant - Company, in its return before the High Court, had also referred to an order dated 22.11.1993 of the Under Secretary to the Government of India, Ministry of Law Justice and Company Affairs (Department of Company Affairs) which had noticed all the above facts including the reasons for the transfers of some of the lands held by the appellant - Company already made or proposed. It was contended that by virtue of the aforesaid order dated 22.11.93 approval of the Central Government for commencement of business of sale of surplus land by the company was granted. Another significant fact that was mentioned by the appellant - Company in its return is a proceeding before the High Court of Madhya Pradesh in Second Appeal No.482 of 2002 which stood concluded by order dated 25.8.03 holding that the appellant - Company had acquired the status of Bhumiswami in respect of the land allotted to it.

6. On a consideration of the respective cases pleaded by the contesting parties and on due consideration of the materials on record the High Court had thought it fit to pass the impugned directions, details of which have already been noticed. Aggrieved, this appeal has been filed.

7. We have heard Shri Ranjit Kumar, learned senior counsel for the appellant and Shri B.S. Banthia, learned counsel for the respondent Nos. 3-12. None has appeared on behalf of the PIL petitioners who have been impleaded as the respondents 1 and 2 in the present appeal.

8. Learned counsel for the appellant has contended that in the revenue records pertaining to the land in question, as existing prior to commencement of Tenancy Act, the appellant - Company was recorded as a 'Gair Mairusi'. After coming into force of the Tenancy Act w.e.f. 15.8.1950 the appellant - Company acquired the status of a "pucca tenant" under Section 54(vii) of the Act. The said status entitled the appellant - Company to the status of "bhumiswami" once the MP Land Revenue Code, 1959 came into force. The aforesaid position, it is pointed out, had been accepted and acknowledged by the State Government in the return filed by it before the High Court. Learned counsel has also pointed out that the status of the appellant - Company as a bhumiswami had not been disputed in the additional return filed on behalf of the State - wherein the only contention urged is that such status would not confer in the appellant a right to transfer the land contrary to the terms of the patta. Learned counsel has also referred to the order of the Government of India, Ministry of Law Justice and Company Affairs dated 22.11.1993 as well as the judgment and order of the High Court of Madhya Pradesh dated 25.08.2003 in Second Appeal No. 480 of 2002 to contend that the transfers already made or proposed by the appellant - company were with due permission of the competent authority of the Government of India and the right of the appellant - company to affect such transfers, as a bhumiswami, had attained finality in law by virtue of the judgment passed in the proceedings of the Second Appeal before the High Court. Learned counsel had vehemently argued that the right of a bhumiswami to transfer the land being a statutory right, the exercise thereof cannot be curtailed by the conditions of the patta, as urged in the additional return dated 7.8.2007 of the State.

9. Proceeding further, learned counsel has pointed out that the Urban Land Ceiling Act stood repealed w.e.f. 22.3.1999 and thus was not in force on the date of the judgment of the High Court. The provisions of the said repealed Act, therefore, could not have been applied to the case of the appellant. In so far as the Ceiling on Agricultural Holding Act is concerned, it is pointed out that in the report of the Tehsildar dated 02.05.2003 it has already been recorded that the appellant - Company was exempted from the provisions of the said Act. In such a situation the High Court could not have invoked the provisions of either of the enactments to the present case so as to justify the directions under challenge.

10. The State which had initially supported the case of the appellant before the High Court had reiterated before us the stand taken by it in the additional counter filed before the High Court on 7.8.2007. Shortly put, it is urged that the land held by the appellant was allotted for the purpose of industry and not agriculture. It is pointed out that after coming into force of the Madhya Pradesh Zamindari Abolition Act, Samvat 2003, w.e.f. 2.10.1951, the land stood reverted to the Government. Under Section 39 of the Zamindari Abolition Act it was incumbent on the appellant to submit an application for grant of a fresh lease to be issued by the State Government under Section 101 of the Tenancy Act of 1950. It is contended that no such application was filed nor any fresh lease was granted by the State Government under the aforesaid provisions of the two Acts in question. The acquisition of the status of bhumiswami, in the absence of a fresh lease under Section 101 of the Tenancy Act, has been questioned on the aforesaid basis. It is also contended that the order of the Government of India, Ministry of Law Justice and Company Affairs dated 22.11.93 was not a permission authorizing to the appellant - Company to sell the land. In so far as the Civil Court decree is concerned, it is contended that the said decree pertains only to land covered by three specific khasra Nos. i.e. 1760/1, 1755/1 and 1776/1 and not to the entire area allotted. In any case according to the

State, the said decree would not be binding on it in as much as it was not a party to the suit and the resultant proceedings.

11. The provisions of section 101 of the Tenancy Act and section 39 of the M.B. Zamindari Abolition Act may be extracted herein below for the purpose of necessary clarity in the discussions that will have to follow:

Section 101 of the Tenancy Act

"101. Leases for non-agricultural purposes - (1) The Government may grant leases of land to be used for other than agricultural purposes. The rights and liabilities of the lessee of such land shall be such as may be defined by the terms of his lease.

Special leases for agricultural purposes - (1) In order to develop and demonstrate farming by mechanical means or in view of the special circumstances of *[any tract or piece of land] the Government may also grant leases of land for agricultural purposes on special and specified conditions. The rights and liabilities of the lessee of such land shall be such as may be defined by the terms of the lease.

(2) The Government may either generally or specially delegate any of its powers under this section to such officer as may be specified in this behalf."

Section 39 of the M.B. Zamindari Abolition Act

"39. Grant of fresh lease for land given for purposes other than agriculture

A person who has taken land on lease from the proprietor for any purpose other than agriculture shall apply within six months from the date of vesting, to obtain from the

*. The word "or place of land" are inserted by M.B. Act No. 18 of 1952.

Government a new lease under Section 101 (1) of Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007, and the Government may grant a lease subject to such terms and conditions for securing the rent and utility of land as may be deemed proper. From the date of vesting up to the grant of new lease the person shall be deemed to be a lessee of the Government for that land on the same conditions on which the lease was granted to him by the proprietor. If the Government does not think it proper in the public interest to grant the lease, the amount of compensation shall be paid at market value."

12. At the very outset, it must be made clear that the provisions of the Zamindari Abolition Act, 1951, have been pressed into service for the first time in the present appeal. Neither in the pleadings nor in the arguments made before the High Court on behalf of the State, the facts now asserted and the legal issues now raised had been urged. However, the question raised being with regard to the effect of a statutory enactment we have considered the same. In the absence of any pleading that the procedure for grant of a fresh lease contemplated under section 39 of the Zamindari Abolition Act had not been followed by the appellant by making the requisite application as contemplated by section 101 of the Tenancy Act, no adverse consequence can be attributed to the appellant as contended on behalf of the State. Rather, the status of the appellant as a bhumiswami recorded in the revenue records of the later years, in the absence of any contrary material, will have to be understood to be pursuant to the grant of a fresh lease under section 39 of the Zamindari Abolition Act read with the provisions of section 101 of the Tenancy Act. Infact, acceptance of the acquisition of the status of bhumiswami by the appellant in the aforesaid manner will render it unnecessary for us to go into the basis of the acquisition of the said status as argued by the learned counsel for the appellant, which, in any case, appears to be contrary to the provision of section 1(2)

of the Tenancy Act. The said provision clearly excludes the villages settled under the Zamindari system from the purview of the operation of Part II of the Tenancy Act, which part of the Act, inter alia, also deals with the acquisition of the status of "pucca tenant" and "Bhumiswami" by a tenant. However obliteration of Part II of the Tenancy Act by operation of section 1(2) thereof does not extinguish the different denominations of tenancy including the status of Bhumiswami which can very well be acquired by grant of such status by a fresh lease under sections 101 of the Tenancy Act read with section 39 of the M.B. Zamindari Abolition Act.

13. The rights of a bhumiswami are clearly enumerated by Section 165 of the MP Land Revenue Code which encompasses a right to transfer. The bar imposed on the right to transfer does not apply to non-agricultural lands and, hence, would not be relevant to the present case. If the right of transfer has been conferred on the appellant by the provisions of a statute and the bar contemplated does not apply to the appellant, we do not see how a clause or a condition in the original patta granted by the Zamindar in samvat 1978-79 (corresponding to English Calender year 1940-41) can restrict such a right. In any case, there is no specific clause or condition in any of the original pattas prohibiting or even restricting the right of the appellant to transfer any part of the land allotted to it that may be lying vacant. Neither any material has been placed before us to enable us to take the view that under terms of the lease granted under Section 101 of Tenancy Act and Section 39 of Abolition of Zamindari Act any restriction or bar had been imposed on the appellant - Company from making such a transfer.

14. In view of the aforesaid conclusions the issue with regard to applicability of the Urban Land Ceiling Act and the Ceiling on Agricultural Holding Act, need not detains us, save and except to hold that the provisions of either of the aforesaid Acts, ex-facie, do not apply to the case of the appellant -

Company. We would further like to observe on the view taken by us it is not necessary to go into the question as to whether the decree affirmed by the High Court of Madhya Pradesh in S.A. No.482 of 2002 binds the State or whether the same is in respect of the entire land holding of the appellant - Company or only a part thereof.

15. In view of the foregoing discussions and conclusions reached we allow this appeal and set aside the judgment and order dated 01.12.2007 of the High Court as well as the directions contained in the said order.

R.P. Appeal allowed.

VIPUL SHITAL PRASAD AGARWAL
v.
STATE OF GUJARAT & ANR.
(Special Leave Petition (Crl.) No. 3672 of 2012 etc.)

NOVEMBER 6, 2012

[ALTAMAS KABIR, CJI, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

ss. 439, 167(2), 173(2) and (8) - FIR -Charge-sheet submitted - Direction by Court for further investigation by CBI - CBI registering another FIR - Application for bail on default ground - Held: Since the prayer for default bail was made in connection with the initial F.I.R. in which charge-sheet had been filed within the stipulated period of 90 days, the plea with regard to the default bail was not available to the petitioner - The mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the Magistrate concerned to whom the report is forwarded does not mean that the report submitted u/s 173(2) is abandoned or rejected - Notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation u/s 173 (8) pursuant to the direction of the court - Further, the delay including the trial has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the petitioner.

The petitioner, a Superintendent of Police, was arrested by the C.I.D. Crime on 3.5.2010 consequent upon an FIR registered as ICR No. 115 of 2006, in respect of an alleged fake encounter in which one 'TP' was killed. Charge-sheet in the case was filed on 30.7.2010 against 12 Police Officers including the petitioner. In the writ petition filed by the mother of the deceased, the Supreme Court by its order dated 8.4.2011 directed the State Police authorities to hand over all the records to the CBI, and the latter was directed to investigate all aspects of the case relating to the killing of the deceased and to file a report in the court concerned. The CBI, on 29.4.2011, registered a separate FIR No. RC 3(5)/2011 and applied before the Court of Session for release of certain documents including the charge-sheet, and supplementary charge-sheet in FIR No. 115/2006, and to handover the same to it for fresh investigation. The prayer was allowed. The petitioner, after unsuccessfully approaching the Judicial Magistrate and the Court of Session for bail on the grounds of investigation not being completed and delay in trial and the petitioner being in custody for a long time, challenged the order of the Sessions Judge before the High Court in a petition under Arts. 226 and 227 of the Constitution read with s.482 CrPC, which was dismissed.

Dismissing the petition, the Court

HELD: Per Altamas Kabir, CJI (for himself and for Surinder Singh Nijjar, J)

1.1 One of the most significant features of this case is that the prayer for default bail was made on behalf of the petitioner in F.I.R.No.115 of 2006, lodged by the local police, though the submissions in respect thereof have been made in connection with the subsequent F.I.R. lodged by the C.B.I. It is obvious that the petitioner was fully aware of the situation while making the application for grant of bail, knowing that he was under arrest in connection with the first F.I.R. and not under the second F.I.R. lodged by the C.B.I. Since the prayer for default bail was made in connection with F.I.R.No.115 of 2006, in which charge-sheet had been filed within the stipulated

period of 90 days, the plea with regard to the default bail was not available to the petitioner. It can also not be said that since a fresh investigation was directed to be conducted by the Court, the earlier charge-sheet must be deemed to have been quashed. [para 18] [996-F-H; 997-A]

1.2 Even on the question of delay in concluding the trial, such delay has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the petitioner. [para 19] [997-B]

Per Chelameswar, J. (Concurring) :

1.1 Section 173 of the Code of Criminal Procedure, 1973 obligates the police investigating a case to make a report to the Magistrate to take cognizance of the offence which is subject matter of the investigation. Sub-s. (8) recognizes the authority of the Investigating Officer/ Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under sub-s. (2) of s.173 had already been submitted. It is settled law that a Magistrate to whom report is submitted u/s 173(2) can direct the Investigating Officer to make a further investigation into the matter. [para 3] [997-G-H; 998-C; 999-A]

Kashmeri Devi v. Delhi Administration & Another **1988 SCR 700 = (1988 (Supp.) SCC 482 - referred to**

1.2 The mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the Magistrate concerned to whom the report is forwarded does not mean that the report submitted u/s 173(2) is abandoned or rejected. It is only that either the investigating agency or the court concerned is not completely satisfied with the material collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report. [para 4] [999-B-D]

1.3 Therefore, it cannot be said that the directions given by this Court earlier in Writ Petition (Criminal) No.115 of 2007 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected. [para 5] [999-E]

1.4 Even the fact that the CBI purported to have registered a "fresh FIR", does not lead to conclusion in law that the earlier report or the material collected by the State Police (CID) on the basis of which they filed the charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI. Notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation u/s 173 (8) of the CrPC pursuant to the direction of the Court. [para 5-6] [999-F; 1000-A-B]

Case Law Reference:

1988 SCR 700	**referred to**	**para 3**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 3672 of 2012 etc.

From the Judgment & Order dated 20.03.2012 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 2698 of 2011.

WITH

Crl. M.P. No. 11364 of 2012.

Ajay Veer Singh Jain, Nitin Jain, Anista Jain, Uday Ram, Ashish Kumar Saini, Atul Agarwal, Mosh. Irshad Hanif for the Petitioner.

Tushar Mehta, Hemantika Wahi, S. Panda, Jesal, Nandini Gupta Maheen Pradhan, Subramonium Prasad, Vaibhav Srivastava for the Respondents.

The Judgments of the Court was delivered by

ALTAMAS KABIR, CJI. 1. This Special Leave Petition is directed against the judgment and order dated 20th March, 2012, passed by the Gujarat High Court dismissing the petition filed by the Petitioner, Dr. Vipul Shital Prasad Agarwal, under Articles 226 and 227 of the Constitution, read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), being SCRMA No.2698 of 2011.

2. There are certain special features in this case which need to be recorded in order to decide this matter.

3. The Petitioner was at the relevant time posted as Superintendent of Police, Banaskantha, Gujarat. On 28th December, 2006, one Tulsiram Prajapati was killed in an encounter and a First Information Report (F.I.R.), being I.C.R.No.115 of 2006, was registered with the Ambaji Police Station, Banaskantha, Gujarat, against unidentified persons under Sections 307, 427 and 34 of the Indian Penal Code, 1860 (IPC), Section 25(1)(A) of the Arms Act, 1959, and Section 135 of the Bombay Police Act, 1951.

4. In 2007, Nirmala Bai, the mother of the deceased, filed Writ Petition (Crl.) No.115 of 2007, before this Court praying for an inquiry into the incident by the Central Bureau of Investigation (C.B.I.), and while the same was pending, the prosecution, upon completion of investigation, added Sections 302, 364, 307, 333, 334, 427, 365, 368, 193, 197, 201, 120-B, 471 read with Section 34 I.P.C., together with Section 25(1)(a) and 27 of the Arms Act, 1959, as also Section 135 of the Bombay Police Act, against 12 police officers, including the Petitioner. Consequent thereupon, the Petitioner was arrested

by the C.I.D. crime, on 3rd May, 2010, and charge-sheet was, thereafter, filed against the accused persons, including the Petitioner, on 30th July, 2010.

5. One of the strange features of this case, therefore, is that in the case which was registered against the victim, 12 police officers, including the Petitioner, came to be arraigned as accused in what was alleged to be a fake encounter. However, the fact remains that F.I.R. No.115 of 2006 was lodged with the Ambaji Police Station on 28th December, 2006, resulting in the arrest of the Petitioner by the C.I.D. crime, on 3rd May, 2010, and the filing of charge-sheet on 30th July, 2010, within 90 days of his arrest.

6. While considering the writ petition filed by the mother of the deceased (Writ Petition (Crl.) No.115 of 2007), this Court, by its judgment and order 8th April, 2011, refused to accept the investigation conducted and completed by the State C.I.D. and directed as follows:

> "39. In view of the above discussion, the Police Authorities of the Gujarat State are directed to handover all the records of the present case to the CBI within two weeks from this date and the CBI shall investigate all aspects of the case relating to the killing of Tulsiram Prajapati and file a report to the concerned court/special court having jurisdiction within a period of six months from the date of taking over of the investigation from the state Police Authorities. We also direct the Police Authorities of the state of Gujarat, Rajasthan and Andhra Pradesh to cooperate with the CBI Authorities in conducting the investigation."

7. We have intentionally quoted the aforesaid direction of this Court, since the main plank of the submissions made on behalf of the Petitioner in this Special Leave Petition depends on an interpretation thereof.

8. Pursuant to the directions given by this Court, the C.B.I.

registered a separate F.I.R. on 29th April, 2011, being R.C.-3(S)/2011/Mumbai dated 29th April, 2011. On 31st May, 2011, the C.B.I. applied before the Court of Sessions Judge Palanpur, Banaskantha, Gujarat, in Sessions Case No.58 of 2010, inter alia, for the following directions:

> "It is, therefore, humbly prayed that keeping in view the orders dated 08.04.2011 of the Hon'ble Supreme Court of India, the articles submitted by the Gujarat Police as per the list enclosed (as desired by this Hon'ble Court) along with the Charge Sheet No.50/2010 dated 30.07.2010 vide CC No.1439/10 dated 30.07.2010 and supplementary Charge Sheets in case FIR No.115/2006 dated 28.12.2006 of PS Ambaji, District Banaskantha may be released and handed over to the CBI for the purpose of fresh investigation.
>
> It is further prayed that in the light of order of the Hon'ble Supreme Court of India, no further proceeding may be allowed in the case till the investigation of CBI is finalized. And for this the applicant shall ever pray."

9. The said application was allowed by the Sessions Judge on 9th June, 2011.

10. Since the investigation was not completed and the Petitioner had been in custody for a long time, an application for bail was moved on his behalf in the Court of learned Sessions Judge, Palanpur, on 16th August, 2011, who rejected the same on the ground that the application ought to have been moved before the Judicial Magistrate, First Class, Danta, and not before the Sessions Court.

11. Having regard to the order of the learned Sessions Judge, the Petitioner moved an application before the Judicial Magistrate, First Class, Danta, on 2nd September, 2011, for bail, which was rejected on 7th October, 2011. The Petitioner then moved the Gujarat High Court by way of Special Criminal

Application No.2698 of 2011, for quashing and setting aside the aforesaid judgment and order dated 7th October, 2011, passed by the Judicial Magistrate, First Class, rejecting his prayer for bail. Another application for regular bail, being Criminal Misc. Application No.04 of 2012, was also filed on behalf of the Petitioner before the Sessions Judge, Palanpur, on 2nd January, 2012, on the limited ground of delay in the trial. The said bail application was dismissed by the 2nd Additional Sessions Judge on 27th February, 2012. The High Court also rejected the Petitioner's application challenging the order of the Magistrate by its order dated 20th March, 2012. On 9th April, 2012, the Petitioner's Criminal Misc. Application No.4729 of 2012, challenging the order of the 2nd Additional Sessions Judge dated 27th February, 2012, was dismissed by the High Court. It is against the said order that the present Special Leave Petition has been filed.

12. The major thrust of the submissions made by Mr. Sushil Kumar, learned Senior Advocate, appearing for the Petitioner, was that the Petitioner was entitled to the benefit of statutory bail in terms of Sub-Section (2) of Section 167 Cr.P.C. Learned counsel urged that since after registering a fresh F.I.R. and commencing of fresh investigation, as directed by this Court, the C.B.I. had failed to file charge-sheet pursuant to such F.I.R., within the stipulated period of 90 days, the Petitioner was entitled to bail on account of such default in view of the provisions of Sub-Section (2) of Section 167 Cr.P.C. Learned counsel also emphasized that the Petitioner was in custody since his arrest on 3rd May, 2010, and on the other hand, the trial was being delayed.

13. Mr. Sushil Kumar urged that since the earlier investigation by the State police had not been accepted by this Court and the C.B.I. was directed to conduct a fresh investigation, it would necessarily entail that the charge-sheet filed on the basis of the initial inquiry was also rejected by this Court, though not in explicit terms. Mr. Sushil Kumar submitted

that there could not be two charge-sheets arising out of the two FIRs in respect of a single incident and charge would have to be framed on the basis of one of the said two charge-sheets filed and, since the first investigation had not been accepted, the logical consequence would be that the first charge-sheet also stood quashed which would give the second charge-sheet due legitimacy. Accordingly, since the charge-sheet had not been filed in respect of the second F.I.R. within a period of 90 days, as stipulated under Section 167(2) Cr.P.C., the Petitioner was entitled to be released on default bail, as a matter of right.

14. Mr. Sushil Kumar made it clear that he was basing his submissions mainly on the ground available under Section 167(2) Cr.P.C. and the fact that the trial had been delayed for a long period during which the Petitioner has remained in custody.

15. Appearing for the C.B.I., Mr. Vivek Tankha, learned Senior Advocate, submitted that there was a basic fallacy in Mr. Sushil Kumar's submissions since the Petitioner was arrested in connection with the first F.I.R., being No.115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days and that he had not been arrested in connection with the second F.I.R. filed by the C.B.I. Accordingly, the benefit of default bail under Section 167(2) Cr.P.C. was not available to the Petitioner. Mr. Tankha also submitted that the investigation started by the C.B.I. was in continuation of the investigation initially commenced on the basis of F.I.R. No.115 of 2006 of Ambaji Police Station and that the lodging of a fresh F.I.R. by the C.B.I. was only for the purpose of enabling the C.B.I. to take over the investigation from the State police in terms of the directions given by this Court.

16. On the question of delay in the trial, Mr. Tankha pointed out that the same had been stayed at the instance of a co-accused and C.B.I., therefore, had no hand as far as delay of the trial is concerned. According to Mr. Tankha, in any event,

charge-sheet had already been filed even on the basis of the second F.I.R., which would have to be treated as a supplementary charge-sheet to the original charge-sheet filed in F.I.R. No.115 of 2006. Mr. Tankha pointed out that it was also significant that the prayer for default bail in terms of Section 167(2) Cr.P.C. had been made on behalf of the Petitioner in connection with F.I.R. No.115 of 2006, of Ambaji Police Station dated 28th December, 2006, and not in connection with F.I.R. No.RC-3(S)/2011/Mumbai dated 9th April, 2011, filed by the C.B.I.

17. Mr. Tankha, therefore, contended that the Special Leave Petition filed by the Petitioner was entirely misconceived and was liable to be dismissed.

18. We have carefully considered the submissions made on behalf of the respective parties and we have little hesitation in rejecting Mr. Sushil Kumar's submissions. One of the most significant features of this case is that the prayer for default bail was made on behalf of the Petitioner in F.I.R.No.115 of 2006, lodged by the local police with the Ambaji Police Station, though the submissions in respect thereof have been made in connection with the subsequent F.I.R. lodged by the C.B.I. It is obvious that the Petitioner was fully aware of the situation while making the application for grant of bail, knowing that he was under arrest in connection with the first F.I.R. and not under the second F.I.R. lodged by the C.B.I. In the event the second investigation is treated to be a fresh investigation and the Petitioner had been arrested in connection therewith, the submissions made by Mr. Sushil Kumar would have been relevant. However, since the prayer for default bail was made in connection with F.I.R.No.115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days, the argument with regard to the default bail was not available to the Petitioner and such argument has, therefore, to be rejected. The other submission of Mr. Sushil Kumar that since a fresh investigation was directed to be conducted by this Court, the

earlier charge-sheet must be deemed to have been quashed, has to be rejected also on the same ground.

19. Even on the question of delay in concluding the trial, such delay has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the Petitioner.

20. Since no argument had been advanced on behalf of the Petitioner on the merits of the case, we also refrain from looking into the same and on the basis of our aforesaid observations, we are not convinced that the Special Leave Petition, along with the Criminal Miscellaneous Petition No.11364 of 2012, warrants any interference by this Court. The Special Leave Petition and the Criminal Miscellaneous Petition are, therefore, dismissed.

J. CHELAMESWAR, J. 1. While I agree with the conclusion reached by Hon'ble the Chief Justice of India, I wish to add a few lines.

2. The necessary facts and submissions of the learned counsel for the petitioner are clearly set out in the judgment of my Lord the Chief Justice. I wish to deal with only one submission made on behalf of the petitioner - that the earlier judgment and order of this Court in Writ Petition (Criminal) No.115 of 2007 dated 8th April 2011 directing the Central Bureau of Investigation (CB) to conduct an investigation pertaining to all aspects of killing of Tulsiram Prajapati would necessarily mean that the charge-sheet filed by the Gujarat Police (CID) stood rejected. In my view, the submission is misconceived for the following reasons.

3. Section 173 of the Code of Criminal Procedure, 1973 (for short "the CrPC") obligates the police investigating a case to make a report to the Magistrate to take cognizance of the offence which is subject matter of the investigation. Sub-section (2) indicates the various pieces of information which are

required to be contained in the said report. Section 173(2)(i)(d)[1] stipulates that the said report should state whether any offence appears to have been committed and, if so, by whom. If the Investigating Officer opines in the said report that an offence appears to have been committed by the persons named therein, he is also obliged to forward to the Magistrate all documents on which the prosecution proposes to rely along with the statements recorded under Section 161 of the CrPC of all persons whom the prosecution proposes to examine as witnesses.[2] Sub-section (8)[3] recognizes the authority of the Investigating Officer/Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under sub-Section (2) of Section 173 had already been submitted. It may be worthwhile noticing that under sub-Section (3), even a superior police officer appointed under Section 158 of the CrPC could direct the Investigating Officer to make a further investigation pending any orders by the

1. Section 173(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the State Government, stating—

(d) whether any offence appears to have been committed and, if so, by whom.

2. Section 173(5). When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—t

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

3. Section 173(8). Notwithstanding in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magisrate a further report or report regarding such evidence in the form prescribed and the provision of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

concerned Magistrate on the report submitted. It is settled law that a Magistrate to whom report is submitted under Section 173(2) can direct the Investigating Officer to make a further investigation into the matter.[4]

4. In my opinion, the mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the concerned Magistrate to whom the report is forwarded does not mean that the report submitted under Section 173(2) is abandoned or rejected. It is only that either the Investigating Agency or the concerned Court is not completely satisfied with the material collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report.

5. Therefore, the submission of Mr. Sushil Kumar, learned senior advocate appearing for the petitioner, that the directions given by this Court earlier in Writ Petition (Criminal) No.115 of 2007 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected is without any basis in law and misconceived. Even the fact that the CBI purported to have registered a "fresh FIR", in my opinion, does not lead to conclusion in law that the earlier report or the material collected by the Gujarat Police (CID) on the basis of which they filed the

4. Kashmeri Devi v. Delhi Administration & Another (1988 (Supp.) SCC 482 para 7.

"7. Since according to the respondents charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge-sheet has been submitted to exercise his powers under Section 173(8) CrPC to direct the Central Bureau of Investigation for proper and through investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge-sheet, if any, in accordance with law. The appeal stands disposed of accordingly."

charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI.

6. In my view, notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation under Section 173 (8) of the CrPC pursuant to the direction of this Court.

R.P. Petitions dismissed.

EX-HAV. SATBIR SINGH
v.
THE CHIEF OF THE ARMY STAFF, NEW DELHI & ANR.
(Civil Appeal Nos. 7939-49 of 2012)

NOVEMBER 9, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

SERVICE LAW:

Terminal benefits - Army - Havildar discharged/ terminated from service prior to date of his superannuation on the ground that he had earned 4 "Red Ink Entries" - High Court directing reinstatement of incumbent, with no benefit of salary for interviewing period - Held: Admittedly, the incumbent having not worked during the intervening period, High Court was justified in disallowing the salary for that period - However, having found the discharge/termination legally unsustainable, High Court ought to have issued direction for counting the intervening period for the purpose of terminal benefits - Ordered accordingly.

The appellant, who was enrolled in the Army on 31.8.1982, and promoted to the rank of Havildar on 14.2.1990, was to superannuate on 31.8.2006. However, he was served with a show-cause notice dated 16.3.1995, stating that he had earned 4 'Red Ink Entries' in the service of 12½ years. Ultimately, he was discharged from service on 1.4.1995. The appellant challenged the order in a writ petition before the High Court, which, by order dated 2.5.2008, set aside the order of discharge and directed his reinstatement with no benefit of salary and other allowances for the "intervening period".

In the instant appeals, the Court confined the notice to the respondents to show cause as to why "the

intervening period should not be counted for the purpose of terminal benefits."

Allowing the appeals in part, the Court

HELD: 1.1 It is not in dispute that the High Court in categorical terms held the discharge/termination of the appellant from service on the basis of the show cause notice as unsustainable, and set it aside. Therefore, the appellant ought to have been provided relief at least to the extent of counting the intervening period for the purpose of terminal benefits. The direction to deprive the appellant the benefit of intervening period for the purpose of terminal benefits is punitive imposing break in service as the period involved amounts to dies non and the said direction was based without considering any related issue and decided on merits by the High Court. Therefore, the same is not sustainable and is liable to be set aside. It is true that during the intervening period, the appellant did not work, in that event, the High Court was justified in disallowing the salary for the said period. [para 9, 10] [1005-B-E; G-H, 1006-A]

1.2 Therefore, while upholding the order of the Division Bench setting aside the termination order, this Court holds that for the purpose of terminal benefits, the "intervening period" for which the appellant remained out of job shall be counted. Respondent Nos. 1 and 2 are directed to pass appropriate orders fixing the terminal benefits. [para 11] [1006-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7939-7940 of 2012.

From the Judgment & Order dated 02.05.2008 and 20.02.2009 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 3874 of 1995 and in Review Petition No. 244 of 2008 respectively.

C.M. Khanna, Rameshwar Prasad Goyal for the Appellant.

A.S. Chandhiok, ASG, R. Balasubramanium, Vikas Bansal, B.V. Balram Das, Yamini Khurana, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Delay condoned.

2. Leave granted.

3. These appeals are filed against the final judgment and order dated 02.05.2008 in Writ Petition (C) No. 3874 of 1995 and order dated 20.02.2009 in Review Petition No. 244 of 2008 passed by the Division Bench of the High Court of Delhi insofar as rejection of salary and terminal benefits for the "intervening period" during which the appellant remained out of service.

4. Brief facts:

(a) The appellant herein was enrolled in the Army on 31.08.1982. In September, 1985, he was promoted to the rank of Lance Naik and in April, 1986, he was promoted to the rank of Naik. On 14.02.1990, he got further promotion to the rank of Havildar and with the said promotion, his tenure of service was extended to 24 years and his date of superannuation also got extended to 31.08.2006.

(b) The Army Headquarters, Adjutant General Branch issued a letter dated 28.12.1988, laying down the procedure for removal of undesirable and inefficient candidates by way of discharge/dismissal. Pursuant to the same, a show-cause notice dated 16.03.1995 was served upon the appellant as the particulars in the service record reveal 4 'Red Ink Entries' in the service of 12 ½ (twelve and a half) years. On 21.03.1995, the appellant submitted his reply and on 01.04.1995, the appellant was discharged from service.

(c) Challenging the same, the appellant filed petition being Writ Petition (C) No. 3874 of 1995 before the High Court of Delhi and prayed for reinstatement of service with all consequential benefits. By impugned judgment dated 02.05.2008, the High Court set aside the order of discharge and directed the respondents to reinstate the appellant in service with no benefit of salary and other allowances for the "intervening period."

(d) Feeling aggrieved by the said impugned judgment, the appellant filed review petition being Review Petition No. 244 of 2008. By impugned order dated 20.02.2009, the review petition was also dismissed.

(e) Feeling aggrieved by impugned judgment dated 02.05.2008 in W.P.(C) No. 3874 of 1995 and order dated 20.02.2009 in R.P.(C) No. 244 of 2008, the appellant has filed these appeals by way of special leave.

5. Heard Mr. C.M. Khanna, learned counsel for the appellant and Mr. A.S. Chandhiok, learned Additional Solicitor General for the respondents.

6. On 07.03.2011, this Court issued notice calling upon the respondents to show cause as to why "the intervening period should not be counted for the purpose of terminal benefits".

7. Since the issue in this appeal is very limited, as mentioned above, in view of narration of facts in the earlier part of our order, there is no need to traverse further factual details.

8. We have to see whether the High Court having arrived at a conclusion that the discharge/termination of the appellant from service is unsustainable and after setting aside the termination order was justified in depriving the appellant from any salary for the intervening period as well as for the purpose of terminal benefits, the intervening period during which the appellant remained out of job shall not be counted. Since we

have issued notice only for the purpose of terminal benefits, there is no need to go into the entitlement of salary during the intervening period.

9. It is not in dispute that in the concluding paragraph, the Division Bench of the High Court in categorical terms set aside the order of termination. The relevant conclusion reads as under:

> "Fact remains that he was discharged/terminated from service on the basis of show cause notice. This action is found to be unsustainable. Therefore, we have no hesitation in setting aside the termination order."

Having found that the discharge/termination is legally unsustainable, we are of the view that the incumbent, namely, the appellant, ought to have been provided relief at least to the extent of counting the intervening period for the purpose of terminal benefits. It is true that during the intervening period, the appellant, admittedly, did not work, in that event, the Division Bench was justified in disallowing the salary for the said period. However, for the terminal benefits, in view of the categorical conclusion of the High Court that discharge/termination is bad, ought to have issued a direction for counting the intervening period at least for the purpose of terminal benefits. According to the Division Bench, the conduct of the appellant, namely, securing 4 Red Ink Entries in the service record is the reason for not considering the intervening period even for the purpose of terminal benefits. We hold that the said reasoning adopted by the Division Bench of the High Court cannot be sustained in view of its own authoritative conclusion in setting aside the discharge/termination order.

10. In the light of the conclusion that the termination is bad and the direction to deprive the appellant the benefit of intervening period for the purpose of terminal benefits is punitive imposing break in service as the period involved amounts to dies non and the said direction was based without considering

any related issue and decided on merits by the High Court, hence, the same is not sustainable and liable to be set aside.

11. In the light of the above discussion, while upholding the order of the Division Bench setting aside the termination order, we hold that for the purpose of terminal benefits, the "intervening period" for which the appellant remained out of job shall be counted. In view of the same, respondent Nos. 1 and 2 are directed to pass appropriate orders fixing terminal benefits within a period of two months from the date of receipt of copy of this judgment and intimate the same to the appellant.

12. The appeals are allowed to the extent mentioned above.

R.P. Appeals Partly allowed.

ORIENTAL INSURANCE COMPANY LTD.
v.
SURENDRA NATH LOOMBA AND OTHERS
(Civil Appeal Nos. 1345-1346 of 2009 etc.)

NOVEMBER 20, 2012

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

MOTOR VEHICLES ACT, 1988:

s.166 - Motor accident - Claimant traveling in offending vehicle lost both of his eyes - Compensation - Liability of insurer - Held: Whether the insurer would be liable or not would depend upon the nature of the policy when it is brought on record in a manner as required by law - When Certificate of Insurance is filed but the policy is not brought on record it only conveys that the vehicle is insured and nature of policy (whether it is "Act Policy" or "Comprehensive/Package Policy") cannot be discerned from the same - In the case at hand, the policy has not been brought on record - Matter remitted to Tribunal to enable the insurance company to produce the policy with liberty to parties to lead further evidence - However, quantum of compensation determined by High Court as Rs.16,42,656/- needs no interference.

