MGB GRAMIN BANK
v.
CHAKRAWARTI SINGH
(Civil Appeal No. 6348 of 2013)

AUGUST 7, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Service Law:

Compassionate appointment – Death of employee of appellant-Bank in harness – His son applied for compassionate appointment – During pendency of the application, new Scheme came into force providing that all applications pending on the date of the Scheme to be considered for grant of ex-gratia payment to the family instead of compassionate appointment – Co8mpassionate appointment denied – Challenged – Courts below directing the Bank to appoint – Held: Courts below not correct in directing the appointment – Mere death of a Government employee in harness does not entitle the family to claim compassionate appointment – Such employment cannot be claimed as a matter of right as the same is not a vested right – Every appointment to public office must be made by strictly adhering to the mandatory requirements of Arts. 14 and 16 of the Constitution – An exception to this rule by providing employment on compassionate grounds has been carved out in order to remove the financial constraints of the bereaved family – The ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment – Courts cannot confer benediction to make appointments on sympathetic grounds when the regulation framed in its respect does not contemplate or cover such appointment – Liberty to applicant to apply for consideration under the new Scheme.

Umesh Kumar Nagpal vs. State of Haryana and Ors.

(1994) 4 SCC 138; *A. Umarani vs. Registrar, Co-operative Societies and Ors.* ***AIR*** **2004 SC 4504: 2004 (7) SCC 112**; *State Bank of India and Anr. vs. Raj Kumar* **(2010) 11 SCC 661 –** *relied on.*

Words and Phrases – 'vested' meaning of – Discussed.

Bibi Sayeeda vs. State of Bihar **AIR 1996 SC 1936;** *Kuldip Singh vs.Government, NCT Delhi* **AIR 2006 SC 2652 2006 (3) Suppl. SCR 335;** *J.S. Yadav vs. State of Uttar Pradesh* **(2011) 6 SCC 570: 2011 (5) SCR 460** *– referred to.*

Black's Law Dictionary (6th Edition) p. 1563 ; *Black's Law Dictionary* (6thEdition) p. 1397, *Webster's Comprehensive* Dictionary (InternationalEdition) p. 1397– referred to.

Case Law Reference:

(1994) 4 SCC 138	**referred to**	**Para 6**
2004 (7) SCC 112	**relied on**	**Para 8**
AIR 1996 SC 516	**referred to**	**Para 11**
2011 (5) SCR 460	**referred to**	**Para 11**
2006 (3) Suppl. SCR 335	**referred to**	**Para 11**
(2010) 11 SCC 661	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6348 of 2013.

From the Judgment & Order dated 27.01.2010 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (Writ) No. 798 of 2009.

Anil Kumar Sangal, Siddharth Sangal for the Appellant.

Vasudevan Raghavan for the Respondent.

The following Order of the Court w

ORDER

1. Leave granted.

2. This appeal has been preferred against the impugned judgment and order dated 27.1.2010 passed by the Division Bench of the High Court of Rajasthan at Jodhpur in D.B.Civil Special Appeal (Writ)No.798 of 2009 upholding the judgment and order of the learned Single Judge dated 27.7.2009 passed in Writ Petition No.7869 of 2008 by which the respondent had been directed to be appointed under a scheme for compassionate appointment.

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

A. Father of the respondent who was working as a Class III employee with the appellant Bank died on 19.4.2006 while in harness. The respondent applied for compassionate appointment on 12.5.2006.

B. During the pendency of the application filed by the respondent, a new scheme dated 12.6.2006 came into force with effect from 6.10.2006. Clause 14 thereof provides that all applications pending on the date of commencement of the scheme shall be considered for grant of ex-gratia payment to the family instead of compassionate appointment.

C. As the appointment on compassionate ground was denied to the respondent, he preferred the writ petition before the High Court and the learned Single Judge took the view that as the cause of action had arisen prior to the commencement of the new scheme, therefore, the case was to be considered as per the then existing scheme i.e. the 1983 Scheme which provided for compassionate appointment and not for grant of ex-gratia payment. The Court directed the appellant not only to consider the case of appointment of the respondent on compassionate grounds but rather directed the appellant to appoint him.

D. Aggrieved, the appellant challenged the said order by filing the Special Appeal which has been dismissed vide impugned judgment and order dated 27.1.2010 concurring with the judgment and order of the learned Single Judge.

Hence this appeal.

4. We have heard learned counsel for the parties.

5. Every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution. An exception by providing employment on compassionate grounds has been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. The Competent Authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. More so, the person claiming such appointment must possess required eligibility for the post. The consistent view that has been taken by the Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right.

The Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds.

Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.

6. In *Umesh Kumar Nagpal v State of Haryana & Ors.,* (1994) 4 SCC 138, this Court has considered the nature of the right which a dependant can claim while seeking employment on compassionate ground. The Court c

"The would object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. ..... The exception to the rule made in favour of the family of the deceased employee is in consideration of the servies rendered by him and the legitimate expetations,and change in the staus and affairs of the family are suddenly upturned. ....The only ground which can justify compassionate employment is the ***penurious condition pf the deceased's family. The consideration foir such employment is not a vested right****. The object being to enable the family toi get over the financial crisis." (Emphasis added)*

7. An 'ameliorating relief' should not be taken as opening an alternative mode of recruitment to public employment. Furthermore, an application made at a belated stage cannot be entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated.

8. The Courts and the Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulation framed in respect thereof did not cover and contemplate such appointments.

9. In *A. Umarani v Registrar, Co-operative Societies & Ors.,* AIR 2004 SC 4504, while dealing with the issue, this Court held that even the Supreme Court should not exercise the extraordinary jurisdiction under Article 142 issuing a direction to give compassionate appointment in contravention of the provisions of the Scheme/Rules etc., as the provisions have to be complied with mandatorily and any appointment given or ordered to be given in violation of the scheme would be illegal.

10. The word 'vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as 'vested', Fixed; accrued; settled;

absolute; complete. Having the character or given in the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights.

11. In Webster's Comprehensive Dictionary (International Edition) at page 1397, 'vested' is defined as Law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (Vide: *Bibi Sayeeda v State of Bihar* AIR 1996 SC 516; and *J.S. Yadav v State of Uttar Pradesh* (2011) 6 SCC 570)

Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/ scheme could be changed. (Vide: *Kuldip Singh v Government, NCT Delhi* AIR 2006 SC 2652)

12. A scheme containing an in *pari materia* clause, as is involved in this case was considered by this Court in *State Bank of India & Anr. vs. Raj Kumar* (2010) 11 SCC 661. Clause 14 of the said Scheme is verbatim to clause 14 of the scheme involved herein, which reads as under:

"14. <u>Date of effect of the scheme and disposal of pending applications:</u>

The Scheme will come into force with effect from the date it is approved by the Board of Directors. Applications pending under the Compasionate Appointment Scheme as on the date on which this new Scheme is approved by [illegible] It

with in accordance with Scheme for payment of ex-gratia lump sum amount provided they fulfill all the terms and conditions of this scheme."

13. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In *State Bank of India & Anr*. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered.

14. In view of the above position, the reasoning given by the learned Single Judge as well as by the Division Bench is not sustainable in the eyes of law. The appeal is allowed and the impugned judgments of the High Court are set aside.

15. The respondent may apply for consideration of his case under the new Scheme and the appellant shall consider his case strictly in accordance with clause 14 of the said new Scheme within a period of three months from the date of receiving of application.

With these observations, appeal stands disposed of.

K.K.T. Appeal disposed of.

MANOJ MANU & ANR.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 6707 of 2013)

AUGUST 12, 2013

[ANIL R. DAVE AND A.K. SIKRI, JJ.]

Service Law – Appointment/selection – Competitive examination - UPSC recommended names of candidates for appointment – 6 vacancies remained unfilled because 6 of the recommended candidates did not join – UPSC. was approached to recommend names for the 6 vacancies – UPSC recommended only 3 names – Two candidates who were next in the merit list and had secured same marks as secured by one of the 3 recommended candidates, challenged the act of UPSC in non-recommending their names – Courts below dismissed their claim – On appeal, held: Though a person included in the select list, does not acquire any right to be appointed – But the decision of the Government not to fill up the advertised vacancies should not be arbitrary or unreasonable – In the instant case, decision of UPSC in forwarding 3 names against the requisition for 6 vacancies was inappropriate – Exclusion of the names of the appellants, even when the vacancies were available, has resulted in discrimination – Constitution of India, 1950 – Articles 14 and 16 – Office Memorandum dated 14th July, 1967 – Clause 4(c).

The appellants, who were working as Assistants in the Central Secretariat Service, appeared in Limited Departmental Competitive Examination for the next promotion to the post of Section Officer's Grade in that service. After the examination, UPSC recommended 184 candidates for appointment. Out of them, 6 candidates did not join. Thereafter 6 general category vacancies were

requisitioned. UPSC recommended names of 3 candidates from out of the reserve list maintained by it. The two appellants, who were next in the merit list had secured the same marks as secured by one of the 3 recommended candidates. The appellants challenged their non-recommendation before Administrative Tribunal, which was dismissed. The writ petition against the order of Tribunal was also dismissed. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the Government not to fill up the required/ advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies. [Para 14] [18-G-H; 19-A-B]

State of Haryana vs. Subhash Chander Marwah **(1972) IILLJ 266 SC – referred to.**

2. In the present case, however, after the UPSC sent the list of 184 persons/recommended by it, to the Government for appointment, six persons out of the said list did not join. It is not a case where the Government decided not to fill up further vacancies. On the contrary DoP&T sent requisition to the UPSC to send six names so that the remaining vacancies are also filled up. This shows that in so far as Government is concerned, it wanted to fill up all the notified vacancies. The requisition dated 20th November 2009 in this behalf was in

consonance with its Clause 4(c) of O.M. dated 14th July 1967. Even when the Government wanted to fill up the post, the UPSC chose to forward names of three candidates. [Para 15] [19-B-D]

3. There is a sound logic, predicated on public interest, behind O.M. dated 14th July 1967. The intention is not to hold further selection for the post already advertised so as to save unnecessary public expenditure. At the same time, this very O.M. also stipulates that the Government should not fill up more vacancies than the vacancies which were advertised. The purpose behind this provision is to give chance to those who would have become eligible in the meantime. Thus, the OM dated 14th July 1967 strikes a proper balance between the interests of two groups of persons. In the present case since the requisition of the DoP&T contained in communication dated 20th November 2009 was within the permissible notified vacancies, the UPSC should have sent the names of six candidates instead of three. [Para 16] [19-D-G]

Sandeep Singh vs. State of Haryana and Anr. **(2002) 10 SCC 549;** *Virender S.Hooda and Ors. Vs. State of Haryana and Anr.* **AIR 1999 SC 1701: 1999 (3) SCC 696 – relied on.**

4. It is not the case of the UPSC that under no circumstances the names are sent by way of supplementary list, after sending the names of the candidates equal to the vacancies. As per the UPSC itself, names of "repeat/common" candidates are sent and in the present case itself, three names belonging to such category were sent. However, exclusion of the persons like the appellants has clearly resulted in discrimination as one of those three candidates who had also secured 305 marks was appointed to the post in question, the appellants with same marks have been left out even when the vacancies were available. [Para 18] [20-C-E]

5. The decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate. Therefore, Mandamus is issued to the UPSC to forward the names of the next three candidates to the DoP&T for appointment to the post of Section Officer's Grade. They shall get the seniority from the date when one of the candidates recommended by UPSC was appointed to the said post. Their pay shall notionally be fixed, without any arrears of the pay and other allowances. [Para 19] [20-E-G]

Case Law Reference:

(1972) IILLJ 266 SC	**referred to**	**Para 13**
(2002) 10 SCC 549	**relied on**	**Para 17**
1999 (3) SCC 696	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6707 of 2013.

From the Judgment & Order dated 16.5.2011 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 3297 of 2011.

Satya Mitra Garg, Padma Kumar for the Appellants.

Naresh Kaushik, Vardhman Kaushik, Lalita Kaushik for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J.1. Leave granted.

2. This appeal has been preferred by the present appellants questioning the validity of the judgment and order dated May 16, 2011 passed by the High Court, in Writ Petition which was filed by the appellants questioning the validity of the order dated 29th March 2011, of the Central Administrative

Tribunal (hereinafter referred to as the "Tribunal"), Principal Bench, New Delhi. The Tribunal had dismissed the Original Application preferred by the appellants herein under Section 19 of the Administrative Tribunal Act against their non-appointment to the post of Section Officer's Grade of the Central Secretariat Service. The said O.A. was dismissed by the Tribunal vide order dated 29th March 2011 which has been upheld by the High Court.

3.There is no dispute about the facts, which may be briefly recapitulated to understand the controversy that has arisen in these proceedings. The appellants were working as Assistants in the Central Secretariat Service (CSS) and appeared in Limited Departmental Competitive Examination for the next promotion to the post of Section Officer's Grade in that service. There are two channels of promotion: one by way of seniority and other fast track in the form of Limited Departmental Competitive Examination (LDCE). The appellants appeared in the said LDCE 2005, which was conducted by the Union Public Service Commission (UPSC) on the requisition sent to it for 184 general category posts by the Department of Personnel and Training (DoP&T). After holding the examination the UPSC had recommended 184 candidates in two lots. First lot of 141 candidates who were found suitable candidates for the said post whereas in the second lot 43 successful candidates were recommended for appointment. Out of them 6 candidates did not join. The DoP&T thereafter vide its letter dated 20th November 2009 had requisitioned 6 general category vacancies. However, the UPSC recommended names of three candidates from out of reserve list maintained by it. These two appellants who were next in the merit list had secured 305 marks, same as secured by one Rajesh Kumar Yadav who was recommended by the UPSC in the supplementary list candidates.

4. The appellants felt aggri-

recommendation, thereby denying them the appointment to the post of Section Officer's Grade. Under these circumstances, these appellants filed the O.A. before the Tribunal alleging that the UPSC had acted in an arbitrary and discriminatory manner in contravention of Article 14 and 16 of the Constitution of India denying them the right to get the appointment to the post to which they were not only selected but equally placed as another candidate who was given the appointment.

5. The Tribunal dismissed the O.A. primarily on the ground that ACR's are also seen for determining merit position inter-se candidates who had secured same marks in written test and it was because of this reason that these two appellants were not placed before Shri Rajesh Kumar Yadav.

6. Before the High Court, the appellants submitted that they were not questioning the aforesaid reason given by the Tribunal determining inter-se merit position of the candidates who qualified the written test. Instead their argument was that the Tribunal lost sight of the actual plea taken viz. when there were sufficient vacancies available and even as per the letter sent by the DoP&T vide its letter dated 20th November 2009 names of 6 candidates were requisitioned, there was no reason not to forward the names of the appellants for the appointment. The appellants relied upon Clause 4(c) of the Office Memorandum dated 14th July 1967 in support of their aforesaid contention. This Clause is reproduced hereinbelow:

> "4(c) Once the results are published, additional persons should not normally be taken till the next examination. Nor should vacancies reported before declaration of the results, be ordinarily withdrawn after declaration of the results. **If, however, some of the candidates recommended/allotted for appointment against the specific number of vacancies reported in respect of a particular examination do not become available for one reason or another, the Commission may be approached, within a reasonable time, with request for replacements from reserved, if available.** When replacements may not be available, the vacancies that may remain unfilled should be reported to the Commission for being filled through the next examination."
>
> (Emphasis supplied)

7. The submission of the appellants before the High Court was that the aforequoted Clause specifically provides that the vacancies which are reported have not to be ordinarily withdrawn after the declaration of results. Therefore, when there were vacancies, and the appellants who had passed the LDCE were available, their names should have been recommended by the UPSC for appointment to ensure that vacancies do not go unfilled. It was also submitted that from the recommended/allotted candidates by the UPSC in case some of them are not available for whatever reason; the concerned department could approach the Commission, within a reasonable time with request for placement from reserved, if available. It was, thus, stressed that in the instant case when some of the persons did not join with the result that some vacancies were still available out of the vacancies reported and even requisition was made, the UPSC should have forwarded the names of 6 persons thereby including the appellants.

8. The stand of the UPSC, on the other hand, was that whether or not UPSC should accept the said requisition was not the subject matter of the aforesaid Office Memorandum. The UPSC pleaded that it was the convention, followed throughout as a policy decision, that supplementary list is not to be issued except in two categories of cases, namely, "repeat" or "common" candidates. Repeat candidates are those candidates, who have participated in the same category in two LDCE and are successful in the first examination and results have not declared when the second Departmental Competitive Examination was held. Common candidates are those

candidates, who get selected in more than one category in the LDCE.

9. The High Court accepted the aforesaid contention of the UPSC with the observation that taking a different view would upset the policy or convention followed by UPSC and will create ambiguity which may also lead to confusion. The High Court observed that the examination in question was held for 196 vacancies as intimated by DoP&T and UPSC had nominated 184 candidates in two lots. 12 SC vacancies remained unfilled for want of suitable candidates. A supplementary list of three persons was also issued as three selected candidates were "common/repeat" candidates.

10. We are unable to agree with the approach of the High Court in the facts of the present case. It will be useful to point out that reason for sending the requisition by DoP&T for forwarding the names of persons in the reserve list was that some of the candidates whose names had been forwarded by the UPSC did not join the post for one or other reason. The DoP&T in its communication dated 20th November 2009 had itself stated so, giving the following reasons:

S. No.	Roll No.	Name	Category (S/Shri)	Reasons for the vacancies to arise
1.	001147	Sanjay Bora	General	Already appointed as PS vide OM No.5/2/ 2009-SC.II dt.16.3.09
2.	000713	Ms.Kitty	General	Already appointed as PS vide OM No.5/2/2009-CS.II dt.16.3.09
3.	001823	Devjyoti Chakravarty	General	Technically resigned on 17th August 2007 i.e.prior to the declaration of the result.His lien is over on 17th August 2009.
4.	001604	Sanjeev Jain	General	He has opted for appointment against seniority quota, 2005 instead of LDCE 2005.
5.	001376	Vishwajit Kalynai	General	He has given his undertaking to remain as Personal Secretary.
6.	001711	Jai Kishore	SC	Qualified in LDCE 2005 Exam.,however pursuant to a court direction, he has been adjusted against SL 2000 (LDCE)

In respect of each of the aforesaid six candidates DoP&T had given the reasons as to why those six persons opted not to join the post of Section Officer's grade.

11. It can be clearly inferred from the reading of the aforesaid that it is not the case where any of these persons initially joined as Section Officer and thereafter resigned/left/ promoted etc. thereby creating the vacancies again. Had that been the situation viz. after the vacancy had been filled up, and caused again because of some subse n

would have been different. In that eventuality the UPSC would be right in not forwarding the names from the list as there is culmination of the process with the exhaustion of the notified vacancies and vacancies arising thereafter have to be filled up by fresh examination. However, in the instant case, out of 184 persons recommended, six persons did not join at all. In these circumstances when the candidates in reserved list on the basis of examination already held, were available and DoP&T had approached UPSC "within a reasonable time" to send the names, we do not see any reason or justification on the part of the UPSC not to send the names.

12. We are conscious of the legal position that merely because the name of a candidate finds place in the select list, it would not give him/her indefeasible right to get appointment as well. It is always open to the Government not to fill up all vacancies. However, there has to be a valid reason for adopting such a course of action. This legal position has been narrated by this Court in *Ms.Neelima Shangla vs. State of Haryana* (1986) 3 SCR 785. In that case:

> The appellant was the candidate for appointment to the post of Subordinate Judge in Haryana. Under the scheme of the Rules, the Public Service Commission was required to hold first a written test in subjects chosen by the High Court and next a viva voce test. Unless a candidate secures 45% of the marks in the written papers and 33% in the language paper, he will not be called for the viva voce test. All candidates securing 55% of the marks in the aggregate in the written and viva voce tests are considered as qualified for appointment. The appellant though secured 55% of the marks was not appointed as her name was not sent by the Public Service Commission to the Govt. The Supreme Court in such fact situation found that the Public Service Commission is not required to make any further selection from the qualified candidates and is, therefore, not expected to withhold the name of any qualified candidate. The duty of the Public Service Commission is

> to make available to the Govt., a complete list of qualified candidates arranged in order of merit. How should Govt., act is stated by the Supreme Court in the following words:
>
> "Thereafter the Government is to make the selection strictly in the order in which they have been placed by the Commission as a result of the examination. The names of the selected candidates are then to be entered in the Register maintained by the High Court strictly in that order and appointments made from the names entered in that Register also strictly in the same order. It is, of course, open to the Government not to fill up all the vacancies for a valid reason. The Government and the High Court may, for example, decide that, though 55 per cent is the minimum qualifying mark, in the interests of higher standards, they would not appoint anyone who has obtained less than 60 per cent of the marks."
>
> (Emphasis supplied)

13. The Court after making reference to the decision of the Supreme Court in the case of *State of Haryana vs. Subhash Chander Marwah* reported in (1972) IILLJ266 SC further observed as under:

> *"However, as we said, the selection cannot arbitrarily be restricted to a few candidates, notwithstanding the number of vacancies and the availability of qualified candidates. There must be a conscious application of the mind of the Govt., and the High Court before the number of persons selected for appointment is restricted. Any other interpretation would make Rule 8 of Part D meaningless."*
>
> (Emphasis supplied)

14. It is, thus, manifest that though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a dec e

Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies.

15. In the present case, however, we find that after the UPSC sent the list of 184 persons/recommended by it, to the Government for appointment six persons out of the said list did not join. It is not a case where the Government decided not to fill up further vacancies. On the contrary DoP&T sent requisition to the UPSC to send six names so that the remaining vacancies are also filled up. This shows that in so far as Government is concerned, it wanted to fill up all the notified vacancies. The requisition dated 20th November 2009 in this behalf was in consonance with its Clause 4(c) of O.M. dated 14th July 1967. Even when the Government wanted to fill up the post, the UPSC chose to forward names of three candidates.

16. There is a sound logic, predicated on public interest, behind O.M. dated 14th July 1967. The intention is not to hold further selection for the post already advertised so as to save unnecessary public expenditure. At the same time, this very O.M. also stipulates that the Government should not fill up more vacancies than the vacancies which were advertised. The purpose behind this provision is to give chance to those who would have become eligible in the meantime. Thus, this OM dated 14th July 1967 strikes a proper balance between the interests of two groups of persons. In the present case since the requisition of the DoP&T contained in communication dated 20th November 2009 was within the permissible notified vacancies, the UPSC should have sent the names of six candidates instead of three.

17. This Court in *Sandeep Singh vs. State of Haryana & Anr.* (2002) 10 SCC 549 commended that the vacancies available should be filled up unless there is any statutory

embargo for the same. In *Virender S.Hooda & Ors. Vs. State of Haryana & Anr.* AIR 1999 SC 1701, 12 posts for direct recruitment were available when the advertisement for recruitment was made which was held in the year 1991. Some of the selected candidates did not join in this batch almost similar to the present case, the Court held that the appellant's case ought to have been considered when some of the candidates for reasons of the non-appointment of some of the candidates and they ought to have been appointed if they come within the range of selection.

18. It is not the case of the UPSC that under no circumstances the names are sent by way of supplementary list, after sending the names of the candidates equal to the vacancies. As per the UPSC itself, names of "repeat/common" candidates are sent and in the present case itself, three names belonging to such category were sent. However, exclusion of the persons like the appellants has clearly resulted in discrimination as one of those three candidates Rajesh Kumar Yadav had also secured 305 marks and once he was appointed to the post in question, the appellants with same marks have been left out even when the vacancies were available.

19. We are, therefore, of the opinion in the facts of the present case, the decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate. We, accordingly, allow the present appeal; set aside the order of the High Court as well as Tribunal and issue Mandamus to the UPSC to forward the names of the next three candidates to the DoP&T for appointment to the post of Section Officer's Grade. They shall get the seniority from the date when Rajesh Kumar Yadav was appointed to the said post. Their pay shall notionally be fixed, without any arrears of the pay and other allowances.

20. No costs.

K.K.T.

STATE OF M.P.
v.
BABULAL & ORS.
(Criminal Appeal No. 1156 of 2013)

AUGUST 12, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Sentence/Sentencing – Conviction u/ss. 148, 324/149 and 326/149 IPC and sentence of 3 years SI by trial court and appellate court – Revisional Court upheld the conviction, but reduced the sentence to 3 months on the ground of delay in criminal proceedings – Held: It is solemn duty of Court to strike a proper balance while awarding sentence – Taking a lenient view showing misplaced sympathy to the accused on any consideration reduces the criminal justice system into a mockery – In the present case, in view of the serious nature of injuries on the victims, High Court was not justified in reducing the sentence – Penal Code, 1860 – ss. 148, 324/ 149 and 326/ 149.

Trial court convicted the respondents-accused for commission of offences punishable u/ss. 148, 324/149 (two counts) and 326/149 (two counts) IPC and sentenced them to 3 years SI and imposed fine with default clause. In appeal, High Court confirmed the conviction and sentence. In Revision Petition, accused prayed only for reducing heir sentence in view of the fact that criminal proceedings had protracted for about 7 years. The Revisional Court reduced the sentence from 3 years to 3 months. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1. One of the prime objectives of criminal law

is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. The most relevant determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing misplaced sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings. The Punishment should not be so lenient that it shocks the conscience of the society being abhorrent to the basic principles of sentencing. Thus, it is the solemn duty of the court to strike a proper balance while awarding sentence as awarding a lesser sentence encourages a criminal and as a result of the same, the society suffers. [Para 16] [31-B-E]

2. In the present case, four persons were injured and two of them had more than one head injury. There were too many injuries on their persons and some of them had been inflicted on vital parts of the body. High Court could not be justified in taking a lenient view which reduces the administration of the criminal justice system to a mockery. Therefore, the Judgment of the High Court is set aside and that of the Trial Court is restored. [Paras 17 and 20] [31-E-G; 32-E]

Mahesh and etc. vs. State of Madhya Pradesh **AIR 1987 SC 1346: 1987 (2) SCR 710;** *State of Punjab vs. Bira Singh and Ors.* **(1995) Supp. 3 SCC 708;** *Chinnadurai vs. State of Tamil Nadu* **AIR 1996 SC 546: 1995 (3) Suppl. SCC 686;** *State of U.P. vs. Shri Kishan* **AIR 2005 SC 1250;** *Sadhupati Nageswara Rao vs. State of Andhra Pradesh* **AIR 2012 SC 3242: 2012 (6) SCR 1143;** *Alister Anthony Pareira vs. State of Maharashtra* **AIR 2012 SC 3802: 2012 (1) SCR 145;** *State of Karnataka vs. Krishnappa* **AIR 2000 SC 1470: 2000 (2) SCR 761;** *Dalbir Singh vs. State of H*

1677: 2000 (3) SCR 1000; *Dhananjoy Chatterjee @ Dhanna vs. State of West Bengal* **(1994) 2 SCC 220: 1994 (1) SCR 37;** *Ravji @ Ram Chandra vs. State of Rajasthan* **AIR 1996 SC 787: 1995 (6) Suppl. SCR 195;** *State of Uttar Pradesh vs. Sanjay Kumar* **(2012) 8 SCC 537: 2012 (7) SCR 359 – relied on.**

Ram Govind and Ors. vs. State of M.P. **(2002) 3 MPHT 301;** *Vijay Singh vs. State of M.P.* **(1994) II MPWN 98;** *Havaldar Singh vs. State of M.P.* **(1995) I MPWN 275 – disapproved.**

Case Law Reference:

1987 (2) SCR 710	**relied on**	**Para 8**
(1995) Supp. 3 SCC 708	**relied on**	**Para 9**
1995 (3) Suppl. SCC 686	**relied on**	**Para 10**
AIR 2005 SC 1250	**relied on**	**Para 11**
2012 (6) SCR 1143	**relied on**	**Para 12**
2012 (1) SCR 145	**relied on**	**Para 13**
2000 (2) SCR 761	**relied on**	**Para 13**
2000 (3) SCR 1000	**relied on**	**Para 13**
1994 (1) SCR 37	**relied on**	**Para 14**
1995 (6) Suppl. SCR 195	**relied on**	**Para 14**
2012 (7) SCR 359	**relied on**	**Para 15**
(2002) 3 MPHT 301	**disapproved**	**Para 18**
(1994) II MPWN 98	**disapproved**	**Para 18**
(1995) I MPWN 275	**disapproved**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1156 of 2013.