A car belonging to respondent no. 2, met with an accident as a result of which the claimant, who was traveling in the said car lost both of his eyes. The Motor Accident Claims Tribunal, keeping in view the salary and various perquisites of the claimant, who was working as a Senior Manager in a nationalized Bank, awarded a compensation of Rs.20,97,984/- with 9% interest. The Tribunal held that the insurer had issued the Certificate of Insurance in respect of he vehicle and it was valid when the accident occurred. Both the insurance company and the claimant filed appeals before the High

Court which reduced the compensation toRs.16,42,656/-

In the instant appeals filed, both by the insurance company and the claimant, it was contended for the insurance company that the insurance policy was only an "Act Policy" and, therefore, no liability of the insurer would arise.

Partly allowing the appeals of the insurance company and dismissing those of the claimant, the Court

HELD: 1.1 In the case at hand, the policy has not been brought on record. The stand of the insurer that it is an "Act Policy" has been disputed by the claimant who would submit that the policy may be a "comprehensive/ package policy". When Certificate of Insurance is filed but the policy is not brought on record it only conveys that the vehicle is insured. The nature of policy cannot be discerned from the same. Thus, it would be appropriate to remit the matter to the tribunal to enable the insurer to produce the policy and grant liberty to the parties to file additional documents and also lead further evidence as advised. Ordered accordingly. [para 14] [1017-E-G]

Yashpal Luthra and Anr. V. United India Insurance Co. Ltd. and Another **2011 ACJ 1415 - relied on.**

1.2 Whether the insurer would be liable or not would depend upon the nature of the policy when it is brought on record in a manner as required by law. [para 15] [1017-H; 1018-A]

1.3 As far as quantum is concerned, the compensation allowed by the High Court is just and proper compensation requiring no interference. [para 6 and 16] [1018-B]

United India Insurance Co. Ltd., Shimla v. Tilak Singh and **2006 (3) SCR 758 = (2006) 4 SCC 404;** *Oriental*

Insurance Company Ltd. v. Jhuma Saha (Smt.) **2007 (1) SCR 979 =(2007) 9 SCC 263,** *Oriental Insurance Company Ltd. v. Sudhakaran K.V. and others* **2008 (9) SCR 367 = (2008) 7 SCC 428 and** *New India Assurance Company Ltd. v. Sadanand Mukhi and others* **2008 (17) SCR 1313 = (2009) 2 SCC 417;** *National Insurance Co. Ltd. v. Laxmi Narain Dhut* **2007 (3) SCR 579 = (2007) 3 SCC 700;** *Oriental Insurance Company Ltd. v. Meena Variyal and Other* **2007 (4) SCR 641 = (2007) 5 SCC 428;** *Bhagyalakshmi and others v. United Insurance Company Limited and another* **2009 (7) SCR 1031 = (2009) 7 SCC 148;** *Amrit Lal Sood and Another v. Kaushalya Devi Thapar and Others* **1998 (2) SCR 284 = (1998) 3 SCC 744; and** *National Insurance Company Ltd. v. Balakrishnan & Another* **2012 (11) JT 260 - referred to.**

New India Assurance Co. Ltd. V. Asha Rani **2002 (4) Suppl. SCR 543 = (2003) 2 SCC 223 - cited.**

Case Law Reference:

2006 (3) SCR 758	**referred to**	**para 7**
2007 (1) SCR 979	**referred to**	**para 7**
2008 (9) SCR 367	**referred to**	**para 7**
2008 (17) SCR 1313	**referred to**	**para 7**
2002 (4) Suppl. SCR 543	**cited**	**para 9**
2007 (3) SCR 579	**referred to**	**para 11**
2007 (4) SCR 641	**referred to**	**para 11**
2009 (7) SCR 1031	**referred to**	**para 12**
1998 (2) SCR 284	**referred to**	**para 12**
2012 (11) JT 260	**referred to**	**para 13**
2011 ACJ 1415	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1345-1346 of 2009.

From the Judgment & Order dated 12.07.2007 of the High Court of Uttarakhand at Nainital in A.O. No. 201 and 284 of 2003.

WITH

C.A. Nos. 1347-1348 of 2009.

Dr. Meera Agarwal, Ramesh Chandra Mishra (for Oriental Insurance Co. Ltd.) for the Appellant.

A.T.M. Rangaramanujam, Vinod Wadhawani, M.A. Chinnasamy, M.A. Krishna Moorthy for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In the present batch of appeals, two preferred by the Oriental Insurance Company Limited and two preferred by claimant, the assail is to the common judgment passed by the High Court of Uttarakhand at Nainital in A.O. No. 201 of 2003 and A.O. No. 284 of 2003 wherein the award dated 19.5.2003 passed by the Motor Accidents Claims Tribunal, Dehradun (for short 'the tribunal') in M.A.C.T. Petition No. 10 of 1999 was challenged by the insurer and the claimant from different spectrums.

2. The facts which are requisite to be stated are that on 9.10.1998 about 4.30 a.m. claimant, Surendra Nath Loomba, was travelling in a Maruti Esteem Car bearing Registration No. DL 8C-5096 belonging to the respondent No. 3, Savita Matta, and driven by the respondent No. 2, Raj Loomba, the son of the claimant. Near the President Body-guard House, Rajpur Road, the vehicle dashed against a tree and in the accident the windscreen (front) of car was smashed and its pieces got inserted into the eyes of the claimant as a consequence of which he lost his both eyes. As set forth, at the time of the accident the claimant was working as a Senior Manager in Punjab

National Bank and his gross salary was Rs.18,949.86 per month and various perquisites were also attached to the service. Keeping in view his salary and other perquisites he filed an application under Section 166 of the Motor Vehicles Act, 1988 before the tribunal putting forth a claim of Rs.62,00,000/- with 18% interest as compensation.

3. The respondent No. 2, Raj Loomba, filed his written statement contending, inter alia, that at the time of accident the vehicle was insured with the Oriental Insurance Company Limited and hence, it being the insurer was liable to pay the compensation.

4. The insurance company resisted the claim of the claimant on the ground that the driver of the vehicle did not have a valid driving licence; that the proceedings had been initiated in a collusive manner; and that even if the accident as well as the injuries were proven the insurer was not liable to indemnify the owner as the claimant was travelling as a gratuitous passenger.

5. The tribunal on the basis of material brought on record came to hold that as the insurer had issued Certificate of Insurance in respect of the vehicle in question and it was valid during the period when the accident occurred, it was liable to pay the compensation; that the opposite party No. 1 had a valid driving licence and the accident had occurred and there was no collusion between the parties; and that the victim was entitled to get a total sum of Rs.20,97,984/- towards compensation with 9% interest per annum regard being had to the pecuniary and non-pecuniary losses. Be it noted, the tribunal, while computing the amount, had deducted certain sum under certain heads which need not be stated in detail.

6. Aggrieved by the aforesaid award the insurance company preferred A.O. No. 201 of 2003 and the injured claimant preferred A.O. No. 284 of 2003 before the High Court. The High Court, by the common impugned order, reduced the

amount of compensation to Rs.16,42,656/- and concurred with the conclusion arrived at by the tribunal as regards the liability. Thus, the appeal preferred by the insurance company was allowed in part and the appeal preferred by the claimant was dismissed. Hence, the present batch of appeals by the insurance company as well as by the claimant.

7. First, we shall deal with the appeals preferred by the insurance company It is worth noting that the Certificate of Insurance was filed before the tribunal which clearly showed that the vehicle was insured with the appellant-company. Dr. Meera Agarwal, learned counsel for the appellant-insurer would submit that it was only an "Act Policy" and, therefore, the liability of the insurer does not arise. She has commended us to the decisions in *United India Insurance Co. Ltd., Shimla v. Tilak Singh and Others*[1], *Oriental Insurance Company Ltd. v. Jhuma Saha (Smt.)*[2], *Oriental Insurance Company Ltd. v. Sudhakaran K.V. and others*[3] and *New India Assurance Company Ltd. v. Sadanand Mukhi and others*[4].

8. Learned counsel for the respondents would contend that whether the policy is an "Act Policy" or a "Comprehensive/ Package Policy" or whether any extra premium was paid to cover the passenger, is not reflected from the Certificate of Insurance as the policy was not brought on record by tendering the same before the tribunal.

9.In *Tilak Singh* (supra) this Court referred to the concurring opinion rendered in a three-Judge Bench decision in *New India Assurance Co. Ltd. V. Asha Rani*[5] and ruled thus:-

"In our view, although the observations made in Asha Rani

1. (2006) 4 SCC 404.
2. (2007) 9 SCC 263.
3. (2008) 7 SCC 428.
4. (2009) 2 SCC 417.
5. (2003) 2 SCC 223.

case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."

It is worthy to note in the said case the controversy related to gratuitous passenger carried in a private vehicle.

10. In *Jhuma Saha (Smt.)* (supra) this Court has stated thus: -

"The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

11. In *National Insurance Co. Ltd. v. Laxmi Narain Dhut*[6] after elaborately referring to the analysis made in Asha Rani (supra) the Bench ruled thus:-

"Section 149 is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third-Party Risks". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities and the obligations relatable to third parties are created only by fiction of Sections 147 and 149 of the Act".

In the said case it has been opined that although the statute is a beneficial one qua the third party but that benefit cannot be extended to the owner of the offending vehicle. The said

6. (2007) 3 SCC 700.

principle was reiterated in *Oriental Insurance Company Ltd. v. Meena Variyal and Other*[7], *Sudhakaran K. V.* (supra) and *Sadanand Mukhi* (supra).

12. It is apt to note here that this Court in *Bhagyalakshmi and others v. United Insurance Company Limited and another*[8], after dealing with various facets and considering the authorities in *Amrit Lal Sood and Another v. Kaushalya Devi Thapar and Others*[9], *Asha Rani* (supra), *Tilak Singh* (supra), *Jhuma Saha* (supra), *Sudhakaran K.V. and Others* (supra), has observed thus :-

"Before this Court, however, the nature of policies which came up for consideration were Act policies. This Court did not deal with a package policy. If the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third-party risk which would include all persons including occupants of the vehicle and the insurer having entered into a contract of insurance in relation thereto, we are of the opinion that the matter may require a deeper scrutiny."

13. Recently this Bench in *National Insurance Company Ltd. v. Balakrishnan & Another*[10], after referring to various decisions and copiously to the decision in *Bhagyalakshmi* (supra), held that there is a distinction between "Act Policy" and "Comprehensive/Package Policy". Thereafter, the Bench took note of a decision rendered by Delhi High Court in *Yashpal Luthra and Anr. V. United India Insurance Co. Ltd. and Another*[11] wherein the High Court had referred to the circulars issued by the Tariff Advisory Committee (TAC) and Insurance

7. (2007) 5 SCC 428.
8. (2009) 7 SCC 148.
9. (1998) 3 SCC 744.
10. Civil Appeal No. 8163 of 2012 (Arising out of SLP(C) No. 1232/2012) decidied on 20.11.2012.
11. 2011 ACJ 1415.

Regulatory and Development Authority (IRDA). This Court referred to the portion of circulars dated 16.11.2009 and 3.12.2009 which had been reproduced by the High Court and eventually held as follows: -

> "19. It is extremely important to note here that till 31st December, 2006 Tariff Advisory Committee and thereafter from 1st January, 2007, IRDA functioned as the statutory regulatory authorities and they are entitled to fix the tariff as well as the terms and conditions of the policies by all insurance companies. The High Court had issued notice to the Tariff Advisory Committee and the IRDA to explain the factual position as regards the liability of the insurance companies in respect of an occupant in a private car under the "comprehensive/ package policy". Before the High Court the Competent Authority of IRDA had stated that on 2nd June, 1986 the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the "comprehensive policy" and the said position continues to be in vogue till date. He had also admitted that the comprehensive policy is presently called a package policy. It is the admitted position, as the decision would show, the earlier circulars dated 18th March, 1978 and 2nd June, 1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the "comprehensive/package policy" irrespective of the terms and conditions contained in the policy. The competent authority of the IRDA was also examined before the High Court who stated that the circulars dated 18th March, 1978 and 2nd June, 1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1st July, 2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position the circulars dated 16th November 2009 and 3rd December, 2009, that have been reproduced hereinabove, were issued.

20. It is also worthy to note that the High Court after referring to individual circulars issued by various insurance companies and eventually stated thus:-

> "In view of the aforesaid, it is clear that the comprehensive/package policy of a two wheeler covers a pillion rider and comprehensive/ package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for Motor Accident Claims Tribunal to go into the question whether the Insurance Company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC's directives and those of the IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case."

21. In view of the aforesaid factual position there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing than a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/ Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of

Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.

22. In view of the aforesaid legal position the question that emerges for consideration is whether in the case at hand the policy is an "Act Policy" or "Comprehensive/Package Policy". There has been no discussion either by the tribunal or the High Court in this regard. True it is, before us Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a comprehensive policy but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a package policy to cover the liability of an occupant in a car."

14. We have quoted in extenso to reiterate the legal position. In the case at hand, the policy has not been brought on record. The learned counsel for the appellant-insurer would submit that it is an "Act Policy". The learned counsel for the respondent would seriously dispute and submit that extra premium might have been paid or it may be a "Comprehensive/ Package Policy". When Certificate of Insurance is filed but the policy is not brought on record it only conveys that the vehicle is insured. The nature of policy cannot be discerned from the same. Thus, we are disposed to think that it would be appropriate to remit the matter to the tribunal to enable the insurer to produce the policy and grant liberty to the parties to file additional documents and also lead further evidence as advised, and we order accordingly.

15. It needs no special emphasis to state that whether the insurer would be liable or not would depend upon the nature of

the policy when it is brought on record in a manner as required by law.

16. As far as quantum is concerned, though numbers of grounds were urged, yet the learned counsel for the parties did not really address on the same and, therefore, we do not think it necessary to dwell upon the same and treat it as just and proper compensation requiring no interference.

17. In the result, the appeals preferred by the insurer, namely, Oriental Insurance Company Limited are allowed to the extent indicated hereinabove and to that extent the award is set aside and the matter is remitted to the tribunal and the appeals preferred by the claimant for enhancement of compensation are dismissed. There shall be no order as to costs.

R.P. Appeals disposed of.

SURINDER KUMAR
v.
STATE OF PUNJAB
(Criminal Appeal No. 579 of 2009)

NOVEMBER 21, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Evidence Act, 1872 - s.32 - Dying declaration - Appreciation and admissibility of - Discussed.

Penal Code, 1860 - ss.304B and 498A - Death of married woman due to burn injuries - Victim gave declaration/ statement squarely blaming her husband - Statement/ declaration was recorded by a police official in the presence of two doctors - Conviction of victim's husband i.e. the appellant by Courts below - Justification of - Held: The dying declaration of the victim was voluntary and truthful - It was not made under any pressure - The dying declaration contained facts which would not have been known to strangers like the police official or the two doctors - The details given by the victim in the dying declaration were indicative of her consciousness and her fitness to make a statement - The dying declaration was truthful inasmuch as the victim did not introduce any exaggerations and narrated only the basic and important facts, namely, about the persistent demand for dowry by the appellant - She also truthfully stated that she had been telling her mother-in-law and brothers-in-law that appellant was demanding dowry and that they had asked him not to make such demands - The victim did not implicate anybody other than the appellant and truthfully stated that since she was fed up with the persistent demand of dowry made by him, she poured kerosene oil on herself and set herself on fire - Consequently, conviction of appellant upheld - Evidence Act, 1872 - s.32.

The appellant's wife was admitted in the hospital with 90% burn injuries. 'M', Assistant Sub Inspector of Police, went to the Hospital and recorded the statement of appellant's wife in vernacular in which she squarely blamed the appellant. Subsequently, the appellant's wife succumbed to her injuries.

The Trial Judge held that the evidence indicated that the appellant had been demanding dowry from his wife and since she had not brought sufficient dowry, he mistreated her; that there was no reason to disbelieve the dying declaration given by the appellant's wife that she was driven by the appellant to commit suicide; that the dying declaration was voluntary and that it was recorded by 'M' in the presence of two doctors, and accordingly convicted the appellant under Section 304-B and 498-A IPC and sentenced him to ten years rigorous imprisonment under Section 304-B IPC and 3 years rigorous imprisonment under Section 498-A IPC. The High Court affirmed the conviction and sentence.

The case of the appellant is that his wife had accidentally caught fire and therefore it was not a case of suicide. The appellant contended before this Court that the dying declaration given by his wife should not be accepted. The reasons given for this were that she had 90% muscle deep burns and as per the post-mortem report the superficial skin had peeled off and that with such a high degree of burns, it cannot be said that the appellant's wife was in a condition to make a statement and secondly she could not have signed the statement or even affixed her thumb impression. It was submitted that the dying declaration was a very detailed one and it is not expected that a person in that condition could make such a detailed dying declaration.

The question which therefore arose for consideration

in the present appeal was whether the dying declaration given by the appellant's wife to the effect that the appellant had driven her to commit suicide should be accepted or not.

Dismissing the appeal, the Court

HELD: 1. There are a large number of decisions where persons with 90% burns have given a dying declaration and that has been accepted. [Para 16] [1028-C]

Amit Kumar v. State of Punjab **(2010) 12 SCC 285: 2010 (9) SCR 1088;** *Paniben v. State of Gujarat* **(1992) 2 SCC 474: 1992 (2) SCR 197;** *Govindappa v. State of Karnataka* **(2010) 6 SCC 533: 2010 (6) SCR 962;** *Sukanti Moharana v. State of Orissa* **(2009) 9 SCC 163: 2009 (11) SCR 996;** *Kamalavva v. State of Karnataka* **(2009) 13 SCC 614: 2009 (11) SCR 498 and** *Satish Ambanna Bansode v. State of Maharashtra* **(2009) 11 SCC 217: 2009 (3) SCR 1166 - relied on.**

2. There is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question-answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time. [Para 21] [1029-C-E]

3. It is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration. It is enough that there is evidence available to show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some

pressure while making a dying declaration. In such a case, the Court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position. [Para 22] [1029-E-G]

4.1. In the instant case, clearly, the dying declaration made by the appellant's wife was not under any pressure. The only persons who were present when she made her dying declaration were 'M' and two doctors. There is no doubt that both the Courts have rightly come to the conclusion that the dying declaration made by the appellant's wife was voluntary. [Para 23] [1029-G-H; 1030-A]

4.2. The dying declaration contains some facts which would not have been known to strangers like 'M' or the two doctors. For example, they could not have known the parental village of the appellant's wife or when she was married or the caste of the appellant and so on. Therefore, it is incorrect to obliquely suggest that since the dying declaration was detailed, it should not be accepted. On the contrary, the details given by the appellant's wife at the time of her death are indicative of her consciousness and her fitness to make a statement. [Para 24] [1030-B-C]

4.3. The dying declaration was truthful inasmuch as the appellant's wife did not introduce any exaggerations and narrated only the basic and important facts, namely, about the persistent demand for dowry by the appellant. She also truthfully stated that she had been telling her mother-in-law and brothers-in-law that the appellant was demanding dowry and that they had asked him not to make such demands. The appellant's wife did not implicate anybody other than the appellant and truthfully stated that since she was fed up with the persistent demand of dowry made by him, she poured kerosene oil

on herself and set herself on fire. [Para 25] [1030-D-E]

4.4. Given the facts of the case and the law laid down in Paniben case, this Court has no difficulty in upholding the concurrent views of the Trial Court as well as the High Court in accepting the dying declaration of the appellant's wife as voluntary and truthful. The appellant's wife was driven to suicide by the appellant and consequently the conviction and sentence awarded to the appellant under Section 304-B and Section 498-A IPC is upheld. [Paras 2, 28] [1024-C; 1031-C-D]

Laxmi v. Om Prakash **(2001) 6 SCC 118: 2001 (3) SCR 777 - distinguished.**

Case Law Reference:

2010 (9) SCR 1088	**relied on**	**Para 16**
1992 (2) SCR 197	**relied on**	**Para 16**
2010 (6) SCR 962	**relied on**	**Para 17**
2009 (11) SCR 996	**relied on**	**Para 18**
2009 (11) SCR 498	**relied on**	**Para 19**
2009 (3) SCR 1166	**relied on**	**Para 20**
2001 (3) SCR 777	**distinguished**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 579 of 2009.

From the Judgment & Order dated 13.8.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 337-SB of 1995.

Rajiv Kumar, Prabhoo Dayal Tiwari, Dinesh Verma (for Dr. Kailash Chand) for the Appellant.

V. Madhukar, AAG, Srijita Mathur, Anvita Gowshish (for Kuldip Singh) for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question for consideration is whether the dying declaration given by Kiran Bala to the effect that her husband (the appellant) had driven her to commit suicide should be accepted or not. The case of the appellant is that Kiran Bala accidentally caught fire and therefore it is not a case of suicide.

2. We agree with the concurrent view of the Trial Court and the High Court that Kiran Bala was driven to suicide by the appellant and as such his conviction and sentence under Section 304-B and Section 498-A of the Indian Penal Code (for short the IPC) should be upheld.

The facts:

3. The appellant Surinder Kumar and Kiran Bala were married some time in 1990-91. They have a female child.

4. On 28th April 1994 Kiran Bala was admitted to the Civil Hospital, Tanda, with burn injuries all over her body. Since her condition appeared to be serious, Dr. Kewal Singh the Medical Officer informed the Assistant Sub Inspector of Police, Mohinder Singh, through a memo, of her admission in the hospital with 90% burns.

5. Mohinder Singh went to the Tehsil Office to contact the Tehsildar who was also the Executive Magistrate. Finding that he was not available and since a Judicial Magistrate was not located in Tanda, Mohinder Singh went to the Civil Hospital apparently to obtain first hand information of the events.

6. In the Civil Hospital, Mohinder Singh contacted Dr. Kewal Singh at about 9.30 a.m. and he certified that Kiran Bala was fit to make a statement. Thereafter, Mohinder Singh recorded the statement of Kiran Bala in vernacular in the presence of Dr. Kewal Singh and Dr. Satpal Singh, Medical Officer. The statement was read over to her and after she

admitted the contents to be true, her signature and right thumb impression was taken on the statement. An endorsement was made on the statement by Dr. Kewal Singh and Dr. Satpal Singh to the effect that Kiran Bala had given her statement in their presence.

7. Unfortunately, Kiran Bala passed away on the same day.

8. In the meanwhile, based on the statement given by Kiran Bala, Mohinder Singh began investigating into the occurrence. On 5th May, 1994 he arrested the appellant who had been absconding till then and on completion of investigations, he filed a challan in which the appellant was accused of having driven Kiran Bala to commit suicide. The appellant was charged for offences under Section 304-B and Section 498-A of the IPC. He pleaded not guilty and claimed trial.

9. Before filing the challan, Mohinder Singh asked Dr. Kewal Singh in writing on 8th July 1994 whether Kiran Bala was conscious throughout the time her statement was recorded. Dr. Kewal Singh certified that Kiran Bala was medically fit (fully conscious) from the beginning of her statement till the very end.

10. At this stage, it is appropriate to quote the English translation of the dying declaration made by Kiran Bala on 28th April 1994. This reads as under:-

> "I am resident of village Bainchan. My parental village is Chatiwind in Amritsar. I was married about 3 ½ years ago with Surinder Kumar son of Rattan Chand, caste Balmiki, resident of Bainchan, Distt. Hoshiarpur, according to customary rites. I have one daughter, who is aged about 2 ½ years. My husband Surinder Kumar is working as a labourer. Today i.e. 28.4.1994 at about 7.30 A.M. my husband Surinder Kumar quarreled with me and was saying that I had brought less dowry at the time of marriage and that I should bring a scooter and Rs.5000/- in cash from my parents. I had been telling my mother-in-law and brothers-in-law that my husband had been demanding more dowry and they had been asking him not to make such demands. I had not informed my parents about the demands of dowry so that they may not form a bad opinion about my husband. Today, at about 7.30 A.M. fed up with the demands of dowry made by my husband, I poured kerosene oil and set myself on fire. When I put myself on fire, my mother-in-law Ramo, sister-in-law Paramjit Kaur, my daughter Ritu, my husband Surinder Kumar were present in the house. However, my mother-in-law and sister-in-law were not aware about the setting on fire. When I caught fire, I raised alarm extinguished the fire. My husband Surinder Kumar, sister-in-aw Paramjit Kaur, a neighbour, namely Kamla my nephew Kala took me to Civil Hospital for treatment. My parents should get back the articles of dowry given to me and my daughter Ritu should remain with my husband. My parents should not marry my younger sister Neeta with my husband Surinder Kumar. I had confided in my younger sister Neeta about demands of dowry made by husband. Except my husband, my mother-in-law, sister-in-law, brother-in-law or other members of my in laws had not made any demands of dowry and only my husband Surinder Kumar used to make the demands of dowry and I have set myself on fire after pouring kerosene oil being fed up from the demands of dowry made by my husband".

Decision of the Trial Court:

11. On the merits of the case, the Trial Judge held that the evidence indicated that the appellant had been demanding dowry from Kiran Bala and since she had not brought sufficient dowry, he mistreated her. The Trial Judge was of the view that there was no reason to disbelieve the dying declaration given by Kiran Bala that she was driven by the appellant to commit suicide. It was held that the dying declaration was voluntary and

was recorded by Mohinder Singh in the presence of two doctors. Under the circumstances, the appellant was found guilty of the offences alleged against him and sentenced to ten years rigorous imprisonment and fine for an offence under Section 304-B of the IPC and 3 years rigorous imprisonment and fine for an offence under Section 498-A of the IPC.

Decision of the High Court:

12. Before the High Court the submission made by the appellant was that the dying declaration could not be relied upon for several reasons. It was argued that since Kiran Bala had suffered burn injuries to the extent of 90%, she was not in a fit condition to make a statement. Moreover, the dying declaration was not recorded in a question-answer form. There was also no reason to disbelieve the defence witnesses who testified that Kiran Bala accidentally caught fire.

13. The High Court was of the view that there was sufficient evidence to show that Kiran Bala was driven to commit suicide, which she did at about 7.30 a.m. on 28th April, 1994. Kiran Bala was conscious when she gave her dying declaration and although her condition may have been critical at that point of time, there was sufficient intrinsic evidence to show that she was fit to make the statement. Moreover, it is not as if her statement was vindictive inasmuch as she squarely blamed only the appellant and nobody else.

14. On this evidence, the High Court upheld the view of the Trial Judge and affirmed the conviction and sentence.

Discussion and conclusion:

15. The only submission before us was that the dying declaration given by Kiran Bala should not be accepted. The reasons given for this were that she had 90% muscle deep burns and as per the post-mortem report the superficial skin had peeled off. It was argued that with such a high degree of burns, it cannot be said that Kiran Bala was in a condition to make a statement and secondly she could not have signed the statement or even affixed her thumb impression. It was submitted that the dying declaration is a very detailed one and it is not expected that a person in that condition could make such a detailed dying declaration.

16. We are not at all impressed by any of these submissions. There are a large number of decisions that have been cited before us by learned counsel for the State where persons with 90% burns have given a dying declaration and that has been accepted. For example, in *Amit Kumar v. State of Punjab,* (2010) 12 SCC 285 the victim had 90% burns and yet her statement was accepted. This Court noted, inter alia, that the victim did not unfairly implicate anybody who had not participated in the crime. This Court relied on ten principles governing a dying declaration as mentioned in *Paniben v. State of Gujarat,* (1992) 2 SCC 474 to conclude that there was no reason to disbelieve the dying declaration given by the victim in that case.

17. Similarly, in *Govindappa v. State of Karnataka,* (2010) 6 SCC 533 the victim had 100% burn injuries and yet she was found to be in a fit state of mind to give her statement and affix her left thumb impression on the statement. The dying declaration was accepted by this Court on the evidence of the doctor that the victim was in a position to talk.

18. In *Sukanti Moharana v. State of Orissa,* (2009) 9 SCC 163, the victim had 90 to 95 per cent burn injuries covering 90 to 95 per cent body surface and yet her dying declaration was accepted after considering the principles laid down in Paniben.

19. In *Kamalavva v. State of Karnataka,* (2009) 13 SCC 614, reference was again made to Paniben. It was noted that the doctor who was present at the time of recording the dying declaration had attached a certificate to the effect that it was recorded in his presence. This Court rejected the technical

objection regarding the non-availability of a certificate and endorsement from the doctor regarding the mental fitness of the deceased. It was held that the view taken by this Court in numerous decisions is that this is a mere rule of prudence and not the ultimate test as to whether or not the dying declaration was truthful or voluntary.

20. In *Satish Ambanna Bansode v. State of Maharashtra,* (2009) 11 SCC 217, the victim had 95% superficial to deep burns and after referring to Paniben, her dying declaration was accepted by this Court.

21. Insofar as the case before us is concerned, we may only note that there is no format prescribed for recording a dying declaration. Indeed, no such format can be prescribed. Therefore, it is not obligatory that a dying declaration should be recorded in a question-answer form. There may be occasions when it is possible to do so and others when it may not be possible to do so either because of the prevailing situation or because of the pain and agony that the victim might be suffering at that point of time.

22. It is also not obligatory that either an Executive Magistrate or a Judicial Magistrate should be present for recording a dying declaration. It is enough that there is evidence available to show that the dying declaration is voluntary and truthful. There could be occasions when persons from the family of the accused are present and in such a situation, the victim may be under some pressure while making a dying declaration. In such a case, the Court has to carefully weigh the evidence and may need to take into consideration the surrounding facts to arrive at the correct factual position.

23. Clearly, the dying declaration made by Kiran Bala was not under any pressure. The only persons who were present when she made her dying declaration were Mohinder Singh and the two doctors. We have no doubt that both the Courts have

rightly come to the conclusion that the dying declaration made by Kiran Bala was voluntary.

24. The dying declaration contains some facts which would not have been known to strangers like Mohinder Singh or the two doctors. For example, they could not have known the parental village of Kiran Bala or when she was married or the caste of her husband and so on. Therefore, it is incorrect to obliquely suggest that since the dying declaration was detailed, it should not be accepted. On the contrary, the details given by Kiran Bala at the time of her death are indicative of her consciousness and her fitness to make a statement.

25. We are also of the opinion that the dying declaration was truthful inasmuch as Kiran Bala did not introduce any exaggerations and narrated only the basic and important facts, namely, about the persistent demand for dowry by her husband. She also truthfully stated that she had been telling her mother-in-law and brothers-in-law that the appellant was demanding dowry and that they had asked him not to make such demands. Kiran Bala did not implicate anybody other than the appellant and truthfully stated that since she was fed up with the persistent demand of dowry made by him, she poured kerosene oil on herself and set herself on fire.

26. It is not necessary for us to repeat the principles laid down in Paniben since they have been repeated in several judgments, some of which have been referred to above. All that we need say is that the decisions referred to and relied on in Paniben need to be updated. Applying the principles laid down Paniben, the dying declaration given by Kiran Bala ought to be accepted as voluntary and truthful.

27. Learned counsel for the appellant relied on *Laxmi v. Om Prakash,* (2001) 6 SCC 118 particularly paragraph 21 of the Report. In that case, the third dying declaration (out of five) was under consideration. This Court upheld the doubt expressed by the Trial Court (and endorsed by the High Court)

that even though the victim had 85% burns, her neck, mouth and lips were burnt. The records available with the Burns Ward of the concerned hospital also showed that her hands were burnt and the skin had peeled off. In such a situation, a grave doubt was expressed whether the victim could have made a detailed statement and put her signature thereon. Clearly, that case was decided on its peculiar facts and no general principle of law was laid down in the paragraph under reference.

Result:

28. Given the facts of the case and the law laid down in Paniben, we have no difficulty in upholding the concurrent views of the Trial Court as well as the High Court in accepting the dying declaration of Kiran Bala as voluntary and truthful. Consequently, we uphold the conviction and sentence awarded to the appellant.

29. There is no merit in the appeal and it is accordingly dismissed.

B.B.B. Appeal dismissed.

KUNJUMON @ UNNI
v.
STATE OF KERALA
(Criminal Appeal No. 38 of 2009)

NOVEMBER 21, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

PENAL CODE, 1860:

ss.397 and 302 - Accused while committing robbery, causing injuries on head of a lady of 90 years, which resulted in her death - Held: In view of the facts that the accused dragged down a frail old lady of 90 years from her cot and caused injuries on her head with a wall clock, it cannot be said that he did not intend the death of the victim or even did not know that his actions would result in her death - Courts below rightly convicted and sentenced the accused u/ss 397 and 302.

s.449 - House trespass in order to commit offence punishable with death - Accused while committing robbery caused injuries to an old lady of 90 years, which resulted in her death - Held: Admittedly, accused had gone to the targeted house to commit robbery and not to kill any body - He is, therefore, acquitted of the offence punishable u/s 449.

IDENTIFICATION/TEST IDENTIFICATION PARADE:

Identification in court of an accused of robbery by victim of robbery - No TIP conducted - Held: In the instant case, the witness was the victim of robbery - She came face to face with the threat and intimidation by accused - The entire traumatic sequence of events would have been clearly etched in her memory - The evidence of such a victim of a crime must be placed on a somewhat higher pedestal, in terms of the

credibility attached to it, than the evidence of any other witness - "Proper administration of justice" should include not only the "life and liberty of an accused" but also the issues of victimology and the treatment of victims - Therefore, absence of the TIP makes no difference to the case of the prosecution or the identification of the accused - Criminal law.

EVIDENCE:

Testimony of a child witness - Held: The evidence of the witness, who was of 11 years at the time of incident, was recorded after a lapse of six years, and, by then, she was no longer a 'child witness' - That apart, her evidence is clear and unambiguous and nothing adverse could be elicited during her cross-examination.

The appellant along with another accused 'JJ' was prosecuted for committing robbery in the house of PW-1 and causing death of an inmate of the house, a 90 years old lady. The prosecution case was that while 'JJ' stood guard near the house, the appellant entered the house of PW-1, caught hold of his 11 year old daughter (PW-2), threatened to kill her and robbed her of her jewellery. The appellant then entered the bed room of 90 years old grand-mother of PW-2, and when she raised alarm, pulled her down from the cot and beat her on the head with a wall clock and robbed her of her jewellery. The victim succumbed to her injuries in the hospital on the 9th day of the incident. The trial court convicted and sentenced the appellant u/ss 302, 397 and 449 IPC. 'JJ' was convicted and sentenced u/s 411 IPC. The High Court acquitted 'JJ', but upheld the conviction and sentence of the appellant.

In the instant appeal, it was contended for the appellant that since a TIP was not conducted, the evidence of PW-2 could not be relied upon; that the evidence of PW-2, as a child witness should be carefully scrutinized; and that the appellant had no intention to murder the deceased and, therefore, his conviction for an offence punishable u/s 302 was improper.

Partly allowing the appeal, the Court

HELD:

Not holding a TIP:

1.1 The sum and substance of the various decisions is that the failure to hold a TIP is not fatal to the case of the prosecution, but the trial judge will need to be circumspect in accepting the identification of an accused by a witness in court if the accused is a stranger to the witness. If there is no substantive evidence against an accused, a TIP will not assist the prosecution. [para 20 and 25] [1042-B; 1043-C]

Sk. Hasib v. State of Bihar, AIR 1972 SC 283; Vaikuntam Chandrappa v. State of Andhra Pradesh, **AIR 1960 SC 1340;** *Rameshwar Singh v. State of J & K,* **1972 (1) SCR 627 = (1971) 2 SCC 715;** *Budhsen v. State of Madhya Pradesh,* **1971 (1) SCR 564 = (1970) 2 SCC 128;** *Malkhansingh v. State of Madhya Pradesh,* **2003 (1) Suppl. SCR 443 = (2003) 5 SCC 746;** *Vijay @ Chinee v. State of Madhya Pradesh,* **2010 (8) SCR 1150 = (2010) 8 SCC 191;** *State of Himachal Pradesh v. Lekh Raj,* **1999 (4) Suppl. SCR 286 = (2000) 1 SCC 247 - referred to.**

Bikau Pandey v. State of Bihar, **2003 (6) Suppl. SCR 201 = AIR 2004 SC 997 and** *State of Rajasthan v. Kishore,* **1996 (2) SCR 1103 =AIR 1996 SC 3035 - cited**

1.2 In the instant case, PW-2 is not an ordinary witness - she is a victim of the crime; she was directly at the receiving end of the actions of the appellant and came face to face with the threat and intimidation by the appellant. The evidence of such a victim of a crime must

be placed on a somewhat higher pedestal, in terms of the credibility attached to it, than the evidence of any other witness. "Proper administration of justice" should include not only the "life and liberty of an accused" but also the issues of victimology and the treatment of victims. PW-2 narrates the incident and says that she saw the appellant for two minutes. The entire traumatic sequence of events would have been clearly etched in her memory. She identifies the appellant in court, but no question is put to her in this regard in her cross-examination. It is quite clear from the evidence of PW- 2, the absence of any meaningful cross-examination, the evidence given by the other witnesses and the recovery of gold ornaments from the possession of the appellant that the absence of the TIP makes no difference to the case of the prosecution or the identification of the appellant. [para 26-29] [1043-D-G; 1044-B, D-E]

(ii) Testimony of a child witness:

1.3 It is true that PW-2 was about 11 years of age when the incident took place. However, her testimony was recorded after a lapse of 6 years. She was, by then, no longer a "child witness". That apart, her evidence is clear and unambiguous and nothing adverse could be elicited during her cross-examination. [para 30] [1044-F-G]

(iii) Murderous intent of the appellant:

2.1 Looking to the overall facts of the case, there is no reason to disagree with the concurrent view of the trial court and the High Court that the appellant is guilty of murder. In view of the facts that a frail old woman aged about 90 years was dragged down from her cot and beaten on the head by the appellant with a wall clock, it cannot be said that he did not intend the death of the victim or even did not know that his actions would result in her death. [para 31] [1044-H; 1045-A-B]

2.2 However, it seems quite clear, and this was also the case of the prosecution, that the appellant had gone to the house of the complainant for the purpose of committing a robbery. He did not go for the purpose of or with the intention to kill anybody. It is true that he killed the victim, but the house trespass was for the purpose of committing a robbery and not for the purpose of committing an offence punishable with death. Under the circumstances, it would not be proper to convict the appellant of an offence punishable u/s 449 of the IPC. [para 32] [1045-C-D]

2.3 On the facts of the case, both the trial court and the High Court were right in convicting the appellant of offences punishable u/ss 397 and 302 IPC. However, as no case has been made out for convicting him of an offence punishable u/s 449 IPC, he is acquitted of the said charge. [para 1] [1037-C-D]

Case Law Reference:

AIR 1972 SC 283	**cited**	**para 15**
2003 (6) Suppl. SCR 201	**cited**	**para 15**
1996 (2) SCR 1103	**cited**	**para 15**
AIR 1960 SC 1340	**referred to**	**para 20**
1972 (1) SCR 627	**referred to**	**para 21**
1971 (1) SCR 564	**referred to**	**para 21**
2003 (1) Suppl. SCR 443	**referred to**	**para 22**
2010 (8) SCR 1150	**referred to**	**para 23**
1999 (4) Suppl. SCR 286	**referred to**	**para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

No. 38 of 2009.

From the Judgment & Order dated 30.10.2007 of the High Court of Kerala at Ernakulam in Crl. A. No. 835 of 2004 (C).

Purnima Bhar for the Appellant.

Liz Mathew, Sana Hasmi for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question before us is whether, in the absence of a Test Identification Parade (TIP for short), the evidence of a child witness should have been accepted for convicting the appellant. In our opinion, on the facts of this case both the Trial Court and the High Court were right in convicting the appellant for offences punishable under Section 397 (robbery or dacoity, with attempt to cause death or grievous hurt) and Section 302 (punishment for murder) of the Indian Penal Code. However, no case has been made out for convicting the appellant for an offence punishable Section 449 (house trespass in order to commit offence punishable with death) of the IPC.

The facts:

2. On 20th October 1997, the appellant and Jose Joseph came to the residential premises of PW-1 Jose son of Anthony at about 4.30 p.m. with the common intention of committing robbery. While Jose Joseph stood guard near the house, the appellant made an entry and came upon PW-2 Lidiya daughter of PW-1 Jose son of Anthony, who was then aged about 11 years. Thereupon he caught hold of her neck, threatened to kill her and then robbed her of her gold chain and two gold ear studs.

3. Thereafter, he entered one bed room in the house and attempted to rob Lidiya's grandmother Annamma, aged about 90 years of her ornaments. When Annamma raised an alarm

the appellant pulled her down from the cot on which she was lying and beat her on the head with a wall clock. He then robbed her of her gold chain weighing about 5.500 grams by breaking it from her neck and also took two imitation bangles from a bag kept inside the almirah in the room. The appellant then went away from the house.

4. Upon the departure of the appellant and Jose Joseph from the scene of crime, Lidiya went to the school where she learnt dancing from her father and informed him of the incident. They both rushed back to the house along with some friends and on discovering Annamma's condition, she was first taken to Kanjirappally Government Hospital and then to the Kottayam Medical College Hospital for treatment. Unfortunately she passed away on 29th October 1997.

5. On a complaint having been lodged of the robbery, the police investigated the case and during the investigations, on 24th October 1997, the Investigating Officer PW-13 T.A. Salim recovered the stolen articles at the instance of the appellant.

6. On conclusion of investigations, a challan was filed and the appellant was charged with offences punishable under Section 449 of the IPC, Section 397 of the IPC and Section 302 of the IPC. Jose Joseph was also similarly charged but the Trial Judge found him guilty of an offence punishable under Section 411 of the IPC.

7. Both the convicts filed appeals in the High Court. While the appeal filed by Jose Joseph was accepted by the High Court, the appeal of the appellant was rejected and his conviction and sentence upheld.

8. We are, therefore, concerned only with the appeal filed by the appellant.

Decision of the Trial Court:

9. The Trial Judge found from the medical evidence given

by PW-10 Dr. V.P. Rajan, Civil Surgeon in the Kanjirappally Government Hospital that Annamma was aged about 90 years. She had an injury on her forehead above the left eyebrow with suspicion of a fracture, edema of both eyelids and lacerated injury on right side of the forehead. According to him, the injuries could have been caused by a wall clock as alleged by the prosecution. The Trial Judge also considered the medical evidence of PW-11 Dr. Babu, Assistant Professor of Forensic Medicine, Kottayam Medical College that Annamma died on 29th October 1997 as a result of the head injuries sustained by her. The Trial Court found that the evidence of both the doctors was not challenged and proved that Annamma died due to the violence inflicted on her including being hit with a wall clock.

10. The Trial Judge also found no reason to disbelieve the consistent testimony of Jose son of Antony and Lidiya who was an eye witness to the incident.

11. In addition, the Trial Court relied on the testimony of PW-3 Leelamma, a neighbour of Jose son of Antony. Although this witness had turned hostile, she admitted having seen the appellant on the fateful day about 100 meters away from the house of Jose son of Antony. She had seen the appellant earlier also and could, therefore, recognize him. The Trial Judge also relied on the evidence on PW-5 Thankuppam, who was residing close by and had also seen the appellant in the vicinity of the house of Jose son of Antony. This witness had also turned hostile, but confirmed seeing the appellant and that he knew the appellant. It appears that this witness had turned hostile on the issue of having seen both the appellant and Jose Joseph together.

12. The Trial Judge also saw no reason to disbelieve the Investigating Officer who confirmed the recovery of the gold ornaments at the instance of the appellant on 24th October 1997.

13. The principal contention of the appellant before the Trial Judge was that since he was a total stranger to Lidiya, she could not have recognized him in the Court and in the absence of a TIP, reliance on her identification of the appellant could not be considered safe. The Trial Judge rejected this contention on the ground that there was sufficient other evidence to show the presence of the appellant in the vicinity of the house of Jose son of Antony and in view of the corroboration from other witnesses, there was no reason to doubt Lidiya.

14. Accordingly, the Trial Court convicted the appellant and sentenced him to 10 years imprisonment and fine for an offence punishable under Section 449 of the IPC, imprisonment for 7 years and fine for an offence punishable under Section 397 of the IPC and for life for an offence punishable under Section 302 of the IPC. It was directed that the sentences would run concurrently.

Decision of the High Court:

15. Feeling aggrieved, the appellant preferred Criminal Appeal No. 835 of 2004 in the High Court of Kerala. By its Judgment and Order dated 30th October 2007, the High Court rejected the appeal and upheld the conviction of the appellant. The High Court relied upon the evidence of the witnesses mentioned above to uphold the conviction.

16. Before the High Court also the contention urged by the appellant was that since a TIP was not conducted, it would not be safe to rely upon the testimony of Lidiya. However, the High Court rejected this contention by holding that there was clear evidence against the appellant, who had been identified by Lidiya and the witnesses in Court, and in view of the decisions of this Court in *Sk. Hasib v. State of Bihar,* AIR 1972 SC 283, *Bikau Pandey v. State of Bihar,* AIR 2004 SC 997 and *State of Rajasthan v. Kishore,* AIR 1996 SC 3035 there was no reason to interfere with the conviction and sentence.

Accordingly, Criminal Appeal No. 835 of 2004 was dismissed.

Discussion and conclusions:

17. Before us the facts as found by both the Courts below have not been contested by learned counsel for the appellant and rightly so. However, it was submitted that since a TIP was not conducted, the evidence of Lidiya could not be relied upon. Additionally, it was contended that since Lidiya was about 11 years of age at the time of the incident, the evidence of the child witness should be carefully scrutinized. Finally, it was contended that the appellant had no intention to murder Annamma and therefore the conviction for an offence punishable under Section 302 of the IPC was improper.

18. We are unable to agree with the submissions made by learned counsel for the appellant.

(i) Not holding a TIP:

19. We have gone through the decisions referred to by the High Court and find that only *Sk. Hasib* is of any relevance. In that case, this Court explained the purpose of a TIP. It was observed that an identification parade is held at the investigation stage by the investigating officer for a two-fold purpose: to identify the property subject matter of the alleged offence or the person concerned in the alleged offence and to assure the investigating authority that the investigation is proceeding along the right lines. For this reason, the identification parade should be held at the earliest, so that memory does not fade in the meanwhile. More importantly, however, to ensure that the identification parade inspires confidence and is fair and effective, certain precautions need to be taken.

20. In spite of this, it was held, relying on *Vaikuntam Chandrappa v. State of Andhra Pradesh,* AIR 1960 SC 1340 that,

"… the substantive evidence is the statement of a witness in court and the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding."

Consequently, if there is no substantive evidence against an accused, a TIP will not assist the prosecution.

21. The advisability of holding a TIP (particularly with reference to avoidable or unreasonable delay) has been emphasized in *Rameshwar Singh v. State of J & K,* (1971) 2 SCC 715 by tethering it to "proper administration of justice". In *Budhsen v. State of Madhya Pradesh,* (1970) 2 SCC 128 it has been pitched to "the life and liberty of an accused". However, in Budhsen an exception has been noted "when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

22. A more useful and elaborate discussion on the subject is to be found in *Malkhansingh v. State of Madhya Pradesh,* (2003) 5 SCC 746 where the TIP is linked to the requirement of Section 9 of the Evidence Act, 1872 and coupled with the caution that in the absence of a TIP, the weight to be attached to the identification of the accused in Court is a matter for the courts of fact to decide.

23. Similarly, in *Vijay @ Chinee v. State of Madhya Pradesh,* (2010) 8 SCC 191 after a discussion on the subject, it was concluded that,

"… … the test identification is a part of the investigation and is very useful in a case where the accused are not known beforehand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what

is given by the witnesses in the court."

It was noted in Vijay with reference to *State of Himachal Pradesh v. Lekh Raj,* (2000) 1 SCC 247 that the holding of a TIP is "a rule of prudence which is required to be followed in cases where the accused is not known to the witness or complainant."

24. We have gone into some detail on this issue because of the unfortunately cursory manner in which the matter has been dealt with by the Trial Judge and the High Court.

25. The sum and substance of the various decisions referred to above and others on the same lines is that the failure to hold a TIP is not fatal to the case of the prosecution, but the Trial Judge will need to be circumspect in accepting the identification of an accused by a witness in Court if the accused is a stranger to the witness.

26. In the present case, we are not dealing with the evidence of any ordinary witness - we are dealing with a victim of a crime, someone who was directly at the receiving end of the actions of the appellant and who came face to face with the threat and intimidation by the appellant. The evidence of such a victim of a crime must be placed, in our opinion, on a somewhat higher pedestal, in terms of the credibility attached to it, than the evidence of any other witness. We need to seriously consider a partial shift in focus in the "proper administration of justice" by including not only the "life and liberty of an accused" but issues of victimology and the treatment of victims. Theories concerning criminal law and the administration of criminal justice are fast developing and we need to keep up with these developments.

27. What does Lidiya say in her evidence? Firstly, she identifies the appellant but no question is put to her in this regard in her cross-examination. Then, she says of the appellant:

> 'He caught me on my neck and told that if I open my mouth I shall be killed. I was scared and kept mum. He told me to remove my earrings and chain. I being scared removed my earrings and chain and gave it to him."

She reiterates this in her cross-examination and says that she saw the appellant for two minutes. The entire traumatic sequence of events would have been clearly etched in Lidiya's memory, even though it may taken only two minutes. And so, the only question put to her in cross-examination in this regard is "You are deposing falsely that you saw A1 [the appellant]?" which of course she denied.

28. We have considered the delay of about 6 years in recording the evidence of Lidiya, but are of the opinion that on a reading of her testimony the episode did not (understandably) fade away from her memory.

29. It is quite clear from the evidence of Lidiya, the absence of any meaningful cross-examination, the evidence given by the other witnesses and the recovery of gold ornaments from the possession of the appellant that the absence of the TIP makes no difference to the case of the prosecution or the identification of the appellant.

(ii) Testimony of a child witness:

30. This issue need not detain us for any length of time. It is true that Lidiya was about 11 years of age when the incident took place. However, her testimony was recorded, unfortunately, after a lapse of 6 years. She was, by then, no longer a "child witness". That apart, her evidence is clear and unambiguous and nothing adverse could be elicited during her cross-examination. We see no merit in this contention advanced on behalf of the appellant.

(iii) Murderous intent of the appellant:

31. Looking to the overall facts of the case, we see no

reason to disagree with the concurrent view of the Trial Court and the High Court that the appellant is guilty of murder. If a frail old woman aged about 90 years is dragged down from her cot and beaten on the head with a wall clock, it is not difficult to imagine what the consequences would be - and surely the appellant would not be oblivious of them. There is no merit in the submission of learned counsel for the appellant that his client did not intend the death of Annamma or even did not know that his actions would result in her death.

32. However, it seems quite clear, and this was also the case of the prosecution, that the appellant had gone to the house of Jose son of Anthony for the purpose of committing a robbery. He did not go for the purpose of or with the intention to kill anybody. That he killed Annamma is unfortunate, but the house trespass was for the purpose of committing a robbery and not for the purpose of committing an offence punishable with death. Under the circumstances, in our opinion, it would not be proper to convict the appellant for an offence punishable under Section 449 of the IPC. To this extent, therefore, his appeal must be allowed.

Result:

33. There is no merit in this appeal to the extent of the appellant's conviction and sentence for offences punishable under Section 397 and Section 302 of the IPC. Accordingly, it is dismissed in this regard. However, the appeal is allowed to the extent that no offence punishable under Section 449 of the IPC has been made out against the appellant.

R.P. Appeal Partly allowed

BUSI KOTESWARA RAO & ORS.
v.
STATE OF A.P.
(Criminal Appeal No. 454 of 2009)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s.148 and s.436 r/w s.149- Arson and violence between two rival groups of the same village - Conviction of accused-appellants - Justification - Held: Justified - At least two PWs spoke about the involvement and the role played by the appellants - It is clear from the statements made by the PWs that the appellants came in a mob and set ablaze around 50 dwelling houses and reduced them into ashes and the same were identified and the involvement of the appellants was established beyond reasonable doubt.

Sentence / Sentencing - Reduction of sentence - Conviction u/s.436 and sentence of 7 years by trial court - High Court reducing sentence of 3 years - Correctness of - Held: s.436 enables the court to award punishment with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years in addition to fine - In view of the sentence prescribed u/s.436 of IPC, the reduction of sentence by the High Court was not warranted, however, in absence of appeal by the State, such reduction in sentence not disturbed.

Evidence - Clash between rival groups - Large number of offenders and large number of victims - Testimony of witness - Appreciation of - Duty of criminal courts - Held: When a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is

that the conviction can be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question - Administration of Criminal Justice.

There was arson and violence between two rival groups of the same village. It was alleged that the accused-appellants formed an unlawful assembly, and armed with deadly weapons raided a Harijan colony and set ablaze around 50 dwelling houses of the prosecution party and abused them in the name of their caste. Charge sheet was filed against the accused persons for offences punishable under Sections 147, 148, 435, 436 read with Section 149 IPC and Sections 3(1)(v), 3(1)(x), 3(2)(v) and 3(2)(iv) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The trial court found the appellants and the other accused guilty and convicted and sentenced each of them to suffer RI for one year and to pay a fine of Rs.2000/- each, in default, to further undergo simple imprisonment (SI) for one month for the offence punishable under Section 148 IPC and further sentenced each of them to suffer RI for 7 years and to pay a fine of Rs.10,000/-, in default, to further undergo SI for two months for the offence punishable under Section 436 IPC read with Section 149 IPC.

In appeal, the High Court set aside the conviction and sentence of other accused, but upheld the conviction of the appellants under Sections 148 and 436 IPC though it reduced their sentence under Section 436 IPC from 7 years to 3 years while maintaining the amount of fine. Hence the instant appeals.

Dismissing the appeals, the Court

HELD: 1. In the case on hand, total 79 persons were charge-sheeted for various offences under IPC including

Sections 147, 148 and Section 436. Though the prosecution examined 52 witnesses, among those witnesses, PWs 1-42 alone were cited as the eye-witnesses to the occurrence. PWs 2, 4-15, 18, 20, 22, 23 and 26-41 did not support the case of the prosecution and were declared hostile witnesses. On the other hand, PWs 1, 3, 16, 17, 19, 21, 24, 25 and 42 supported the version of the prosecution. [Para 4] [1052-G-H; 1053-A]

2.1. The incident in question was a group clash between two rivalries. In such type of incidents, an onerous duty is cast upon the criminal courts to ensure that no innocent is convicted and deprived of his liberties. At the same time, in the case of group clashes and organized crimes, persons behind the scene executing the crime should not be allowed to go scot-free. In other words, in cases involving a number of accused persons, a balanced approach by the court is required to be insisted upon. In cases of arson and murder where large number of people are accused of committing crime, the courts should be cautious to rely upon the testimony of witnesses speaking generally without specific reference to the accused or the specific role played by them. [Para 5] [1053-C-E]

2.2. It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question. [Para 7] [1054-E-F]

2.3. In the instant case, as discussed by the High Court, PWs 1-21 spoke about the participation of A-1 and A-38 whereas PWs 3 and 42 narrated with regard to the participation of A-4 and PWs 16 and 17 described about the participation of A-30. In the same way, the participation

of the 12 accused persons has been spoken to by two or more witnesses. Inasmuch as at least two prosecution witnesses have spoken about the involvement and the role played by the above accused persons, there is no reason to differ with the decision arrived by the High Court. It is clear from the statements made by the witnesses on the side of the prosecution that the appellants/accused came in a mob and set ablaze around 50 dwelling houses and reduced them into ashes and the same were identified and their involvement is established by the reliable prosecution witnesses beyond reasonable doubt which cannot be disturbed. On the other hand, the view and the ultimate decision arrived by the High Court is fully endorsed. [Paras 11, 12] [1055-C-G]

Masalti & Ors. v. The State of Uttar Pradesh **AIR 1965 SC 202: 1964 SCR 133 and** *State of U.P. v. Dan Singh and Others* **(1997) 3 SCC 747: 1997 (1) SCR 764 - relied on.**

3. Coming to the sentence, the prosecution has established the offence under Sections 148 and 436 of IPC. Insofar as the appellants are concerned, though the trial Court has awarded 7 years of imprisonment, the High Court reduced the same to 3 years while maintaining the fine amount. In fact, Section 436 IPC enables the court to award punishment with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years in addition to the fine. Keeping in view the sentence prescribed under Section 436 IPC, the reduction of sentence by the High Court is not warranted, however, in the absence of appeal by the State, this Court is not inclined to disturb the same. [Para 13] [1055-H; 1056-A-B-C]

Case Law Reference:

1964 SCR 133	**relied on**	**Para 6**
1997 (1) SCR 764	**relied on**	**Paras 8,9,12**

CRIMINAL APPELLLATE JURISDICTION : Criminal Appeal No. 454 of 2009 etc.

From the Judgment & Order dated 20.06.2007 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 368 of 2003.

WITH

Crl. A. No. 455 of 2009.

V. Sridhar Reddy, V.N. Raghupathy for the Appellants.

Mayur R. Shah, Suchitra, Amit Nain, Savita M.B. Shivudu, D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the final judgments and orders dated 20.06.2007 and 13.06.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal Nos. 368 and 367 of 2003 respectively whereby the High Court while setting aside the conviction and sentence of other accused, partly allowed the criminal appeals upholding the conviction of the appellants herein for the offences punishable under Sections 148 and 436 of the Indian Penal Code, 1860 (in short 'the IPC') and reduced the sentence for the offence punishable under Section 436 of the IPC from 7 years to 3 years while maintaining the amount of fine and directed the appellants herein to surrender themselves before the trial Court in order to serve the remaining period of sentence.

2. **Brief facts:**

a) There were land disputes between two groups at Pedagarlapadu Village, Guntur District, Andhra Pradesh in respect of the lands belonging to the Temples which were leased out by the Endowments Department to the upper class people of the village and there was resentment in local dalits

for the same. One day, the agitators trespassed into the said lands, in respect of which, Pinnam Peda Subbaiah-the leaseholder filed a complaint which resulted into a deep seated rivalry between the two groups.

b) In order to take revenge, the other party attacked the leaseholder to commit his murder. In retaliation, on 14.04.1997, the accused/appellants, formed an unlawful assembly, armed with deadly weapons, raided the Harijan colony and set ablaze around 50 dwelling houses of the prosecution party and abused them in the name of their caste.

c) The Inspector of Police, Dachepalli took up the investigation which culminated into registration of Crime Nos. 29 and 28 of 1997 and later, the case was transferred to the Crime Investigation Department (CID). The Deputy Superintendent of Police, CID, Vijayawada filed the charge sheet against the accused persons for the offence punishable under Sections 147, 148, 435, 436 read with Section 149 IPC and Sections 3(1)(v), 3(1)(x), 3(2)(v) and 3(2)(iv) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the SC & ST Act').

d) The cases were committed to the Court of Special Sessions Judge, Guntur under the SC & ST Act and numbered as S.C. Nos. 63/S/2000 and 62/S/2000. In both the cases, by separate orders dated 24.03.2003, the Special Sessions Judge found the appellants herein and others guilty for the offence punishable under Sections 148 and 436 of the IPC and convicted and sentenced each of them to suffer RI for one year and to pay a fine of Rs.2000/- each, in default, to further undergo simple imprisonment (SI) for one month for the offence punishable under Section 148 IPC and further sentenced each of them to suffer RI for 7 years and to pay a fine of Rs.10,000/-, in default, to further undergo SI for two months for the offence punishable under Section 436 IPC read with Section 149 IPC.

e) Aggrieved by the said order of conviction and sentence,

the two appeals being Criminal Appeal Nos. 368 and 367 of 2003 were filed before the High Court.

f) By impugned order dated 20.06.2007 in Criminal appeal No. 368 of 2003 and order dated 13.06.2007 in Criminal Appeal No. 367 of 2003, the High Court, partly allowed the appeals and while setting aside the conviction and sentence of other accused, upheld the conviction of the appellants herein for the offences punishable under Sections 148 and 436 IPC but reduced the sentence for the offence punishable under Section 436 IPC from 7 years to 3 years while maintaining the amount of fine.

g) Aggrieved by the said order, Busi Koteswara Rao (A-1), Pinnam Nageswara Rao (A-4) and Busa Mattayya (A-30) have filed Criminal Appeal No. 454 of 2009 and Busi Koteswara Rao (A-1), Katakam Pedda Biksham (A-11), Katakam China Biksham (A-12), Busa Mattayya (A-13), Busa Kotaiah (A-14), Pinnam Rangaiah (A-15), Pinnam Sankar (A-17), Pinnam Nageswara Rao (A-19), Boosa Srinu (A-21), Marasu Venkata Swamy (A-22), Pinnam Ramana (A-24) and Pinnam China Subbayya A-25 have filed Criminal Appeal No. 455 of 2009 before this Court by way of special leave.

3. Heard Mr. V. Sridhar Reddy, learned counsel for the appellants/accused and Mr. Mayur R. Shah, learned counsel for the respondent-State.

4. In the case on hand, total 79 persons were chargesheeted for various offences under IPC including Sections 147, 148 and Section 436. Though the prosecution has examined 52 witnesses and exhibited 12 documents in support of their case, among those witnesses, PWs 1-42 alone were cited as the eye-witnesses to the occurrence. Due to the arson and violence that had happened on 14.04.1997 between two groups of the same village, about 50 dwelling houses reduced into ashes. PWs 2, 4-15, 18, 20, 22, 23 and 26-41 did not support the case of the prosecution and were declared

hostile witnesses. On the other hand, PWs 1, 3, 16, 17, 19, 21, 24, 25 and 42 supported the version of the prosecution.

5. According to the prosecution, there was a friction amongst the two groups of the same village. The prosecution party belongs to Telugu Desam Party and the accused Party belongs to Congress (I). It is also projected by the prosecution that apart from the political rivalry, there is also serious enmity between the parties in respect of lease of temple lands. There is no dispute that the incident occurred on 14.04.1997 was a group clash between two rivalries. In such type of incidents, an onerous duty is cast upon the criminal courts to ensure that no innocent is convicted and deprived of his liberties. At the same time, in the case of group clashes and organized crimes, persons behind the scene executing the crime, should not be allowed to go scot-free. In other words, in cases involving a number of accused persons, a balanced approach by the court is required to be insisted upon. In a series of decisions, this Court has held that in cases of arson and murder where large number of people are accused of committing crime, the courts should be cautious to rely upon the testimony of witnesses speaking generally without specific reference to the accused or the specific role played by them.

6. Even, as early as in 1965, a larger Bench of this Court in *Masalti & Ors. vs. The State of Uttar Pradesh,* AIR 1965 SC 202 considered about how the prosecution case is to be believed. The principles laid down in para 16 of the decision are relevant which is as under:-

> "16. Mr Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case."

7. It is clear that when a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, the normal test is that the conviction could be sustained only if it is supported by two or more witnesses who give a consistent account of the incident in question.

8. No doubt, in *State of U.P. vs. Dan Singh and Others* (1997) 3 SCC 747, a Bench of two-Judges, in para 48 has held that "……it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least 4 eye-witnesses…."

9. We have already quoted the requirements for convicting an accused in a clash between two groups as per *Masalti* (supra) which is a larger Bench decision of this Court. In the light of the same, we reiterate and hold that when an unlawful assembly or a large number of persons take part in arson or

in a clash between two groups, in order to convict a person, at least two prosecution witnesses have to support and identify the role and involvement of the persons concerned.

10. With the above background, let us consider whether the impugned order of the High Court convicting A-1, A-4 and A-30 in Criminal Appeal No. 454 of 2009 and A-1, A-11, A-12, A-13 to A-15, A-17, A-19, A-21, A-22, A-24 and A-25 in Criminal Appeal No. 455 of 2009 is sustainable.

11. We were taken through the statements of witnesses who supported the case of the prosecution. We also perused all the relevant documents and connected papers. As discussed by the High Court, PWs 1-21 spoke about the participation of A-1 and A-38 whereas PWs 3 and 42 narrated with regard to the participation of A-4 and PWs 16 and 17 described about the participation of A-30. In the same way, the participation of the above mentioned 12 accused persons in Criminal Appeal No. 455 of 2009 has been spoken to by two or more witnesses.

12. By applying the principles laid down in Masalti (supra) and as reiterated by us in the above paragraphs, inasmuch as at least two prosecution witnesses have spoken to about the involvement and the role played by the above accused persons, we have no reason to differ with the decision arrived by the High Court. It is clear from the statements made by the witnesses on the side of the prosecution that the appellants/accused came in a mob and set ablaze around 50 dwelling houses and reduced them into ashes and the same were identified and their involvement is established by the reliable prosecution witnesses beyond reasonable doubt which cannot be disturbed. On the other hand, we fully endorse the view and the ultimate decision arrived by the High Court.

13. Coming to the sentence, the prosecution has established the offence under Sections 148 and 436 of IPC. Insofar as the appellants are concerned, though the trial Court has awarded 7 years of imprisonment, the High Court reduced

the same to 3 years while maintaining the fine amount. In fact, Section 436 IPC enables the court to award punishment with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years in addition to the fine. We have already noted that the dwelling houses of PWs 1-42 were set on fire and reduced into ashes by the above appellants/accused and the same have been duly established by the prosecution beyond reasonable doubt. Taking note of the sentence prescribed under Section 436 of IPC, we are of the view that even the reduction of sentence by the High Court is not warranted, however, in the absence of appeal by the State, we are not inclined to disturb the same.

14. In the light of the above discussion, both the appeals are dismissed. In view of the fact that this Court on 06.03.2009 enlarged all the appellants on bail, if any portion of the sentence is left out, they are directed to surrender within a period of 2 weeks from today to undergo the remaining sentence.

B.B.B. Appeals dismissed

JASVIR KAUR
v.
STATE OF PUNJAB
(Criminal Appeal No. 1961 of 2012)

NOVEMBER 26, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Sentence / Sentencing - Offence of cheating - Appellant's husband was Head Constable in the Punjab Police - Allegation that appellant and her husband extracted money from the informant by making false promise that a job would be arranged for him in the Police - Both the accused, the appellant and her husband were found guilty of cheating by the courts below u/s.420 IPC and both were given the same punishment, i.e. imprisonment for two years - Notice issued by Supreme Court on the question of sentence in the case of appellant - Held: Though, both appellant and her husband were convicted for the same offence, it does not necessarily follow that they should be punished in the same way - The courts below overlooked their relative role in the commission of the offence - From the prosecution case and the evidence of witnesses it is evident that the primary role in the commission of the offence was of the appellant's husband, and the appellant had only a subsidiary role - It also needs to be kept in mind that she is a woman - In view of the aforesaid facts, the appellant deserves a lesser punishment than the other accused, her husband - Sentence of one year imprisonment to the appellant would meet the ends of justice - Penal Code, 1860 - s.420 - Administration of criminal justice.

Hiralal Mallick v. State of Bihar, **(1977) 4 SCC 44 - referred to.**

Case Law Reference:

(1977) 4 SCC 44	**referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1961 of 2012.

From the Judgment & Order dated 28.11.2011 of the High Court of Punjab & Haryana at Chandigarh in Criminal Revision No. 2576 of 2011.

J.P. Dhanda, Abhijeet Sah for the Appellant.

V. Madhurkar, AAG, S. Mathur (for Kuldip Singh) for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The appellant along with her husband has been convicted under Section 420 of the Penal Code and both of them are sentenced to imprisonment for two years and a fine of Rs.2,000/- with the default sentence of 15 days' imprisonment.

3. The special leave petition giving rise to the present appeal was filed both by the present appellant as petitioner No.1 and her husband - Ginder Singh as petitioner No.2. The special leave petition at the instance of the husband was dismissed and in case of the appellant, notice was issued only on the question of sentence. We, accordingly, proceed to consider the appeal to that limited extent.

4. According to the prosecution case Ginder Singh who was a Head Constable in the Punjab Police extracted Rs.70,000/- from the informant Angrej Singh by making the false promise that he would arrange for a job for him in the Police. The deal was struck at Rs.1,40,000/-; half of which, i.e., Rs.70,000/- was to be paid in advance and the balance half, after the employment was made. It is further the prosecution

case that on September 22, 2002, the informant paid Rs.50,000/- to Ginder Singh at his quarter in the presence of his wife. Ginder Singh took the money and handed it over to his wife, the present appellant, who counted it before the informant. A few days later both the accused came to the house of the informant to collect the balance amount of Rs.20,000/-. Needless to say that neither any employment was provided to the informant nor was the money refunded to him.

5. Both the accused were tried by Judicial Magistrate, 1st Class, Faridkot, who, by his judgment and order dated March 29, 2010, passed in Criminal Case No.543 dated 14-10-2005 (arising out of FIR No.22 dated June 2, 2004), convicted and sentenced the accused, as noted above.

6. Their appeal (Criminal Appeal No.75 of 14.10.2005) was dismissed by the judgment and order dated September 30, 2011 by the Additional Sessions Judge, Faridkot and their revision [(Criminal Revision No.2576 of 2011) (O&M)] was similarly rejected by the High Court without any modification in the conviction or sentence vide judgment dated November 28, 2011.

7. Coming now to the issue of punishment, sentencing of the convicted accused which is at the heart of the administration of criminal justice is both a delicate and difficult task. In *Hiralal Mallick v. State of Bihar*[1] Krishna Iyer, J. quoted the English Judge Henry McCardie as saying "Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty". Unfortunately, however, the question of sentencing does not receive due importance and the requisite application of mind by the courts. In our country, there is very little legislative, judicial or any other kind of guidance available to meaningfully deal with the question of sentencing. The absence of any guidelines makes the task of the court more difficult and casts a heavy responsibility on it to

1. (1977) 4 SCC 44.

calibrate the due punishment that might be awarded to a convict, taking into consideration all the relevant facts and circumstances. It is, however, regrettable that the courts hardly give the question of sentencing as much attention and application of mind as it deserves. The present is a case in point. As seen above, both the accused, the wife and the husband have been found guilty of cheating and both of them have been given the same punishment, i.e., imprisonment for two years and a fine of Rs.2,000/-. Though, both the accused, the wife and the husband are convicted for the same offence, it does not necessarily follow that they should be punished in the same way. What seems to have been overlooked is their relative role in the commission of the offence.

8. From the prosecution case and the evidence of witnesses it is evident that the primary role in the commission of the offence was of Ginder Singh, the husband, and the wife (the present appellant) had only a subsidiary role. It also needs to be kept in mind that she is a woman. In view of the aforesaid facts, the appellant deserves a lesser punishment than the other accused, her husband who played the main role in the commission of the offence.

9. In light of the discussion made above, we are of the view that a sentence of one year imprisonment to the appellant would meet the ends of justice. We, accordingly, modify and reduce her sentence of imprisonment from two years to one year leaving the fine undisturbed.

10. The appeal is allowed to the limited extent, as indicated above.

B.B.B. Appeal Partly allowed.

SASIKUMAR & ANR.
v.
STATE OF KERALA
(Criminal Appeal No. 1987 of 2012)

DECEMBER 4, 2012

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

(Kerala) Abkari Act - s.8(1) r/w s.8(2) - Illicit trade in arrack - Three accused -Seizure of two cans containing 40 litres of arrack from their possession - Trial court convicted all the accused and sentenced them to RI for 3 years and a fine of Rs.1,00,000/- with default sentence of one year RI - High Court, though maintaining the conviction, reduced the sentence to RI for 18 months and the default sentence for failure to pay the fine, to RI for six months - On appeal before Supreme Court by two accused i.e. the two appellants - Held: The conviction of the appellants was justified - However, from the quantity seized and the manner in which it was being carried, it is evident that the accused were only small time operators in the illicit trade of arrack - In the circumstances, sentence reduced to one year RI and sentence in default of payment of fine reduced to 15 days in the case of the appellants - Relief granted to appellants extended to the non-appealing accused as well, since no distinction between him and the case of the appellants.