From the Judgment & Order dated 14.12.2011 of the High Court of Madhya Pradesh, Jabalpur Bench at Gwalior in Criminal Revision No. 74 of 2010.

Bansuri Swaraj, C.D. Singh for the Appellant.

Prashant Shukla, Nikilesh Ramachandran for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been filed against the impugned judgment and order dated 14.12.2011 passed by the High Court of Madhya Pradesh, (Gwalior Bench) in Criminal Revision No. 74 of 2010, by way of which the conviction of the respondents has been maintained under Sections 148, 324, 326 and 149 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') as awarded by the learned trial court, however, the sentence has been reduced from 2 years to 3 months.

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

A. One Sunil (PW.1) lodged a complaint with the police station Bhander on 21.3.2004 that his father Nahar Singh (PW.5) had gone to his agricultural field for guarding his crops, all the respondents came there on a tractor driven by Kallu, armed with axe, farsa and lathi etc. When the complainant Sunil tried to stop the tractor, the respondents started abusing him and on being asked not to abuse, the respondents caused injuries to the complainant Sunil (PW.1) with their respective weapons. When his father Nahar Singh (PW.5) came to rescue him, the respondents had beaten him of which he suffers injuries. In the meanwhile, on hearing hue and cry, brother of complainant, namely, Brijraj (PW.3) and one Kunwar Singh (PW.2) reached the spot and tried to intervene, they were also beaten by the respondents. When other p[illegible]n

Singh and Nirbhay Singh reached the spot, the accused persons fled away from there hurling threats to kill the complainant side.

B. In view of the complaint filed by Sunil (PW.1), the law came into motion. The police arrested the accused persons, weapons etc. were recovered on the basis of the disclosure statements made by them, and various memos were prepared.

C. After completing the investigation, the police filed chargesheet against the respondents under Sections 147, 148, 149, 294, 323, 324 and 506-B IPC. On the basis thereof, the charges had been framed against the respondents/accused under Sections 147, 148, 294, 506 Part 2, 326/149 (two counts), 324/149 (two counts).

D. In order to prove their case, the prosecution examined large number of witnesses. The learned Magistrate vide impugned judgment and order dated 10.9.2009 convicted the respondents for commission of the offences punishable under Sections 148, 324/149 (two counts) and 326/149 (two counts) of IPC, and sentenced them to undergo one-one year simple imprisonment with fine of Rs.100-100/- and two-two years simple imprisonment with fine of Rs.150-150/- respectively, and in default of payment of fine, to further undergo simple imprisonment of 10-10 days.

E. Aggrieved, the respondents-accused filed Criminal Appeal No. 74 of 2009 before the learned Additional Sessions Judge (Fast Track), Datia. The said appeal was dismissed by order dated 15.1.2010.

F. The respondents further challenged the said order dated 15.1.2010 by filing Criminal Revision No. 74 of 2010 before the High Court which was disposed of vide impugned judgment and order dated 14.12.2011.

Hence, this appeal by the State.

3. Ms. Bansuri Swaraj, learned counsel appearing on behalf of the appellant State, has submitted that if the criminal proceedings has protracted for 7-1/2 years that could not be a ground for reducing the sentence from two years to 3 months only by the High Court. Such a reduction of sentence is not justified, particularly, when the respondents did not argue their case on merit at all. In case, the High Court earlier had reduced the sentence in a similar manner that cannot be a precedent as other case is to be decided on its own merit. Therefore, in the facts and circumstances of the case, the sentence awarded by the learned trial court should be restored and the order of the High Court requires to be modified to that extent.

4. On the contrary, Shri Prashant Shukla, learned counsel appearing on behalf of the respondents, has submitted that the respondents faced the criminal prosecution for a long time and the sentence was reduced vide order dated 14.12.2011. The High Court was justified in following the earlier judgment wherein under the similar circumstances, the sentence had been reduced as undergone. Thus, the facts of the case do not warrant any interference whatsoever in the case and the appeal is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel appearing on behalf of the parties and perused the records.

6. Admittedly, the respondents did not argue the case on merit. It was prayed before the High Court that as a period of more than 7 years had elapsed when the incident had taken place, while upholding the guilt of the said accused, sentence may be reduced as undergone which was about 3 months and amount of fine may be imposed. Such a prayer has been accepted by the High Court. Even before us learned counsel appearing on behalf of the respondents has not argued anything on merit and the matter is restricted only to the quantum of punishment and nothing else.

7. Dr. G.L. Verma (PW.7) who had examined the victims/ injured witnesses in this case proved the injuries as under:

Nahar Singh (PW.5) had suffered 5 injuries including an incised wound (fracture) on his right hand thumb and an lacerated wound in the middle of his left leg. Brijraj (PW.3) got 7 injuries including an incised wound in the middle of his left leg, and incised wound in the right side of his ***head***. Kunwar Singh (PW.2) was found to have 7 injuries including an incised would deep to skin on the right side of his B and a lacerated wound on his left hip. Sunil (PW.1) had found 11 injuries including an incised wound deep to bone in right side of his ***head***, an incised wound deep to bone in left side of his ***head***, an incised wound in the middle of his ***head***, an incised wound deep to bone in the middle of his left leg, and a lacerated wound in the right hand thumb and an incised wound in the left leg.

8. In *Mahesh & etc. v. State of Madhya Pradesh,* AIR 1987 SC 1346, while dealing with a similar issue, this Court held as under:

> "….it will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in Courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon……"

9. This Court in *State of Punjab v. Bira Singh & Ors.*, (1995) Supp. 3 SCC 708, has held that at the time of awarding the sentence, the court should not be confused with the principle of adopting the most lenient view and an accused may not be awarded lesser punishment so that there would be deterrence for committing the crime again and such a view may adversely affect not only the accused but the society as a whole.

10. In *Chinnadurai v. State of Tamil Nadu,* AIR 1996 SC 546, this Court rejected the plea for reduction of sentence in view of a considerable *delay* and other circumstances observing that sentence has to be awarded taking into consideration the gravity of the injuries.

11. In *State of U.P. v. Shri Kishan,* AIR 2005 SC 1250, this Court has emphasised that just and proper sentence should be imposed. The Court held:

> "…… Any liberal attitude by imposing meager sentences or ***taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive*** in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should c onform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'." (Emphasis added)

12. In S*adhupati Nageswara Rao v. State of Andhra Pradesh,* AIR 2012 SC 3242, this Court observed that the courts cannot take lenient view in awarding sentence on the ground of sympathy or delay as the same cannot furnish any ground for reduction of sentence.

13. In *Alister Anthony Pareira v. State of Maharashtra,* AIR 2012 SC 3802, this Court held as under:

"Sentencing is an important task in the matters of crime. **One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done**. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

The principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime-doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence." (Emphasis added)

(See also: *State of Karnataka v. Krishnappa,* AIR 2000 SC 1470; and *Dalbir Singh v. State of Haryana,* AIR 2000 SC 1677)

14. In *Dhananjoy Chatterjee* @ Dhanna *v. State of West Bengal* (1994) 2 SCC 220, this Court observed:

"…The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering the imposition of appropriate punishment."

(See also: *Ravji @ Ram Chandra v. State of Rajasthan,* AIR 1996 SC 787).

15. In *State of Uttar Pradesh v. Sanjay Kumar,* (2012) 8 SCC 537, this Court examined the issue of sentencing policy and came to the conclusion:

"21. Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.

22. Ultimately, it becomes the duty of the courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed, etc. The courts should impose a punishment befitting the crime so that the courts are able to accurately reflect public abhorrence of the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punish[illegible]l.

Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise."

16. In view of the above, the law on the issue can be summarised to the effect that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. The most relevant determinative factor of sentencing is proportionality between crime and punishment keeping in mind the social interest and consciousness of the society. It is a mockery of the criminal justice system to take a lenient view showing mis-placed sympathy to the accused on any consideration whatsoever including the delay in conclusion of criminal proceedings. The Punishment should not be so lenient that it shocks the conscience of the society being abhorrent to the basic principles of sentencing.

Thus, it is the solemn duty of the court to strike a proper balance while awarding sentence as awarding a lesser sentence encourages a criminal and as a result of the same society suffers.

17. The case at hand is required to be decided on the basis of the aforesaid settled legal propositions in respect of principles of sentencing. Admittedly, four persons were injured and two of them had more than one head injury. There were too many injuries on their persons and some of them had been inflicted on vital parts of the body. In our view, the High Court could not be justified in taking a lenient view which reduces the administration of the criminal justice system to a mockery.

18. We do not find any force in the submission advanced by Shri Prashant Shukla, learned counsel appearing for the respondents that the High Court has passed a correct order placing reliance on the earlier judgment in *Ram Govind & Ors. v. State of M.P.*, (2002) 3 MPHT 301, wherein the accused

therein had been convicted under Sections 147 and 325/149 IPC and awarded the sentence of 6 months RI under Section 147 IPC and a sentence of 1 year RI under Sections 325/149 IPC, and further a fine had been imposed. The High Court considering the fact that period of 16 years had elapsed took a lenient view further placing reliance on earlier judgments in *Vijay Singh v. State of M.P.,* (1994) II MPWN 98; and *Havaldar Singh v. State of M.P.,* (1995) I MPWN 275 and reduced the sentence to the period undergone by them which was only 6 days for the reason that none of the judgments referred to in *Ram Govind* (supra) can be approved.

19. All the judgments relied upon by learned counsel for the respondents are not in consonance with the law of sentencing policy laid down by this court in any of the judgments referred to hereinabove. Taking such a lenient view in awarding the sentence tantamounts to doing injustice of a crude form against the innocent victims and the society as a whole. Thus, the submission advanced is liable to be rejected.

20. In view of the above, the appeal succeeds and is allowed. The Judgment of the High Court is set aside and that of the Trial Court restored. The respondents are directed to surrender within four weeks from today failing which the learned Judicial Magistrate, Ist Class Bhander, Distt. Datia is directed to take them into custody and send them to jail to serve out the remaining part of the sentence. A copy of the order be sent to the learned Magistrate concerned.

K.K.T. Appeal allowed.

M/S V.K.M. KATTHA INDUSTRIES PVT. LTD.
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 6792 of 2013)

AUGUST 16, 2013

[P. SATHASIVAM, CJI, RANJANA PRAKASH DESAI AND RANJAN GOGOI, JJ.]

Land Acquisition Act, 1894 – ss.4 & 5A – Non-publication of the substance of the notification as prescribed under the Act in the locality concerned – Effect – Held: The requirement is mandatory – By effecting such publication in the locality, it is possible for the person in possession, namely, either the owner or lessee to make representation/ objection in enquiry u/s.5A – By non-publication of the same in the locality as provided under the Act, the owner or occupier loses his valuable right – Appellant-company prevented from making objection u/s.5A – Acquisition proceedings in respect of lands belonging to appellant-company therefore liable to be quashed.

Land Acquisition Act, 1894 – s.4 – Acquisition of running industrial unit for public purpose – Justification – Held: Not justified – Appellant-Company was a running industrial unit even prior to the notification u/s.4 – Hence could not be acquired for a public purpose – No justification in acquiring a running industrial unit for industrialization of the area – Impugned notifications qua the running industrial unit cannot be sustained in law.

Land Acquisition Act, 1894 – s.4 – Appellant-Company running an industry similar to the public purpose for which lands were being acquired – Location of appellant-Company on the extreme corner of the acquired lands – Respondent-

State itself excluded more than 76 acres of land – Held: Even if the Government or the authority concerned excludes the lands of the appellant-Company, there would not be any difficulty in executing the scheme – Lands of appellant-company ought to have been excluded.

Constitution of India, 1950 – Article 226 – Land acquisition – Award – Writ petition filed by appellant-landowner within 5 weeks of the passing of the award – Maintainability – Held: The writ petition was filed within reasonable time – It could not be simply dismissed on the ground of delay or laches.

On 21-2-2005, the Haryana Government Industries Department issued a notification under Section 4 of the Land Acquisition Act, 1894 for acquisition of certain lands for a public purpose. The lands belonging to appellant-Company were covered in the said notification. The declaration under Section 6 of the Act was made on 29-12-2006 and the award was announced on 15-07-2007.

Challenging the said award, a writ petition was filed by the appellant-Company on 20.08.2007, i.e. within 5 weeks of the passing of the award. The High Court dismissed the petition, and therefore the instant appeal.

The appellant-Company submitted:- (i) that the High Court committed an error in dismissing the writ petition filed by the appellant-Company on the ground that the same was not maintainable; (ii) that the notification under Section 4(1) of the Act was not published in the locality wherein the land is situate which prevented the appellant-Company from making objection under Section 5A of the Act; (iii) that as the appellant-Company itself was a running industry on the date of the notification, the said land could not be acquired for a public purpose; and (iv) that inasmuch as the respondent-State itself excluded m of

land and the appellant is running an industry even as on date, it ought to have been excluded.

Allowing the appeal, the Court

HELD: 1. The appellant-Company filed the writ petition within a reasonable time, namely, within 5 weeks of the passing of the award. The Writ Petition filed by the appellant before the High Court cannot be simply dismissed on the ground of delay or laches. The said issue depends upon the facts and circumstances of each case and in view of the fact that the appellant has approached the High Court within a reasonable time, it is but proper for the High Court to go into the merits of the claim of the appellant. In normal circumstance, the matter has to go back to the High Court for consideration of various points raised, however, in order to shorten the litigation and of the fact that necessary/ required materials are available before this Court, the case of both the parties is being considered on merits. [Para 9] [41-C-F]

Star Wire (India) Ltd. vs. State of Haryana & Ors. **(1996) 11 SCC 698: 1996 (7) Suppl. SCR 6;** *Municipal Council, Ahmednagar & Anr. vs. Shah Hyder Beig & Ors.* **(2000) 2 SCC 48: 1999 (5) Suppl. SCR 197;** *C. Padma & Ors. vs. Dy. Secretary to the Government of Tamil Nadu & Ors.* **(1997) 2 SCC 627: 1996 (9) Suppl. SCR 158 and** *Swaika Properties (P) Ltd. & Anr. vs. State of Rajasthan & Ors.* **(2008) 4 SCC 695: 2008 (2) SCR 521 – held inapplicable.**

2.1. In spite of knowing the specific ground raised by the appellant about the non-publication of the substance of the notification as prescribed under the Act in the locality concerned, neither the State nor the Land Acquisition Collector availed the opportunity of filing reply refuting the same. In such circumstances, this Court has no other option except to hold that there was no publication of the substance of the notification under

Section 4(1) of the Act in the locality which is held to be mandatory. By effecting such publication in the locality, it would be possible for the person in possession, namely, either the owner or lessee to make their representation/ objection in the enquiry under Section 5A. In addition to the same, such person "owner or occupier" is entitled to file their objections within 30 days from the date of publication in the locality and by non-publication of the same in the locality as provided under the Act, the owner or occupier loses his valuable right. For these reasons also, the acquisition proceedings are liable to be quashed. [Para 15] [48-C-G]

2.2. There is no justification in acquiring a running industrial unit for industrialization of the area. By placing acceptable materials, the appellant-Company has demonstrated that the construction at the site in question is A-Class construction and the fact that Rector No. 75 itself, which is a substantial part of the area, has been left out from the acquisition, the impugned notifications *qua* the running industrial unit cannot be sustained in law. On going through the materials placed, it is clear that the appellant-Company has established that it is a running industrial unit even prior to the notification under Section 4 of the Act and the appellant has established its case on this ground also. [Para 16] [48-H; 49-A-B, D]

2.3. If the appellant-Company had the opportunity of participating in the enquiry under Section 5A, it would be open to the Company to make a representation for exclusion like others and there would be every possibility for the State Government to accede to the request since the appellant-Company is running an industry which is similar to the public purpose for which lands were being acquired. The location of the appellant-Company is on the extreme corner of the acquired lands. Even if the Government or the authority conc e

lands of the appellant-Company, there would not be any difficulty in executing the scheme. [Para 17] [50-B-D]

Khub Chand & Ors. vs. State of Rajasthan & Ors. **(1967) 1 SCR 120;** *J&K Housing Board and Anr. vs. Kunwar Sanjay Krishan Kaul & Ors.* **(2011) 10 SCC 714: 2011 (14) SCR 976 and** *Usha Stud & Agricultural Farms P. Ltd. & Ors. vs. State of Haryana and Ors.* **(2013) 4 SCC 210 - cited.**

3. The impugned order of the High Court is set aside and the land acquisition proceedings insofar as the appellant-Company is concerned is quashed. [Para 18] [50-E]

Case Law Reference:

1996 (7) Suppl. SCR 6	**held inapplicable**	**Para 8**
1999 (5) Suppl. SCR 197	**held inapplicable**	**Para 8**
1996 (9) Suppl. SCR 158	**held inapplicable**	**Para 8**
2008 (2) SCR 521	**held inapplicable**	**Para 8**
(1967) 1 SCR 120	**cited**	**Para 14**
2011 (14) SCR 976	**cited**	**Para 14**
(2013) 4 SCC 210	**cited**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6792 of 2013.

From the Judgment and Order dated 08.07.2008 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 13208 of 2007.

Guru Krishna Kumar, Hari Shankar K., Vikas Singh Jangra, Aditya Verma, Lakshmi for the Appellant.

Manjit Singh, AAG, Vivekta Singh, Tarjit Singh, Kamal Mohan Gupta, Ravindra Bana for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 08.07.2008 passed by the High Court of Punjab & Haryana at Chandigarh in CWP No. 13208 of 2007 whereby the High Court dismissed the petition filed by M/s V.K.M. Kattha Industries Pvt. Ltd.-the appellant-Company.

3. ***Brief Facts:***

(a) The appellant-Company is an industrial unit engaged in manufacturing of kattha for various tobacco and non-tobacco products, having its office at Janti Kalan Road, Post Office Kundli, District Sonipat. Vide sale deed dated 10.05.1994, the appellant-Company purchased a running industrial unit comprised in Rect. No. 75, Khasra No. 25, Rect. No. 80, Khasra Nos. 5/1 and 6/2 total measuring 23 kanals 14 marlas and got it registered as a Small Scale Industrial Unit with the Director, Industries Department, Haryana. On 05.05.2003, the appellant-Company leased out the running industrial unit to one M/s Anand Agro Products.

(b) On 21.12.2005, Haryana Government Industries Department issued a notification under Section 4 of the Land Acquisition Act, 1894 (in short 'the Act') for acquisition of certain lands situated in Village Kundli and Village Sirsa for a public purpose, namely, for the development of a Industrial Estate and the lands belonging to the appellant Company were covered in the said notification. The declaration under Section 6 of the Act was subsequently made on 29.12.2006 and the award was announced on 15.07.2007.

(c) Being aggrieved by the notifications dated 21.12.2005 and 29.12.2006, the appellant-Company preferred CWP No. 13208 of 2007 before the High Court. By order dated 08.07.2008, the High Court dismissed the writ petition

(d) Being aggrieved of the same, the appellant-Company has preferred this appeal by way of special leave before this Court.

4. Heard Mr. Guru Krishna Kumar, learned senior counsel for the appellant-Company, Mr. Manjit Singh, learned Additional Advocate General for the respondent-State.

Contentions:

5. Mr. Guru Krishnakumar, learned senior counsel for the appellant-Company submitted as under:- (i) The notification under Section 4 (1) of the Act was not published in the locality wherein the land situate which prevented the appellant-Company from making objection under Section 5A of the Act. (ii) As the appellant-Company itself is a running industry on the date of the notification, the said land cannot be acquired for a public purpose, namely, for the development of Industrial Estate. (iii) The High Court committed an error in dismissing the writ petition filed by the appellant-Company herein on the ground that the same is not maintainable after the announcement of award, particularly, when the appellant-Company failed to file any objection under Section 5A of the Act. The decisions of this Court relied on by the High Court are not applicable to the facts of this case and are distinguishable. (v) Inasmuch as the respondent-State itself has excluded more than 76 acres of land and the appellant is running an industry even as on date, it ought to have excluded and such exclusion would not affect the execution of the Scheme.

6. On the other hand, Mr. Manjit Singh, learned Additional Advocate General appearing for the State of Haryana submitted that inasmuch as the land acquisition authorities have complied with all the formalities, the appellant-Company failed to file objection under Section 5A of the Act and the writ petition having been filed in the High Court after passing of the award, the High Court is fully justified in dismissing the writ petition filed by the appellant-Company.

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

Discussion:

8. Coming to the contention of learned senior counsel for the appellant about the dismissal of the writ petition by the High Court on the ground that the same has been filed after passing of the award, it is brought to our notice that all the four cases relied on by the High Court are inapplicable to the facts of the present case. The first decision relied on by the High Court is *Star Wire (India) Ltd. vs. State of Haryana & Ors.*, (1996) 11 SCC 698. In that case, notification under Section 4(1) of the Act was published in the Gazette on 01.06.1976, award was passed on 03.07.1981 and the aggrieved parties filed writ petition in the High Court only on 21.01.1994, i.e. after 13 years. Second decision relied on by the High Court in *Municipal Council, Ahmednagar & Anr. vs. Shah Hyder Beig & Ors.,* (2000) 2 SCC 48 wherein notification under Section 4(1) was published on 15.05.1971, award was passed on 26.04.1976 and the writ petition came to be filed on 21.10.1992, i.e., 21 years after the date of notification. Third decision relied on by the High Court is C. *Padma & Ors. vs. Dy. Secretary to the Government of Tamil Nadu & Ors.,* (1997) 2 SCC 627 wherein notification under Section 4(1) was published on 17.10.1962, acquisition proceedings became final and possession was taken on 30.04.1964, compensation was paid and accepted and writ petition was filed after 32 years. The last decision relied on by the High Court is *Swaika Properties (P) Ltd. & Anr. vs. State of Rajasthan & Ors.,* (2008) 4 SCC 695 wherein notification under Section 4(1) of the Act was published on 08.02.1984, possession was taken on 17.02.1987 and writ petition came to be filed on 10.03.1989. It is relevant to point out that the writ petition came to be filed after two years that too after taking over possession.

9. In the case on hand, notification

the Act was published in the official gazette on 21.12.2005, declaration under Section 6 of the Act was issued on 29.12.2006 and the award was passed on 15.07.2007. Challenging the said award, a writ petition was filed by the appellant-Company on 20.08.2007, i.e. within 5 weeks of the passing of the award. It is the assertion of the appellant-Company that possession of the said land is still vested with them. Taking note of the above factual scenario and of the fact that in the decisions relied on by the High Court, there was a huge delay in filing the writ petitions, such as 13 years, 21 years, 32 years and 2 years after taking over possession, hence, in the light of the fact that the appellant-Company has filed the writ petition within a reasonable time, namely, within 5 weeks of the passing of the award, we are of the view that all the 4 decisions referred to and relied on by the High Court are inapplicable to the facts of the present case. On this ground itself, the impugned order dismissing the writ petition is liable to be set aside. Accordingly, we hold that the Writ Petition filed by the appellant herein before the High Court cannot be simply dismissed on the ground of delay or laches or filed after passing of the award. The said issue depends upon the facts and circumstances of each case and in view of the fact that the appellant has approached the High Court within a reasonable time, it is but proper for the High Court to go into the merits of the claim of the appellant. In normal circumstance, the matter has to go back to the High Court for consideration of various points raised, however, in order to shorten the litigation and of the fact that necessary/required materials are available before this Court, we consider the case of both the parties on merits and give our reasons hereunder.

10. Regarding the contention relating to publication of notification under Section 4(1) of the Act, it is the claim of the appellant that since the same was not in accordance with the mandate provided in the Statute, the appellant-Company was not at all in a position to file their objection under Section 5A of the Act.

11. In order to answer the above claim, it is better to understand the Scheme of the Act and the benefits given to the land owners for which it is desirable to extract Sections 4, 5A and 6 of the Act which are as under:

> *"**4. Publication of preliminary notification and powers of officers thereupon**.*—(1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).
>
> (2) Thereupon it shall be lawful for any officer, either generally or specially authorised by such Government in this behalf, and for his servants and workmen,—
>
> to enter upon and survey and take levels of any land in such locality;
>
> to dig or bore into the subsoil;
>
> to do all other acts necessary to ascertain whether the land is adapted for such purpose;
>
> to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;
>
> to mark such levels, boundaries and line by placing marks and cutting trenches; and,
>
> where otherwise the survey canno e

levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

5A. Hearing of objections:.—(1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under Section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

6. Declaration that land is required for a public purpose.—(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Section 4, sub-section (1), irrespective of whether one report or different reports has or have been made (wherever required) under Section 5-A, sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under Section 4, sub-section (1)—

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

Explanation 1.—In computi s

referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under Section 4, sub-section (1), is stayed by an order of a court shall be excluded.

Explanation 2.—Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the date of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

12. Among the above provisions, Section 4 of the Act empowers the appropriate Government to initiate proceedings for the acquisition of land. Section 4(1) of the Act lays down that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, then a notification to that

effect is required to be published in (i) the Official Gazette; (ii) two daily newspapers having circulation in that locality of which, one shall be in the regional language; and (iii) it is also incumbent on the part of the Collector to cause public notice of the substance of such notification to be given at convenient places in the locality. It is relevant to mention that the last of the dates of such publication and the giving of such public notice is treated as the date of the publication of the notification. In terms of Section 4(2), any officer authorized by the Government in this behalf and his servants or workmen can enter upon and survey and take levels of any land in such locality, dig or bore into the subsoil and can do all other acts necessary for ascertaining that the land is suitable for the purpose of acquisition. The officers concerned can set out the boundaries of the land proposed to be acquired and the intended line of the work, if any, proposed to be made on it. They are also permitted to mark such levels, boundaries and lines by placing marks and cutting trenches and can cut down and clear away any part of any standing crop, fence or jungle for the same purpose. However, neither the officer nor his servants or workmen can enter into any building or upon any enclosed court or garden attached to a dwelling house without the consent of the occupier and previously giving such occupier at least 7 days notice in writing of their intention to do so.

13. In terms of Section 5A, any person interested in any land notified under Section 4(1) may, within 30 days from the date of publication of the notification, submit objection in writing against the proposed acquisition of land or of any land in the locality to the Collector. Thereafter, the Collector is required to give the objector an opportunity of being heard either in person or by any person authorized by him or by his pleader. After hearing the objections and making such further inquiry, as he may think necessary, the Collector shall make a report in respect of the land notified under Section 4(1) containing his recommendations on the objections and forward the same to the Government along with the record o d

by him. It is open to the Collector to make different reports in respect of different parcels of land proposed to be acquired.