(Kerala) Abkari Act - s.8(1) r/w 8(2) - Illicit trade in arrack - Minimum fine prescribed at Rs.1,00,000/- in terms of s.8(2) - Default sentence/imprisonment for failure to pay the fine - Effect of - Observation made by Supreme Court that in a way, fixing the minimum fine at such a high amount (i.e. Rs.1,00,000/-), leads to a) discrimination in favour of convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and b) additional sentence of imprisonment for poor convicts as they are hardly in a position

to pay such high amount of fine - It is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine.

According to the prosecution, the three accused were coming in an auto-rickshaw when they saw a police party whereupon all of them ran away leaving the auto-rickshaw at the spot. On inspection, the police found two cans containing 40 litres of arrack lying inside the auto-rickshaw.

The trial court convicted the three accused under Section 8(1) read with 8(2) of the (Kerala) Abkari Act and sentenced them to rigorous imprisonment for three years and a fine of Rs.1,00,000/- with default sentence of one year rigorous imprisonment. In appeal, the High Court, though maintaining the conviction, reduced the sentence to rigorous imprisonment for 18 months and the default sentence for failure to pay the fine, to rigorous imprisonment for six months.

The accused No.1 apparently accepted the judgment of the High Court and did not prefer any SLP. The other two accused, i.e., the appellants, however, came up before this Court in the present appeal challenging their conviction as also the sentence awarded to them.

Partly allowing the appeal, the Court

HELD: 1. Both the trial court and the High Court have meticulously considered the evidences led by the prosecution and have rightly arrived at the conclusion in regard to the appellants' guilt. Insofar as the conviction of the appellants under Section 8(1) of the Abkari Act is concerned, there is no scope for any interference and the conviction of the appellants as recorded by the trial court and affirmed by the High Court is upheld. [Para 7] [1065-H; 1066-A]

2. From the facts of the case it is evident that the appellants (accused nos.2 and 3) as well as accused no.1 are not the real men behind the nefarious trade of illicit intoxicants in the State. From the quantity seized from the possession of the accused and the manner in which it was being carried, it is evident that the three accused were only small time operators in the illicit trade of arrack and though visible, they constitute the weakest link in the chain of illicit trade in arrack. In those circumstances, a further reduction of the sentence would be quite in order. Accordingly, the sentence of imprisonment is reduced from 18 months, as awarded by the High Court, to one year and further the sentence in default of payment of fine is reduced from six months to fifteen days. [Para 11] [1066-H; 1067-A-C]

3. Accused No.1 is not before this Court presumably on account of poverty, as his appeal to the High Court was also a jail appeal. There is no distinction between the case of the appellants (accused nos.2 and 3) and the case of accused No.1 and, accordingly, the relief granted to the two appellants is extended to accused No.1 as well. [Para 12] [1067-D]

4. Before parting with this case, this Court would like to point out that Section 8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than Rs.1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. It may be noted that in cases where poor people like the appellants who may only be the carrier of the arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of Rs.1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission of the offence under Section 8(1), leads to discrimination in favour of those convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and the small fries for whom the default sentence would invariably mean an additional sentence of imprisonment. It is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine. [Para 13] [1067-E-H; 1068-A]

CRIMINAL APPELLLATE JURISDICTION : Criminal Appeal No. 1987 of 2012.

From the Judgment & Order dated 04.08.2011 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 1338 of 2010.

Raghenth Basant (For Senthil Jagadeesan) for the Appellants.

Jogy Scaria for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted.

2. The two appellants (who are accused Nos.2 & 3), along with one Narayanan (accused No.1) have been convicted under Section 8(1) read with 8(2) of the (Kerala) Abkari Act. They were sentenced by the trial court to rigorous imprisonment for three years and a fine of Rs.1,00,000/- with the default sentence of one year rigorous imprisonment. In appeal the High Court, though maintaining the conviction, reduced the sentence to rigorous imprisonment for 18 months and the default sentence for failure to pay the fine, to rigorous imprisonment for a period of six months. The High Court also directed that the accused would be entitled to get the benefit of set off under Section 428 of the Code of Criminal Procedure.

3. According to the prosecution case, on March 12, 2005 at about 11:15 AM the accused were seen coming in an auto-rickshaw bearing registration No.KL-03-F-3146. The auto-rickshaw belonged to and it was being driven by appellant No.2. On seeing the police party, all the three occupants ran away leaving the auto-rickshaw at the spot. On its inspection, the police found two (2) 20 litres cans containing 40 litres of arrack lying inside the auto-rickshaw and, thus, according to the police, the accused had committed the offence under Section 8(1) of the Abkari Act.

4. The three accused were tried by the Court of the Additional District and Sessions Judge (Ad-hoc) Fast Track Court-I, Pathanamthitta who, by his judgment and order dated June 22, 2010 in Sessions Case No.682/2006 convicted and sentenced them, as noted above.

5. The three accused came to the High Court in two separate appeals, being Criminal Appeal No.1338 of 2010 preferred by the two appellants before this Court and Criminal Appeal No.2198 of 2010 submitted to the High Court as jail appeal on behalf of accused No.1 Narayanan. The High Court disposed of both the appeals by judgment and order dated August 4, 2011. It maintained their conviction but modified and reduced their sentence, as noted above.

6. The accused No.1 Narayanan apparently accepted the judgment of the High Court and has not preferred any special leave petition against the High Court judgment. The other two accused, i.e., the appellants are before this Court in the present appeal.

7. We have heard Mr. R. Basant, learned counsel for the appellants and we have gone through the materials on record. We find that both the trial court and the High Court have meticulously considered the evidences led by the prosecution and have rightly arrived at the conclusion in regard to the appellants' guilt. Insofar as the conviction of the appellants under

Section 8(1) of the Abkari Act is concerned, there is no scope for any interference and we uphold the conviction of the appellants as recorded by the trial court and affirmed by the High Court.

8. Mr. Basant, however, urged before us to take a lenient view in regard to the sentence awarded to the appellants.

9. On the question of sentence, the High Court in paragraph 19 of its judgment has made the following observations:-

> "It is relevant to note that at the time of registration of the crime, first accused was at the age of 57 and accused Nos.2 and 3 were at the age of 42 and 48 respectively. Now six years are over. Therefore, first accused will be at the age of 63, second accused at the age of 48 and third accused at the age of 54. The prosecution has no case that the accused are habitual offenders. Having regard to the above facts and the mitigating circumstances, I am of the view that the substantial sentence imposed against the accused requires reconsideration. Thus, according to me, 18 months rigorous imprisonment will be sufficient to meet the ends of justice. While confirming the sentence of fine, the default sentence can be reduced to six months. In the result, in modification of sentence imposed by the trial court, the accused are sentenced to undergo rigorous imprisonment for 18 months each and to pay fine of Rs.1 lakh each and in default, each of them is directed to undergo simple imprisonment for a period of six months instead of one year rigorous imprisonment ordered by the trial court. The appellants are entitled to get the benefit of set off under Section 428 of Cr.P.C."

10. We agree with the view taken by the High Court.

11. We would like to further observe that from the facts of the case it is evident that the appellants and the other accused

in this case are not the real men behind the nefarious trade of illicit intoxicants in the State. From the quantity seized from the possession of the accused and the manner in which it was being carried, it is evident that the three accused were only small time operators in the illicit trade of arrack and though visible, they constitute the weakest link in the chain of illicit trade in arrack. In those circumstances, we think a further reduction of the sentence would be quite in order. We, accordingly, reduce the sentence of imprisonment from 18 months, as awarded by the High Court, to one year and further reduce the sentence in default of payment of fine from six months to fifteen days.

12. Accused No.1, Narayanan is not before this Court presumably on account of poverty, as his appeal to the High Court was also a jail appeal. We find there is no distinction between the case of the appellants and the case of accused No. 1 and, accordingly, extend the relief granted to the two appellants to accused No.1 Narayanan as well.

13. Before parting with the record of the case, we would like to point out that Section 8(2) of the Abkari Act does not fix any upper limit for the fine but lays down that the fine shall not be less than Rs.1,00,000/-. Since the minimum amount of fine prescribed by the law is kept so high, the courts naturally give the default sentence of imprisonment for a substantially longer period. As noted above, the trial court has given the default sentence of one year which was reduced by the High Court to six months. We may note that in cases where poor people like the appellants who may only be the carrier of the arrack or who may be trying to eke out a living from the illegal trade are caught committing the offence, they are hardly in position to pay the fine of Rs.1,00,000/- and for them the default sentence becomes an additional period of incarceration. In a way, fixing the minimum fine at such a high amount, regardless of the countless possible variables in the commission of the offence under Section 8(1), leads to discrimination in favour of those

convicts who have sufficient means to pay the fine and, thus, avoid any default imprisonment and the small fries for whom the default sentence would invariably mean an additional sentence of imprisonment. To our mind, it is desirable to leave the Court free in exercise of judicial discretion in the matter of imposition of fine.

14. In the light of the discussion made above, the appeal is allowed to the limited extent, as directed above.

B.B.B. Appeal partly allowed.

GUDU RAM
v.
STATE OF HIMACHAL PRADESH
(Criminal Appeal No. 862 of 2008)

DECEMBER 4, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 - s.304, second part - Assault with 'thapi'- a wooden object shaped like a cricket bat used for beating clothes while washing - Death of one person due to head injuries and injury to another person (PW1) - Conviction of accused-appellant u/s.302 IPC - Justification - Held: PW1 categorically stated that appellant attacked him with a wooden stick like a 'thapi' and pushed him in the bushes - Presence of appellant (and none other) at the scene of occurrence not in doubt - Medical evidence showed that injuries on PW1 as also on the deceased could have been caused by a 'thapi' - In the circumstances of the case, conclusion inescapable that none other than the appellant attacked PW1 and the deceased and inflicted injuries on them with a thapi - Insinuation that PW1 committed the crime too nebulous - It is true that the appellant caused multiple injuries on the deceased, but it is difficult to infer therefrom that the appellant intended to kill him - His intention seems to have been to injure PW1 and to severely injure the deceased - The conduct of PW1 also points to the intentions of the appellant - PW1 did not expect the assault on the deceased to be fatal, otherwise he would have tended to the needs of the deceased rather than have gone to call PW2 - The attack was not so severe (in the estimation of PW1) as to have imminently caused the death of the deceased - It is quite clear that the appellant had no intention to kill the deceased - However, the nature and number of injuries and their location (the skull) as well as the "weapon" used (a small wooden cricket bat) leads

to the conclusion that to a reasonable person, an attack of the nature launched by the appellant on the deceased could cause his death - Clearly the appellant had knowledge that his actions were likely to cause the death of the deceased - He would, therefore, be guilty of culpable homicide not amounting to murder and liable to be sentenced under the second part of s.304 IPC.

Witness - Hostile witness - Appreciation of - Held: The evidence of a hostile witness need not be completely rejected only because he has turned hostile - The Court must, however, be circumspect in accepting the testimony of such a witness and, to the extent possible, look for its corroboration.

Evidence - Circumstantial evidence - Appreciation of - Held: No doubt, proof cannot be substituted by robust suspicion - But if all the facts and circumstances point to only one conclusion, it is difficult to ignore them and even in a case of circumstantial evidence, it is possible to secure a conviction.

PW-2 was living in a rented accommodation with his brother (PW-1), cousin brother ('D') and wife's cousin (appellant). On the incident night, during consumption of drinks and dinner, the appellant and 'D' got involved in a scuffle. To prevent the scuffle from escalating, PW1 asked 'D' to accompany him to PW2's place of work so that 'D' could spend the night over there away from the appellant. It is alleged that when PW1 and 'D' had walked about 50-60 yards, the appellant appeared from behind and hit PW1 on the head with a thapi [a wooden object shaped like a cricket bat used for beating clothes while washing] and pushed him into the bushes. Thereafter, the appellant hit 'D' with the thapi and pushed him also into the bushes. PW1 did not sustain any serious injury and so he got up and went to inform PW2 about the incident. Thereafter, PW 2 accompanied by PW1 came upon 'D' lying in the bushes and took him to the hospital where

he succumbed to his injuries. The doctor was of the opinion that 'D' died due to hemorrhagic shock as a result of ante mortem head injuries. He was also of the opinion that the injuries could possibly have been caused by a wooden stick or thapi.

The appellant was charged with having committed the murder of 'D'. PW1, the only eyewitness to the crime, turned hostile. The trial court, however, held that the appellant had murdered 'D' and accordingly convicted him under Section 302 IPC. In appeal, the High Court upheld the conviction of the appellant holding that there was sufficient evidence to conclude that none other than the appellant caused the death of 'D'.

The question raised in the instant appeal was whether, despite PW1, the sole eyewitness to the incident, turning hostile, could the Trial Court and the High Court legitimately hold that the appellant committed the murder of 'D'.

Disposing of the appeal, the Court

HELD: 1.1. Despite the sole eyewitness PW1 turning hostile, it can and should be held on the facts of this case that though the appellant did commit a crime, it was not of murder but culpable homicide not amounting to murder. [Para 1] [1075-G]

1.2. The evidence of a hostile witness need not be completely rejected only because he has turned hostile. The Court must, however, be circumspect in accepting his testimony and, to the extent possible, look for its corroboration. [Para 23] [1081-E]

1.3. From the evidence of PW1, it is clear that he categorically stated that the appellant attacked him with a wooden stick like a thapi and pushed him in the bushes. To this extent the evidence of PW1 is quite clear

and he did not recant from this. Then he goes on to say that though he noticed the appellant, he did not actually see him beat 'D' or throw him in the bushes. But the fact is that 'D' was beaten by someone and pushed into the bushes. There is nothing to suggest the presence of any third person. The presence of the appellant (and none other) at the scene of occurrence is not in doubt. [Para 27] [1082-E-G]

1.4. The medical evidence shows that injuries on PW1 could have been caused by a blunt wooden stick such as a thapi. Again, to this extent, the evidence of PW1 is consistent. As per the medical evidence, the injuries on 'D' could also have been caused by a similar wooden stick or thapi. Under these circumstances, the conclusion is inescapable that none other than the appellant attacked PW1 and 'D' and inflicted injuries on them with a thapi. [Para 28] [1082-H; 1083-A]

1.5. PW1 was a credible witness and his testimony to the extent that it implicates the appellant should be accepted. The insinuation that PW1 committed the crime was too nebulous. The family dispute between PW1 and 'D' was obviously not particularly serious since 'D' had ventured to stay with PW1 and his brother PW2 in the same rented accommodation for about one year. In any event, this was not even the case set up by the appellant in his statement under Section 313 Cr.P.C. [Paras 33, 34] [1084-A-C]

Karuppanna Thevar v. State of T.N. **(1976) 1 SCC 31;** *Bhagwan Singh v. State of Haryana* **(1976) 1 SCC 389: 1976 (2) SCR 921;** *Rabindra Kumar Dey v. State of Orissa* **(1976) 4 SCC 23;** *Bhajju v. State of M.P.* **(2012) 4 SCC 327 and** *Ramesh Harijan v. State of U.P.* **(2012) 5 SCC 777 - relied on.**

2. The conduct of the appellant leaves a lot to be desired. The Trial Judge and the High Court found it

suspicious (and so does this Court) that on the intervening night of 12th and 13th November, 2003 the appellant should leave the place of occurrence for his village. According to the statement of the appellant under Section 313 Cr.P.C. he had left the place of occurrence before the incident took place. This may or may not be true, but it is certainly relevant for appreciating his conduct. In this context, it would be worthwhile to refer to Section 8 of the Evidence Act, 1872 which makes relevant the conduct of the appellant subsequent to the crime. Similarly, the recovery of a bloodstained pajama from the appellant's house adds to the circumstances that call for an explanation from the appellant. However, no explanation has been forthcoming on either issue. [Paras 29, 30 and 31] [1083-B-E]

3. No doubt, proof cannot be substituted by robust suspicion. But if all the facts and circumstances point to only one conclusion, it is difficult to ignore them and even in a case of circumstantial evidence, it is possible to secure a conviction. The present case is much stronger since there is an eyewitness to the incident and both the Trial Court and the High Court accepted the version of events given by PW1. In such circumstances, this Court should not normally interfere with the conclusion expressed concurrently by the Trial Court and the High Court. Interference is, however, permissible in exceptional circumstances - but the circumstances of this case are not found to be exceptional. [Para 32] [1083-F-H]

Ramachandran v. State of Kerala **2012 (10) SCALE 592 - relied on.**

4.1. It is true that the appellant caused multiple injuries on 'D', but it is difficult to infer from this that the appellant intended to kill him. His intention seems to have been to injure PW1 and to severely injure 'D' and after

beating them up with a thapi, he pushed them into the bushes and walked away. It cannot be imagined that his intention was to injure PW1 but kill 'D'- he would be leaving behind PW1 as an eyewitness. [Para 36] [1084-E-F]

4.2. The conduct of PW1 also points to the intentions of the appellant. PW1 did not expect the assault on 'D' to be fatal, otherwise he would have tended to the needs of the victim rather than have gone to call PW2. That the delay in attending to 'D' may have eventually led to his death is another matter altogether, but the attack was not so severe (in the estimation of PW1) as to have imminently caused the death of 'D'. [Para 37] [1084-G-H]

4.3. Even though the situation in pregnant with hypotheses, it is quite clear that the appellant had no intention to kill 'D' and even the rejection of the hypotheses cannot lead to the conclusion that the appellant intended to kill 'D'. [Para 38] [1085-A]

4.4. However, the nature and number of injuries and their location (the skull) as well as the "weapon" used (a small wooden cricket bat) leads to the conclusion that to a reasonable person, an attack of the nature launched by the appellant on 'D' could cause his death. While it may be difficult to delve into the mind of the attacker to decode his intentions, knowledge of the consequences of his actions can certainly be attributed to him. [Para 39] [1085-B-C]

4.5. Accordingly, it is clear that the appellant had knowledge that his actions are likely to cause the death of 'D'. He would, therefore, be guilty of culpable homicide not amounting to murder. Under the circumstances, the conviction of appellant for the murder of 'D' is set aside but he is convicted under the second part of Section 304 IPC. However, inasmuch as the appellant has already

undergone over eight years of actual imprisonment and almost eleven years including remissions earned, under the circumstances, he is sentenced to imprisonment for the period already undergone. [Paras 40, 41 and 42] [1085-D-G]

Case Law Reference:

(1976) 1 SCC 31	**relied on**	**Para 24**
1976 (2) SCR 921	**relied on**	**Para 25**
(1976) 4 SCC 23	**relied on**	**Para 25**
(2012) 4 SCC 327	**relied on**	**Para 26**
(2012) 5 SCC 777	**relied on**	**Para 26**
2012 (10) SCALE 592	**relied on**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 862 of 2008.

From the Judgment and Order dated 31.10.2007 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 562 of 2004.

T. Anamika for the Appellant.

Naresh K. Sharma and Abhishek Sood for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question before us is whether, despite the sole eyewitness to the incident turning hostile, could the Trial Court and the High Court legitimately hold that the appellant committed the murder of Dalip Singh. In our opinion, despite the sole eyewitness turning hostile, it can and should be held on the facts of this case that though the appellant did commit a crime, it was not of murder but culpable homicide not amounting to murder.

The facts:

2. PW-2 Sheetal Singh was an employee of the Himachal Pradesh Transport Corporation, posted in a workshop of the

Corporation at Taradevi in Himachal Pradesh. He was living in a rented accommodation and for the last about one year, his brother PW-1 Jai Pal Singh and the deceased Dalip Singh (his cousin brother) were living with him. The appellant (a cousin of Sheetal Singh's wife) joined them in the rented accommodation about a week prior to the alleged murder of Dalip Singh by the appellant.

3. On the intervening night of 12th and 13th November, 2003 Sheetal Singh was at work. Around 8 p.m., the appellant, Dalip Singh and Jai Pal Singh planned to cook some meat and consume some whisky brought by the appellant.

4. During the consumption of drinks and dinner, a minor brawl took place between the appellant and Dalip Singh as a result of Dalip Singh's refusal to consume more whisky. At that time, Jai Pal Singh intervened and some sort of a truce was worked out.

5. Later, Jai Pal Singh went to urinate and upon his return, he found the appellant and Dalip Singh involved in a scuffle. To prevent the scuffle from escalating, Jai Pal Singh asked Dalip Singh to accompany him to Sheetal Singh's place of work so that Dalip Singh could spend the night over there away from the appellant.

6. According to the prosecution, when Jai Pal Singh and Dalip Singh had walked about 50-60 yards, the appellant appeared from behind and hit Jai Pal Singh on the head with a thapi and pushed him into the bushes. (A thapi is a wooden object shaped like a cricket bat used for beating clothes while washing). Thereafter, the appellant hit Dalip Singh with the thapi and pushed him also into the bushes.

7. Jai Pal Singh did not sustain any serious injury and so he got up and went to inform Sheetal Singh about the incident.

8. Thereafter, Sheetal Singh accompanied by Jai Pal Singh went to the rented accommodation of Sheetal Singh

since Jai Pal Singh had told him that a quarrel had taken place in the rented accommodation between Dalip Singh and the appellant. When they did not find either the appellant or Dalip Singh in the rented accommodation, they went to search for them and at that time, upon hearing some cries, they came upon Dalip Singh lying in the bushes. The appellant was apparently not traceable.

9. Both Jai Pal Singh and Sheetal Singh brought Dalip Singh back to the rented accommodation. Thereafter an ambulance was called and Dalip Singh was taken to the hospital where he succumbed to his injuries.

10. The appellant was charged with having committed the murder of Dalip Singh. He pleaded not guilty and claimed trial. In all, the prosecution examined 17 witnesses and also produced several documents and articles during the trial.

Decision of the Trial Judge:

11. The Trial Judge analyzed the statements of the witnesses and the documents on record and concluded that the appellant had murdered Dalip Singh. It was held that the appellant's presence in the rented accommodation along with Jai Pal Singh and Dalip Singh on the intervening night of 12th and 13th November, 2003 was not in dispute. It was also held that Dalip Singh died an unnatural death.

12. It was argued before the Trial Judge that the sole eye witness, Jai Pal Singh had stated in his cross examination that he had not actually seen the appellant beat Dalip Singh or push him into the bushes. This witness was then cross-examined by the Public Prosecutor on the ground that he was suppressing the truth. However, the Trial Judge relied on the evidence of Jai Pal Singh and held that he had positively deposed that the appellant had attacked Dalip Singh. Even though Jai Pal Singh may not have actually seen the attack, but it was clear that the appellant had hit and pushed Dalip Singh in the bushes after the attack on Jai Pal Singh.

13. In addition, the Trial Judge also noted the disappearance of the appellant in the middle of the night from the place of occurrence and his being later located in his village. This gave room for suspicion with regard to the conduct of the appellant post the incident.

14. The Trial Judge noticed the statement of PW-7 Rajinder Singh to the effect that there was some land dispute between the family of Dalip Singh and Jai Pal Singh and that they were on inimical terms. However, he was of the view that the terms between them were not so strained as made out, otherwise there was no reason for Dalip Singh to stay in the rented accommodation along with Sheetal Singh and Jai Pal Singh for about a year. The Trial Judge also took note of the suspicion expressed by PW-7 Rajinder Singh that Jai Pal Singh may have caused the death of Dalip Singh but did not give much credence to this suspicion in view of the statement of Jai Pal Singh. The attempt to shift the blame onto Jai Pal Singh was, accordingly, discounted.

15. The Trial Judge also took into account the recovery, during interrogation, of a bloodstained pajama from the appellant's house. This pajama had human bloodstains as per the report of the forensic science laboratory. It was noted that though the bloodstains on the pajama were not matched with the blood group of Dalip Singh, the appellant had failed to explain the bloodstains.

16. The Trial Judge noted the injuries on Dalip Singh as given by PW-16 Dr. Uvi Tyagi, Registrar, Department of Forensic Medicine, I.G.M.C., Shimla. The injuries suffered by Dalip Singh were found to be ante mortem and were as follows:-

1. Two contusions on forehead 2 cm. above left eyebrow 2.5 cm. apart from each other each of size 1 cm. in dimension, bluish in colour.

2. A grazed abrasion over the root of the nose 2.5 cm. brownish in colour.

3. On opening the dressing (which was completely soaked in blood) surgically stitched wounds over the occipital region of the head. They were four in number.

17. The doctor was of the opinion that Dalip Singh died due to hemorrhagic shock as a result of the ante mortem head injuries. He was also of the opinion that the injuries could possibly have been caused by a wooden stick or thapi. The Trial Judge noted that Jai Pal Singh was also injured and, as per the medical opinion, a blunt wooden stick could have caused his injury.

18. The appellant admitted in his statement recorded under Section 313 of the Code of Criminal Procedure that he was residing with Sheetal Singh. He admitted his presence in the rented accommodation on the intervening night of 12th and 13th November, 2003 but denied having consumed any drinks. According to him, only Jai Pal Singh and Dalip Singh were drinking. He denied having had a brawl with Dalip Singh and denied any knowledge of the events which resulted in the death of Dalip Singh. In fact, he stated that he had left Taradevi for his village before the alleged incident took place. The appellant did not produce any witness in defence.

19. On the basis of the above material, the Trial Judge held that the appellant had murdered Dalip Singh and accordingly he was convicted for an offence punishable under Section 302 of the Indian Penal Code.

Decision of the High Court:

20. Feeling aggrieved by the conviction and sentence passed by the Trial Judge, the appellant preferred an appeal to the High Court. By a judgment and order dated 31.10.2007 passed by the High Court of Himachal Pradesh in Criminal

Appeal No.562 of 2004, the conviction of the appellant for an offence punishable under Section 302 of the Indian Penal Code was upheld. The High Court held that there was sufficient evidence to conclude that none other than the appellant caused the death of Dalip Singh.

Evidence of a hostile witness:

21. The prime question that we are required to consider is the credibility of Jai Pal Singh since he was the only eyewitness to the crime and had turned hostile.

22. Jai Pal Singh stated in his examination in chief as follows:

> "When we were still going, Gudu also came from behind and gave me beatings with the help of a wooden stick and threw me aside in the bushes. Gudu then also gave beatings to Dalip Singh and threw him in the bushes. I alone went to Sheetal Singh and informed him about the occurrence. Sheetal Singh came with me to the scene of occurrence and on search, we found Dalip Singh lying in injured condition at the place where quarrel had taken place outside the house of Sheetal Singh. Dalip Singh had sustained injuries on his head, which was bleeding and, therefore, we took him to Snowdon Hospital in an ambulance, where he was declared as dead."

In his cross-examination, Jai Pal Singh stated as follows:

> "After sustaining hurt at the place of occurrence, I have fallen down to the depth of about 5 feet. I did not see Gudu causing injuries to Dalip Singh, but I only noticed him when he threw Dalip Singh near me in the bushes. I could not see Gudu while throwing Dalip Singh in the bushes. When Dalip Singh fell down, his head had struck against the ground."

Later during his cross-examination, it is recorded as follows:

"At this stage, the learned public prosecutor seeks permission to cross-examine the witness on the ground that the witness is suppressing the truth. Heard. Keeping in view the substantial variation in the statement of the witness recorded in the court and recorded under Section 161 Cr. P.C. with regard to the actual position of beatings. Learned Public Prosecutor is permitted to cross-examine the witness.

xxxxx Cross-examination xxxxx (by learned P.P.)

"My statement was recorded by the police. I had not seen the accused Gudu giving beatings to Dalip Singh with any thing and I also did not see the accused Gudu throwing Dalip Singh in the bushes. (Confronted with portion A to A with police statement of the witness Ext. PB, wherein it is so recorded). I did not state this to the police. It is incorrect to suggest that I have deposed falsely today in collusion with the accused."

23. The law on the treatment of the evidence of a hostile witness is that the evidence of such a witness need not be completely rejected only because he has turned hostile. The Court must, however, be circumspect in accepting his testimony and, to the extent possible, look for its corroboration.

24. In *Karuppanna Thevar v. State of T.N.,* (1976) 1 SCC 31 this Court held that the testimony of a hostile witness may not be rejected outright "but the court has at least to be aware that, prima facie a witness who makes different statements at different times has no regard for truth. The court should therefore be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence."

25. Similarly, in *Bhagwan Singh v. State of Haryana,* (1976) 1 SCC 389 this Court held:

"But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence."

(Incidentally this passage is incorrectly attributed to P.N. Bhagwati, J in *Rabindra Kumar Dey v. State of Orissa,* (1976) 4 SCC 23. It should be correctly attributed to P.K. Goswami, J).

26. These basic principles have been reiterated recently in *Bhajju v. State of M.P.,* (2012) 4 SCC 327 and *Ramesh Harijan v. State of U.P.,* (2012) 5 SCC 777. In *Bhajju* one of us (Swatanter Kumar, J) held for the Court:

"The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law."

27. If we consider the totality of the evidence of Jai Pal Singh, it is clear that he categorically stated that the appellant attacked him with a wooden stick like a thapi and pushed him in the bushes. To this extent the evidence of Jai Pal Singh is quite clear and he did not recant from this. Then he goes on to say that though he noticed the appellant, he did not actually see him beat Dalip Singh or throw him in the bushes. But the fact is that Dalip Singh was beaten by someone and pushed into the bushes. There is nothing to suggest the presence of any third person. The presence of the appellant (and none other) at the scene of occurrence is not in doubt.

28. The medical evidence shows that injuries on Jai Pal Singh could have been caused by a blunt wooden stick such as a thapi. Again, to this extent, the evidence of Jai Pal Singh is consistent. As per the medical evidence, the injuries on Dalip

Singh could also have been caused by a similar wooden stick or thapi. Under these circumstances, the conclusion is inescapable that none other than the appellant attacked Jai Pal Singh and Dalip Singh and inflicted injuries on them with a thapi.

29. To this, we may add the conduct of the appellant, which leaves a lot to be desired.

30. The Trial Judge and the High Court found it suspicious (and so do we) that on the intervening night of 12th and 13th November, 2003 the appellant should leave Taradevi and go to his village at Rohru. According to the statement of the appellant under Section 313 of the Cr.P.C. he had left Taradevi before the incident took place. This may or may not be true, but it is certainly relevant for appreciating his conduct. In this context, it would be worthwhile to refer to Section 8 of the Evidence Act, 1872 which makes relevant the conduct of the appellant subsequent to the crime.

31. Similarly, the recovery of a bloodstained pajama from the appellant's house adds to the circumstances that call for an explanation from the appellant. However, no explanation has been forthcoming on either issue.

32. No doubt, proof cannot be substituted by robust suspicion. But if all the facts and circumstances point to only one conclusion, it is difficult to ignore them and even in a case of circumstantial evidence, it is possible to secure a conviction. The present case is much stronger since there is an eyewitness to the incident and both the Trial Court and the High Court accepted the version of events given by Jai Pal Singh. In such circumstances, we should not normally interfere with the conclusion expressed concurrently by the Trial Court and the High Court. We have recently expressed this view in Ramachandran v. State of Kerala 2012 (10) SCALE 592 and it need not be repeated. Interference is, however, permissible in exceptional circumstances - but we do not find the circumstances of this case to be exceptional.

33. We are, therefore, prepared to agree with the Trial Court and the High Court that Jai Pal Singh was a credible witness and that his testimony to the extent that it implicates the appellant should be accepted.

34. We are in agreement with the Trial Judge that the insinuation that Jai Pal Singh committed the crime was too nebulous. The family dispute between Jai Pal Singh and Dalip Singh was obviously not particularly serious since Dalip Singh had ventured to stay with Jai Pal Singh and his brother Sheetal Singh in the same rented accommodation for about one year. In any event, this was not even the case set up by the appellant in his statement under Section 313 of the Cr.P.C.

Intention to kill:

35. The next question to be considered is whether the appellant had the intention to kill Dalip Singh. Here we have some difficulty in accepting the understanding of the events as narrated by the Trial Court and the High Court.

36. It is true that the appellant caused multiple injuries on Dalip Singh, but it is difficult to infer from this that the appellant intended to kill him. His intention seems to have been to injure Jai Pal Singh and to severely injure Dalip Singh and after beating them up with a thapi, he pushed them into the bushes and walked away. It cannot be imagined that his intention was to injure Jai Pal Singh but kill Dalip Singh - he would be leaving behind Jai Pal Singh as an eyewitness.

37. It seems to us that the conduct of Jai Pal Singh also points to the intentions of the appellant. Jai Pal Singh did not expect the assault on Dalip Singh to be fatal, otherwise he would have tended to the needs of the victim rather than have gone to call Sheetal Singh. That the delay in attending to Dalip Singh may have eventually led to his death is another matter altogether, but the attack was not so severe (in the estimation of Jai Pal Singh) as to have imminently caused the death of Dalip Singh.

38. Even though the situation is pregnant with hypotheses, it is quite clear that the appellant had no intention to kill Dalip Singh and even the rejection of the hypotheses cannot lead to the conclusion that the appellant intended to kill Dalip Singh.

39. However, the nature and number of injuries and their location (the skull) as well as the "weapon" used (a small wooden cricket bat) lead us to conclude that to a reasonable person, an attack of the nature launched by the appellant on Dalip Singh could cause his death. While it may be difficult to delve into the mind of the attacker to decode his intentions, knowledge of the consequences of his actions can certainly be attributed to him.

40. Accordingly, we are of the opinion that the appellant had knowledge that his actions are likely to cause the death of Dalip Singh. He would, therefore, be guilty of culpable homicide not amounting to murder and liable to be sentenced under the second part of Section 304 of the IPC.

Conclusion:

41. Under the circumstances, we partly allow this appeal and set aside the conviction of the appellant for the murder of Dalip Singh but convict him of an offence punishable under the second part of Section 304 of the IPC.

42. We have been informed that the appellant has already undergone over eight years of actual imprisonment and almost eleven years including remissions earned. Under the circumstances, we sentence him to imprisonment for the period already undergone.

43. The appeal is disposed of on the above terms.

B.B.B. Appeal disposed of.

KUKAPALLI MOHAN RAO
v.
STATE OF A.P.
(Criminal Appeal No. 316 of 2008)

DECE0MBER 11, 2012

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

Penal Code, 1860 - s.302 - Murder - Eyewitness account - Allegation that appellant hacked the deceased with an axe as he suspected that the latter was having illicit relationship with his wife - Conviction of appellant u/s.302 IPC - Justification - Held: Justified - PW2 (wife of deceased) and PW3 (brother of deceased) were crucial witnesses to establish that it was the appellant who had committed the crime - Evidence of PW2 was trustworthy and it cannot be said that she was implicating the appellant - She had no motive to do so as well - Direct evidence of illicit intimacy cannot always be expected, but, taking into consideration the evidence of PW5 and PWs 8 and 9, the prosecution could establish that appellant had a grudge or ill-feeling towards the deceased that led him to commit the murder - Prosecution also proved that axe was seized from the scene of occurrence by PW 15, in the presence of PWs 1 and 11 - Also, blood of human origin was detected on the axe - Further, there was sufficient explanation for the delay of 10 hours in intimating the offence to the police - The prosecution had succeeded in establishing the guilt of the appellant beyond all reasonable doubt.

FIR - Evidentiary value of - Held: FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s.161 of the Evidence Act or to contradict him u/s.145 of the Act - It is not the requirement of the law that the minutest details be recorded in the FIR lodged immediately after the occurrence - Evidence Act, 1872 - ss.145 and 161.

Motive - When irrelevant - Held: Motive would be irrelevant when there is un-impeachable oral evidence.

The prosecution case was that the accused-appellant committed the murder of the deceased as he suspected that the latter was having illicit relationship with his wife. The incident allegedly occurred at midnight when the deceased was sleeping in his house with his wife PW2. PW3, the brother of the deceased, was also sleeping inside the said house at that time.

An axe was allegedly used as the weapon of offence. The deceased had sustained bleeding head injuries. PW4, the father of the deceased, informed about the death of the deceased to PW1, the Village Administrative Officer, who scribed the report Ex.P1, and presented the same to the police and, on the basis of the same, PW14, Sub Inspector of Police issued the FIR Ex. P14. The Sessions Court convicted the appellant under Section 302 IPC and sentenced him to life imprisonment. The conviction and sentence was confirmed by the High Court.

In the instant appeal, the appellant contended that the evidence of PWs 2 and 3 could not be believed since they were interested witnesses; that the names of PWs 2 and 3 did not find any place in Ex.P1 report and, as such, their testimony be considered only with suspicion; that omission to mention the names of the eye-witnesses in the FIR and unexplained delay in despatch of FIR would throw serious doubt on the prosecution case; that the prosecution miserably failed to prove the alleged motive for the commission of the offence and, as such, the appellant be given the benefit of doubt; and further that there was considerable delay in registering the FIR, and thus the appellant was entitled to be acquitted.

Dismissing the appeal, the Court

HELD: 1. PWs 2 and 3 are crucial witnesses in this case to establish that it was the accused-appellant who had committed the crime. PW2, wife of the deceased, had clearly deposed that she herself and daughter were sleeping on a cot and the deceased was sleeping on the other cot in the same room. PW3, brother of the deceased, and other family members were sleeping inside the house. In the midnight on 13.6.2001, the deceased raised a cry as "Ammo". On hearing the cries of the deceased, she woke up and switched on the light and found the appellant near the deceased with an axe. Out of fear, she called PW 3 and he rushed in. On seeing PW 3, the appellant ran away from the place throwing the axe used for the commission of the offence. The evidence of PW2 is trustworthy and it cannot be said that she is implicating the appellant. She has no motive to do so as well. PW3, in his deposition, has categorically stated that he has chased the appellant, but when PW2 had informed him that the blood was bleeding from the head of the deceased, he came back. PW3 then informed the incident to the brother-in-law of the deceased. PWs 3 and 5 shifted the deceased to a private hospital in a tractor and the dead body of the deceased was brought back at 3.00 am on 14.6.2001. PW3 then informed the incident to the brother of the deceased - PW 4 through telephone. PW3 has categorically stated that the appellant had hacked the deceased with an axe and ran away and he found the axe at the scene of occurrence. There is no reason to disbelieve the evidence of PW 3. PW 3 also had no reason to implicate the appellant in this crime. [Para 9] [1095-B-G]

2. PWs 8 and 9 stated that the appellant had indicated to them that the deceased was having illicit intimacy with his wife. It was stated that the appellant had informed them that he was even prepared to go to jail by beating the deceased, if the deceased had not stopped that illicit

intimacy. PW13, the doctor, who conducted the post-mortem, opined that the deceased died due to shock and the head injury. PW15, the Investigating Officer, stated that he had visited the scene of offence at about 12.45 am on 14.6.2001 and seized the blood stained earth, material objects and conducted the inquest over the dead body of the deceased and sent the dead body for post-mortem examination. PW14, Sub-Inspector of Police, stated that he had registered the crime and issued the FIR. Ex.P1 report clearly discloses the commission of the offence by the appellant. There is no necessity of the detailed narration of the incident, as to how PWs2 and 3 saw it, in the FIR. PWs 2 and 3 after all are not the authors of the complaint. Their statements cannot be disbelieved on the ground that their finding the appellant on the scene of occurrence with an axe, has not found any place in the FIR. [Para 10] [1095-H; 1096-A-D]

3. FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Evidence Act or to contradict him under Section 145 of the Act. It is not the requirement of the law that the minutest details be recorded in the FIR lodged immediately after the occurrence. [Para 11] [1096-E-F]

Surjit Singh @ Gurmit Singh v. State of Punjab **1993 Supp. (1) SCC 208: 1992 (2) SCR 786 and** *Ravi Kumar v. State of Punjab* **(2005) 9 SCC 315: 2005 (2) SCR 548 - relied on.**

4. The appellant submitted that the prosecution had miserably failed to prove the alleged motive for the commission of the offence, however, even assuming that the prosecution has not succeeded in establishing the motive for the commission of the offence, when there is un-impeachable oral evidence, the motive would be irrelevant. [Para 12] [1096-G; 1097-B]

Baitullah and Another v. State of U.P. **(1998) 1 SCC 509;** *State of Himachal Pradesh v. Jeet Singh* **(1999) 4 SCC 370: 1999 (1) SCR 1033 and** *Nathuni Yadav and Another v. State of Bihar and Another* **(1998) 2 SCC 238 - relied on.**

5. The direct evidence of illicit intimacy cannot always be expected. But, taken into consideration of the evidence of PW 5 and PWs 8 and 9, the prosecution could establish that the appellant had a grudge or ill-feeling towards the deceased that led him to commit the murder. PWs 2 and 3 found the appellant with MO6 (axe) which was used for the commission of the offence. PWs 5 and 9 also stated that in their evidence that they found the axe near the cot at the scene of the offence. The prosecution also proved that MO6 axe was seized from the scene of occurrence by PW 15, in the presence of PW 1 and 11. MO6 axe was also sent to R.F.S.L. for analysis and from Ex.P18 report, it was observed that the blood of human origin was detected on MO6 axe. Therefore, the contention raised by the appellant that MO6 was planted, cannot be accepted. [Para 14] [1097-F-H; 1098-A]

6. There is also no basis in the contention raised on behalf of the appellant that there was delay in informing the incident to the police. The incident had happened at the midnight of 13.6.2001. The deceased was taken to the private hospital by PWs 3 and 5 in a tractor of PW 7, where he was declared dead. The dead body of the deceased was brought back to the house at about 3.00 am. PW 4, father of the deceased, then informed the death of the deceased to PW 1, the Village Administrative Officer, at about 8.00 am on 14.6.2001. PW 14, Sub-Inspector of Police, stated that he had registered the complaint after 10 hours from the time of the incident, i.e. in the morning of 14.6.2001. Not only that there was no inordinate delay in informing the incident to the police, there has been sufficient explanation for the delay of 10

hours in intimating the offence to the police. [Paras 15, 17] [1098-B-D; 1099-D]

State of West Bengal v. Orilal Jaiswal **(1994) 1 SCC 73;** *Jahoor and Others v. State of U.P.* **1999 Supp (1) SCC 372;** *Tara Singh & Others v. State of Punjab* **1991 Supp (1) SCC 536;** *Jamna v. State of U.P.* **1994 Supp (1) SCC 185 and** *Ravinder Kumar and Another v. State of Punjab* **(2001) 7 SCC 690: 2001 (2) Suppl. SCR 463 - relied on.**

Madudanal Augusti v. State of Kerala **(1980) 4 SCC 425 - cited.**

7. In the facts and circumstances of the case, the Sessions Court and the High Court correctly came to the conclusion that the prosecution had succeeded in establishing the guilt of the appellant beyond all reasonable doubt. [Para 18] [1099-F]

Case Law Reference:

(1980) 4 SCC 425	**cited**	**Para 6**
1992 (2) SCR 786	**relied on**	**Para 11**
2005 (2) SCR 548	**relied on**	**Para 11**
(1998) 1 SCC 509	**relied on**	**Para 13**
1999 (1) SCR 1033	**relied on**	**Para 13**
(1998) 2 SCC 238	**relied on**	**Para 13**
(1994) 1 SCC 73	**relied on**	**Para 16**
1999 Supp (1) SCC 372	**relied on**	**Para 16**
1991 Supp (1) SCC 536	**relied on**	**Para 16**
1994 Supp (1) SCC 185	**relied on**	**Para 16**
2001 (2) Suppl. SCR 463	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 316 of 2008.

From the Judgment & Order dated 03.11.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 2480 of 2004.

Ajay Sharma for the Appellant.

Shishir Pinaki, Amjid Mazbool, D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The suspicion that the deceased had illicit relationship with the wife of the accused was the reason for this mid-night murder. The accused had disclosed the same to PWs 8 and 9 and requested them to warn the deceased, or else, the accused announced that he would deal with the same and was even prepared to go to jail. PWs 8 and 9 warned the deceased, but the deceased reacted stating that the accused was only suspecting him.

2. At mid-night 12 O'clock on 13.6.2001, the deceased was sleeping on the western side of Pancha of his house along with wife PW 2. PW 3, brother of the deceased, was also sleeping inside the house along with the children of the deceased. At midnight PW 2 heard the cries of the deceased and woke up and saw the accused standing near the deceased with an axe. PW2 then called PW 3 who chased the accused, but he escaped leaving the axe at the spot. Noticing that the deceased was bleeding with head injury, PW 3 along with PW 5, brother-in-law of the deceased, took the deceased in a tractor of PW 12 to a private hospital of PW 7, where the deceased was declared dead. Later, PW 4, father of the deceased, informed the death of the deceased to PW 1, the Village Administrative Officer at 8.00 am on 14.6.2001. PW 1 scribed the report - Ex.P1 - and presented the same to the

police on 14.6.2001 and, on the basis of the same, PW 14, Sub-Inspector of Police registered Crime No. 34 of 2001 and issued the FIR Ex.P14.

3. PW 15, Inspector of Police, conducted the investigation and he visited the scene of occurrence and completed other formalities, including the inquest over the dead body of the deceased. PW 15 also requisitioned the services of the dog squad and seized the material object including the axe which was used for the commission of the offence. PW 13, the Civil Assistant Surgeon, held autopsy over the dead body and opined that the cause of death was due to shock and head injury.

4. The prosecution, in order to prove the guilt of the accused, examined PW 1 to PW 15 and marked Ex. P1 to P18 and also MOs 1 to 7. On behalf of the defence, no oral evidence was adduced, but Ex. D1 to 4 were marked. On conclusion of the examination of the prosecution witnesses, the accused was examined under Section 313 Cr.P.C. and he denied all incriminating materials appeared against him in the prosecution evidence.

5. Learned Sessions Judge, after completion of the trial and on going through the evidence, found the accused guilty of the offence under Section 302 IPC and sentenced him to life imprisonment, vide its judgment dated 14.9.2004. Aggrieved by the same, the accused filed Criminal Appeal No. 2480 of 2004 before the High Court of Andhra Pradesh. The High Court dismissed the appeal and confirmed the conviction and sentence awarded by the Sessions Court. Aggrieved by the same, this appeal has been preferred.

6. Shri Ajay Sharma, Advocate-on-Record, appearing on behalf of the appellant, submitted that the evidence of PWs 2 and 3 cannot be believed since they are interest witnesses. Further, it was also pointed that the name of PWs 2 and 3 do not find any place Ex.P1 report and, as such, their testimony

be considered only with suspicion. Learned counsel submitted placed reliance on the judgment of this Court in *Madudanal Augusti v. State of Kerala* (1980) 4 SCC 425 and submitted that omission to mention the names of the eye-witnesses in the FIR and unexplained delay in despatch of FIR would throw serious doubt on the prosecution case. Learned counsel also submitted that the prosecution miserably failed to prove the alleged motive for the commission of the offence and, as such, the accused be given the benefit of doubt. Further, it was also pointed out that there was considerable delay in registering the FIR, hence, there is scope for concoctions and confabulations. All these factors, according to the learned counsel, would be sufficient to acquit the accused giving the benefit of doubt.

7. Shri Shishir Pinaki, learned counsel appearing on behalf of the State, submitted that there is no illegality in the findings recorded by the Sessions Court, which were confirmed by the High Court. The evidence of PWs 2 and 3 is reliable and crucial to the prosecution case. Further, it was also pointed out that the axe used in the commission of the offence was also recovered from the spot. Learned counsel also submitted that there was no considerable delay in lodging the FIR and if, at all, there was some delay, that has been clearly explained and that explanation has been accepted both by the Sessions Court and the High Court. Learned counsel also submitted that the motive for the commission of crime has been established and the evidence of PWs 8 and 9 would indicate that the accused was suspecting that the deceased had illicit intimacy with his wife PW 2. Learned counsel further submitted that even assuming that the prosecution has not succeeded in proving the motive, even then there is sufficient ocular evidence to prove that the accused had committed the offence. Learned counsel submitted that there is no reason to upset the concurrent findings recorded by the Sessions Court as well as the High Court, after appreciating the oral and documentary evidence adduced by the prosecution as well as the defence.

8. We are, in this case, concerned only with the question whether the prosecution has proved the guilt of the accused beyond all reasonable doubt and the Sessions Court and the High Court have rightly reached the conclusion that the accused has committed the offence.

9. PWs 2 and 3 are crucial witnesses in this case to establish that it was the accused who had committed the crime. PW 2, wife of the deceased, had clearly deposed that she herself and daughter were sleeping on a cot and the deceased was sleeping on the other cot in the same room. PW3, brother of the deceased, and other family members were sleeping inside the house. In the midnight on 13.6.2001, the deceased raised a cry as "Ammo". On hearing the cries of the deceased, she woke up and switched on the light and found the accused near the deceased with an axe. Out of fear, she called PW 3 and he rushed in. On seeing PW 3, the accused ran away from the place throwing the axe used for the commission of the offence. In our view, the evidence of PW 2 is trustworthy and we have no reason to disbelieve that she is implicating the accused and she has no motive to do so as well. PW 3, in his deposition, has categorically stated that he has chased the accused, but when PW 2 had informed him that the blood was bleeding from the head of the deceased, he came back. PW 3 then informed the incident to the brother-in-law of the deceased. PWs 3 and 5 shifted the deceased to a private hospital in a tractor and the dead body of the deceased was brought back at 3.00 am on 14.6.2001. PW 3 then informed the incident to the brother of the deceased - PW 4 through telephone. PW3 has categorically stated that the accused had hacked the deceased with an axe and ran away and he found the axe at the scene of occurrence. We have no reason to disbelieve the evidence of PW 3. PW 3 also had no reason to implicate the accused in this crime.

10. PWs 8 and 9 stated that the accused had indicated to them that the deceased was having illicit intimacy with his

wife. It was stated that the accused had informed them that he was even prepared to go to jail by beating the deceased, if the deceased had not stopped that illicit intimacy. PW 13, the doctor, who conducted the post-mortem, opined that the deceased died due to shock and the head injury. PW 15, the Investigating Officer, stated that he had visited the scene of offence at about 12.45 am on 14.6.2001 and seized the blood stained earth, material objects and conducted the inquest over the dead body of the deceased and sent the dead body for post-mortem examination. PW 14, Sub-Inspector of Police, stated that he had registered the crime No. 34 of 2001 and issued the FIR. Ex.P1 report clearly discloses the commission of the offence by the accused. There is no necessity of the detailed narration of the incident, as to how PWs2 and 3 saw it, in the FIR. PWs 2 and 3 after all are not the authors of the complaint. Their statements cannot be disbelieved on the ground that their finding the accused on the scene of occurrence with an axe, has not found any place in the FIR.

11. This Court in *Surjit Singh @ Gurmit Singh v. State of Punjab* 1993 Supp. (1) SCC 208, held that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Evidence Act or to contradict him under Section 145 of the Act. It is not the requirement of the law that the minutest details be recorded in the FIR lodged immediately after the occurrence. Reference may also be made to the judgment of this Court in *Ravi Kumar v. State of Punjab* (2005) 9 SCC 315.

12. Learned counsel appearing for the appellant submitted that the prosecution had miserably failed to prove the alleged motive for the commission of the offence. In Ex.P1, it was mentioned that the accused killed the deceased in view of the illicit intimacy of his wife with the deceased. Prior to the commission of the offence, about one month back, the accused had informed PW 5 on the illicit affairs of his wife with the deceased and asked him to advise the deceased to deter from

that. PW 5 along with PWs 8 and 9 would indicate that the accused had carried the feeling that the deceased was having some illicit relationship with his wife. Assuming that the prosecution has not succeeded in establishing the motive for the commission of the offence, when there is un-impeachable oral evidence, the motive would be irrelevant.

13. In *Baitullah and Another v. State of U.P.* (1998) 1 SCC 509, this Court has taken the view that where a murderous assault has been established by clear ocular evidence, the motive pales into insignificance. In *State of Himachal Pradesh v. Jeet Singh* (1999) 4 SCC 370, this Court held that it is a sound principle to remember that every criminal act was done with a motive, but its corollary is not that no criminal offence would have been committed if the prosecution has filed to prove the precise motive of the accused to commit it and the prosecution succeeded in showing the possibility of some ire for the accused towards the victim. This Court held that it is also impossible for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended. Reference may also be made to the judgments of this Court in *Nathuni Yadav and Another v. State of Bihar and Another* (1998) 2 SCC 238.

14. The direct evidence of illicit intimacy cannot always be expected. But, taken into consideration of the evidence of PW 5 and PWs 8 and 9, the prosecution could establish that the accused had a grudge or ill-feeling towards the deceased that led him to commit the murder. PWs 2 and 3 found the accused with MO6 (axe) which was used for the commission of the offence. PWs 5 and 9 also stated that in their evidence that they found the axe near the cot at the scene of the offence. The prosecution also proved that MO6 axe was seized from the scene of occurrence by PW 15, in the presence of PW 1 and 11. MO6 axe was also sent to R.F.S.L., Vijayawada for analysis and from Ex.P18 report dated 4.8.2001, it was observed that the blood of human origin was detected on MO6 axe. Therefore,

the contention raised by the learned counsel appearing for the appellant accused that MO6 was planted, cannot be accepted.

15. We are also not impressed by the contention raised on behalf of the appellant that there was delay in informing the incident to the police. The incident had happened at the midnight of 13.6.2001. The deceased was taken to the private hospital by PWs 3 and 5 in a tractor of PW 7, where he was declared dead. The dead body of the deceased was brought back to the house at about 3.00 am. PW 4, father of the deceased, then informed the death of the deceased to PW 1, the Village Administrative Officer, at about 8.00 am on 14.6.2001. PW 14, Sub-Inspector of Police, stated that he had registered the complaint after 10 hours from the time of the incident, i.e. in the morning of 14.6.2001. Learned counsel for the appellant, as we have already indicated, pointed out that the delay in reporting the incident to the police cause serious suspicion on the evidence of PWs 2 and 3. It was pointed out that immediately after the alleged incident, PW 3 had the occasion to pass through Martur village, but had not reported the same to the police. The delay in registering the FIR, according to the learned counsel, weakens the prosecution case. We find no basis in the contention raised by the counsel.

16. This Court in *State of West Bengal v. Orilal Jaiswal* (1994) 1 SCC 73 held that the delay in filing the FIR ipso facto could not go to show that the case against the accused is false. This Court in *Jahoor and Others v. State of U.P.* 1999 Supp (1) SCC 372, *Tara Singh & Others v. State of Punjab* 1991 Supp (1) SCC 536 and *Jamna v. State of U.P.* 1994 Supp (1) SCC 185, has held that where there is a delay in making the FIR, the Court is to look at the causes for it and if such causes are not contributable to any effort to concoct a version, no consequence shall be attached to the mere delay in lodging the FIR. In *Tara Singh* (supra), this Court held as follows:

> "It is well-settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case.

Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report….."

The view expressed in the above mentioned judgments was later followed by this Court in *Ravinder Kumar and Another v. State of Punjab* (2001) 7 SCC 690.

17. We are of the view that the principle laid down by this Court in the above mentioned judgments is squarely applicable to the facts of the present case. Not only that there was no inordinate delay in informing the incident to the police, there has been sufficient explanation for the delay of 10 hours in intimating the offence to the police. We, therefore, find no basis in the contention raised by the learned counsel appearing for the appellant.

18. In the facts and circumstances of the case, we are of the view that the Sessions Court and the High Court have correctly come to the conclusion that the prosecution has succeeded in establishing the guilt of the accused beyond all reasonable doubt.

19. The appeal, therefore, lacks in merits and accordingly dismissed.

B.B.B. Appeal dismissed.

COMMISSIONER OF CENTRAL EXCISE, VADODARA
v.
GUJARAT NARMADA VALLEY FERTILIZERS COMPANY LTD.
(Civil Appeal Nos. 4189-4196 of 2010)

DECEMBER 11, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Cenvat Credit Rules, 2002 - r.12 - Cenvat credit for duty paid inputs used in manufacture of exempted final products - Claim for - Whether under the Cenvat Credit Rules, 2002 an assessee is entitled to claim cenvat credit on duty paid Low Sulphur Heavy Stock (LSHS) utilized as an input in the manufacture of fertilizer exempt from duty - Question referred to larger Bench - Central Excise Act, 1944 -s.11A - Reference to larger Bench.

The assessee had been utilizing cenvat duty paid Low Sulphur Heavy Stock (LSHS) as fuel input for generating steam. The steam so generated was utilized to generate electricity for the manufacture of fertilizer which is exempt from excise duty. According to the assessee, it was entitled to claim cenvat credit on the input, that is, LSHS even though the end-product fertilizer is exempt from excise duty. The Commissioner, Central Excise & Customs, disagreed and issued notices to the assessee to show cause why cenvat credit wrongly availed by it should not be recovered under Rule 12 of the Cenvat Credit Rules, 2002 read with Section 11A of the Central Excise Act, 1944. After giving the assessee an opportunity of hearing, the Commissioner confirmed the demand of cenvat credit wrongly claimed by the assessee. Aggrieved, the assessee preferred appeals which were referred to a larger Bench of the Customs,

Excise & Service Tax Appellate Tribunal. The larger Bench held that the issue was no longer res integra and was fully covered in favour of the assessee by a decision of the Tribunal in *Gujarat Narmada Fertilizers Co. Ltd. v. Commissioner of Central Excise, Vadodara,* 2004 (176) ELT 200 (Tri. - Mumbai) against which the Revenue's appeal before the Gujarat High Court was dismissed. The reference made to the larger Bench was then answered by holding that the assessee was eligible to cenvat credit of duty paid on that quantity of LSHS which was used for producing steam and electricity used in turn in relation to manufacture of exempted goods, namely fertilizers.

Pursuant to the decision of the larger Bench, the substantive appeals were placed before a Division Bench of the Tribunal. The Division Bench of the Tribunal allowed the assessee's appeals relying on the decision of the larger Bench of the tribunal. In the meanwhile, the Revenue preferred an appeal to this Court against the decision of the larger Bench of the Tribunal. By a judgment rendered after the impugned order passed by the Tribunal, this Court in *Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited,* (2009) 9 SCC 101 set aside the order of the larger Bench and decided the issue in favour of the Revenue holding that cenvat credit for duty paid inputs used in the manufacture of exempted final products is not allowable. Thus, when the substantive appeals were taken up for consideration by the Division Bench of the Tribunal, the decision of this Court in *Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited,* (2009) 9 SCC 101 was not available. It is under these circumstances that the Revenue filed the instant appeals.

Referring the matter to larger Bench, the Court

HELD: There is an apparent conflict between an earlier decision of this Court in *Commissioner of Central*

***Excise Vadodara v. Gujarat State Fertilizers & Chemicals Ltd., [GSFCL]* (2008) 15 SCC 46 and the decision in *Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited,* (2009) 9 SCC 101. In GSFCL a view has been taken that modvat credit can be taken on LSHS used in the manufacture of fertilizer exempt from duty. Although this decision was rendered in the context of availing modvat credit under the Central Excise Rules, 1944 as they existed prior to the promulgation of the Cenvat Credit Rules, 2002 the principle of law laid down is general and not specific to the Central Excise Rules, 1944. The decision rendered in Gujarat Narmada has been rendered in the context of the Cenvat Credit Rules, 2002 and is, therefore, more apposite. However, since GSFCL does lay down a general principle of law, this Court is referring the issue to a larger Bench to resolve the conflict between GSFCL and Gujarat Narmada. The conflict to be resolved is whether under the Cenvat Credit Rules, 2002 an assessee is entitled to claim cenvat credit on duty paid LSHS utilized as an input in the manufacture of fertilizer exempt from duty. The Registry may place the case papers before Hon'ble the Chief Justice for constituting a larger Bench to decide the aforesaid conflict of views. [Paras 9, 16, 19, 20, 21] [1106-B; 1108-D; 1109-C-G]**

Gujarat Narmada Fertilizers Co. Ltd. v. Commissioner of Central Excise,Vadodara **2004 (176) ELT 200 (Tri. - Mumbai);** *Commissioner of CentralExcise and Customs v. Gujarat Narmada Fertilizers Co. Ltd.* **2006 (193) ELT 136 (Gujarat);** *Commissioner of Central Excise v. Gujarat NarmadaFertilizers Company Limited* **(2009) 9 SCC 101: 2009 (13) SCR 286;** *MarutiSuzuki Ltd. v. Commissioner of Central Excise,* **Delhi-III (2009) 9 SCC 193: 2009 (13) SCR 301;** *Ramala Sahkari Chini Mills Limited, Uttar Pradesh v. Commissioner, Central Excise,* **Meerut-I (2010) 14 SCC 744: 2010 (13) SCR 1152 and** *Commissioner of Central Excise*

Vadodara v. Gujarat State Fertilizers & Chemicals Ltd. **(2008) 15 SCC 46 - referred to.**

Case Law Reference:

2004 (176) ELT 200 (Tri. - Mumbai)	**referred to**	**Para 6**
2006 (193) ELT 136 (Gujarat)	**referred to**	**Para 6**
2009 (13) SCR 286	**referred to**	**Para 9**
2009 (13) SCR 301	**referred to**	**Para 15**
2010 (13) SCR 1152	**referred to**	**Para 15**
(2008) 15 SCC 46	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4189-4196 of 2010.

From the Judgment & Order dated 10.04.2008 of the Custom, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad in Appeal No. E-2517, 3672 of 2004 and E-87-88 of 2005, Order dated 21.07.2008 in Misc. Application No. in Appeal No. E-2517 and 3672 of 2004 and Order dated 03.11.2008 in Misc. Application No. in Appeal No. E-2517 and 3672 of 2004.

Paras Kuhad, ASG, Vivek Nayaran Sharma, Ritu Bhardwaj, Jitin Chaturvedi, B.K. Prasad (for Anil Katiyar) for the Appellant.

Soli J. Sorabjee, Meenakshi Arora for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The assessee utilizes cenvat duty paid Low Sulphur Heavy Stock (for short LSHS) as fuel input for generating steam. The steam so generated is utilized to generate electricity for the manufacture of fertilizer which is

exempt from excise duty. According to the assessee, it is entitled to claim cenvat credit on the input, that is, LSHS even though fertilizer is exempt from excise duty. The correctness of this view was disputed by the Revenue.

2. Consequently, the Commissioner, Central Excise & Customs, Vadodara-II (hereinafter referred to as 'the Commissioner') issued two notices to the assessee to show cause why cenvat credit wrongly availed by it should not be recovered under Rule 12 of the Cenvat Credit Rules, 2002 (hereinafter referred to as Rules) read with Section 11A of the Central Excise Act, 1944. The assessee was also required to show cause why interest be not recovered on the wrongly availed cenvat credit and why penalty be not imposed on it.

3. The first show cause notice issued to the assessee was dated 8th March 2004 and pertained to the period 31st March 2003 to September 2003 while the second show cause notice was dated 28th July 2004 and was for the period October 2003 to March 2004.

4. The assessee replied to both the show cause notices and after giving the assessee an opportunity of hearing, the Commissioner adjudicated the first show cause notice by passing an order adverse to the assessee on 24th June 2004. The second show cause notice was similarly adjudicated and an adverse order passed on 30th August 2004. By these orders, the Commissioner confirmed the demand of cenvat credit wrongly claimed by the assessee. The Commissioner also directed the assessee to pay interest on the demanded amount and also imposed personal penalty under Rule 13 of the Rules.

Proceedings before the Tribunal:

5. Feeling aggrieved, the assessee preferred two appeals before the Customs, Excise & Service Tax Appellate Tribunal at Mumbai (hereinafter referred to as the Tribunal). The

appeals were numbered as Appeal Nos.E/2517/2004 and E/3672/2004.

6. For reasons that are not apparent from the record, both appeals were referred to a larger Bench and heard by the Vice-President and two members of the Tribunal (hereinafter referred to for convenience as the larger Bench). By an order dated 27th December 2006/4th January 2007, the larger Bench held that the assessee was entitled to claim cenvat credit on the LSHS used as input for producing steam and electricity for the manufacture of fertilizer. According to the larger Bench, the issue raised by the assessee was fully covered in its favour by a decision of the Tribunal in *Gujarat Narmada Fertilizers Co. Ltd. v. Commissioner of Central Excise, Vadodara,* 2004 (176) ELT 200 (Tri. - Mumbai) against which the Revenue's appeal before the Gujarat High Court was dismissed since no substantial question of law arose. The decision of the *Gujarat High Court is Commissioner of Central Excise and Customs v. Gujarat Narmada Fertilizers Co. Ltd.,* 2006 (193) ELT 136 (Gujarat).

7. The Tribunal was, therefore, of the opinion that the issue was no longer res integra and the decision earlier rendered by the Tribunal was binding upon the parties. The reference made to the larger Bench was then answered in the following terms:-

> "The reference is thus answered by holding that the assessees are eligible to cenvat credit of duty paid on that quantity of LSHS which was used for producing steam and electricity used in turn in relation to manufacture of exempted goods, namely fertilizers."

8. Pursuant to the decision of the larger Bench, the substantive appeals were placed before a Division Bench of the Tribunal. By an order dated 10th April 2008 (impugned before us) the Division Bench of the Tribunal allowed the assessee's appeals relying on the decision of the larger Bench.

Earlier proceedings in this Court:

9. In the meanwhile, the Revenue preferred an appeal to this Court against the decision of the larger Bench of the Tribunal. By a judgment and order dated 17th August 2009 (rendered after the impugned order passed by the Tribunal), this Court in *Commissioner of Central Excise v. Gujarat Narmada Fertilizers Company Limited,* (2009) 9 SCC 101 set aside the order of the larger Bench and decided the issue raised in favour of the Revenue.

10. This Court held that the Tribunal (and later the Gujarat High Court) did not correctly appreciate the legal position in Gujarat Narmada. In coming to this conclusion, this Court referred to Rule 6 of the Rules. For convenience, Rule 6(1) and 6(2) of the Rules are reproduced and they read as follows:-

> **"6. Obligation of manufacturer of dutiable and excisable goods-**
>
> (1) The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).
>
> Provided xxx xxx xxx
>
> (2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods."

11. This Court was of the view that Rule 6(1) of the Rules is plenary and that cenvat credit for duty paid inputs used in the manufacture of exempted final products is not allowable. Rule 6(1) of the Rules covers all inputs, including fuel. On the other hand, Rule 6(2) of the Rules refers to other inputs (other than fuel) used in or in relation to the manufacture of the final product (dutiable and exempted).

12. This Court further held that on a cumulative reading of Rule 6(1) and Rule 6(2) of the Rules it is clear that the legal effect of Rule 6(1) of the Rules is applicable to all inputs, including fuel. Therefore, cenvat credit will not be permissible on the quantity of fuel used in the manufacture of exempted goods. As regards non-fuel inputs, an assessee would have to maintain separate accounts or be governed by Rule 6(3) of the Rules.

13. As mentioned above, when the substantive appeals were taken up for consideration by the Division Bench of the Tribunal, the decision of this Court in *Gujarat Narmada* was not available. Accordingly, by the impugned order, the Division Bench of the Tribunal allowed the appeals filed by the assessee relying on the decision of the larger Bench of the Tribunal. It is under these circumstances that the Revenue is before us.

Submissions:

14. The first and in fact the only contention of the learned Additional Solicitor General appearing for the Revenue was that these appeals deserve to be allowed in view of the decision rendered by this Court in Gujarat Narmada. It was submitted that the orders impugned in these appeals were dependent upon the order passed by the larger Bench of the Tribunal on 27th December 2006/4th January 2007. The decision of the larger Bench having been set aside by this Court in Gujarat Narmada the substratum of the case of the assessee is wiped out.

15. On the other hand, the submission of learned counsel for the assessee was that the issue whether LSHS is an "input" as defined in Rule 2(g) of the Rules is debatable. According to the assessee, it should be given a wide meaning, but in *Maruti Suzuki Ltd. v. Commissioner of Central Excise,* Delhi-III (2009) 9 SCC 193 this Court gave "input" a restrictive meaning. The correctness of this view was doubted in *Ramala Sahkari Chini Mills Limited, Uttar Pradesh v. Commissioner, Central Excise, Meerut-I,* (2010) 14 SCC 744 and the issue has been referred to a larger Bench of this Court. It was submitted that if it is held in these appeals that LSHS is not an input, then the assessee would be adversely affected. It was, therefore, submitted that these appeals may also be referred to a larger Bench or we may await the decision of the larger Bench of this Court.

16. On merits, it was submitted that while deciding Gujarat Narmada this Court did not notice its earlier decision in *Commissioner of Central Excise Vadodara v. Gujarat State Fertilizers & Chemicals Ltd.,* (2008) 15 SCC 46. In GSFCL it was clearly held in favour of the assessee that a claim of modvat credit on LSHS is justified if it is used in the manufacture of steam, which in turn is used in the generation of electricity for the manufacture of fertilizer exempt from duty. Since that decision was overlooked, this Court fell into error while deciding *Gujarat Narmada* against the assessee.

17. Assuming "input" is not given a restrictive meaning, then in view of *GSFCL* the issue whether the assessee is entitled to claim cenvat credit on duty paid LSHS is no longer open to discussion and the appeals must be dismissed on that basis alone.

18. In response, the learned Additional Solicitor General submitted that the interpretation of "input" does not arise in these appeals and we may proceed on the basis that "input" as defined in Rule 2(g) of the Rules may be given a broad interpretation and that LSHS utilized by the assessee is an input

for the manufacture of fertilizer exempted from duty. The second step, namely, entitlement to cenvat credit does not necessarily follow even if the first step is decided in favour of the assessee. There was, therefore, no necessity of referring these appeals to a larger Bench of this Court and the case was fully covered in favour of the Revenue in view of Gujarat Narmada.

Our view:

19. There is an apparent conflict between *GSFCL* and *Gujarat Narmada*.

20. In *GSFCL* a view has been taken that modvat credit can be taken on LSHS used in the manufacture of fertilizer exempt from duty. Although this decision was rendered in the context of availing modvat credit under the Central Excise Rules, 1944 as they existed prior to the promulgation of the Cenvat Credit Rules, 2002 the principle of law laid down is general and not specific to the Central Excise Rules, 1944. The decision rendered in *Gujarat Narmada* has been rendered in the context of the Cenvat Credit Rules, 2002 and is, therefore, more apposite. However, since *GSFCL* does lay down a general principle of law, we have no option but to refer the issue to a larger Bench to resolve the conflict between *GSFCL* and *Gujarat Narmada*. The conflict to be resolved is whether under the Cenvat Credit Rules, 2002 an assessee is entitled to claim cenvat credit on duty paid LSHS utilized as an input in the manufacture of fertilizer exempt from duty.

21. The Registry may place the case papers before Hon'ble the Chief Justice for constituting a larger Bench to decide the aforesaid conflict of views.

B.B.B. Matter referred to Larger Bench.

RAM VISWAS
v.
THE STATE OF MADHYA PRADESH
(Criminal Appeal No. 2048 of 2012)

DECEMBER 14, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s.302 - Death of married woman due to burn injuries - Prosecution case that the victim's husband i.e. the appellant had poured kerosene oil on her and set her on fire - In the dying declaration recorded by the Naib Tahsildar, the victim named the appellant for the overt act - Conviction of appellant u/s. 302 IPC with RI for life - Justification - Held: The dying declaration satisfied all the prescribed conditions and procedure and was proved beyond doubt - Prosecution was fully justified in relying on the dying declaration - Appellant was the only person inside the room at the time of the incident along with the victim - Even if it is accepted that in the course of the said incident he sustained some burn injuries, it is not a ground for exonerating his guilt - Merely because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution cannot be thrown out - Conviction of appellant accordingly upheld - Evidence Act, 1872 - s.32.