14. Keeping the above principles in mind, let us consider the first submission made by learned senior counsel for the appellant-Company viz., the notification was not in consonance with the requirements laid down under Section 4(1) of the Act. Learned senior counsel for the appellant-Company argued before this Court that in the light of the language used under Section 4(1) of the Act, all the three modes of publication mentioned therein are mandatory. He further asserted that since the notification was not published at the conspicuous places of the locality concerned, neither the lessee of the appellant-Company nor the appellant-Company came to know about the same. It is also asserted that no individual notice was served. In view of the same, according to learned senior counsel, the appellant-Company was deprived of its valuable right to file objections under Section 5A of the Act. He further contended that, it is an opportunity given to the land owners or person in possession of lands to make a representation under Section 5A of the Act. To put it clear, the purpose of publication of the notification is two-fold, first, to ensure that adequate publicity is given so that land owners and persons interested will have an opportunity to file their objections under Section 5A of the Act, and second, to give the land owners/occupants a notice that it shall be lawful for any officer authorized by the government to carry out the activities enumerated in sub-section (2) of Section 4 of the Act. This position has been reiterated in several decisions of this Court vide *Khub Chand & Ors. vs. State of Rajasthan & Ors.,* (1967) 1 SCR 120, *J&K Housing Board and Anr.* vs. *Kunwar Sanjay Krishan Kaul & Ors.,* (2011) 10 SCC 714 and *Usha Stud & Agricultural Farms P. Ltd. & Ors.* vs. *State of Haryana and Ors.*, (2013) 4 SCC 210.

15. Learned Additional Advocate General appearing for respondent-State asserted that the authorities have complied with all the three modes of publication. To test the above statements, we verified the written statement of Shri L.B. Verma,

District Revenue Officer-cum-Land Acquisition Collector, Sonipat filed on behalf of respondent No. 2 herein before the High Court. Though in para 6, it is stated that the notification was published in two daily newspapers, namely, National Herald dated 02.01.2006 in English and Amar Ujala in Hindi dated 31.12.2005 but there is no whisper about the publication of the substance of the notification in the locality as provided under Section 4(1) of the Act. Except the above said written statement dated 15.11.2007, no other material such as counter affidavit or reply had been projected before the High Court as well as before this Court in support of their stand. In fact, on 09.08.2010, when the matter was called for hearing, learned counsel appearing for the State submitted that "in view of the counter filed before the High Court, no separate counter is being filed here". In view of the above, it is clear that in spite of knowing the specific ground raised by the appellant about the non-publication of the substance of the notification as prescribed under the Act in the locality concerned, neither the State nor the Land Acquisition Collector availed the opportunity of filing reply refuting the same. In such circumstances, we have no other option except to hold that there was no publication of the substance of the notification under Section 4(1) of the Act in the locality which is held to be mandatory. It is also relevant to point out that by effecting such publication in the locality, it would be possible for the person in possession, namely, either the owner or lessee to make their representation/objection in the enquiry under Section 5A. In addition to the same, such person "owner or occupier" is entitled to file their objections within 30 days from the date of publication in the locality and by non-publication of the same in the locality as provided under the Act, the owner or occupier loses his valuable right. For these reasons also, the acquisition proceedings are liable to be quashed.

16. Coming to the contention raised by learned senior counsel that the appellant-Company itself is running an industry on the date of the notification, we are o s

no justification in acquiring a running industrial unit for industrialization of the area. By placing acceptable materials, the appellant-Company has demonstrated that the construction at the site in question is A-Class construction and the fact that Rector No. 75 itself, which is a substantial part of the area, has been left out from the acquisition, the impugned notifications qua the running industrial unit cannot be sustained in law. The appellant-Company, in support of the same, has also placed copy of the sanctioned building plan of the Company dated 18.03.1994, copy of the sale deed dated 10.05.1994, copy of the communication of the Director, Urban Estates Development Haryana, Chandigarh dated 23.03.1982, copy of the certificate by the Haryana Financial Corporation dated 14.05.2003, copy of no objection certificate from the Haryana State Pollution Control Board dated 17.10.1996 and copy of lease deed in favour of M/s Anand Agro Products dated 05.05.2003. On going through the materials placed, we are satisfied that the appellant-Company has established that it is a running industrial unit even prior to the notification under Section 4 of the Act and the appellant has established its case on this ground also.

17. Coming to the last contention, viz., exclusion of more than 76 acres of land, in the writ petition as well as in the grounds of appeal, the appellant has furnished details of the area released from acquisition in Rector-75 itself which is as under:

S.No.	Name of indstrial Concern	Khasra No.	Area left from Acquisition
1.	Natraj Stationery Products Pvt. Ltd.	75/11/2/2 2/13 12/2/1	— 1-6 1-1
2.	Moja shoes (Pvt) Ltd.	75/11/2 76/16 ½	1-6 0-6

3.	Haryana Coir (P) Ltd.	75/12/2/1	2-14
		75/13/1	4-0
		11/2/1	1-4
		12/1/1	1-6
		75/12/2/1	2-14

As rightly pointed out, if the appellant-Company had the opportunity of participating in the enquiry under Section 5A, it would be open to the Company to make a representation for exclusion like others and there would be every possibility for the State Government to accede to the request since the appellant-Company is running an industry which is similar to the public purpose for which lands were being acquired. During the course of hearing, learned senior counsel for the appellant has also brought to our notice an approved sketch about the excluded lands and location of the appellant-Company which is on the extreme corner of the acquired lands. In other words, even if the Government or the authority concerned excludes the lands of the appellant-Company, there would not be any difficulty in executing the scheme. The said claim of the appellant is acceptable.

18. Under these circumstances, we set aside the impugned order of the High Court dated 08.07.2008 and quash the land acquisition proceedings insofar as the appellant-Company is concerned. The Civil Appeal is allowed. No order as to costs.

B.B.B. Appeal allowed.

PREM SINGH
v.
STATE OF HARYANA
(Criminal Appeal No. 925 of 2009)

SEPTEMBER 2, 2013

[P. SATHASIVAM, CJI, RANJANA PRAKASH DESAI AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – ss. 302/34 – Prosecution under – Acquittal by trial court – Conviction by High Court – On Appeal, held: High Court reversed the acquittal order entirely on the basis of evidence of two eye-witnesses, without considering inherent lacunae in their evidence – High Court failed to test the prosecution case in the totality of the facts – Conclusion reached by the trial court was reasonable and possible conclusion – Hence, accused entitled to acquittal.

Code of Criminal Procedure, 1973 – s. 378 – Appeal against acquittal – Power of High Court – Held: So long as the view taken by the trial court was a possible view, High Court ought not to disturb the findings of trial court.

Appellant-accused alongwith six others, was charged u/ss. 120-B, 148 and 302 r/w.s.149 IPC and u/s.25 of Arms Act, 1959. Trial court in view of non-examination of a prime witness, inherent lacunae in the evidence of the two eye-witnesses, suspicion about recovery of firearms etc., acquitted all the accused of all the charges. High Court, in appeal of the State, reversed the acquittal order as regards the appellant-accused and another co-accused and convicted them u/s. 302 r/w. s.34 IPC. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1.1. There are certain parameters within which

the High Court is required to exercise its powers under Section 378 Cr.P.C., while hearing the State's appeal. An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. Cr.P.C. puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. [Paras 5 and 11] [57-B-H; 58-A; 60-F]

Murugesan vs. State Through Inspector of Police **(2012) 10 SCC 383:2012 (13) SCR 1 – relied on.**

1.2. If a conclusion with regard to the innocence of the accused is reasonably possible

evidence and materials on record, the High Court ought not to have disturbed the findings recorded by the Trial Court, even if, on a re-appreciation of the evidence, it was inclined to take a different view. So long the view taken by the Trial Court was a possible view the exercise of the appellate power of the High Court under Section 378 CrPC, would remain circumscribed by the well settled parameters. [Para 11] [60-F-G]

2.1. In the present case, the Trial Court came to the conclusion that the accused should be acquitted. An inference adverse to the prosecution on account of non-examination of the person, who could be the star witness for the prosecution, the inherent lacunae in the evidence of PWs 11 and 12 (the eye-witnesses); the doubt and suspicion with regard to the *bonafides* of the recovery of the fire arms; the failure of the prosecution to establish the linkage between the weapons recovered and the bullets extracted from the body of the deceased are facts and conclusions that can be reasonably reached on the basis of the evidence and materials on record. If the conclusions are possible to be reached, the same cannot be characterized as unreasonable or perverse so as to justify the interference made by the High Court. [Para 12] [60-H; 61-A-C]

2.2. The order of the High Court indicates that the reversal made was entirely on the basis of the evidence tendered by PWs 11 and 12. The High Court accepted their versions without considering the shortcomings inherent therein which made their presence at the place of occurrence highly doubtful. The mere claim of the prosecution that PW-11 and PW-12 were eye-witnesses to the occurrence could not have been sufficient for the High Court to treat their ocular version as the undisputed version of the occurrence. The High Court did not test the prosecution claim in the backdrop of the totality of the facts of the case. Therefore, the High Court was not

justified in reversing the acquittal of the accused-appellant. The order of acquittal of the appellant-accused is restored. [Para 13] [61-D-G]

Case Law Reference:

2012 (13) SCR 1 relied on Para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 925 of 2009.

From the Judgment & Order dated 12.05.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. A.No. 757 DBA of 1997.

D.B. Goswami, Sapam Biswajit Meitei, Khwairakpam Nobin Singh for the Appellant.

Suryanaryana Singh, AAG, Pragati Neekhra, Parth Tiwari for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The appellant, Prem Singh, alongwith six others was charged for various offences punishable under the Indian Penal Code (IPC), 1860 and the Arms Act, 1959, including, the offence under Section 302 read with Section 149 IPC. Two of the accused, namely, Satish Kumar and Surinder, were acquitted even prior to the recording of their statements under Section 313 Code of Criminal Procedure (Cr.P.C). The remaining five accused, including the present appellant, were acquitted by the learned Trial Court at the conclusion of the trial by order dated 5.4.1997. Aggrieved, the State had filed an appeal before the High Court of Punjab & Haryana. The High Court by judgment and order dated 12.5.2008 reversed the acquittal insofar as the present appellant Prem Singh and another accused, i.e., Vishwa Bandhu is concerned. Both the aforesaid accused persons were convicted under Section 302 read with Section 34 IPC and have been sentenced to undergo

for life. The appeal of the State in respect of the remaining three accused, namely, Daulat Ram, Ballu and Radhey Shyam was dismissed. Aggrieved by his conviction and the sentence imposed, the appellant, Prem Singh, has filed the present appeal.

2. The case of the prosecution, in short, is that on 26.11.1993 at about 6.30/6.45 a.m. when PW-16 Sohan Lal was present in his house, one Vijay Kumar, a neighbour, came and informed him that his elder brother Siri Krishan who had gone for a morning walk has been shot at by some persons who had come in a Maruti car. On receipt of the said information from Vijay Kumar, who claimed to have witnessed the occurrence, PW-16 alongwith his nephew Navneet Kumar went to the spot and found Siri Krishan lying in a pool of blood. The injured was removed to the government hospital at Karnal where he was declared "brought dead". According to the prosecution, on the basis of the information sent to the police by the doctor in the government hospital, PW-24 SI Gurcharan Singh arrived in the hospital and recorded the statement of PW-16 Sohan Lal to the above effect (Exh.PQ). On the basis of the said statement a FIR was registered which was investigated initially by PW-23 Inspector Om Prakash and thereafter by PW-24 SI Gurucharan Singh and PW-27 Inspector Gordhan Singh. In the course of investigation the seven accused persons including the appellant were arrested and recovery of fire arms was allegedly effected at the instance of accused-appellant and co-accused Ballu. From the place of occurrence several empty cartridges and lead bullets were recovered. 3 bullets were also recovered from the dead body in the course of the post-mortem examination. The same alongwith fire arms allegedly recovered at the instance of the two accused were sent for forensic examination. On completion of the investigation the accused persons including the present appellant were chargesheeted and the case was committed for trial to the Court of Sessions at Karnal. Charges under Sections 120-B, 148, 302 read with Section 149 of the Indian Penal Code and Section 25 of the

Arms Act were framed against the accused. While the trial ended in the acquittal of all the accused persons the same has been reversed by the High Court in respect of the two accused persons, namely, Prem Singh and Vishwa Bandhu. Challenging the order of the High Court this appeal has been filed by accused-appellant Prem Singh.

3. The appeal was initially heard by a Bench of two Hon'ble Judges. However, there being a difference of opinion between the Hon'ble Judges the matter required consideration by a larger Bench. This is how the appeal has come to be posted before us.

4. We have heard Mr. D.B. Goswami learned counsel for the appellant and Mr. Suryanaryana Singh, learned Addl. Advocate General for the State of Haryana.

5. Having regard to the fact that in the instant case the High Court had thought it proper to reverse the order of acquittal passed by the learned Trial Court it will be appropriate to notice, though very briefly, the virtually settled position in law with regard to the power of the Appellate Court to reverse an order of acquittal passed by a Trial Court. In a recent decision in *Murugesan v. State Through Inspector of Police*[1] this Court had the occasion to consider the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure, 1973. The summary of the relevant principles of law set out in para 21 of the judgment may be extracted hereinunder:

> "**21.** A concise statement of the law on the issue that had emerged after over half a century of evolution since *Sheo Swarup*[2] is to be found in para 42 of the Report in *Chandrappa v. State of Karnataka*[3]. The same may, therefore, be usefully noticed below:

1. (2012) 10 SCC 383.
2. Sheo Swarup v. King Emperor, (1933-34) 61 IA 398 : AIR 1934 PC 227 (2)
3. (2007) 4 SCC 415.

"*42*. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(*3*) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(*5*) *If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court*

should not disturb the finding of acquittal recorded by the trial court." **(Emphasis supplied)**

6. It is in the light of the above principles of law that the reasoning and conclusions of the High Court that will have to be analysed so as to determine the correctness of the view taken by the High Court in the present case. To facilitate the aforesaid exercise the manner in which the learned Trial Court had arrived at its conclusions in the matter may be usefully noticed in the first instance.

7. Vijay Kumar, who according to PW-16 Sohan Lal, came and informed him about the incident was not examined by the prosecution. The above fact assumes significance in as much as from the statement of PW-16 recorded in the hospital (Exh.PQ) it would appear that Vijay Kumar had witnessed the occurrence. The learned Trial Court took note of the above facts and also that the statement of the aforesaid Vijay Kumar was recorded by the Investigating Officer only on 28.3.1994 and that too on account of an objection raised by the public prosecutor prior to the filing of the chargesheet (Challan) before the Court. The public prosecutor had tried to justify the non-examination of Vijay Kumar by contending that it was not Vijay Kumar but his daughter who had witnessed the occurrence. Considering the aforesaid contention the learned Trial Court held that even if the same is to be accepted the daughter of Vijay Kumar should have been examined as a witness. However, the evidence of Investigating Officers PW-23 Insp. Om Prakash, PW-24 SI Gurcharan Singh and PW-27 Insp. Gordhan Singh make it clear that none of the members of the family of Vijay Kumar were examined and no statement of any family member was recorded.

8. The learned Trial Court came to the conclusion that there is ample room to doubt whether PW-11 Sohan Lal and PW-12 Bharat Lal, who were examined by the prosecution as eye witnesses, had actually witnessed the occurrence. Both the aforesaid two witnesses had come to Ka

Sunam in Punjab about two months prior to the incident and in the month of March, 1994 they had shifted back to Sunam from where they had come. In this regard the Trial Court specifically noticed that both the witnesses were not able to give any specific address in Karnal; they had not received any summons to appear as witnesses and had so appeared at the request of the son of the deceased. Furthermore, PW-11 Sohan Lal claimed to be an employee of the brother of PW-13 Smt. Pushpa Devi who is the wife of the deceased. Both PW-11 and PW-12 claimed that they knew the deceased from before and that the house of the deceased was very near to the place of occurrence. Yet, PW-11 and PW-12 did not go to the house of the deceased to inform the family members of the incident; neither did they report the incident to the police. Instead, they were roaming around aimlessly in the streets of Karnal until they came to the place of occurrence at 1.30 p.m. when their statements were recorded by the police. The aforesaid facts, according to the learned Trial Court, cast a serious doubt with regard to the presence of PW-11 Sohan Lal and PW-12 Bharat Lal at the scene of the occurrence.

9. Furthermore, the learned Trial Court on the basis of the evidence adduced before it held the recovery of the weapons at the instance of the accused-appellant and co-accused Ballu to be highly doubtful inasmuch as though the weapons were not concealed under the earth, no recovery was made from the spot on 21.09.1994; yet, on 22.1.1994 and 23.1.1994 the two fire arms were recovered allegedly at the instance of the accused-appellant Prem Singh and co-accused Ballu respectively. In this regard the Trial Court also noticed that according to the report (Exh.PAK) of the Deputy Director, Forensic Science Laboratory, Madhuban no linkage could be established between the bullets recovered from the dead body and the fire arms allegedly recovered at the instance of the accused both of which were sent for forensic examination. The learned Trial Court also noticed that PW-11 and PW-12 had identified the accused including the present appellant for the first time in Court. It was also held that the refusal of the

accused to cooperate and take part in the test identification parade could not be held adversely against the accused on account of the fact that even earlier to the proposed test identification parade the accused were shown to PWs 11 and 12 and also to the son of the deceased.

10. In addition to the above, the Trial Court also noticed significant discrepancies in the evidence of PWs 11 and 12, particularly, with regard to the identity of the accused who had held the deceased while the two accused, i.e., accused-appellant Prem Singh and co-accused Vishwa Bandhu allegedly fired at the deceased. In this regard PW-11 in his evidence had named accused Bijender Singh alias Ballu as the person who held the deceased from behind whereas PW-12 Bharat Lal had named accused Satish. The fact that the evidence of PWs 11 and 12 on the above aspect of the case is belied by the evidence of PW-3 (Dr. N.K.Bhandwal) and PW-25 (Dr. R.K.Kaushal) had also been taken note by the learned Trial Court. Both PWs 3 and 25 had stated that all the shots could not have been fired on the deceased if he had been held by a third person. The above is the broad basis on which the order of acquittal passed by the learned Trial Court was founded.

11. The parameters within which the High Court was required to exercise its powers under Section 378 of the Code while hearing the State's appeal have already been noticed. If a conclusion with regard to the innocence of the accused is reasonably possible on the basis of the evidence and materials on record the High Court ought not to have disturbed the findings recorded by the Trial Court, even if, on a re-appreciation of the evidence, it was inclined to take a different view. So long the view taken by the Trial Court was a possible view the exercise of the appellate power of the High Court under Section 378 CrPC would remain circumscribed by the well settled parameters.

12. In the present case, the learned Trial Court for the reasons noticed came to the conclus[illegible]d

before it should be acquitted. An inference adverse to the prosecution on account of non-examination of the person who could be the star witness for the prosecution, namely, Vijay Kumar; the inherent lacunae in the evidence of PWs 11 and 12; the doubt and suspicion with regard to the bonafides of the recovery of the fire arms; the failure of the prosecution to establish the linkage between the weapons recovered and the bullets extracted from the body of the deceased are facts and conclusions that can be reasonably reached on the basis of the evidence and materials on record. If the aforesaid conclusions are possible to be reached and we are inclined to so hold, the same cannot be characterized as unreasonable or perverse so as to justify the interference made by the High Court.

13. Furthermore, a reading of the order of the High Court indicates that the reversal made was entirely on the basis of the evidence tendered by PWs 11 and 12. The High Court seems to have accepted the versions narrated by the aforesaid two witnesses without considering the shortcomings inherent therein which made their presence at the place of occurrence highly doubtful, facts that had been elaborately noted by the learned Trial Court in its order. The mere claim of the prosecution that PW-11 Sohan Lal and PW-12 Bharat Lal were eye witnesses to the occurrence could not have been sufficient for the High Court to treat the ocular version of the said witnesses as the undisputed version of the occurrence. The High Court did not test the prosecution claim in the backdrop of the totality of the facts of the case. Having done so, we arrive at a different conclusion and, therefore, take the view that the High Court was not justified in reversing the acquittal of the accused-appellant Prem Singh. We, therefore, set aside the order of the High Court insofar as the present appellant is concerned and restore the order of acquittal passed by the learned Trial Court. The appeal is consequently allowed. If the appellant is presently in custody he be released forthwith unless his custody is required in connection with any other case.

K.K.T. Appeal allowed.

GOVT. OF KERALA & ORS.

v.

SUDHIR KUMAR SHARMA & ORS.

(Civil Appeal No. 7364 of 2013)

SEPTEMBER 02, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Code of Civil Procedure, 1908 – s. 80(2) and Or. VII r.11 – Suit against Government – With application u/s. 80(2) seeking leave of the court to file the suit without notice u/s. 80(1) – Defendant's application u/Or. VII r.11 seeking rejection of plaint – Rejection of application u/Or. VII r.11 without disposing of the application u/s. 80(2) – Whether correct – Held: Rejection of application u/Or. VII r.11 without deciding the application u/s.80(2) was not correct – Till a final order is passed granting application u/s. 80(2), the irregularity in filing the suit continues – By mere filing of application it cannot be presumed that the application, is granted.

Respondent No.1 filed a suit against appellant-State with application u/s. 80(2) CPC, seeking leave of the court to file the suit without serving notice u/s. 80(1) CPC. The appellant-State filed applications u/Or.VII, r.11 CPC praying for rejection of the plaint. Trial court dismissed the applications filed by the State. In Revision, High Court confirmed the order of trial court, holding that it can be presumed that the application u/s. 80(2) was granted since the trial court entertained the application u/Or. VII, r.11, while the application u/s. 80(2) was pending. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The trial court had wrongly rejected the applications filed by the appellants under Order VII Rule

11 CPC. The trial court ought to have heard and decided the application filed u/s. 80(2) CPC before hearing the application under Order VII Rule 11 CPC. [Para 27] [71-G]

2. A suit filed without compliance of Section 80(1) cannot be regularized simply by filing an application u/s. 80(2) CPC. Upon filing an application u/s. 80(2) CPC, the Court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice u/s. 80(1) to the concerned Government authorities. According to the provisions of Section 80(2) CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice u/s. 80(1) CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application u/s. 80(2) CPC. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination it can be presumed that the application is granted. If such a presumption is accepted, it would mean that the court has not to take any action in pursuance of such an application and if the court has not to take any action, then there is no need to file such application. [Paras 24 and 26] [70-E-H; 71-D-F]

3. Till a final order is passed granting the application u/s. 80(2), the irregularity in filing of the suit continues and it cannot be known whether the suit filed without issuance of notice u/s. 80(1) CPC was justifiable. If ultimately the application is rejected, the plaint is to be

returned and in that event the application filed on behalf of the appellants under Order VII Rule 11 CPC is to be granted. If the application filed u/s. 80(2) is ultimately granted, the objection with regard to non-issuance of notice u/s. 80(1) CPC cannot be raised and in that event the suit would not fail on account of non-issuance of notice u/s. 80(1) CPC. [Paras 25 and 26] [71-A-D]

State of A.P. and Ors. vs. Pioneer Builders **(2006) 12 SCC 119: 2006 (6) Suppl. SCR 571;** *M/s. Bajaj Hindustan Sugar and Industries Limited vs. Balrampur Chini Mills Ltd. and Ors.* **2007 (9) SCC 43: 2007 (4) SCR 132;** *Irappa Basappa Kudachi vs. State of Karnataka* **1996 (2) KLJ 591 – referred to.**

Case Law Reference:

2006 (6) Suppl. SCR 571	**referred to**	**Para14**
2007 (4) SCR 132	**referred to**	**Para 15**
1996 (2) KLJ 591	**referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7364 of 2013.

From the Judgment & Order dated 20.01.2005 of the High Court of Karnataka at Bangalore in Civil Revision Petition No. 5189 of 2001.

V. Giri, M.T. George, Kavitha K.T. for the Appellants.

A.S. Chandhok, ASG, Ritu Bhardwaj, Sunita Sharma, Kiran Suri, S.J. Amith, Nakibur Rahman Barbhuiya, Venkita Subramonium T.R, Rahat Bansal, Sushma Suri, A. Raghunath, E.M.S. Anam for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave grante

2. Being aggrieved by the judgment delivered in Civil Revision Petition No. 5189 of 2001 dated 20th January, 2005 by the High Court of Karnataka, this appeal has been filed by the Government of Kerala & other officials.

3. The facts giving rise to the present litigation, in a nutshell, are as under:

Respondent No. 1 has filed a civil suit, being OS No. 11286 of 1998 in the Court of the Additional City Civil Judge at Mayo Hall in Bangalore. According to respondent no.1, he had been wrongfully detained by the State Authorities and therefore, in the said suit he has prayed that he should be awarded Rs.55,00,000/- as damages with interest thereon at the rate of 18%. As the suit has been filed against the State, he was supposed to give a notice under Section 80 of the Civil Procedure Code, 1908 (hereinafter referred to as 'the CPC') but he had not given the statutory notice under Section 80 of the CPC in accordance with law. In fact, the notice was issued by him on 24th October, 1998 whereas the suit had been filed on 28th October, 1998. At the time of filing the suit, he had not even received acknowledgment from the authority to whom he had issued the notice. He had not even affixed requisite court fee stamp to the plaint when the plaint was filed in the Court. Respondent No. 1 being conscious of the defects in the suit filed by him, had also filed two interlocutory applications along with the plaint on the date on which the plaint had been filed. An I.A. No. I was filed under the provisions of Section 80(2) of the CPC seeking leave of the court to file the suit without serving a notice under Section 80(1) of the CPC and an I.A. No. II was filed under Section 151 of the CPC praying for extension of time for payment of the court fee.

4. On 29th October, 1998, the I.A. No. II had been granted by the court, whereby respondent no. 1 was granted time up to 28th November, 1998 for paying the court fee stamp and the same was paid by him on 28th November, 1998 and therefore,

summons had been issued on 28th November, 1998. Thereafter, hearing had been adjourned from time to time.

5. In the said suit, I.A. Nos. III & IV were filed on behalf of the present appellants under Order VII Rule 11 of the CPC praying for rejection of the plaint.

6. The said applications filed by the appellants had been heard by the Trial Court and ultimately, by an order dated 3rd September, 2001, the said applications praying for rejection of the plaint had been rejected.

7. Being aggrieved by the Order dated 3rd September, 2001, whereby the applications praying for rejection of the plaint had been rejected, the appellants had filed Civil Revision Petition No. 5189 of 2001, which was also rejected by the High Court by an order dated 20th January, 2005 and the said order has been challenged by the appellants in this appeal.

8. The Trial Court had rejected the I.A. Nos. III & IV praying for rejection of the plaint for the reason that it did not find any justifiable reason for rejecting the plaint.

9. So far as the High Court is concerned, it came to the conclusion that the Trial Court was right in rejecting the applications praying for rejection of the plaint as there was no justifiable reason for rejecting the plaint. The High Court also came to the conclusion that I.A. No. I filed by respondent No. 1 seeking leave of the Court to permit the filing of the suit without serving notice under Section 80(1) of the CPC had been presumed to have been granted and therefore, there was no reason for rejecting the plaint. The High Court also found that the deficit court fee stamp had also been paid within the extended period granted by the Trial Court. Thus, there was no justifiable objection to the plaint and therefore, according to the High Court the decision of the Trial Court was just and proper.