According to the prosecution, in order to get rid of his wife, the appellant poured kerosene oil on her and set her on fire. The victim sustained 100% burn injuries. Her statement/declaration was recorded wherein she named the appellant for the overt act. Later she succumbed to her injuries. The trial Court convicted the appellant under Section 302 IPC and sentenced him to suffer RI for life. The conviction and sentence was affirmed by the High Court and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1. It is seen from the FIR (Exh.P-4) that the accused-appellant was not happy with his married life and had frequent quarrels with the deceased. A perusal of the FIR further shows that on 03.02.1998, in the midnight, when the appellant and the deceased alone were in the house, the appellant poured kerosene oil on the deceased and set her on fire. It is further seen that on hearing the cry of the deceased, a number of persons entered into the room when the appellant himself opened the door from inside and a report was made to the police. [Para 7] [1115-A-C]

2. The dying declaration Exh.P-11 made by the victim was recorded by Naib Tahsildar, (PW-11) wherein it was stated that the victim's husband abused her and compelled her to go away from his house. She further stated that on the fateful night, when they were sleeping together, he poured kerosene oil on her and set fire. She further narrated that when she shouted for help, neighbours came in and she was taken to G.M.Hospital, Rewa. The above statement was recorded at 3.25 p.m. on 04.02.1998. Before recording the above statement, the doctor concerned certified that she was fit for giving a statement. The doctor also certified that the patient was conscious while giving the dying declaration. Inasmuch as the Tahsildar (PW-11) recorded her statement after fulfilling all the formalities and her condition was also specified as seen from the certificate of the doctor, there is no reason to reject the same, on the other hand, as rightly accepted by the trial Court and the High Court, the prosecution is fully justified in relying on the same. The dying declaration satisfied all the prescribed conditions and procedure and is proved beyond doubt. [Paras 8, 9, 10] [1115-D-H; 1116-B]

3. As rightly observed by the trial Court and the High

Court, merely because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution cannot be thrown out. [Para 10] [1116-A]

4. It is clear from the prosecution case that the appellant was the only person inside the room at the time of the incident along with his wife. Even if it is accepted that in the course of the said incident he sustained some burn injuries, it is not a ground for exonerating his guilt. Dr. (PW-8) has stated that on 04.02.1998 he examined the victim and found her conscious and fit to make a statement. The said report has also been marked as Exh.P-11 and the statement of the deceased was recorded by the Executive Magistrate in his presence. [Para 11] [1116-C-D]

5. In the light of the above discussion and on perusal of the entire material relied on by the prosecution and the defence, it is clear that the conclusion arrived at by the courts below is correct. [Para 12] [1116-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2048 of 2012.

From the Judgment & Order dated 25.06.2008 of the High Court of Madhya Pradesh at Jabalpur (M.P.) in Criminal Appeal No. 884 of 2000.

S.C. Patel, Meera Kaura, Tejas Patel for the Appellant.

Vibha Dutta Makhija for the Respondent.

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 07.05.2009 passed by the High Court of Judicature at

Jabalpur, Madhya Pradesh in Criminal Appeal No. 884 of 2000 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein.

3. **Brief facts:**

(a) This case relates to one Maladeep, resident of village Semaria, District Rewa, Madhya Pradesh, who was burnt to death by her husband-Ram Viswas, the appellant herein by pouring kerosene oil.

(b) Maladeep (the deceased) and Ram Viswas were married to each other but were not in good terms. The appellant herein was not happy with his married life and often used to quarrel with Maladeep. He was actually forcing his wife to leave her matrimonial home which was not agreeable to her.

(c) In order to get rid of her, on 03.02.1998, in the midnight, the appellant herein poured kerosene oil on Maladeep and set her on fire. On hearing her cries, a number of persons gathered on the spot and tried to extinguish the fire. The appellant herein also tried to douse the fire and got his hands burnt.

(d) Maladeep was taken to the G.M. Hospital, Rewa and a First Information Report (FIR) being No. 10/98 was registered against the appellant herein with the Police Station Semaria. On 04.02.1998, the CMO, G.M. Hospital Rewa, opined that she had sustained 100% burn injuries and at about 03:05 p.m., the statement of Maladeep was recorded wherein while narrating the whole story, she named her husband-the appellant herein for the overt act. On 07.02.1998, she succumbed to her injuries.

(e) After filing of the charge sheet, the case was committed to the Court of Sessions Judge, Rewa, (M.P.) and numbered as Session Case No. 80/98. The trial Court, by order dated 22.04.1999, convicted the appellant under Section 302 of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced him to suffer RI for life along with a fine of Rs. 100/-, in default, to further undergo RI for 1 month.

(f) Being aggrieved, the appellant herein preferred Criminal Appeal No. 884 of 2000 before the High Court. By judgment and order dated 07.05.2009, the High Court dismissed the appeal filed by the appellant herein. Questioning the same, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. S.C. Patel, learned counsel for the appellant-accused and Ms. Vibha Dutta Makhija, learned counsel for the respondent-State.

5. Learned counsel for the appellant, after taking us through the entire material relied on by the prosecution, reasoning of the trial Court and the High Court submitted that there are material omissions in the dying declaration - Exh. P-11 which also differ from the contents of the First Information Report (Exh. P-4), hence, the courts below ought not to have accepted the prosecution case. He further submitted that in the absence of smell of kerosene from the bed sheet, quilt and the pillow, the entire statement in the form of dying declaration is to be rejected. He finally submitted that even if the case of the prosecution is acceptable, in view of the fact that the appellant tried to extinguish the fire and by such conduct at the most, he would be punishable only under Section 304 Part II IPC and not under Section 302. On the other hand, Ms. Vibha Dutta Makhija, learned counsel for the State submitted that the very same contentions were raised by the accused before the trial Court and the High Court and taking note of the statement of the deceased in the form of dying declaration, all other relevant materials and compliance of all the formalities, the said objections were rejected, hence, there is no valid and acceptable ground for interference with the concurrent findings of the courts below by exercising jurisdiction under Article 136 of the Constitution of India.

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

7. As rightly pointed out by the counsel for the State, it is seen from the FIR (Exh.P-4) that the accused was not happy with his married life and they had frequent quarrels. A perusal of the FIR further shows that on 03.02.1998, in the midnight, when the accused and the deceased alone were in the house, the accused poured kerosene oil on the deceased and set her on fire. It is further seen that on hearing the cry of the deceased, a number of persons entered into the room when the accused himself opened the door from inside and a report was made to the police. No doubt, a perusal of the FIR shows that her husband, the present appellant also tried to extinguish the fire.

8. In the light of the contents of the FIR (Ex.P-4), now we have to consider the dying declaration which is Exh.P-11 made by the deceased recorded by Rajendra Tiwari, Naib Tahsildar, (PW-11) wherein it was stated that her husband abused her and compelled her to go away from his house. She further stated that on the fateful night, when they were sleeping together, he poured kerosene oil on her and set fire. She further narrated that when she shouted for help, neighbours came in and she was taken to G.M.Hospital, Rewa. The above statement was recorded at 3.25 p.m. on 04.02.1998.

9. Before recording the above statement, the doctor concerned certified that she was fit for giving a statement. The doctor also certified that the patient was conscious while giving the dying declaration. Inasmuch as the Tahsildar (PW-11) recorded her statement after fulfilling all the formalities and her condition was also specified as seen from the certificate of the doctor, there is no reason to reject the same, on the other hand, as rightly accepted by the trial Court and the High Court, we are also of the view that the prosecution is fully justified in relying on the same. No doubt, in her statement as stated in the FIR (Exh. P-4) that her husband tried to save her was not stated in the dying declaration. Inasmuch as the dying declaration satisfied all the prescribed conditions and procedure, we are not inclined to accept the stand taken by learned counsel for the appellant.

10. As rightly observed by the trial Court and the High Court, merely because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution cannot be thrown out. Since the dying declaration (Exh.P-11) is proved beyond doubt, as discussed above, we reject the argument of the counsel for the appellant. For the same reasons, the appellant cannot be convicted only under Section 304 Part II IPC.

11. It is clear from the prosecution case that the accused was the only person inside the room at the time of the incident along with his wife. Even if it is accepted that in the course of the said incident he sustained some burn injuries, it is not a ground for exonerating his guilt. We have already observed that Dr. Manish Kaushal (PW-8) has stated that on 04.02.1998 he examined the injured - Maladeep and found her conscious and fit to make a statement. The said report has also been marked as Exh.P-11 and the statement of the deceased was recorded by the Executive Magistrate in his presence.

12. In the light of the above discussion and on going through the entire material relied on by the prosecution and the defence, we are unable to agree with the argument of the counsel for the appellant, on the other hand, we concur with the conclusion arrived at by the courts below. Consequently, the appeal fails and the same is dismissed.

13 Learned counsel for the appellant by pointing out the fact that the appellant had served more than 14 years in prison, prayed for appropriate direction for his release as per Jail Manual. Without expressing any opinion on the merits of his claim, inasmuch as we dispose of his appeal, the State is free to consider the same in accordance with the Rules/Instructions/ Jail Manual applicable to the appellant. With the above observation, the appeal is dismissed.

B.B.B. Appeal dismissed.

KUMAR ETC. ETC.
v.
KARNATAKA INDUSTRIAL COOP. BANK LTD. & ANR.
(Criminal Appeal Nos. 2049-2066 of 2012)

DECEMBER 14, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Code of Criminal Procedure, 1973 - s.397 r/w s.401 - Revisional Jurisdiction - Reversal of acquittal into conviction - Permissibility - Allegation that appellants pledged fake ornaments and obtained loans thereagainst from respondent-bank - Acquittal of appellants by trial court - Revision petition - High Court allowed the same and convicted the appellants u/ss.406 and 420 r/w s.34 IPC - On appeal, held: While revisional power under the CrPC vest in the High Court the jurisdiction to set aside an order of acquittal, the same would not extend to permit conviction of the accused - Thus, order of High Court converting the acquittal of appellants to one of conviction cannot be sustained in law - Further, the revision petition was inordinately delayed and no sufficient cause was made out within the meaning of s.5 of the Limitation Act - Evidence tendered by the prosecution witnesses also made it clear that the prosecution had failed to prove that the gold ornaments exhibited were the very same articles pledged by the appellants - Appellants accordingly entitled to acquittal - Penal Code, 1860 - ss.406 and 420 r/w s.34 - Limitation Act, 1963 - s.5.

Respondent no.1-Bank filed complaints alleging that the accused-appellants had obtained loans from it by pledging fake gold ornaments. The trial court acquitted the appellants. Respondent no.1-Bank filed revision applications under Section 397 read with Section 401 CrPC . The High Court allowed the applications and

convicted the appellants under Sections 406 and 420 r/w s.34 IPC, and therefore the present appeals.

Allowing the appeals, the Court

HELD: 1. The revisional jurisdiction of a High Court is conferred by the provisions of Section 397 read with Section 401 CrPC. While Section 397 empowers the High court to call for the record of any proceeding before any inferior criminal court within its jurisdiction to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order and such power extends to suspension of execution of any sentence or order and also to release the accused on bail, under Section 401(3) CrPC there is an express bar in the High Courts to convert a finding of acquittal into one of conviction. While the revisional power under the CrPC would undoubtedly vest in the High Court the jurisdiction to set aside an order of acquittal the same would not extend to permit the conviction of the accused. The High Court may, however, order a retrial or a rehearing of the case, as may be, if so justified. The order of the High Court converting the acquittal of the accused-appellants to one of conviction and the sentences imposed on each of them cannot be sustained in law. [Para 5] [1121-H; 1122-A-D]

Sheetala Prasad & Ors. v. Sri Kant & Anr. **2010 (2) SCC 190: 2009 (16) SCR 686 and** *Johar & Ors. v. Mangal Prasad & Anr.* **2008 (3) SCC 423: 2008 (2) SCR 185 - relied on.**

2. Further, the Revision Applications filed by the complainant Bank before the High Court were inordinately delayed, i.e., some by 290 days and the others by 785 days. An application was filed by the complainant Bank under Section 5 of the Limitation Act, 1963 seeking condonation of the delay in instituting the Revision Applications. The entire application is in a single paragraph containing a bald statement that the result of

the case (perhaps the order of the trial court) was not intimated to the bank and it is only after getting the requisite information and certified copies of the judgment that the Revision application could be filed. The High Court had condoned the delay on the ground that mere technicalities should not come in the way of rendering justice. While there can be no dispute with the above proposition, one does not see how the same could have had any application to the present case. It was the duty of the High Court to consider the reasons assigned for the delay and thereafter come to the conclusion whether, on the grounds shown, sufficient cause within the meaning of Section 5 of the Limitation Act has been made out. On the basis of the statements made in the condonation application filed on behalf of the bank, no satisfaction could have been reasonably reached that the complainant Bank was prevented by sufficient cause from filing the Revision Applications in time. [Para 6] [1122-E-G; 1123-A-C]

3. Also, from the evidence tendered by the prosecution witnesses, viz. PWs 1,2,3 and 4, it is difficult to see as to how the conclusion of the trial court that the prosecution had failed to prove that the gold ornaments exhibited in the case are the very same articles pledged by the accused is in any way erroneous or untenable in law so as to disentitle the accused to be acquitted. [Para 7] [1123-D-E; 1124-C-D]

Case Law Reference:

2009 (16) SCR 686	**relied on**	**Para 5**
2008 (2) SCR 185	**relied on**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 2049-2066 of 2012.

From the Judgment & Order dated 16.11.2010,

22.03.2011 of the High Court of Karnataka Circuit Bench at Dharwad in Criminal Revision Petition Nos. 2250 of 2010 CW, 2256, 2251, 2252, 2253, 2254, 2255, 2257, 2258 of 2010, 2158, 2159, 2160, 2162, 2163, 2164, 2165, 2171 and 2161 of 2009.

Shankar Divate for the Appellants.

N.D.B. Raju, Bharathi Raju, N. Ganpathy, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted in each of the Special Leave Petitions.

2. The appellants who have been acquitted of the charges under Sections 406 and 420 read with Section 34 of the Indian Penal code have filed the instant appeals challenging the conviction ordered by the High Court of Karnataka in the exercise of its Revisional Jurisdiction under Section 397 read with Section 401 of the Code of Criminal Procedure. The appellant in each of the appeals has been sentenced to undergo R.I. for three months for the offence punishable under Section 406 IPC and R.I for six months for the offence under Section 420 IPC. While both the sentences of imprisonment are to run concurrently, each of the appellants has also been sentenced to pay fine or undergo the default sentence that has been imposed.

3. The facts lie within a short compass and may be briefly enumerated herein under.

The respondent No. 1 in each of these appeals i.e. Karnataka Industrial Corporation Bank Ltd., Hubli (hereinafter shall be referred to 'the complainant Bank') had filed 18 different complaints in the Court of Judicial Magistrate, First Class, Hubli alleging that between 12.07.2003 and 31.03.2004 loans were taken by each of the appellants by mortgaging gold ornaments.

According to the complainant Bank, on 10.06.2004, a news item had appeared in the local newspapers that the appraiser of Maratha Cooperative Bank had given false appraisal reports on the basis of which the said bank had granted loans against fake gold ornaments. As the said person was also the appraiser of the complainant Bank the gold ornaments pledged with the complainant bank by the accused were verified through another appraiser (PW.4) who certified the gold ornaments pledged by the accused to be fake. Accordingly, the complaints in question were filed alleging commission of offences under Section 406, 420 read with Section 34 of the IPC by each of the accused persons who had taken loans from the complainant Bank by pledging fake gold ornaments. The complaints were referred, by the learned Magistrate, to the police for investigation and on completion of such investigation charge sheets were filed in the Court against each of the accused. Thereafter charges were framed to which the accused pleaded not guilty and claimed to be tried. All the complaint cases were taken up for trial together and the evidence of the prosecution was recorded in the complaint case registered and numbered as CC. No. 1235 of 2005. In the course of the trial six witnesses were examined by the prosecution and several documents were also exhibited. Thereafter, the learned trial court by order dated 29.2.2008 acquitted each of the accused of the charges levelled against them. It may also be noticed that during the pendency of the trial, the appraiser, who was impleaded as the second accused had died. Aggrieved by the said acquittal, the complaint Bank instituted separate Revision applications before the High Court of Karnataka. The High Court by its common order dated 16/11/2010 and 22/3/2011 allowed each of the Revision Applications filed by the complainant Bank and convicted and sentenced the accused as aforesaid. Aggrieved the present appeals have been filed.

4. We have heard Mr. Shankar Divate, learned counsel for the appellant and Mr. N.D.B. Raju and Mr. V.N. Raghupathy, learned counsels for the respondents.

5. The revisional jurisdiction of a High Court is conferred by the provisions of Section 397 read with Section 401 of the Code of Criminal Procedure. While Section 397 empowers the High court to call for the record of any proceeding before any inferior criminal court within its jurisdiction to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order and such power extends to suspension of execution of any sentence or order and also to release the accused on bail, under Section 401 (3) Cr.P.C. there is an express bar in the High Courts to convert a finding of acquittal into one of conviction. While the revisional power under the Code would undoubtedly vest in the High Court the jurisdiction to set aside an order of acquittal the same would not extend to permit the conviction of the accused. The High Court may, however, order a retrial or a rehearing of the case, as may be, if so justified. [vide *Sheetala Prasad & Ors. v. Sri Kant & Anr.*[1] and *Johar & Ors. v. Mangal Prasad & Anr.*[2]]. In view of the above we do not see how the orders of the High Court dated 16/11/2010 and 22/3/2011 converting the acquittal of the accused appellants to one of conviction and the sentences imposed on each of them can be sustained in law.

6. There is another aspect of the case which cannot be left unaddressed. The Revision Applications filed by the complainant Bank before the High Court were inordinately delayed, i.e., some by 290 days and the others by 785 days. We have read and considered the application filed by the complainant Bank under Section 5 of the Limitation Act, 1963 seeking condonation of the delay that had occurred in instituting the Revision Applications. The entire application is in a single paragraph containing a bald statement that the result of the case (perhaps the order of the trial court) was not intimated to the bank and it is only after getting the requisite information and certified copies of the judgment that the Revision application could be filed. The High Court had condoned the delay on the

1. 2010 (2) SCC 190.
2. 2008 (3) SCC 423.

ground that mere technicalities should not come in the way of rendering justice. While there can be no dispute with the above proposition, we do not see how the same could have had any application to the present case. It was the duty of the High Court to consider the reasons assigned for the delay and thereafter come to the conclusion whether, on the grounds shown, sufficient cause within the meaning of Section 5 of the Limitation Act has been made out. We have already taken note of the contents of the condonation application filed on behalf of the bank and it is our considered view that on the basis of the statements made therein no satisfaction could have been reasonably reached that the complainant Bank was prevented by sufficient cause from filing the Revision Applications in time.

7. We have also been addressed by the learned counsels for the parties at some length on the merits of the matter. To make the discussion complete we may briefly note the reasons that had weighed with the learned trial court to acquit the accused in the present cases. We have considered the evidence tendered by the prosecution witnesses, particularly, Madan Athani (PW-1), A.N. Ramakrishna (PW-2), Irappa Abbigeri (PW-3) and Pandurang (PW-4). Significantly, PW-1 had deposed that a register is maintained with respect to the gold articles pledged with the Bank showing the weight, the nature of the article, quality of the gold, name of the design etc. for purposes of identification of the articles pledged. However, no such register was brought on record by the prosecution. At the same time, PW-2 who was the Manager of the bank at the time of the filing of the complaint had stated that he had not called the borrowers/accused to identify the gold articles when the same were found to be fake nor had he informed the accused that the gold ornaments pledged by them were fake. That a register showing the particulars and description of the gold ornaments pledged to the bank was maintained had also been admitted by PW-3. PW-1 in his cross-examination had admitted that each gold article pledged with the bank will have a chit containing the loan account number, signature of the

borrower and the bank officials but in respect of the gold articles exhibited in the court no such chits were found to be affixed. It also transpires that PW-1 who was the Bank Manager at the time of the loan transaction had handed over the articles to the new incumbent (PW-2) and furthermore that the gold ornaments pledged were kept in a locker and were subjected to regular inspection by the bank officials. PW-4 who had submitted the second appraisal report to the effect that the gold ornaments sent to him were fake had deposed that the said fact i.e. gold ornaments were fake could be made out on an examination by the naked eye. If the prosecution evidence itself had revealed the aforesaid facts it is difficult to see as to how the conclusion of the learned trial court that the prosecution had failed to prove that the gold ornaments exhibited in the case are the very same articles pledged by the accused is in any way erroneous or untenable in law so as to disentitle the accused to be acquitted.

8. For all the aforesaid reasons we are of the view that the judgment and order dated 16/11/2010 and 22/3/2011 passed by the High Court in each of the Criminal Revisions before it cannot be sustained in law. We therefore, allow the appeals and set aside the common judgment and order dated 16/11/2010 and 22/3/2011 passed by the High Court in the Criminal Revision Petitions filed by the respondent Bank.

B.B.B. Appeals allowed.

SR. DIVISIONAL RETAIL SALES MANAGER, INDIAN OIL CORPORATION LTD. THROUGH POA HOLDER & ORS.

v.

ASHOK SHANKARLAL GWALANI

(Civil Appeal No. 9101 of 2012)

DECEMBER 14, 2012

[SWATANTER KUMAR AND SUDHANSU JYOTI MUKOPADHAYA, JJ.]

Public Distribution - Allotment of petrol/diesel dealership - First round of selection for allotment cancelled due to irregularities in the selection process - In the second round of selection, respondent selected - This selection also cancelled due to irregularities - In the third round of selection, candidature of the respondent rejected - Writ petition by respondent challenging rejection of his candidature - High Court allowing the appeal, directing the company to issue Letter of Intent in favour of the respondent - On appeal, held: Decision to cancel the selection was taken by the competent authority - High Court ought not to have interfered with such decision in exercise of its jurisdiction under Article 226 of Constitution - Constitution of India, 1950 - Article 226.

Appellant-company invited applications for grant of petrol/diesel retail outlets (dealership) for various locations in the State of Maharashtra. The respondent, alongwith others, applied for one of the locations. In the first round of the selection process, 'K' was selected by the Interview and Screening Committee. The respondent was placed at 2nd and 3rd position in the merit list by the Interview Committee and Screening Committee respectively. On complaint, the Investigation Officer placed the respondent at 1st position. Ultimately the selection was cancelled and all the candidates were called for re-interview. Thus in the second round of selection, after re-interview, the respondent was found to be only candidate in the merit panel. Complaints were lodged against the same. Inquiry Commission was appointed to investigate into the complaints. Writ petition was also filed against the company by 'K' challenging the order whereby the merit list where he was declared as No. 1 candidate was cancelled. High Court dismissed the petition. After inquiry, the complaints were found to have merit and therefore, the company again advertised for re-interview of all the candidates. Thus in the third round of selection, the Committee, before whom the applications of all the eligible candidates were placed, rejected the candidature of the respondent on the ground that 'Relationship Affidavit' was not as per the format. Respondent's writ petition, challenging the rejection of his candidature was allowed by High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The Interview Committee, Screening Committee and the Investigation Officer assessed the three candidates in three different groups due to which the position of the candidates changed in the merit list prepared by the Interview Commitstee, Screening Committee and the Investigation Officer. The High Court has not noticed and discussed the aforesaid facts and without discussing the further developments as taken place after 24.12.2008 (i.e. the date the respondent was placed in merit list in the second round of selection) directed the appellants to issue the Letter of Intent in favour of the respondent. Though the High Court noticed the stand taken by the appellants that the 'Relationship Affidavit' submitted by the respondent was not as per format, it failed to discuss the effect of such an incomplete affidavit in the matter of selection. [Paras 15 and 16] [1139-F-H; 1140-A]

2. Generally, if an irregularity is detected in the matter of selection or preparation of a panel, it is desirable to have a fresh selection instead of re-arranging the panel which is found to be vitiated. In the present case, the Authority empowered to appoint, is the competent authority to decide as to whether the panel should be discarded and there should be a fresh selection in view of the facts. In such circumstances, the High Court under Article 226 of the Constitution of India ought not to have interfered with the decision of the competent authority in canceling the selection. Accordingly, the impugned order is set aside with a liberty to the Competent Authority to re-advertise the petrol/diesel retail outlets in question and to make a fresh selection in accordance with law. [Paras 17 and 18] [1140-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9101 of 2012.

From the Judgment and Order dated 29.09.2010 of the High Court of Judicature at Bombay in WP No. 5032 of 2010.

G.E. Vahanvati, AG, Jaideep Gupta, Rahul Narayan, Meenakshi Arora, Prashant Bhushan, Sumeet Sharma, Sanjiv Kumar Saxena, Ruchi Misra, Partha Sil and Kunal Chatterjee for the appearing parties.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. The present appeal has been filed against the impugned order dated 29th September, 2010 passed by the Bombay High Court in Writ Petition No. 5032 of 2010 wherein the High Court has granted the Writ of Mandamus directing the Indian Oil Company to allot the dealership of the site located at Thane Belapur Road, Village Mahape, Navi Mumbai, Maharashtra to Shri Ashok Shankarlal Gwalani (hereinafter referred to as the "respondent")

3. The relevant facts as pleaded by the appellant are as follows:

On 11th June, 2005, the Indian Oil Corporation Limited (hereinafter referred to as the "Company") published a proclamation in leading newspapers and invited applications for grant of petrol/diesel retail outlets (dealership) for various locations in the State of Maharashtra. The respondent on 14th July, 2005, amongst others applied for the same. Interviews were conducted on 9th-10th December, 2005. One Mr. Nilesh L. Kudalkar was placed at the top of the merit panel while the respondent was placed second and one Mr. K. Srinadha Rao was third. However, since the difference between the marks of the top three candidates was within 5%, the result of the interview was kept in abeyance in accordance with the policy of the company dated April 7, 2005. A Screening Committee was established which reviewed the markings and carried out another interview of the three candidates. The result was declared on 4th April, 2006 and Mr. Nilesh L. Kudalkar was first in the merit panel.

4. Being aggrieved respondent and Mr. K. Srinadha Rao both made complaints on 10.4.2006 and 19.4.2006 respectively to the company alleging irregularities in the selection process. In accordance with the policy dated 1st September, 2005, an investigation was made by the Company into the allegations made by them. It was found, among other things, that the respondent and Mr. Srinadha Rao had not been marked correctly as regards their financial capability and that both had failed to provide the attested documents as had been specifically required under the advertisement. Since the allegations in the complaints were found to have merit, the selection was cancelled and all the candidates were to be called for re-interview. In the meantime, on 28th April, 2006, one Mr. Pritesh Chhajed, who was an M&H Contractor operating on the site filed Civil Suit No. 230/2006 before the Thane Sr. Division Court seeking an injunction against the company from terminating the contract and evicting him from the land. He was

unsuccessful in the same and filed an appeal before the Bombay High Court which was dismissed by the High Court on 27th June, 2008 and he was asked to vacate the site by December 31, 2008.

5. Re-interviews were conducted on 22nd and 24th December, 2008. The respondent was found to be the only candidate in the merit panel. However, complaints were received from Mr. Pritesh Chajjed (who had also appeared in the interviews) on 26th December, 2008 and from Mr. K. Srinadha Rao on 16.12.2008, 23.12.2008, 30.12.2008, 2.01.2009 and 10.02.2009. Again on 30.12.2008, a one man Inquiry Commission was appointed to investigate the allegations contained in the complaints. Also on 14.1.2009, Mr. Nilesh L. Kudalkar filed a Writ Petition vide no. 113 of 2009 against the company for cancelling the merit list and declaring him to be the no.1 candidate. The High Court of Bombay was pleased to dismiss the aforementioned writ petition in April, 2009.

6. In the meantime, the inquiry instituted by the Company revealed that the complaints made by various persons had merit.

7. Therefore, on 6th August, 2009, the appellants sought approval from their management for re-advertisement of the location. On 18th August, 2009, the Company management advertised for re-interview of all the candidates including scrutiny of all documents from the initial stage in order to remove all errors from the selection process. Since the code of conduct for elections was in force, the re-interview was deferred till its withdrawal.

8. In December, 2009, the L-1 Committee was appointed before which the applications along with other documents of all ten eligible candidates were placed. The Committee submitted its report. The candidature of the respondent was rejected on the ground that the 'Relationship Affidavit' was not as per the format.

9. On 3rd June, 2010, respondent was communicated about the rejection of his application.

10. Being aggrieved respondent filed a writ petition being WP(C) No. 5032 of 2010 before the Bombay High Court on 17.6.2010 praying inter alia for issuing of an appropriate writ directing the appellants to allot the dealership at the site as per the advertisement dated 11.6.2005 and setting aside the letter dated 3.06.2010 to enforce the decision of the Selecting Committee dated 24.12.2008, which was allowed by the impugned order.

According to the appellants, considering that all the former merit panels were vitiated on account of grave errors, including complaints received with regard to all the interviews, the Company is desirous of undertaking the selection process de novo by re-advertising the location.

11. Learned counsel for the appellant submitted that on 8th December, 2009, L-I Committee was nominated in view of the complaints filed by one Srinadhrao and Shri Pritesh Chajed. These complaints were thoroughly investigated and report dated 24th March, 2009 was received by the Company. Pursuant to the said report the Company decided to look into the matter from the scrutiny level and to re-interview all the candidates so as to remove the defects in the selection process. Re-scrutiny of all the applications was made and during that process the documents including the application submitted by the respondent found to be suffering from deficiencies. It was contended that the affidavit submitted by the respondent was not as per the format and, therefore, his application was liable to be rejected as per the policy. Consequently, the impugned letter was issued to the respondent.

12. The aforesaid fact was disputed by the learned counsel appearing on behalf of the respondent. They invited the affidavit filed by the Company in Writ Petition No. 113 of 2009

wherein they supported the selection process as well as the merit list prepared by the Selection Committee on 24.12.2008. In the said affidavit, the allegation that the respondent was less meritorious was denied by the Company. The stand of the Company was that the decision to award dealership to the respondent did not suffer from any manifest error, equity, fair play and justice. In the said case, the Company pleaded that the decision in favour of the respondent was transparent and was not motivated on any consideration other than probity. The said case was filed by second person challenging the selection of the respondent. The Division Bench of the Bombay High Court after hearing both the parties vide order dated 17th April, 2009 in Writ Petition No. 113 of 2009 held that the High Court could not sit in appeal over the decision of the selection committee and the decision is not arbitrary. The Court further held that the writ petitioner of the said case (Writ Petition No. 113/2009) having participated in the subsequent selection without any protest, could not revert back to the earlier selection process.

13. On 17th September, 2012, after hearing both the parties, this Court requested the learned Attorney General who was appearing on behalf of the Company to give us the reasons in detail for cancellation of the first and second rounds of the selection process held by the authorities concerned. The learned Attorney General after meeting with the representative of the Company in his office on 22nd September, 2012 and after going through the relevant papers of interviews submitted a report; the relevant portion of which reads as under:-

> "In respect of the first round of the selection process, in which interviews were conducted on 9th land 10th December, 2005, the Screening Committee had released the results on 4.4.2006 subsequent to which complaints received from Shri Ashok Shankarlal Gwalani on 10.04.2006 and from Shri K. Srinadha Rao on 19.4.2006. The General Manager, Maharashtra State Office of the Indian Oil Corporation appointed an inquiry committee to

> investigate the complaints. Based on the Inquiry Report, which was submitted on October 7, 2006, the Maharashtra State Office prepared a Note dated 17.10.2006 which was finally approved and endorsed on November 7, 2006 by which a decision was taken in accordance with existing guidelines to re-interview eligible candidates as the merit panel had been vitiated due to errors in evaluating financial parameters of the candidates in the merit panel which resulted in a change in the merit panel. A typed copy of the Note dated 17.10.2006 has been annexed by the petitioner in the Application to bring on record facts, subsequent events and documents, marked as Annexure P-5 thereto.
>
> 4. In respect of the second round of the selection process, in which interviews were conducted on December 22-24, 2008, two complaints were received from Shri Pritesh Chhajed on 26.12.2008 and from Shri K.Srinadha Rao on 16.12.2008 with a reminder on 10.1.2009. An inquiry report was prepared by investigating officer on 24.3.2009 which was finalized by the Maharashtra State Office vide Note dated 13.4.2009. In relation to the complain of Shri Pritesh Chhajed, it was found that after giving benefit to the complainant, the following position emerged:
>
> "a) Even if it is considered giving benefits to the complainant candidates Sri Pritesh J. Chajjed as eligible based on enquiry findings, the number one empanelled candidate remains unchanged as 1st in the Merit Panel, however, the panel will get changed by adding other qualified candidates in 2nd rank at least.
>
> b) The other two complainant candidates would be ranked hypothetically as below"

Name of the candidate	Marks by the L1 committee	Marks by the L2 committee	% marks allotted by interview committee (out of total 65 marks)	Empanelment by interview committee	% marks evaluated if deviations taken into consideration	Empanelment after deviations taken into consideration (analysis)
Shri Ashok Gwalani	41.78	5.2	72.38%	1	NA	
Shri Pritish Chhajed	35.67	7.4	Ineligible (42.07) (66.26)	Ineligible	66.26%	
Shri K. Shrinadharao	31.00	6.9	58.30	Not qualified	NA	
Shri Keshavrao Gopairao Shinde	32.85	5.8	59.46	Not qualified	NA	

Based on evaluation by L1 (Annexure A) and L2 (Annexure B) committee the mark sheet as complied by the interview committee (Annexure C), the marks awarded to the complainant Sri Pritosh Chhajjed is computed in the above table, though the same was not declared by the committee due to his ineligibility.)

Considering that the marks allotted by L1 (35.67) and L2 (7.4) to Sri Pritish Chajjed is added, he gets 66.26% marks (i.e. 43.07 out of 65) and would have become 2nd in the merit panel whereby the original merit panel dated 23.12.08 undergoes a change with two candidates in the merit panel instead of one empanelled candidate and thus the selection gets vitiated. Hence, as per policy in vogue, since the above referred selection gets vitiated and also there are other eligible candidates available, the location should be reinterviewed with all the eligible candidates.

c) From the records, it is also observed that the location Mahape had been originally advertised on 11.6.2005 against which based on interview, the first merit panel was declared on 4.4.4006, thereafter there were complaints and after investigation as per grievance redressal procedure and the decision by the competent authority, re-interview of all the eligible candidates was conducted on 22.12.08 to 24.12.2008 and accordingly the above referred merit panel dated 24.12.2008 was declared by the interview committee. The selection process for this location remained inconclusive for the last four years and is yet to be concluded. Further it is also observed that this will be a case of 2nd re-interview with all the eligible candidates for the same location. In all likelihood, based on the above investigation details

and analysis, there may not be any further change in the merit panel in respect of the first empanelled candidate. Additionally, there may be other candidates who may come in the panel in the 2nd and 3rd position. Though as per policy in vogue re-interviews recommended."

5. In view of this, the following recommendations were put up for final verdict by the competent authority in the matter:-

" 1. Since the above referred selection process on investigation gets vitiated and also there are other eligible candidates available, the location should be re-interviewed with all the eligible candidates as per selection guidelines in vogue.

2. However, the competent authority, i.e. State Head, MSO while giving the final order in the above investigation (vide report dated 6.2.2009 and 24.3.2009 by Sri R. Ganeshan as placed below), may also like to take a view on the facts given in para (c) above, whether to continue with the existing merit panel dated 24.12.08 with the lone candidate whose position is not disturbed as per above analysis remaining as 1st empanelled candidate or to go for re-interview as per extant guidelines.

3. Action is recommended in view of the lapses by the DO Coordinating officer and interview committee (L2) for not accepting the duplicate of original marksheet as detailed above in the IO's report in tabulation.

6. These recommendations were studied/reviewed by the new Retail team at the MSO and comments were prepared on 29.07.2009, which were approved on 3.08.2009:

1. Since vitiation in the selection process has been established, as recommended, it is agreed/recommended that the location should be re-interviewed as per the extant policy guidelines.

2. In view of Sr. No.1 above, in which vitiation in the selection process has been established and re-interview recommended, in order to have transparency in selection it is recommended that re-interview be done with all the eligible candidates as per the extant policy guidelines.

3. Chief Manager (RS), MSO has proposed action against the DO Co-ordinating and the L2 Committee. Our comments are as under:

In this case the candidate had brought the Duplicate copy of the original, which in its strictest sense is not the original. Logically duplicate copy of the documents should have been considered as original for the purpose verification. This could/ should have been got confirmed by the coordinating officer and implemented.