10. The High Court noted that I.A. N[illegible] was pending before the Trial Court and yet applications pray[illegible]e

plaint had been heard by the Trial Court. The High Court, therefore, presumed that I.A. No. I, filed under Section 80(2) of the CPC, was granted and therefore, the objection with regard to non-compliance of Section 80(1) of the CPC was not justifiable.

11. In the aforestated circumstances, what is to be examined by this court is whether there can be any presumption with regard to grant of the application filed under Section 80(2) of the CPC, even if no order was passed on the said application and whether the Trial Court was justified in dismissing the applications of the appellants filed for rejection of the plaint though the application filed by respondent No.1-plaintiff under Section 80(2) of the CPC was not finally decided.

12. The learned counsel appearing for the appellants had submitted that as no order had been passed on the application filed under Section 80(2) of the CPC, it had not been finally disposed of and therefore, the High court was in error in presuming that the said application had been granted.

13. It had been also submitted that without deciding the application filed by respondent No.1 under Section 80(2) of the CPC, the Trial Court as well as the High Court could not have come to the conclusion that the plaint was not liable to be rejected under Order VII Rule 11 of the CPC. It had been further submitted that without deciding the application filed by respondent No.1, the Trial Court should not have even heard the applications filed by the appellants for rejection of the plaint under Order VII Rule 11 of the CPC. It had been thus submitted that the High Court as well as the Trial Court had committed a grave error by coming to the conclusion that the plaint could not have been rejected under the provisions of Order VII Rule 11 of the CPC.

14. So as to substantiate the aforestated submissions made by the learned counsel appearing for the appellants, he had relied upon the judgment delivered by this Court in the case

of *State of A.P. & Ors. vs. Pioneer Builders* [(2006) 12 SCC 119]. He had drawn our attention to the observations made by this court on the requirement of giving statutory notice to the Government and the object of giving notice under Section 80(1) of the CPC. He had drawn our attention specifically to para 14 of the aforestated judgment, which reads as under:

> "From a bare reading of sub-section (1) of Section 80, it is plain that subject to what is provided in sub-section (2) thereof, no suit can be filed against the Government or a public officer unless requisite notice under the said provision has been served on such Government or public officer, as the case may be. It is well-settled that before the amendment of Section 80 the provisions of un-amended Section 80 admitted of no implications and exceptions whatsoever and are express, explicit and mandatory. The Section imposes a statutory and unqualified obligation upon the Court and in the absence of compliance with Section 80, the suit is not maintainable. (See: Bhagchand Dagdusa Gujrathi & Ors. Vs. Secretary of State for India ; Sawai Singhai Nirmal Chand Vs. The Union of India and Bihari Chowdhary & Anr. Vs. State of Bihar & Ors.). The service of notice under Section 80 is, thus, a condition precedent for the institution of a suit against the Government or a public officer. The legislative intent of the Section is to give the Government sufficient notice of the suit, which is proposed to be filed against it so that it may reconsider the decision and decide for itself whether the claim made could be accepted or not. As observed in Bihari Chowdhary (supra), the object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."

15. Thereafter, the learned counsel had relied upon the judgment delivered in the case of *M/s. Bajaj Hindustan Sugar & Industries Limited vs. Balrampur Chini Mills Ltd. & Ors*. [2007 (9) SCC 43] which also lays dow[illegible]at a suit may be filed against the Governm[illegible]er

without serving notice as required by Section 80(1) of the CPC only with the leave of the court.

16. He had further submitted that as the suit was defective on account of non- compliance of Section 80(1) of the CPC and as leave had not been granted by the Trial Court to respondent no. 1 plaintiff under Section 80(2) of the CPC, the plaint ought to have been rejected by the Trial Court and alternatively he had submitted that hearing of applications praying for rejection of the plaint filed under the provisions of Order VII Rule 11 of the CPC should have been postponed till the application filed under Section 80(2) of respondent No. 1 was finally decided.

17. On the other hand the learned counsel appearing for respondent No.1- original plaintiff had made an effort to justify the reasons given by the Trial Court as well as by the High Court for rejecting the applications filed under Order VII Rule 11 of the CPC.

18. It had been submitted by the learned counsel appearing for respondent No. 1 that the High Court was right in presuming that the application filed under Section 80(2) of the CPC had been entertained and granted. The learned counsel had relied upon the judgment delivered in the case of *Irappa Basappa Kudachi vs. State of Karnataka* [1996 (2) Karnataka Law Journal 591] wherein it has been held on the facts of the case that even if no order is passed on an application filed under Section 80(2) of the CPC, it can be presumed that the said application is granted.

19. Relying upon the aforestated judgment of the Karnataka High Court, it had been submitted by the learned counsel for Respondent No.1 that though no order was passed on the application made under Section 80(2) of the CPC, it was rightly presumed that the Trial Court had granted the said application and therefore, there could not have been any objection with regard to filing of the suit in violation of the provisions of Section 80(1) of the CPC.

20. It had been also submitted that had the application filed under Section 80(2) been rejected by the Trial Court, the plaint would have been returned to respondent No.1-plaintiff but as the plaint had not been returned, the presumption would be that the application under Section 80(2) had been granted.

21. For the aforestated reasons, the learned counsel appearing for the respondents had submitted that the appeal should be dismissed by this court.

22. We have heard the learned counsel at length and have also perused the judgments cited by them.

23. Looking to the facts of the case and the provisions of law, we do not agree with the view expressed by the Trial Court as well as by the High Court.

24. It is an admitted fact that no order had been passed on the application filed under Section 80(2) of the CPC whereby leave of the court had been sought for filing the suit without complying with the provisions of Section 80(1) of the CPC. In our opinion, a suit filed without compliance of Section 80(1) cannot be regularized simply by filing an application under Section 80(2) of the CPC. Upon filing an application under Section 80(2) of the CPC, the Court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice under Section 80(1) to the concerned Government authorities. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination it can be presumed that the application is granted. If such a presumption is accepted, it would mean that the court has not to take any action in pursuance of such an application and if the court has not to take any action, then we failed to understand as to why such an application should be filed.

25. It is an admitted fact that no order had been passed on the application filed under Section 80(2) of the CPC. Till a final order is passed granting the said application, in our opinion, the irregularity in filing of the suit continues. If ultimately the application is rejected, the plaint is to be returned and in that event the application filed on behalf of the appellants under Order VII Rule 11 is to be granted. If the application filed under Section 80(2) is ultimately granted, the objection with regard to non issuance of notice under Section 80(1) of the CPC cannot be raised and in that event the suit would not fail on account of non-issuance of notice under Section 80(1) of the CPC.

26. We reiterate that till the application filed under Section 80(2) of the CPC is finally heard and decided, it cannot be known whether the suit filed without issuance of notice under Section 80(1) of the CPC was justifiable. According to the provisions of Section 80(2) of the CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice under Section 80(1) of the CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application under Section 80(2) of the CPC. We, therefore, come to the conclusion that mere filing of an application under Section 80(2) of the CPC would not mean that the said application was granted by the trial court.

27. In the aforestated circumstances, we hold that the trial court had wrongly rejected the applications filed by the appellants under Order VII Rule 11 of the CPC. The trial court ought to have heard and decided the application filed under Section 80(2) of the CPC before hearing the applications under Order VII Rule 11 of the CPC.

28. As a result of the above discussion, the appeal is

allowed. The impugned judgment delivered by the High Court confirming the order of the Trial Court dated 30th September, 2001 is quashed and set aside. The order of the Trial Court rejecting applications under Order VII Rule 11 is also quashed and set aside. It is directed that the trial court shall first of all decide the application filed by respondent no. 1 under Section 80(2) of the CPC and only after final disposal of the said application, the applications filed by the appellants under Order VII Rule 11 of the CPC shall be decided.

29. The appeal is allowed with no order as to costs.

K.K.T. Appeal allowed.

VIJAY S. SATHAYE

v.

INDIAN AIRLINES LTD. AND ORS.

(Special Leave Petitions (C) Nos.24220-24221 of 2007)

SEPTEMBER 6, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Service Law:

Voluntary Retirement – Employee applied seeking voluntary retirement under Voluntary Retirement Scheme – During pendency of his application for approval from the competent authority, he did not attend the duty – Application rejected – Writ petition challenging the rejection dismissed by Single Judge of High Court – Writ appeal also dismissed by Division Bench of High Court – Held: The employee did not ensure compliance of Regulation 12(b) of Service Regulations which required three months notice as a condition for applying VRS – Acceptance of the application was also subject to approval of the Competent Authority – The employee having not attended the duty even before the approval of his application, would be considered as having voluntarily abandoned the service and there was no requirement on the part of the employee to pass any order on his application – Absence from duty in the beginning may be a misconduct, but when the absence is for a very long period, it would amount to voluntary abandonment of service and in that event, the bonds of service come to an end automatically without requiring any order to be passed by the employer – Petitions dismissed – Indian Airlines Service Regulations – Regulation 12(b).

Words and Phrases – 'Approval' – Meaning of in the context of Service Law.

Sant Lal Gupta and Ors. vs. Modern Co-operative Group Housing Society Ltd. and Ors. **(2010) 13 SCC 336: 2010 (13) SCR 621;** M/s. *Jeewanlal (1929) Ltd., Calcutta vs. Its Workmen* **AIR 1961 SC 1567: 1962 SCR 717;** *Shahoodul Haque vs. The Registrar, Co-operative Societies, Bihar and Anr.* **AIR 1974 SC 1896: 1975 (3) SCC 108;** *State of Haryana vs. Om Prakash and Anr.* **(1998) 8 SCC 733;** *Buckingham and Carnatic Co. Ltd. vs. Venkatiah and Anr.* **AIR 1964 SC 1272: 1964 SCR 265;** *G.T. Lad and Ors. vs. Chemicals and Fibres India Ltd.* **AIR 1979 SC 582: 1979 (2) SCR 613;** *Syndicate Bank vs. General Secretary, Syndicate Bank Staff Association and Anr.* **AIR 2000 SC 2198: 2000 (3) SCR 285;** *Aligarh Muslim University and Ors. vs. Mansoor Ali Khan* **AIR 2000 SC 2783: 2000 (2) Suppl. SCR 684;** *V.C. Banaras Hindu University and Ors. vs. Shrikant* **AIR 2006 SC 2304: 2006 (2) Suppl. SCR 536;** *Chief Engineer (Construction) vs. Keshava Rao (dead) by Lrs.* **(2005) 11 SCC 229;** *Regional Manager, Bank of Baroda vs. Anita Nandrajog* **(2009) 9 SCC 462 – relied on.**

Case Law Reference:

2010 (13) SCR 621	**relied on**	**Para 7**
1962 SCR 717	**relied on**	**Para 10**
1975 (3) SCC 108	**relied on**	**Para 10**
(1998) 8 SCC 733	**relied on**	**Para 11**
1964 SCR 265	**relied on**	**Para 12**
1979 (2) SCR 613	**relied on**	**Para 12**
2000 (3) SCR 285	**relied on**	**Para 13**
2000 (2) Suppl. SCR 684	**relied on**	**Para 13**
2006 (2) Suppl. SCR 536	**relied on**	**Para 13**
(2005) 11 SCC 229	**relied**	

(2009) 9 SCC 462 relied on Para 13

CIVIL APPELLATE JURISDICTION : SLP (Civil) Nos. 24220-24221 of 2007.

From the Judgment and Order dated 12.03.2002 of the High Court of Madras in Writ Petition No. 21384 of 1994 and final judgment and Order dated 20.07.2007 in Writ Appeal No. 2415 of 2002.

Manish Pitale, Sunil Kumar, Chander Shekhar Ashri for the Petitioner.

Lalit Bhasin, Nina Gupta, Ratna D. Dhingra, Swati Sharma, Bina Gupta for the Respondents.

The following Order of the Court was delivered by

ORDER

1. These petitions have been filed challenging the judgments and orders of the High Court of Madras dated 12.3.2002 in Writ Petition No. 21384 of 1994 and dated 20.7.2007 in Writ Appeal No. 2415 of 2002, rejecting the claim of the petitioner for directing the respondents to grant voluntary retirement to him from 12.11.1994.

2. Facts and circumstances giving rise to these petitions are that:

A. Petitioner joined the service of the erstwhile Indian Airlines Limited on 19.3.1972 as First Officer, and he has acquired the necessary license for becoming a Pilot. Petitioner was promoted as a Captain on 19.12.1975 and was further promoted as Commander on 1.1.1986.

B. The respondents came out with a Voluntary Retirement Scheme (in short 'VRS') for its employees in 1989 in order to reduce the surplus manpower. The said scheme was for the employees who had completed 25 years of service or had

attained 55 years of age. Subsequently, the condition prescribed in the aforementioned scheme was reduced to 20 years of service in 1992.

C. Regulation 12 of the Service Regulations provided that if an employee fulfils the aforesaid criteria of eligibility he can give three months' notice for voluntary retirement. However, the acceptance of the said resignation would be subject to the approval of the competent authority.

D. The petitioner completed 20 years of service on 19.3.1992. He was promoted as Deputy General Manager (Operations) on 30.8.1994. On 7.11.1994, the petitioner submitted an application seeking VRS w.e.f. 12.11.1994. Petitioner was informed vide letter dated 11.11.1994 that he should continue in service till the time decision is taken. However, the petitioner did not attend the duty after 12.11.1994. Petitioner joined the services of Blue Dart Ltd., and as he did not go to the respondents to work from 12.11.1994 and there had been no response from the respondents, he filed Writ Petition No. 19143 of 1994 for issuance of a writ of mandamus directing the respondents to accept the petitioner's application for voluntary retirement.

E. During the pendency of the said petition, the petitioner was informed by respondent no.4 vide letter dated 13/15.12.1994 that his application had been rejected. Thus, the writ petition filed by the petitioner had become infructuous and the petitioner preferred another Writ Petition No. 21384 of 1994 challenging the order dated 13/15.12.1994.