However it appears that the DO coordinating officer/L2Committee has strictly gone by the policy guidelines in this regard to verify the attested copy of the document submitted with the application, from the Original to be brought by the candidate at the time of interview. Therefore technically the DO coordinating Officer/L2 Committee has strictly followed the guidelines.

ED MSO has detailed his views & finally opined as follows in:

"In order to avoid any further complication and to

give fair chance to everyone, in my opinion this selection process should be cancelled and the location should be Re-advertised. Since there is no specific policy in this regard it is suggested that HO opinion may be sought."

14. From the pleading of the parties as noticed above and the record, the following facts emerges:-

(a) The proclamation was made on 11.6.2005 i.e. more than seven years ago but till date no person has been granted the dealership in question.

(b) The first interview was conducted on 9th-10th December, 2005 in which one Mr. Nilesh L. Kudalkar was placed at the top of the merit panel while the respondent was placed second and one Mr. K. Srinadha Rao was third. When complaints were made against the selection as well as an allegation of irregularity in the process, after investigation, the Company found that the respondent and Mr. Srinadha Rao had not been marked correctly and both failed to provide the attested documents as had been specifically required under the advertisement and therefore the first selection was cancelled.

(c) The second re-interview was called for and conducted on 22nd and 24th December, 2008. In the said re-interview the respondent was the only eligible candidate in the merit panel. On the basis of the complaints made by other persons a one man Inquiry Commission was appointed. On the basis of the report of the Investigating Officer dated 6.2.2009 and 24.3.2009, it was found that there were lapses by the DO Coordinating Officer and the interview committee (L2), in not accepting the duplicate of the original mark-sheet of a candidate as detailed in the Inquiry Officer report in tabulation.

(d) The record further shows that the respondent submitted

a representation before the Chairman of the Company on 24.8.2009 with the reminder filed on different dates including the one dated 23.1.2010. The Senior Divisional Retail Sales Manager by communication dated 3.06.2010 informed the respondent that *"on perusing the application and the accompanying documents it is observed that Relationship Affidavit not as per format. We regret that in view of the same your application is found ineligible."*

In the aforesaid background, the DGM (RC) by its note dated 13.8.2009 rejected the opinion submitted by the Office for re-interview.

15. It is not clear as to how the assessment was made by the authorities as apparent from the investigation report (Annexure-R6). The Investigating Officer in the summary of investigation submitted his conclusion, the relevant potion of which reads as follows:

"Summary of Investigation:

Based on documents provided/handed over by DO, as also application the policy guidelines RO/6002 dt. 7.4.2005 & 4.4.2006 the following is the conclusion:

A) L-1 Committee has not strictly followed the guidelines regarding signing of all documents for assessment. However, irrespective of this deviation, L-1 Committee has considered all documents for assessment.

B) In case of 'Liquid Cash in the form of Bank Fixed Deposit etc. and 'Fixed and Movable Assets" as detailed in my report, for financial capability, the L-1 Committee, Screening Committee has given weight-age to documents of family members/ relatives even though 'No Consent' affidavit/letter is available. Therefore, in my final assessment, in line with the policy 'No weight-age has been given to documents without consent. Therefore final

marks have undergone change. Hence in line with the above the final result is as under:

As per Interview Committee (in line with merit):

Sr.No.	Name of candidate	Total marks
1	Shri Nilesh Laxmikant Kudalkar	56.50
2	Dr Ashok Shankarlal Gwalani	55.33
3	Shri K. Srinadharao	54.33

As per Screening Committee (in line with merit):

Sr.No.	Name of candidate	Total marks
1	Shri Nilesh Laxmikant Kudalkar	59.0
2	Shri K. Srinadharao	57.0
3	Dr Ashok Shankarlal Gwalani	52.0

As per Investigation (in line with merit):

Sr.No.	Name of candidate	Total marks
1	Dr Ashok Shankarlal Gwalani	56.78
2	Shri K. Srinadharao	53.63
3	Shri Nilesh Laxmikant Kudalkar	48.52

From the aforesaid report, it is clear that the Interview Committee, Screening Committee and the Investigation Officer assessed the three candidates in three different groups due to which the position of the candidates changed in the merit list prepared by the Interview Committee, Screening Committee and the investigation Officer.

16. In the present case, the High Court has not noticed and discussed the aforesaid facts and without discussing the further developments as taken place after 24.12.2008, directed the appellants to issue the Letter of Intent in favour of the

respondent. Though the High Court noticed the stand taken by the appellants that the 'relationship affidavit' submitted by the respondent was not as per format, it failed to discuss the effect of such an incomplete affidavit in the matter of selection.

17. Generally, if an irregularity is detected in the matter of selection or preparation of a panel it is desirable to have a fresh selection instead of re-arranging the panel which is found to be vitiated. The Authority empowered to appoint, is the competent authority to decide as to whether the panel should be discarded and there should be a fresh selection in view of the facts narrated above. In such circumstances, the High Court under Article 226 of the Constitution of India ought to not have interfered with the decision of the competent authority in canceling the selection.

18. For the reasons aforesaid, we have no other option but to set aside the order of the High Court. Accordingly, the order and judgment dated 29.9.2010 passed by the High Court of Bombay is set aside with a liberty to the Competent Authority to re-advertise the petrol/diesel retail outlets in question and to make a fresh selection in accordance with law. The appeal is allowed with aforesaid observation and directions. There shall be no order as to costs.

K.K.T. Appeal allowed.

PRADIP KUMAR
v.
UNION OF INDIA AND ORS.
(Civil Appeal No. 9082 of 2012)

DECEMBER 14, 2012

[ALTAMAS KABIR, CJI, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

CUSTOMS EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MEMBERS (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1987:

r. 9(2) - Termination of service of Judicial Member appointed directly from the Bar - Challenged - Held: In the instant case, r. 9(2) is relevant, which provides that in the case of a person appointed as Judicial Member directly from the Bar, unless he is confirmed, his appointment may be terminated at any time without assigning any reason, after giving him one month's notice - The respondent had completed the mandatory period of probation - During three years of service no order was issued extending his period of probation - Therefore, it was expected of the department to take a decision about the performance of the respondent within a reasonable period from the expiry of one year - The order of discharge was based on the report of the President, CESTAT pursuant to a complaint made by advocates and, therefore, it was stigmatic, punitive in nature and, as such, vitiated by legal malice - It could not have been passed without giving an opportunity to respondent to meet the allegations contained in the report of the President, CESTAT - Besides, the order has been passed in order to avoid the procedure of giving one month's notice as required under r.9(2) and, thus, is vitiated by colourable exercise of power - Order of discharge is set aside - Respondent is entitled to be reinstated with all consequential benefits - Administrative Law

- Malice in law - Constitution of India, 1950 - Art. 14 - Colourable exercise of power.

The respondent in C. A. No. 9089 of 2012 on being appointed directly from the Bar as a Member (Judicial), Customs Excise and Service Tax Appellate Tribunal, assumed charge on 22.11.2006. He received an order dated 19.11.2009 extending his period of probation first upto 21.11.2008 and then upto 21.11.2009. The respondent tendered his resignation on 20.11.2009. On that very date an order discharging him from service under r. 8 (3) of the Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987 was also issued. The respondent challenged the said order in an O.A. before the Central Administrative Tribunal contending that his services were terminated as a direct consequence of the complaint made by the representatives of the Bar with regard to an incident that occurred in his court on 09.09.2009 and the consequent report dated 18.11.2009 sent by the President, CESTAT. The Tribunal dismissed the O. A. But the High Court held that since the respondent had completed more than three years of service and he was a Judicial Member, under r. 9(2) his services could not be terminated without serving upon him one month's notice.

Disposing of the appeals, the Court

HELD: 1.1 Rule 8 of the Customs, Excise and Service Tax Appellant Tribunal Members (Recruitment and Conditions of Service) Rules, 1987 provides for discharge of a probationer. It operates within the period of three years during which a member can be continued on probation. Under r. 8(3) a Member may be discharged from service at any time during the period of probation without assigning any reason. [para 5] [1147-G-H]

1.2 Rule 9 talks of reversion or termination of service of Members. Rule 9(1) deals with Members, who have been appointed whilst already in the service of the Central Government. In the case of Judicial Member directly recruited from the Bar, the procedure prescribed under r. 9(2) is required to be followed. In the instant case, r. 9(2) is relevant, which provides that in the case of a person appointed as Judicial Member directly from the Bar, unless he is confirmed, his appointment may be terminated by the Central Government at any time without assigning any reason, after giving him one month's notice. Rationale underlying the provision in r. 9(1) is to enable the member recruited from a Central Government post to be reverted to his parent post. To put Judicial Member recruited directly from the Bar at par with those recruited from Central Government posts, the necessary provision of one month notice has been made in r. 9(2). [para 5 and 10] [1148-A-B, D-E, H; 1149-A; 1153-E]

1.3 In the instant case, the order of discharge cannot be upheld, as it is stigmatic and punitive in nature. It is a matter of record that during three years of service no order was issued extending the period of probation of the respondent. He completed the mandatory period of probation on 21.11.2007, therefore, it was expected of the department to take a decision about the performance of the respondent within a reasonable period from the expiry of one year. The respondent continued in service without receiving any formal or informal notice about the defects in his work or any deficiency in his performance. It is also a matter of record that the procedure for confirmation of the respondent had been initiated on 26.11.2007 and vigilance report for his confirmation had also been received. Therefore, it cannot be said that the discharge of the respondent is not founded on the complaint made by some of the advocates and the report submitted by the President, CESTAT. [para 6 and 11-12] [1153-F-H;

1154-A, F-G]

P. Shere Dr. Vs. Union of India & Ors. **1989 (3) SCC 311- relied on**

2.1 The report prepared by the President, CESTAT on 18.11.2009, clearly indicated that the only reason for issuing the order of discharge was contained therein. There is clearly a live nexus between the decision to discharge the respondent and the disturbance caused by the members of the Bar in the Court of the appellant and his leaving the Bench and retiring to his Chambers. The report of the President prepared on 18.11.2009 leaves no manner of doubt that the respondent had been condemned unheard on the basis of the said incident. The order of discharge, being based upon the report of the President, CESTAT, is clearly stigmatic, punitive in nature and vitiated by the legal malice and could not have been passed without giving an opportunity to the appellant to meet the allegations contained in the said report. [para 12-13] [1154-G; 1155-A, E-H]

2.2 This apart, the order of discharge has been passed in order to avoid the procedure of giving one month's notice as required under r.9(2) and an order was passed on 19.11.2009, extending the respondent's period of probation from 21.11.2007 to 21.11.2008 and further upto 21.11.2009. This was clearly done with an oblique motive of issuing the order of discharge on the very next day, i.e., 20.11.2009. The action of the Union of India is undoubtedly a colourable exercise of power. The order of discharge is arbitrary and, therefore, violates Art.14 of the Constitution. Consequently, this Court holds that the respondent is entitled to be reinstated in service with all consequential benefits. He shall be entitled to full back wages during the period he has been compelled to remain out of service. [para 14-15] [1156-D-G; 1157-A, D-E]

Union of India and Ors. Vs. Mahaveer C. Singhvi **2010 (9) SCR 246 = 2010 (8) SCC 220 - relied on**

Case Law Reference:

1989 (3) SCC 311	**relied on**	**para 11**
2010 (9) SCR 246	**relied on**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9082 of 2012.

From the Judgment and Order dated 27.07.2012 of the High Court of Delhi at New Delhi in WP No. 98 of 2011.

WITH

Civil Appeal No. 9089 of 2012.

Mukul Rohtagi, B.H. Marlapalle, Saurabh Kirpal, Bhaskar Baisal and Nikhil Jain for the Appellant.

K. Radhakrishnan, S. Wasim A. Qadri, Charul Sarin and B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted in both the special leave petitions.

2. By this common order, we propose to dispose of the aforesaid two appeals as they are both directed against the same judgment delivered by the High Court of Delhi in Writ Petition [C] No.98 of 2011 decided on 27th July, 2012. Appeal arising out of Special Leave Petition No.34671 of 2012 has been filed by the Union of India challenging the judgment on various legal grounds. By the aforesaid judgment the High Court has set aside the order passed by the Central Administrative Tribunal [hereinafter referred to as the "CAT'] Principal Bench, New Delhi, dismissing OA No.3544 of 2009 on 9th December, 2010 whereby the respondent was discharged from service. Appeal arising out of Special Leave

Petition No.27821 of 2012 has been filed by Pradip Kumar challenging the judgment of the High Court, in so far as the said judgment limits the relief granted to him only to the extent of quashing of the order passed by the CAT and the order dated 20th November, 2009, whereby he was discharged from service as Member [Judicial] in the Customs Excise and Service Tax Appellate Tribunal ["the CESTAT"].

3. We will firstly take up the Civil Appeal No.......... of 2012 arising out of Special Leave Petition No.34671 of 2012, filed by Union of India, for consideration.

4. The respondent was a practising Advocate in the Calcutta High Court as well as before the CESTAT for over twenty years mainly dealing with the customs, excise and service tax matters. On 22nd April, 2006 he appeared for an interview before the Selection Committee for the post of Member [Judicial] in CESTAT. On being duly selected, he assumed charge as Member [Judicial] in the CESTAT on 22nd November, 2006. Service conditions of the Member of the CESTAT are governed by Customs, Excise and [Service Tax] Appellate Tribunal Members [Recruitment and Conditions of Service] Rules 1987 [hereinafter referred to as the "Rules"]. The controversy in the present proceedings is limited to the interpretation of Rule 8 and Rule 9 [2] of the aforesaid Rules. The said Rules are as under:

"Rule 8. Probation - [1] Every person appointed as a member shall be on probation for a period of one year.

[2] The Central Government may extend the period of probation for a further period of one year at a time so that the period of probation in aggregate may not exceed three years.

[3] A member may be discharged from service at any time during the period of probation without assigning him any reason.

Rule 9. Reversion or termination of the service of members. - [1] In case of a person appointed as a technical or a judicial member from any post under the Union or a State, unless such a person is confirmed, the Central Government may at any time revert him to his parent post without assigning any reason, after giving him one month's notice of such reversion and in case a technical or a judicial member wishes to revert to his parent post, he shall be required to give one month's notice to the Central Government:

Provided that in case such technical or judicial member has already superannuated according to the relevant rules of his parent post, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such technical or judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

[2] In case of a person appointed as a judicial member directly from the Bar, unless he is confirmed, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such judicial member wishes to resign, he shall be required to give one month's notice to the Central Government."

5. Under the aforesaid Rules, Member of the CESTAT is put on probation for a period of one year [Rule 8(1)]. Furthermore, under Rule 8(2), the period of probation may be extended for a further period of one year at a time. However, the total period of probation cannot exceed three years. Under Rule 8(3) a Member may be discharged from service at any time during the period of probation without assigning any reason. This rule makes a general provision regulating the period of probation of members Technical or Judicial,

irrespective of their source of recruitment. Rule 9 (1) and (2), on the other hand, deals with Technical or Judicial Members, recruited from two different sources. Rule 9(1) deals with members, who have been appointed whilst already in the service of the Central Government. In the case of such Members a provision is made in Rule 9(1) to enable the Central Government to revert him to his parent post without assigning any reason, unless such a person is confirmed. Such Member can be reverted to his parent post after giving one month's notice of such reversion. If such a Member wishes to revert to his parent post, he is required to give one month's notice to the Central Government. Under the proviso, services of such member can be terminated by giving one month's notice, without assigning any reason, if he has already superannuated under the relevant rules of his parent post. Such member has a corresponding right to resign by giving one month's notice. We are, however, concerned only with Rule 9(2) which provides that in the case of a person appointed as Judicial Member directly from the Bar, unless he is confirmed, his appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice. Similarly in case the Judicial Member wishes to resign, he is required to give one month's notice to the Central Government. Rule 8 clearly operates within the period of the three years, during which a member can be continued on probation. Rule 9(2) would apply only in cases where the Judicial Member is still not confirmed even after the maximum period of three years, on probation. Rule 9(2) would have no application within the period of three years. Rule 8 provides for discharge of probationer. Rule 9(2) talks of termination of service. In such circumstances, it provides that notice of one month shall be given before termination. But this procedure would become applicable only if the Judicial Member has been in service for three years or more. Otherwise, provision of one month notice would have been made in Rule 8 itself. Rationale underlying the provision in Rule 9(1) is to enable the member recruited from a Central Government post to be reverted to his

parent post. To put Judicial member recruited directly from the Bar at par with those recruited from Central Government posts, the necessary provision of one month notice has been made in Rule 9(2). No such notice would be required if the Judicial Member is discharged within a period of three years, if not confirmed.

6. Keeping in view the aforesaid interpretation of Rules 8 and 9, let us now examine the facts. It appears that no order extending the period of probation of the respondent was passed at the end of the mandatory period of probation on 21st November, 2007 or soon thereafter. The respondent, therefore, continued to work as Member [Judicial]. However, he received an order dated 19th November, 2009 extending his period of probation; first upto 21st November, 2008 and then upto 21st November, 2009. Receipt of the letter dated 19th November, 2009 resulted in the respondent tendering his resignation from the post of Member [Judicial] CESTAT on 20th November, 2009. On that very date an order was issued whereby the respondent was discharged from service on the post of Member [Judicial] CESTAT. The said order is reproduced below:

"F.No.26/8/2006-Ad.IC.
Government of India
Ministry of Finance
Department of Revenue
New Delhi the 20th Nov. 2009

ORDER NO.5 OF 2009

In pursuance of rule 8(3) of the Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules 1987, the President hereby discharges forthwith Sh. P.K. Das, Member (Judicial) in Customs Excise & Service Tax Appellate Tribunal from service.

2. By order and in the name of the President.

Sd/-
(Victor James)
Under Secretary to the Govt. of India

To,

Sh. P.K. Das, Member (Judicial)
CESTAT, West Block No.2
R.K. Puram, New Delhi

Copy to:

1. President, Customs, Excise & Service Tax Appellate Tribunal, New Delhi.
2. Registrar, Customs Excise & Service Tax Appellate Tribunal, New Delhi.
3. Establishment Officer, Department of Personnel & Training North Block.
4. Pay and Accounts Officer, Department of Revenue
5. Notification Folder

Sd/-
(Victor James)
Under Secretary to the Govt. of India"

It appears that thereafter by letter dated 23rd October, 2009 the respondent withdrew his resignation under Rule 9(2), which was well within the prescribed period of one month.

7. During the period of his service the respondent had served under three Presidents, CESTAT, namely, Justice Abichandanani, Justice S.N. Jha and Justice R.M. Khandparkar. It is the case of the respondent that he never received any adverse comments from any of the Presidents during his tenure of service as a Member [Judicial], CESTAT. In fact, he was given the annual increments in the years 2007

and 2008. Since, he had received no adverse reports, the respondent assumed that he would be confirmed on the post of Member [Judicial] CESTAT. But to his utter shock and dismay, he received the order dated 19th November, 2009 which extended his period of probation; first upto 21st November, 2008 and then further upto 21st November, 2009. It is further the case of the respondent, on the basis of the information obtained under the Right to Information Act 2005, that there is a note dated 26th November, 2007 in File No.27/22/2005-AD.IC in which it has been mentioned that the action for initiation of the process of confirmation of the respondent, which was due on 22nd November, 2007, would be initiated in a new file. There is further noting on 23rd January, 2008 calling for the ACRs of the respondent and two other Members. On 6th June, 2008 Justice S.N. Jha, President, CESTAT, wrote to the Secretary, Department of Revenue, requesting him to take steps for the confirmation of some of the Members of the CESTAT including the respondent. The Vigilance Cell had also conveyed its clearance from its own angle, in so far as the respondent was concerned.

8. However, the circumstances did a complete about turn when, like a bolt out of the blue, on 14th September, 2009, the respondent received a note from the President of the CESTAT annexing therewith a copy of the complaint from the members of the Bar about an incident which was alleged to have occurred in the respondent's Court on 9th September, 2009 and requesting for a report about the incident. The President of the CESTAT prepared a report on 18th November, 2009 regarding the incident, which inter alia, contained the following observations regarding the conduct of the respondent:

> "15. It must be noted that whenever any act of misbehavior on the part of the parties or their representatives takes place in the court, it is essentially for the Presiding Officer to administer proper control and to try to defuse the tension if any caused on that count and not to retire immediately to the chamber. Abstaining from and abandoning the court in such a situation and leaving it open and free for all court result is encouraging indiscipline in the court. Merely because some of the representatives of the parties start raising voice or make allegations against the Bench, it would not be proper to abandon the court functioning and to retire to chamber. Rather the Presiding Officer has to try to control such situation by use of administrative acumen. In the case in hand, there does not appear any efforts made by the Presiding Officer in that regard."

The respondent claims that his services were terminated as a direct consequence of the complaint made by the representatives of the Bar and the report of the President, CESTAT.

9. Aggrieved by the aforesaid order, the respondent challenged the same before the CAT by way of OA No.3544 of 2009 on 7th December, 2009. On 9th December, 2009, the OA was dismissed by the CAT. The CAT rejected the submission that the respondent was deemed to be confirmed upon completion of one year period of probation. In any event it seems respondent had dropped the contention regarding the deemed confirmation after some arguments initially and upon considering the judgment of the CAT in OA No.1895 of 2009 - Dr. Vineet Sodhi Vs Union of India decided on 6th December, 2010. CAT also rejected the submission of the respondent that the order of discharge from service was punitive in nature. It was held by CAT that even though report had been received from the President, CESTAT regarding the complaint made by the Members of the Bar, ultimately the discharge of the respondent was on the basis of his unsuitability of the job and unsatisfactory performance of duty. It was also observed by the CAT that there was no full scale formal inquiry, but only facts have been brought to the notice of the competent authority about the unsatisfactory performance of the respondent. With these observations, the OA was dismissed.

10. The respondent being aggrieved challenged the order

before the High Court of Delhi by way of Writ Petition [C] No.98 of 2011. The High Court allowed the writ petition only on the interpretation of Rule 8(3) and Rule 9(2) of the Rules, although the respondent had raised four specific points for the consideration of the High Court. It was submitted that the order of discharge could not be sustained as it had been passed in arbitrary exercise of power. It was said to be a product of malice in law. Secondly it was submitted that the discharge order was punitive in nature inasmuch as it was stigmatic and, therefore, it was essential that inquiry under Article 311(2) of the Constitution of India ought to have been conducted. Thirdly, it was submitted that the relevant rules and in this case Rule 9(2) of the said Rules, requires giving of one month's notice prior to termination. That notice was admittedly not given and, therefore, the termination was bad. Fourthly, it was submitted that by virtue of Rule 8 of the Rules the respondent could be deemed to have been confirmed. The High Court on interpretation of Rules 8 and 9 of the Rules has held that since the respondent had completed more than three years service and he was a Judicial Member, under Rule 9(2) his services could not be terminated without serving upon him one month's notice. In our view, the interpretation given by the High Court on Rule 9(2) is not correct. In the case of Judicial Member directly recruited from the Bar, the procedure prescribed under Rule 9(2) is required to be followed only if such member without being confirmed continues for three years or more.

11. Nonetheless the order of discharge cannot be upheld, as it is stigmatic and punitive in nature. It is a matter of record that during three years of service no order was issued extending the period of probation of the respondent. He completed the mandatory period of probation on 21st November, 2007, therefore, it was expected of the department to take a decision about the performance of the respondent within a reasonable period from the expiry of one year. It is also a matter of record that the respondent continued in service without receiving any formal or informal notice about the defects

in his work or any deficiency in his performance. This Court, in the case of *Sumati P. Shere Dr. Vs. Union of India & Ors.*[1], emphasised the importance of timely communication of defects and deficiencies in performance to a probationer, so that he could make the necessary efforts to improve his work. Non-communication of his deficiencies in work would render any movement order of such an employee on the ground of unsuitability arbitrary. In Paragraph 5 of the judgment, it is observed:-

> "5. We must emphasise that in the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

In our opinion, the aforesaid observations are fully applicable in the facts and circumstances of this case.

12. It is also a matter of record that the procedure for confirmation of the respondent had been initiated on 26th November, 2007. It is also not disputed that vigilance report for his confirmation had also been received. Therefore, it is difficult to accept the submission of learned counsel for the Union of India, that the discharge of the respondent is not founded on the complaint made by some of the advocates. The report prepared by the President, CESTAT on 18th November, 2009, clearly indicated that the only reason for issuing the order of

1. (1989) 3 SCC 311.

discharge was contained in the aforesaid report. In our opinion the order of discharge passed by the Union of India was clearly vitiated by the legal malice. It was clearly founded upon the report submitted by the President, CESTAT. In our opinion the controversy herein is squarely covered by a number of earlier judgments of this Court, which have been considered and reaffirmed in the case of *Union of India and Ors. Vs. Mahaveer C. Singhvi*[2]. Considering the similar circumstances this Court observed as follows:

> "25. In the facts of the case the High Court came to the conclusion that a one-sided inquiry had been conducted at different levels. Opinions were expressed and definite conclusions relating to the respondent's culpability were reached by key officials who had convinced themselves in that regard. The impugned decision to discharge the respondent from service was not based on mere suspicion alone. However, it was all done behind the back of the respondent and accordingly the alleged misconduct for which the services of the respondent were brought to and end was not merely the motive for the said decision but was clearly the foundation of the same."

13. In our opinion, there is clearly a live nexus between the decision to discharge the respondent vide order dated 19th November, 2009; the disturbance caused by the members of the Bar in the Court of the respondent and his leaving the Bench and retiring to his Chamber. The report of the President leaves no manner of doubt that the respondent had been condemned unheard on the basis of the aforesaid incident and the report of the Chairman, CESTAT dated 18th November, 2009. The order of discharge, being based upon the report of the President, is clearly stigmatic and could not have been passed without giving an opportunity to the respondent to meet the allegations contained in the report of the President, CESTAT. We may notice here the observations made by this court in the

2. [2010] 8 SCC 220.

case of *Mahaveer C. Singhvi* [supra]:

> "46. As has been held in some of the cases cited before us, if a finding against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted to the facts of this case."

14. This apart, we are also of the opinion that the order of discharge has been passed in order to avoid the procedure of giving one month's notice as required under Rule 9(2). The aforesaid Rule has made a distinction between the members of the CESTAT who were working in the Central Government prior to their recruitment as Members of the CESTAT and the Judicial Member directly recruited from the Bar. In the case of members recruited from the various services of the Central Government, a provision has been made for their reversion to the parent department. In their case a provision has also been made for them to be reverted to the parent department without assigning any reason. However, the same can only be upon giving one month's notice. In the case of Judicial Member, directly recruited, it has been specifically provided [Rule 9(2)] that upon completion of three years if the Judicial Member has not been confirmed, his services can only be terminated upon being given one month's notice. To avoid this provision, an order was passed on 19th November, 2009, extending the respondent's period of probation from 21st November, 2007 to 21st November, 2008 and further upto 21st November, 2009. This was clearly done with an oblique motive of issuing the order of discharge on the very next day, i.e., 20th November, 2009. The action of the Union of India is undoubtedly a

colourable exercise of power. The order of discharge is in utter violation of Article 14 of the Constitution of India, rendering the same void. In view of the above, we have no hesitation in holding that the special leave petition No. 34671 of 2012 filed by the Union of India is wholly devoid of merit and has to be dismissed.

15. This now brings us to the appeal arising out of Special Leave Petition No. 27821 of 2012 filed by Pradip Kumar claiming the relief of reinstatement and for the grant of consequential benefits including full back wages. Although, the High Court had allowed the writ petition of the respondent only on the ground that there had been a violation of Rule 9(2), we have come to a conclusion that the order of discharge was vitiated being colourable exercise of power, stigmatic and punitive in nature and such order cannot be sustained in law. In our opinion, the order of discharge is arbitrary and therefore violates Article 14 of the Constitution. Consequently, we hold that the appellant - Pradip Kumar is entitled to be reinstated in service. He shall be entitled to full back wages during the period he has been compelled to remain out of service. Union of India is directed to release all consequential benefits to the said Pradip Kumar within a period of two months of the receipt of a certified copy of this order.

16. With these observations, the appeal filed by Union of India being Civil Appeal No……………..of 2012 arising out of Special Leave Petition [C] No. 34671 of 2012 is dismissed and Civil Appeal No……………..of 2012 arising out of Special Leave Petition [C] No. 27821 of 2012 filed by the Pradip Kumar is allowed.

R.P. Appeals disposed of.

CHANDRADHOJA SAHOO
v.
STATE OF ORISSA AND OTHERS
(Civil Appeal No. 9085 of 2012 etc.)

DECEMBER 14, 2012.

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

JUDGMENTS:

Writ petition before High Court - Arising out of orders of revenue authorities with regard to settlement of land with landless persons for agricultural purposes - State authorities alleging the proceedings as forged and fabricated and also resisting the leases as not permissible under the provisions of Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 - High Court rejecting the claim of the applicant on the basis of provisions of 1948 Act - Held: All courts whose orders are appealable and not final, should decide the lis before it on all issues - Such a course of action is necessary to enable the next court in the hierarchy to bring the proceeding before it to a full and complete conclusion instead of causing a remand of the matter for a decision on the issue(s) that may have been left undetermined - In the instant case, High Court ought not to have split up the two questions as if they were independent of each other and on that basis ought not to have proceeded to determine the second question without recording acceptable findings on all aspects connected with the first -Order of the High Court discloses mere acceptance of the version of the State as disclosed in the counter affidavit without any attempt to enter into the core questions that the conflicting claims of the parties had thrown up - Order of High Court is set aside and the matter remanded to it for a de novo decision expeditiously - Orrisa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 - Constitution of India, 1950 - Art.226.

The appellant in C.A. No. 9085 of 2012 stated to have filed an application claiming himself to be a landless person, which was numbered as WL Case No. 71/1979 before the Tehsildar. By an order dated 26.3.1979, two acres of land comprising plot No. 516 and 301 was settled in his favour for agricultural purposes. However, when in spite of the order of the Board of Revenue passed on 7.1.2005, the Record of Rights was not corrected in terms of the order dated 26.3.1979, the appellant filed Writ Petition No. 281 of 2007 before the High Court, which by order dated 26.2.2007, directed the Tehsildar to comply with the directions issued by the Board of Revenue in its order dated 7.1.2005. Thereafter, the State Government filed an application before the Board of Revenue to recall its order dated 7.1.2005. It also filed Letters Patent Appeal challenging the order dated 26.2.2007 passed by the Single Judge. The Division Bench of the High Court remanded the matter to the Single Judge for consideration de novo. The appellant then filed Writ petition No. 337 of 2008 challenging the proceedings before the Board of Revenue seeking recall of its order dated 7.1.2005. The stand of the State Government was that the record of proceedings of WL Case No. 71 of 1979 including the orders dated 26.3.1979 and 28.5.1979 were forged and fabricated. Alternatively, it was pleaded that the subject land having been recorded as "kanta jungle" could not have been leased out as claimed.

The questions for consideration before the High Court were: (i) whether the case record of W.L. Case No. 71 of 1979, including the reports and orders passed therein, were forged and fabricated; and (ii) assuming the lease as claimed by the appellant to have been granted, whether the same was permissible under the provisions of the Orrisa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948. The High Court held that the subject land being covered by the 1948 Act, the

lease granted was void and, as such, no legal right could be recognized in the claimant, and issued directions for resumption of the subject land by the State. Aggrieved, the claimant filed C.A. No. 9085 of 2012. The other appeal was filed in similar circumstances.

Allowing the appeals, the Court

HELD: 1.1 The fundamental principle of law that all courts whose orders are appealable and not final, should take notice of is that they should decide the lis before it on all issues as may be raised by the parties though in its comprehension the same can be decided on a single or any given issue without going into the other questions raised or that may have arisen. Such a course of action is necessary to enable the next court in the hierarchy to bring the proceeding before it to a full and complete conclusion instead of causing a remand of the matter for a decision on the issue(s) that may have been left undetermined, as has happened in the instant case. It may provide a small solution to the inevitable delays that occur in rendering the final verdict in a given case. [para 19] [1172-A-C]

1.2 In the instant case, the two questions that arose before the High Court may not be independent of each other and in fact the answer to the second question may be contingent on an effective resolution of the first. The High Court did not record any specific finding with regard to the allegations of forgery and fabrication of the case record of W.L. Case No. 71 of 1979 and the orders passed therein on the basis of the claims and counter claims raised before it. The conclusion of the High Court that "serious irregularities had been committed while granting the lease about which it was stated in the counter affidavit" and that "it is also revealed from the counter affidavit that before grant of lease no enquiry was ever conducted" indicates a mere passive acceptance of the

stand projected by the State without any attempt to verify the correct position on the issue and to enter into the core questions that the conflicting claims of the parties had thrown up. In fact, a reading of the judgment would indicate that the High Court did not go into the first question raised before it in any acceptable manner. Instead, the High Court thought it proper to proceed on the basis that the land in respect of which claims had been made by the appellant is covered by the provisions of the Act of 1948 and the leases granted, as claimed, were void as the conditions precedent for the grant of such leases, as prescribed by the statute, had not been complied with. [para 15, 16 and 18] [1169-C-F, H; 1170-A; 1171-G]

1.3 If the version put forth by the appellant is correct, the outcome/decision on the second issue before the High court would have certainly stood answered in his favour inasmuch as in such a situation the question of applicability of the Act of 1948 would not arise. If the answer to the said question was, however, to be adverse to the appellant and in favour of the State, the appellant would not be entitled to any relief from the Court on a more fundamental principle than what the second question had raised inasmuch as in that event the principle that "fraud and justice never dwell together" would come into play. The High Court ought not to have split up the two questions as if they were independent of each other and on that basis ought not to have proceeded to determine the second question without recording acceptable findings on all aspects connected with the first. Thus, the approach of the High Court in attempting to resolve the conflict between the parties suffer from a fundamental error which would justify a correction. The order of the High Court is set aside and the matter is remanded to it for a de novo decision expeditiously. [paras 17, 18 and 20] [1170-G-H; 1171-A-B, E-F; 1172-D-E]

Meghmala vs. G.Narasimha Reddy **2010 (10) SCR 47=2010 (8) SCC 383 - referred to**

Case Law Reference:

2010 (10) SCR 47	**referred to**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9085 of 2012.

From the Judgment and Order dated 13.05.2009 of the High Court of Orissa at Cuttak in W.P. (C) No. 337 of 2008.

WITH

Civil Appeal No. 9086 of 2012.

Ranjit Kumar, S.P. Singh, P.K. Mohanty, Pinky Anand, J.K. Das, Pramod Swarup, D.S. Parmar, Susheek Tomer, Ashok Panigrahi, Surjit Bhaduri, Aruna Gupta, Aayush Chandra, Milind Kumar, Swetaketu Mishra, Sandeep Devashish Das, Parmanand Gaur, S.K. Biswal, Pareena Swarup, Sachin Das, Sachin Das, Azim H. Laskar, Rajiv Narain, Chandra Bhushan Prasad, Rajdipa Behura, A. Venayagam Balan and V. Santhanalakshmi 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 two separate but identical orders dated 13.05.2009 passed by the High Court of Orissa whereby the High Court has held that no legal or valid right has accrued to the two appellants under the lease(s) granted in respect of two separate areas of land as claimed by them. As the facts of the two cases are identical, for brevity, reference to the facts in the appeal arising out of S.L.P. (C) No.14618 of 2009 [Chandradhoja Dahu versus State of Orissa and others] would suffice. Similarly, reference to the appellants, hereinafter, is being made in the singular for purpose of clarity.

3. The appellant had instituted a writ petition (W.P.(C) No. 337/2008) before the High Court of Orissa contending that sometime in the year 1979 he, as a landless person, had applied for grant of a lease of government wasteland. On the basis of the aforesaid application W.L. Case No. 71/1979 was registered in the file of the Tehsildar, Bhubaneswar. Notices were duly issued and served and the report of the Amin was called for and considered by the Tehsildar. Thereafter an order dated 26.3.1979 was passed settling the land mentioned below in favour of the appellant for agricultural purposes with the liability to pay rent as a "bagayatdui":

"LAND SCHEDULE

MOUZA- Patia, Khata No.493, Plot No.516, Area Ac.1.107 decs
301 Area Ac 0.93 decs.
Ac.2.00 "

4. Specifically, the appellant had claimed that in the report of the Amin it was mentioned that the settlement operations of village Patia had been completed and in the Record of the Rights of the said village published in the year 1973, plot numbers 516 and 301 have been recorded as "Kanta Jungle". However, the said land did not find any place in the reservation proceedings. As the land had not been reserved for any specific purpose it was stated in the aforesaid report that the same was surplus land. Furthermore, according to Amin, spot enquiries had revealed that there was no forest growth over the land and therefore the surplus land could be settled for agricultural purposes. Consequently, by the order dated 26.3.1979, settlement of the land was made in favour of the appellant. Thereafter, by order dated 28.5.1979, the Tehsildar had directed for correction of the Record of Rights and issuance of patta in favour of the appellant.

5. As the Record of Rights was not corrected and patta was not issued inspite of the order of the Tehsildar the appellant

approached the Tehsildar once again in the year 2004. The Tehsildar called for a detailed report in the matter from the Revenue Inspector. According to the appellant, the report of the Revenue Inspector was submitted on 6.7.2004 specifically mentioning that the Record of Rights had not been corrected and patta had not been issued to the appellant and the other persons mentioned in the report of the Revenue Inspector. On the basis of the report of the Revenue Inspector dated 6.7.2004, the Tehsildar addressed a communication dated 27.8.2004 to the Sub-Collector, Bhubaneshwar, seeking his instructions as to whether the Record of Rights is to be corrected and pattas are to be issued to the concerned persons including the appellant. Despite the above, as no steps were taken in the matter the appellant moved the Board of Revenue seeking appropriate directions. The learned Board by order dated 7.1.2005 directed the Tehsildar to correct the Record of Rights in terms of the order dated 26.3.1979 passed in W.L. Case No. 71 of 1979 within a period of 15 days and, thereafter, report compliance of the action taken.

6. As the order of the Board of Revenue dated 07.01.2005 was also not implemented a Writ Petition i.e. WP(C) No.281 of 2007 was filed by the appellant before the High Court for appropriate directions commanding the respondents therein to give effect to the said order of the Board. The Writ Petition was disposed of by the High Court, at the admission stage, on 26.02.2007 directing the Tehsildar, Bhubaneswar to forthwith comply with the directions issued by the Board of Revenue by its order dated 07.10.2005.

7. Thereafter on 25.08.2007 and while Writ Petition No.281 of 2007 was pending, the State of Orissa filed an application before the Board of Revenue for recall of its order dated 07.01.2005. By order dated 12.10.2007 the said application (registered as Misc. Case No.8 of 2007) was entertained and the earlier order of the Board dated 07.10.2005 was suspended. While the matter was so situated

the State filed a Letters Patent Appeal (Writ Appeal No.129 of 2007) before the High Court challenging the order dated 26.02.2007 passed in Writ Petition No. 281 of 2007, inter-alia, on the ground that the said order was passed ex-parte in so far as the State is concerned. The aforesaid LPA was disposed of on 25.07.2008 remanding the matter to the learned Single Judge for a de novo consideration after taking into account the stand of the State in the matter. It is at this stage that WP(C)No.337 of 2008 was filed by the appellant challenging the proceedings before the Board of Revenue (Misc. Case No. 8 of 2007) seeking recall of its order dated 07.01.2005. It is in the said Writ Petition that the impugned order has been passed giving rise to the present appeals.

8. We have heard Mr. Ranjit Kumar, Ms. Pinky Anand, Mr. J.K. Das, Mr. Pramod Swarup, learned senior counsels and Mr. Rajdipa Behura, learned counsel on behalf of the contesting parties.

9. The case urged by the appellant before the High Court has already been noticed. We may therefore proceed to take note of the stand taken on behalf of the official respondents before the High Court.

In the counter affidavit filed by the Tehsildar, Bhubaneswar it was averred that on receipt of a copy of the order dated 26.02.2007 passed in WP(C)No. 281 of 2007, the Tehsildar, Bhubaneswar, examined the case records of W.L. Case No.71 of 1979. On such examination it was found that the record of the said case including the report of the Amin and the order dated 26.3.1979 passed therein are forged and fabricated. The report dated 06.07.2004 of the Revenue Inspector to the Tehsildar and the communication dated 27.8.2004 of the Tehsildar to the Sub-Collector are claimed to be non-existent. The signatures of the Tehsildar at different places in the record of the proceedings of W.L. Case No.71 of 1979 including those appended below the orders passed, including the orders dated 26.3.1979 and 28.5.1979, are forged and fabricated. The case

registered as W.L. Case No.71 of 1979 was entered in the Case Register on 22.1.1979 though W.L. Case Nos. 71-77 of 1979 were already entered in the Register on a previous date i.e. 19.1.1979. No notice was issued to the Gram Pancayat or published by beating of drums. No proper enquiry was conducted whether the appellant was a landless person so as to be eligible for grant of a lease. In the said affidavit it was further mentioned that though, according to the appellant, the lease was granted by the order of Tehsildar dated 26.03.1979 the case record was not available in the record room of the Tehsil. In fact, according to the official respondents, the appellant had obtained certified copies of the orders in the W.L. Case No.71 of 1979 in the year 2004 i.e. after nearly 25 years of the grant of lease claimed to have been made by the order dated 26.03.1979. It is on the basis of the copies of such orders, obtained belatedly and in highly suspicious circumstances, that the appellant had approached the different forums claiming relief, as already noticed. The above, in substance, was the stand of the State in the writ proceeding before the High Court.

10. In the affidavit filed, alternatively, it was claimed that the plots in question were recorded in the Record of Rights as 'Kanta jungle" which entries would have the effect of bringing the land within the purview of the Orrisa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 (hereinafter referred to as the Act of 1948). According to the respondents, the land is covered by the definition of 'Communal land' or 'Forest land' under the Act of 1948. The same, therefore, could not have been leased out to any person without the previous sanction of the Collector. Any such transfer after the notified date i.e. 01.04.1996 would be invalid unless such invalidation is saved by the proviso to Section 4 which is not so in the present case. Furthermore, according to the State, the expression "landlord" defined by Section 2(d) of the Act of 1948 is comprehensive enough to include the State.

11. It would thus appear from the stand taken by the State

that the claim made by the appellant in the Writ Petition filed before the High Court was resisted on two principal grounds, namely:

(1) No valid order passed on the basis of an appropriate proceeding in law exists so as to recognize any right in the appellant to the land under the lease claimed; and

(2) The land having been shown as "kanta jungle' in the Record of Rights lease of the said land, even if assumed, is void being contrary to the provisions of the Act of 1948.

12. To appreciate the respective stands of the parties before the High Court it will be useful to notice the definition of 'Communal land' and 'Forest land' as defined in Section 2(a) and (c) of the Act of 1948:

"(a) "Communal land" means -

(i) in relation to estates governed by the Madras Estates Land Act, 1908 (Mad. Act I of 1908), land of the description mentioned in sub-clause (a) or sub-clause (b) of C1. (16) of Sec.3 of that Act; and

(ii) in relation to cases governed by the Orissa Tenancy Act, 1913 (B.& O. Act 11 of 1913), lands recorded as gochar, rakshit or sarbasadharan in the record-of-rights or waste lands which are either expressly or impliedly set apart for the common use of the villagers, whether recorded as such in the record-of rights.

x x x x x

(c) "forest land" includes any waste land containing shrubs and trees and any other class of land declared to be forest land by a notification of the [State]* Government."

13. Certain other significant facts must be taken note of

*. Subs by the Adaptation of Laws Order, 1950, for "Provincial."

now. It appears that during the pendency of the present appeals, impleadment applications have been filed on behalf of the Orissa Industrial Infrastructure Development Corporation -IDCO, (impleaded as respondent No.6) and one Smt. Malaya (no formal orders for impleadment has been passed). According to the aforesaid respondent No.6 by a Government order dated 24.01.1986 sanction for alienation of Government land to the extent of Ac 707.93 in Patia village under the Bhubneshwar Tehsil had been accorded in favour of the Managing Director, IDCO for establishment of the Chandaka Industrial Nucleus Complex on payment of premium and ground rent. Possession of the said land was already handed over to IDCO on 14.10.1985 and a lease deed bearing No. 1381 dated 05.02.1986 was executed between the Collector, Puri and IDCO in respect of the land for a total consideration of Rs.17,69,825. The aforesaid documents i.e. sanction order dated 24.01.1986; letter of handing over possession dated 04.10.1985 and lease deed No.1381 dated 05.02.1986 have been brought on record by the aforesaid respondent No.6. The schedule of the land mentioned in the said documents would go to show that a part of the land in respect of the which the present claim had been made by the appellant (Khatta No.493 plot No.516) had been allotted to IDCO on the basis of the documents referred to hereinabove. The respondent No.6 further claims that the entire land covered by Plot No.561 allotted to it had been developed and handed over to different units/ establishments for starting their respective projects and possession of such land had also been handed over to such units long back. In fact, the other applicant who had sought impleadment claims to have been allotted a part of the land covered by plot No.516 (Ac 0.500 decimals) located at Industrial Estate, Chandka, Bhubneswar by the IDCO by letter dated 27/29.06.2001.

14. As already noticed two questions had arisen for determination before the High Court on the conspectus of the facts noted above. The first is whether the case record of W.L.

Case No. 71 of 1979, including the reports and orders passed therein, are forged and fabricated. The second is assuming the lease as claimed by the appellant to have been granted whether the same is permissible under the provisions of the Act of 1948. The questions posed above not only indicates that the second may be contingent on an answer to the first and, in any case, as discussed hereinafter, there is a fair amount of co-relation between the two questions though the same may appear to be independent of each other.

15. The High Court did not record any specific finding with regard to the allegations of forgery and fabrication of the case record of W.L. Case No. 71 of 1979 and the orders passed therein on the basis of the claims and counter claims raised before it. The conclusion of the High Court that *"serious irregularities had been committed while granting the lease about which it was stated in the counter affidavit"* and that "it is also revealed from the counter affidavit that before grant of lease no enquiry was ever conducted" indicates a mere passive acceptance of the stand projected by the State without any attempt to verify the correct position on the issue. Infact a reading of the judgment would indicate that the High Court did not go into the first question raised before it in any acceptable manner. Instead, the High Court thought it proper to proceed on the basis that the land in respect of which claims had been made by the appellant is covered by the provisions of the Act of 1948 and the leases granted, as claimed, were void as the conditions precedent for the grant of such leases, as prescribed by the statute, had not been complied with. On the said basis the High court came to the conclusion that no legal right in respect of the land in question can be recognized in the appellant. Accordingly, directions were issued for resumption of the land in question by the State.

16. It has already been indicated in the earlier part of this order that the two questions that arose before the High Court may not be independent of each other and infact the answer

to the second question may be contingent on an effective resolution of the first. Having given our anxious consideration to the matter we are of the view that the manner in which the High Court had proceeded to decide the writ petition, namely, by an inconclusive and vague determination of the first issue and instead, by attempting to answer the second is not only unacceptable but certain fundamental errors are inherent and, therefore, writ large in the said approach, to which area we must now travel.

17. The publication of the Record of Rights of Mouza Patia Village in the year 1973 showing the land covered by plot No. 516 and 301 as "Kanta jungle" was noticed in the report of the Amin submitted to the Tehsildar. However, in the said report, it was mentioned that there was no forest growth over the land and also that the aforesaid land did not find any place in the reservation proceedings. It was also reported that the land, not having been reserved for any specific purpose, was surplus land available for settlement for agricultural purposes. Pursuant to the said report the Tehsildar by order dated 26.3.1979 granted settlement of the land in favour of the appellant and on 28.5.1979, on expiry of the appeal period, it was directed that the Record of Rights be corrected and patta be issued in favour of the appellant. In the record of proceedings of W.L. Case No.71 of 1979, it is also recorded that the aforesaid orders were passed by the Tehsildar upon due service of notice. The State contended that the aforesaid facts are wholly non-existent and the reports mentioned and orders issued in connection with W.L. Case No.71 of 1979 are forged and fabricated. In fact, according to the State, the entire claim of the appellant was based on non-existent facts conceived in fraud and deceit and there was no case registered as W.L. Case No.71 of 1979 in respect of the plot Nos. 516 and 301. If the version put forth by the appellant is correct, the outcome/decision on the second issue before the High Court would have certainly stood answered in his favour inasmuch as in such a situation the question of applicability of the Act of 1948 would not arise. If

the answer to the said question was, however, to be adverse to the appellant and in favour of the State, the appellant would not be entitled to any relief from the Court on a more fundamental principle than what the second question had raised inasmuch as in that event the principle that "fraud and justice never dwell together" would come into play. The elaborate discussions on the said principle of law in *Meghmala vs. G.Narasimha Reddy*[*] made by one of us (Sathasivam,J.) may be remembered at this stage with abundant profit. Besides, the additional facts now made available to the court on behalf of the IDCO namely, that a part of the land covered by plot Nos. 516 and 301 had been alienated in favour of IDCO under the provisions of the Orissa Land Settlement Act would require a closer examination of the question as to how such an alienation could have been made in favour of the IDCO if the land was recorded as "Kanta Jungle in the Record of Rights published in the year, 1973.

18. The discussions that have preceded reasonably lead to the conclusion that the approach of the High Court in attempting to resolve the conflict between the parties suffer from a fundamental error which would justify a correction. The High Court ought not to have split up the two questions as if they were independent of each other and on that basis ought not to have proceeded to determine the second question without recording acceptable findings on all aspects connected with the first. The extracts from the order of the High Court made above discloses mere acceptance of the version of the State as disclosed in the counter affidavit filed without any attempt to enter into the core questions that the conflicting claims of the parties had thrown up. If required, the High Court could have entrusted the required exercise to be performed by a Court Appointed Committee. In any event, such a Committee had been constituted by the High Court by its very same order to look into other such cases of grant of leases under the Act of 1948.

*. (2010) 8 SCC 383.

19. We also deem it necessary to reiterate herein a fundamental principle of law that all courts whose orders are not final and appealable, should take notice of. All such courts should decide the lis before it on all issues as may be raised by the parties though in its comprehension the same can be decided on a single or any given issue without going into the other questions raised or that may have arisen. Such a course of action is necessary to enable the next court in the hierarchy to bring the proceeding before it to a full and complete conclusion instead of causing a remand of the matter for a decision on the issue(s) that may have been left undetermined as has happened in the present case. The above may provide a small solution to the inevitable delays that occur in rendering the final verdict in a given case.

20. In the light of what has been discussed and the conclusions reached by us we are of the view that in the present case the order of the High Court should receive our interference and the matter should be remanded to the High Court for a de novo decision which may be rendered as expeditiously as possible. Accordingly, we set aside the order dated 13.05.2009 of the High Court and allow these appeals as indicated above.

R.P. Appeals allowed.

LAHU KAMLAKAR PATIL AND ANR.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 114 of 2008)

DECEMBER 14, 2012

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

A

B

Penal Code, 1860 - ss. 302, 147, 148, 149 and 452 - Death of one person - Due to alleged assault with deadly weapons - Conviction of accused-appellants on basis of sole testimony of PW2, the alleged eye-witness - Sustainability - Held: Not sustainable - Conduct of PW2 after the alleged incident was very unnatural and not in accord with acceptable human behaviour allowing of variations - Veracity of PW2's version doubtful - Absence of clinching evidence to connect the appellants with the crime - Conviction of appellants accordingly set aside - Evidence - Witness - Unnatural conduct.

C

D

Evidence - Hostile witness - Held: Evidence of a hostile witness not to be rejected in toto.

E

Criminal Trial - Non-examination of Investigating Officer (IO) - Effect.

The prosecution case is that PWs-1 and 2 and the deceased 'B' had travelled in a rickshaw, went to a tailor's shop, and then entered inside a Hotel when the accused-appellants and the other accused came there and started assaulting 'B' with swords, iron bars and sticks which subsequently led to his death.

F

G

PW1, the informant, turned hostile The trial court convicted the appellants under Sections 302, 147, 148, 149 and 452 IPC and sentenced them to life imprisonment. On appeal, the High Court affirmed the

H

A **conviction and the sentence of the appellants. The conviction was primarily based on the sole testimony of PW2.**

In the instant appeal, the appellants challenged their conviction inter alia on grounds that when PW1, the informant had turned hostile, the FIR could not have been relied upon as a piece of substantial evidence corroborating the testimony of PW-2, the alleged eye-witness; that the testimony of PW-2 was totally unreliable because of his unnatural conduct and further that the Investigating Officer had not been examined as a consequence of which prejudice was caused to the appellants.

B

C

Allowing the appeal, the Court

D

HELD: 1. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution. [Paras 16, 17] [1183-G; 1184-A-B; 1185-D]

E

F

Rameshbhai Mohanbhai Koli and Others v. State of Gujarat **(2011) 11 SCC 111: 2010 (14) SCR 1;** *Bhajju alias Karan Singh v. State of Madhya Pradesh* **(2012) 4 SCC 327 and** *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* **(2010) 6 SCC 1: 2010 (4) SCR 103 - relied on.**

G

Bhagwan Singh v. State of Haryana **(1976) 1 SCC 389: 1976 (2) SCR 921;** *Rabindra Kumar Dey v. State of Orissa* **(1976) 4 SCC 233: 1977 (1) SCR 439;** *Syad Akbar v. State of Karnataka* **(1980) 1 SCC 30;** *Khujji v. State of M.P.* **(1991) 3 SCC 627: 1991 (3) SCR 1;** *State of U.P. v. Ramesh Prasad*

H

Misra **(1996) 10 SCC 360: 1996 (4) Suppl. SCR 631;** *Balu Sonba Shinde v. State of Maharashtra* **(2002) 7 SCC 543: 2002 (2) Suppl. SCR 135;** *Gagan Kanojia v. State of Punjab* **(2006) 13 SCC 516;** *Radha Mohan Singh v. State of U.P.* **(2006) 2 SCC 450: 2006 (1) SCR 519;** *Sarvesh Narain Shukla v. Daroga Singh* **(2007) 13 SCC 360: 2007 (11) SCR 300 and** *Subbu Singh v. State* **(2009) 6 SCC 462: 2009 (7) SCR 383 - referred to.**

2. PW 1 has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. Neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer, for which no explanation has been offered. In certain circumstances the examination of Investigating Officer becomes vital. The present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution, especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 CrPC. [Para 19] [1185-F-G; 1186-B-E]

Arvind Singh v. State of Bihar **(2001) 6 SCC 407: 2001 (3) SCR 218;** *Rattanlal v. State of Jammu and Kashmir* **(2007) 13 SCC 18: 2007 (4) SCR 1029;** *Ravishwar Manjhi and others v. State of Jharkhand* **(2008) 16 SCC 561: 2008 (17) SCR 420 - relied on.**

Behari Prasad v. State of Bihar **(1996) 2 SCC 317: 1996 (1) SCR 262; Bahadur Naik v. State of Bihar (2000) 9 SCC 153 - referred to.**

3. PW1 has supported the prosecution story but to the point of assault and thereafter he has resiled from his version. Even if to such extent his testimony is accepted, it only goes to the extent of proving that PWs-1 and 2 and the deceased 'B' had travelled in a rickshaw, went to the tailor's shop, entered inside the Milan Hotel and some boys came inside the hotel and started assaulting the deceased. PW-1 had not named any assailant in the court to support the version of the FIR. He had stated that he had run away from the scene of assault and, therefore, his testimony does not, in any way, establish the involvement of the appellants in crime. [Para 20] [1186-F-G; 1187-A]

4.1. As is evincible from the deposition of PW2, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune. He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed that the police had come and that 'B', who had accompanied him, was dead. In the statement under Section 161 CrPC, he had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that 'B' was dead was also not mentioned. One thing is clear from his testimony that seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behaviour. He has also not stated anywhere that he was so scared that even after he

reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion 'B' had died, he went to the police station. Though certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed, but in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. [Para 27] [1189-E-H; 1190-A-F]

4.2. Witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be

discarded. [Para 26] [1189-B-E]

4.3. The trial court as well as the High Court made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the Post Mortem report and convicted the appellants. In absence of any kind of clinching evidence to connect the appellants with the crime, it would not be appropriate to sustain the conviction. The judgment of conviction and sentence recorded by the Sessions Judge and affirmed by the High Court is set aside. [Para 27, 28] [1190-F-H]

Mohd. Khalid v. State of W.B. **(2002) 7 SCC 334: 2002 (2) Suppl. SCR 31;** *Gopal Singh and others v. State of Madhya Pradesh* **(2010) 6 SCC 407: 2010 (6) SCR 1062 and** *Alil Mollah and another v. State of W.B.* **(1996) 5 SCC 369: 1996 (3) Suppl. SCR 666 - relied on.**

Case Law Reference:

2010 (14) SCR 1	relied on	Para 16
1976 (2) SCR 921	referred to	Para 16
1977 (1) SCR 439	referred to	Para 16
(1980) 1 SCC 30	referred to	Para 16
1991 (3) SCR 1	referred to	Para 16
1996 (4) Suppl. SCR 631	referred to	Para 17
2002 (2) Suppl. SCR 135	referred to	Para 17
(2006) 13 SCC 516	referred to	Para 17
2006 (1) SCR 519	referred to	Para 17
2007 (11) SCR 300	referred to	Para 17
2009 (7) SCR 383	referred to	Para 17
(2012) 4 SCC 327	relied on	Para 17
2010 (4) SCR 103	relied on	Para 18
1996 (1) SCR 262	referred to	Para 19

(2000) 9 SCC 153 referred to Para 19

2001 (3) SCR 218 relied on Para 20

2007 (4) SCR 1029 relied on Para 20

2008 (17) SCR 420 relied on Para 20

2002 (2) Suppl. SCR 31 relied on Para 23

2010 (6) SCR 1062 relied on Para 24

1996 (3) Suppl. SCR 666 relied on Para 25

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 114 of 2008.

From the Judgment & Order dated 08.02.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 790 of 1989.

Sushil Karanjkar, K.N. Rai for the Appellants.

Sanjay V. Kharde, Sachin J. Patil, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal has been preferred by original accused Nos. 2 and 3 assailing the judgment of conviction and order of sentence passed by the High Court of Judicature at Bombay in Criminal Appeal No. 790 of 1989 whereby the High Court has confirmed the conviction and sentence passed by the learned Additional Sessions Judge, Raigad, Alibag in Sessions Case No. 113 of 1988 for offences punishable under Sections 302, 147, 148, 149 and 452 of the Indian Penal Code, 1860 (for short "the I.P.C.") and sentenced the appellants to suffer life imprisonment and pay a fine of Rs.1,000/- each, in default, to suffer simple imprisonment for six months.

2. Filtering the unnecessary details, the prosecution case is that on 19.2.1988, PW-1, Chandrakant Phunde, the informant, who is the owner of a rickshaw bearing No. MCT-858, while going from Somatane to Panvel for his business, met PW-2, Janardan Bhonkar, who hired his rickshaw for Panvel. On the way, they met the deceased Shriram @ Bhau

Harishchandra Patil who wanted to go in the rickshaw and with the consent of Janardan, the three of them proceeded towards Panvel. The deceased, Bhau Harishchandra Patil, went to Gemini Tailors to pick up his stitched clothes at Palaspe Phata and thereafter they stopped near Milan Hotel to have some snacks. As the prosecution story proceeds, when they were inside the hotel, 10 to 15 people entered inside being armed with swords, iron bars and sticks. As alleged, Lahu Kamlakar Patil, the appellant No. 1, had an iron bar and appellant No. 2, Bali Ram, had a sword. Bali Ram and Lahu assaulted the deceased on his head with their respective weapons and the other accused persons also assaulted him. Janardan tried to resist and got hit on his right hand finger due to the blow inflicted by the sword. As there was commotion in the hotel, people ran hither and thither, and PW-2, Janardan, also took the escape route. After the assault, the accused persons ran away and Bhau was left lying there in the hotel in a pool of blood.

3. As the facts are further unfurled, Chandrakant Phunde went to the police station, lodged an F.I.R. and handed over the stitched clothes of the deceased which were in the rickshaw to the police. On the basis of the F.I.R., a case under Sections 147, 148, 149, 302 and 452 of the I.P.C. was registered and the criminal law was set in motion. In the course of investigation, the investigating agency got the autopsy conduted, seized the weapons, prepared the `panchnama', examined the witnesses under Section 161 of the Code of Criminal Procedure, 1973 (for short "the Code") and arrested six accused persons including the present appellants. After completing the investigation, the investigating agency placed the charge-sheet before the competent Court who, in turn, committed the matter to the Court of Session and, eventually, it was tried by the learned Additional Sessions Judge, Raigad Alibag.

4. The accused persons abjured their guilt and pleaded false implication and, hence, faced trial.

5. In order to prove its case, the prosecution examined nine witnesses; PW-1, Chandrakant Phunde, the informant,

PW-2, Janardan Bhonkar, who was an eye-witness to the occurrence, PW-3, Shantaram Jadhav, from whom the accused persons had made enquires relating to the whereabouts of the deceased, PW-4, Baburao Patil, father of the deceased, PW-5, Prakash Patil, a post-occurrence witness who had reached Hotel Milan to find that Bhau was lying in a pool of blood, PW-6, the Inspector who had registered the complaint of PW-1, PW-7, Dyaneshwar Patil, a panch witness who has proven the blood-stained clothes and the iron bar, PW-8, Eknath Kamble, and PW-9, Shrirang Wahulkar, the two other panch witnesses who have been declared hostile.

6. The defence chose not to adduce any evidence.

7. The learned trial Judge, after scrutiny of the evidence, found that the prosecution had been able to prove the case against the present appellants and, accordingly, convicted them for the offences and imposed the sentence as has been stated hereinbefore. As far as the other accused persons are concerned, he did not find them guilty and, accordingly, recorded an order of acquittal in their favour.

8. The convicted-accused persons assailed their conviction by filing an appeal and the High Court, placing reliance on the seizure memoranda, namely, Exhibits P-25, 26, 35 and 36 and accepting the credibility of the testimony of PW-2 and a part of the evidence of PW-1, the informant, who had turned hostile, affirmed the conviction and the sentence.

9. We have heard Mr. K.N. Rai, learned counsel for the appellants, and Mr. Sanjay V. Kharde, learned counsel for the respondent.

10. Mr. Rai, learned counsel for the appellants, criticizing the judgment of conviction passed by the High Court, submitted that when the version of PWs-3 to 5 have not been given credence, the evidence of PW-1 and PW-2 should not have been relied upon by the trial court as well as by the High Court and due to such reliance, the decision is vitiated. It is urged by him that when the informant had turned hostile, the F.I.R. could not have been relied upon as a piece of substantial evidence

corroborating the testimony of PW-2, the alleged eye-witness. It is vehemently canvassed by him that the conviction has been rested on the testimony of PW-2 who has claimed to be the eye-witness though his version is totally unreliable because of his unnatural conduct and his non-availability for examination by the police which is not founded on any ground. It is urged by him that the Investigating Officer had not been examined as a consequence of which prejudice has been caused to the appellants. That apart, the seizure of weapons has not been established since the panch witnesses have turned hostile and the High Court has relied upon the discovery made at the instance of accused No. 1 who has been acquitted. The last plank of argument of the learned counsel for the appellants is that the conviction is recorded on the basis of assumptions without material on record to convict the appellants.

11. Mr. Kharde, learned counsel for the State, supporting the judgment of conviction, contended that though the informant had turned hostile, yet his evidence cannot be totally discarded as it is well settled in law that the same can be relied upon by the prosecution as well as by the defence. It is his further submission that the evidence of PW-1, Chandrakant Phunde, clearly proves the first part of the incident and what he has stated in the examination-in-chief cannot be disregarded. It is urged by him that once that part of the testimony is accepted, the deposition of PW-2, the eyewitness to the incident gains acceptation as he has vividly described the incident and the assault. Learned counsel would further submit that the minor contradictions and discrepancies do not make his deposition unreliable.

12. At the very outset, we may state that the learned trial Judge had placed reliance on the evidence of PWs-3 to 5, but the High Court has not accepted their version and affirmed the conviction on the basis of the testimony of PWs-1 and 2 and other circumstances. Therefore, the evidence of the witnesses which are required to be considered is that of PWs-1 and 2 and their intrinsic worth.

13. PW-1, the informant, has stated in the examination-in-

chief that the deceased had taken PW-2, Janardan Bhonkar, to the tailor's shop and, eventually, took Bhau to Milan Hotel where he waited outside in the rickshaw. He has also deposed that he was asked to come inside the hotel and while he was having water, 8-10 boys arrived there and started assaulting the deceased. Seeing the assault, he got scared and ran away. After deposing to that effect, he has stated that he had not seen anything and he was taken to the police station and his signature was taken on the complaint which was not shown to him. After being declared hostile, in the cross-examination he has denied the contents of the F.I.R. and has deposed that he came to know that Bhau had been murdered.

14. In the cross-examination by one of the accused, he has stated that he was brought to the police station in a drunken state and kept in the police station till 10.00 a.m. the next day. The trial court as well as the High Court has accepted his version in the examination-in-chief to the extent that he had taken the deceased and PW-2 to the tailor's shop and thereafter to the hotel and further that he had seen 8-10 boys entering the hotel and assaulting the deceased.

15. The learned counsel for the appellants submitted that the whole evidence of PW-1 is to be discarded inasmuch as he has clearly stated that he has not seen anything and his signature was taken on the blank paper. In any case, he has not deposed anything about the assailants except stating that 8-10 boys came and assaulted. Emphasis had been laid that the informant having been declared hostile, the whole case of the prosecution story collapses like a pack of cards. Thus, emphasis is on the aspect that once a witness is declared hostile, that too in the present circumstances, his testimony cannot be relied upon by the prosecution.

16. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. In *Rameshbhai Mohanbhai Koli and Others v. State of Gujarat*[1], reiterating the principle, this Court has stated thus:-

1. (2011) 11 SCC 111.

"16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide *Bhagwan Singh v. State of Haryana*[2], *Rabindra Kumar Dey v. State of Orissa*[3], *Syad Akbar v. State of Karnataka*[4] and *Khujji v. State of M.P.*[5])

17. In *State of U.P. v. Ramesh Prasad Misra*[6] this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra*[7], *Gagan Kanojia v. State of Punjab*[8], *Radha Mohan Singh v. State of U.P.*[9], *Sarvesh Narain Shukla v. Daroga Singh*[10] and *Subbu Singh v. State*[11]."

17. Recently, in *Bhajju alias Karan Singh v. State of Madhya Pradesh*[12], a two-Judge Bench, in the context of consideration of the version of a hostile witness, has expressed

2. (1976) 1 SCC 389.
3. (1976) 4 SCC 233.
4. (1980) 1 SCC 30.
5. (1991) 3 SCC 627.
6. (1996) 10 SCC 360.
7. (2002) 7 SCC 543.
8. (2006) 13 SCC 516.
9. (2006) 2 SCC 450.
10. (2007) 13 SCC 360.
11. (2009) 6 SCC 462.
12. (2012) 4 SCC 327.

thus: -

> "Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution."
>
> [Emphasis added]

18. In the case of *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)*[13], while discussing about the evidence of a witness who turned hostile, the Bench observed that his evidence to the effect of the presence of accused at the scene of the offence was acceptable and the prosecution could definitely rely upon the same.

19. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. It is an accepted principle that non-examination of the Investigating Officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar*[14], this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the

13. (2010) 6 SCC 1.

14. (1996) 2 SCC 317.

accused. In *Bahadur Naik v. State of Bihar*[15], it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating Officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar*[16], *Rattanlal v. State of Jammu and Kashmir*[17] and *Ravishwar Manjhi and others v. State of Jharkhand*[18], has explained certain circumstances where the examination of Investigating Officer becomes vital. We are disposed to think that the present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

20. Having stated that, we may proceed to analyse his evidence. He has supported the prosecution story but to the point of assault and thereafter he has resiled from his version. The submission of the learned counsel for the State is that to such extent his testimony deserves acceptance. Even if the said submission is accepted, it only goes to the extent of proving that PWs-1 and 2 and the deceased had travelled in a rickshaw, went to the tailor's shop, entered inside the Milan Hotel and some boys came inside the hotel and started assaulting the deceased. PW-1 had not named any assailant in the court to support the version of the FIR. On a scanning of

15. (2000) 9 SCC 153.

16. (2001) 6 SCC 407.

17. (2007) 13 SCC 18.

18. (2008) 16 SCC 561.

the evidence, we find that he had stated that he had run away from the scene of assault and, therefore, his testimony does not, in any way, establish the involvement of the appellants in crime.

21. On a scrutiny of the entire material on record, we find that the conviction is based on the testimony of the sole eyewitness, PW-2. True it is, corroboration to the extent of going to Milan Hotel is there from the testimony of PW-1, but the question remains whether the conviction can be sustained if the version of PW-2 is not accepted. The learned counsel for the appellants has seriously challenged the reliability and trustworthiness of the said witness, PW-2, who has been cited as an eyewitness.

22. The attack is based on the grounds, namely, that the said witness ran away from the spot; that he did not intimate the police about the incident but, on the contrary, hid himself behind the pipes near a canal till early morning of the next day; that though he claimed to be eye witness, yet he did not come to the spot when the police arrived and was there for more than three hours; that contrary to normal human behaviour he went to Pune without informing about the incident to his wife and stayed for one day; that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21.2.1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto.

23. From the aforesaid grounds, the primary attack of the learned counsel for the appellants is that there has been delay in the examination of the said witness and he has contributed for such delay and, hence, his testimony should be discredited. In *Mohd. Khalid v. State of W.B.*[19], a contention was raised that three witnesses, namely, PWs-40, 67 and 68, could not be termed to be reliable. Such a contention was advanced as

19. (2002) 7 SCC 334.

regards PW-68 that there had been delay in his examination. The Court observed that mere delay in examination of the witnesses for a few days cannot in all cases be termed fatal so far as prosecution is concerned. There may be several reasons and when the delay is explained, whatever the length of delay, the court can act on the testimony of the witnesses, if it is found to be cogent and credible. On behalf of the prosecution, it was urged that PW-68 was attending to the injured persons and taking them to the hospital. Though there was noting in the medical reports that unknown persons had brought them, yet the court did not discard the evidence of PW-68 therein on the foundation that when an incident of such great magnitude takes place and injured persons are brought to the hospital for treatment, it is the foremost duty of the doctors and other members of the staff to provide immediate treatment and not to go about collecting information, though that would be contrary to the normal human conduct. Thus, emphasis was laid on the circumstance and the conduct.

24. In *Gopal Singh and others v. State of Madhya Pradesh*[20], this Court had overturned the judgment of the High Court as it had accepted the statement of an eyewitness of the evidence ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the spacious and unacceptable plea that he feared for his own safety.

25. In *Alil Mollah and another v. State of W.B.*[21], an eyewitness, who was employee of the deceased, witnessed the assault on the employer but did not go near the employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. His plea was that he was frightened and fled away to his home. He had admitted in his cross-examination that he neither disclosed at his home nor in his village as to what he had seen in the evening

20. (2010) 6 SCC 407.

21. (1996) 5 SCC 369.

when the incident occurred. He gave the information to the police only after 2-3 days. The plea of being frightened and not picking up courage to inform anyone in the village or elsewhere was not accepted by this Court.

26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be discarded.

27. Keeping in mind the aforesaid, we shall proceed to scrutinize the evidence of PW-2. As is evincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune. He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under Section 161 of the Code, he had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not

mentioned. One thing is clear from his testimony that seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behaviour. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned trial court as well as the High Court has made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the Post Mortem report and convicted the appellants. In the absence of any kind of clinching evidence to connect the appellants with the crime, we are disposed to think that it would not be appropriate to sustain the conviction.

28. In the result, the appeal is allowed. The judgment of conviction and sentence recorded by the learned Sessions Judge and affirmed by the High Court is set aside and the appellants be set at liberty forthwith unless their detention is required in connection with any other case.

B.B.B. Appeal allowed.