F. The respondents contested the said writ petition and during the pendency of the said writ petition the petitioner attained the age of superannuation i.e. 58 years of age on 7.3.2001. The learned Single Judge dismissed the said writ petition vide order dated 12.3.2002.

G. Aggrieved, the petitioner prefe[illegible].

2415 of 2002 which has been dismissed vide impugned judgment and order.

Hence, these petitions.

3. We have heard Shri Manish Pitale, learned counsel for the petitioner and Shri Lalit Bhasin, learned counsel appearing for the respondents and perused the record.

4. The High Court has examined all the aspects of the matter. Admittedly, the petitioner did not ensure compliance of Regulation 12(b) of the Service Regulations which required a three months' notice as a condition for applying for VRS. The stand taken by the petitioner that he had sufficient number of earned leaves in his leave account which could be adjusted in lieu of three months' notice, had been rightly rejected by the High Court.

5. Regulation 12 reads as under:

"An employee shall retire from the service of the corporation (now Company) on attaining the age of 58 years provided that the Competent Authority may ask an employee to retire after he attains the age of 55 years, on giving 3 months notice, without giving any reason. An employee

(a) on attaining the age of 55 years; or

(b) on the completion of 20 years of continuous service, may by giving 3 months, voluntarily retire from service, provided that the voluntary retirement under Clause (b) shall be subject to approval of the Competent Authority."

6. It is evident from the above that three months' notice is mandatory and as the petitioner had not given that notice, his application was liable to be rejected. The fact that the respondents had adjusted the earned leave in case of others that cannot be a ground for acceptance of VRS of the petitioner

as it is a settled legal proposition that Article 14 of the Constitution does not envisage a negative equality. More so, the application is subject to **approval** of the Competent Authority.

7. Approval means confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. The very act of approval means, the act of passing judgment, the use of discretion, and determining as an adjudication therefrom unless limited by the context of the Statute.

There can be no quarrel with the settled legal proposition that if a statute provides for the approval of the higher Authority, the order cannot be given effect to unless it is approved and the same remains inconsequential and unenforceable. (Vide: *Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors.* (2010) 13 SCC 336).

8. Even otherwise, the petitioner was asked to continue in service till the decision is taken on his application. However, he did not attend the office of the respondents after 12.11.1994. In view of the above, as the petitioner had voluntarily abandoned the services of the respondents, there was no requirement on the part of the respondents to pass any order whatsoever on his application and it is a clear cut case of voluntary abandonment of service and the petitions are liable to be dismissed.

9. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

10. In *M/s. Jeewanlal (1929) Ltd., Calcutta v. Its Workmen,* AIR 1961 SC 1567, this Court held as under:

> *".....there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."*

(See also: *Shahoodul Haque v. The Registrar, Co-operative Societies, Bihar & Anr.*, AIR 1974 SC 1896).

11. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as 'retrenchment' from service.

(See: *State of Haryana v. Om Prakash & Anr.,* (1998) 8 SCC 733).

12. In *Buckingham and Carnatic Co. Ltd. v. Venkatiah & Anr.*, AIR 1964 SC 1272 while dealing with a similar case, this Court observed :

> *"Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf."*

A similar view has been reiterated in *G.T. Lad & Ors. v. Chemicals and Fibres India Ltd.,* AIR 1979 SC 582.

13. In *Syndicate Bank v. General Secretary, Syndicate Bank Staff Association & Anr.,* AIR 2000 SC 2198; and *Aligarh Muslim University & Ors. v. Mansoor Ali Khan*, AIR 2000 SC 2783, this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he *should be treated to have resigned and ceases* to be in

service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities.

A similar view has been reiterated in *V.C. Banaras Hindu University & Ors. v. Shrikant,* AIR 2006 SC 2304; *Chief Engineer (Construction) v. Keshava Rao* (dead) by Lrs., (2005) 11 SCC 229; and *Regional Manager, Bank of Baroda v. Anita Nandrajog*, (2009) 9 SCC 462.

14. Thus, in view thereof, the petitions are devoid of merits. An offer had been made by the respondents to the petitioner vide letter dated 9.4.2008 for accepting the payment of Rs.1,42,042.45 and Rs.6,24,104.58. However, he did not accept the said amount. The same amount has been paid today to Shri Manish Pitale, learned counsel for the petitioner through (i) D.D. No.795783 dated 5.9.2013 drawn on State Bank of India amounting to Rs.6,24,104.58 (Rupees Six Lakh Twenty Four Thousand One Hundred Four and Fifty Eight paise only), and (ii) D.D. No. 753199 dated 5.9.2013 drawn on State Bank of India amounting to Rs.1,42,042.45 (Rupees One Lakh Forty Two Thousand Forty Two and Forty Five paise only) and the same have been accepted herein.

15. In view thereof, we do not see any justification to other dues. By this payment claim stands fully and finally settled.

With these observations, the special leave petitions are disposed of.

K.K.T. SLPs disposed of.

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

SEPTEMBER 10, 2013

[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]

Negotiable Instruments Act, 1881 – ss.138 & 142 – Prosecution based on second or successive dishonour of the cheque – Held: Is permissible so long as it satisfies the requirements stipulated under the proviso to s.138.

The respondent issued four cheques to the appellant. The appellant presented those four cheques on 21st November, 1996 and on presentation, those cheques were dishonoured. On 8th January, 1997, the appellant sent a notice to the respondent under section 138(b) of the Negotiable Instruments Act, 1881. The respondent duly received the said notice. Subsequent thereto, those cheques were again presented before the Bank on 21st January, 1997 by the appellant. On presentation, the said cheques were again dishonoured. On 28th January, 1997 the appellant sent a notice under Section 138(b) of the Act. While the first notice dated 8th January, 1997 was beyond the limitation period, as required under Section 138(b) of the Act, the second notice sent by the appellant under the Act was within the limitation period from the date the Bank informed the appellant on the second occasion, i.e., on 28th January, 1997.

Thereafter, the appellant filed a complaint before the Trial Court. In the circumstances, question arose for consideration before this Court as to whether the action

of the appellant was time-barred under Section 138(b) of the Negotiable Instruments Act, 1881 or not.

The Division Bench of the Supreme Court since expressed reservation about the correctness of the law laid down in *Sadanandan Bhadran* case and felt that it requires to be considered by a larger Bench and accordingly, the matter was placed before a larger Bench.

Allowing the instant appeals, the Court

HELD: 1. The larger Bench, while deciding the question, noticed that proviso to Section 138 of the Negotiable Instruments Act, 1881, stipulates three distinct conditions precedent, which must be satisfied before dishonour of the cheque can constitute an offence and becomes punishable; and that fulfilment of those three conditions constitutes an offence under Section 138 and it can then be said that an offence under the said section has been committed by the person issuing the cheque. Their Lordships further noticed that no court shall take cognizance of any offence punishable under Section 138 except when a complaint in writing is made by the payee or by the holder in due course and such complaint has to be made within one month from the date on which the cause of action arises under clause (b) of the proviso to Section 138. It was also noticed by their Lordships that neither Section 138 nor Section 142 of the Act or any other provision contained in the said Act prevents the holder or the payee of the cheque from presenting the cheque for encashment for any number of occasions within a period of six months from the date of its issuance or within a period of its validity, whichever is earlier. Therefore, it appears that the payee or the holder has a right to present the same as many number of times for encashment within a period of six months or within its validity period, whichever is earlier. After analysing Sections 138 and 142 of the Act, the it

"difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138." In the result, their Lordships overruled the decision in *Sadanandan Bhadran's* case and held that the prosecution based on second or successive dishonour of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the Act. In the light of the said decision, the impugned order passed by the High Court is set aside. [Para 6, 7, 8, 10 & 11] [85-A-B, E-H; 86-A-C; 88-F-G]

Sadanandan Bhadran vs. Madhavan Sunil Kumar **1998 (6) SCC 514:1998 (1) Suppl. SCR 178 – held overruled.**

Case Law Reference:

1998 (1) Suppl. SCR 178 held overruled Para 5

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 261-264 of 2002.

From the Judgment & Order dated 19.01.2001 of the High Court of Madras in Criminal Revision Petitions No. 618, 624, 664 and 665 of 2000.

Danish Zubair Khan (for Arputham, Aruna & Co.) for the Appellant.

Abhishek Krishna (for K.K. Mani) for the Respondents

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. 1. This matter was referred before the larger Bench by order dated 25th March, 2009. The question referred to the larger Bench was : "whether the action of the appellant was time-barred under Section 138(b) of the Negotiable Instruments Act or not ?"

2. The facts of the case, briefly stated, are that the

respondent issued four cheques to the appellant on 14th August, 1996. The appellant presented those four cheques on 21st November, 1996 and on presentation, those cheques were returned by the Bank with an endorsement "not arranged funds for". At the request of the respondent, the appellant did not present the said cheques since the respondent agreed to settle the dispute. However, the respondent failed to settle the dispute subsequently. In these circumstances, on 8th January, 1997, the appellant sent a notice (to the respondent) under section 138(b) of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act'). The respondent duly received the said notice. Subsequent thereto, those cheques were again presented before the Bank on 21st January, 1997 by the appellant. On presentation, the said cheques were dishonoured for want of sufficient funds.

3. On 28th January, 1997 the appellant sent a notice under Section 138(b) of the Act and called upon the respondent to pay the said amount with interest within 15 days. The respondent duly received the said notice on 3rd February, 1997.

4. From the said facts, it appears that while the first notice dated 8th January, 1997 was beyond the limitation period, as required under Section 138(b) of the Act, the second notice sent by the appellant under the Act was within the limitation period from the date the Bank informed the appellant on the second occasion, i.e., on 28th January, 1997. Thereafter, the appellant filed a complaint before the Trial Court on 4th March, 1997. In the circumstances, the question arises whether the action of the appellant was time-barred under Section 138(b) of the Act or not.

5. The Division Bench since expressed their Lordships' reservation about the correctness of the law laid down in *Sadanandan Bhadran vs. Madhavan Sunil Kumar [*1998 (6) SCC 514] and felt that it requires to be considered by a larger Bench and the matter was placed before the Hon'ble Chief Justice for consideration.

6. Accordingly, the matter was placed before a larger Bench. Their Lordships, while deciding the said question, noticed that proviso to Section 138 stipulates following three distinct conditions precedent, which must be satisfied before dishonour of the cheque can constitute an offence and becomes punishable.

> "…*The first condition is that the cheque ought to have been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The second condition is that the payee or the holder in due course of the cheque, as the case may be, ought to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. The third condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice*…."

Fulfilment of those three conditions constitutes an offence under Section 138 and it can then be said that an offence under the said section has been committed by the person issuing the cheque.

7. Their Lordships further noticed that no court shall take cognizance of any offence punishable under Section 138 except when a complaint in writing is made by the payee or by the holder in due course and such complaint has to be made within one month from the date on which the cause of action arises under clause (b) of the proviso to Section 138. It is also noticed by their Lordships that neither Section 138 nor Section 142 of the Act or any other provision contained in the said Act prevents the holder or the payee of the cheque from presenting the cheque for encashment for any number of occasions within

a period of six months from the date of its issuance or within a period of its validity, whichever is earlier. Therefore, it appears that the payee or the holder has a right to present the same as many number of times for encashment within a period of six months or within its validity period, whichever is earlier.

8. After analysing Sections 138 and 142 of the Act, their Lordships held that "… *we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.*" Accordingly, their Lordships held as follows :

> "*23. Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which* ***Sadanandan Bhadran's*** *case (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh oppo*

defaulter on any juristic principle, to get a complete absolution from prosecution."

9. It was further held as follows :

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

32. The controversy, in our opinion, can be seen from another angle also. If the decision in ***Sadanandan Bhadran****'s case (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of*

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

10. In the result, their Lordships overruled the decision in *Sadanandan Bhadran's* case (supra) and held that the prosecution based on second or successive dishonour of the cheque is also permissible so long as it satisfies the requirements stipulated under the proviso to Section 138 of the Act.

11. In the light of the said decision, we set aside the order passed by the High Court and allow these appeals.

B.B.B. Appeals allowed.

HILL PROPERTIES LTD.
v.
UNION BANK OF INDIA AND OTHERS
(Civil Appeal No. 7939 of 2013)

SEPTEMBER 11, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Transfer of Property – Multi-storeyed flats – Flats purchased by members of Cooperative Society or shareholders of Company – Right, title, interest over such flat – Nature of – Held: It is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society – It cannot be said that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company – The right of transfer of land is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute – The Articles of Association of a Company have no force of a Statute and consequently on facts, right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association – Neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit – A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion – The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently no error with the warrant of attachment issued by the DRT on the flat in question.

The Appellant-company claims to be the owner of the flat in question. Respondent No.5 is a shareholder of appellant-Company holding one "A" equity share. The

flat was allotted to Respondent No.5 which was holding the Share Certificate. Respondent No.5, being an associate of Respondent no.2, created an equitable mortgage to secure dues of Respondent No.2 to Respondent no.1-bank by depositing the Share Certificate. Respondent no.1- Bank filed suit for recovery of the dues and also for enforcement of the security. The Debt Recovery Tribunal (DRT) passed an order of attachment in respect of the flat in question.

The question arose as to whether the property which was mortgaged to the Bank and the right of Respondent No.5 upon it could be attached and sold in execution of a decree.

On behalf of the appellant, it was submitted that Respondent No.5 was only a shareholder of appellant-Company and hence only permitted to use and occupy one of the flats owned by the Company and all the rights, title and interest in respect of the flat in question exclusively vested in the Company; and that Respondent No.5 being a shareholder, was bound by the provisions of Articles of Association of the appellant-Company and could not have mortgaged the suit flat without the permission of appellant-Company.

Dismissing the appeals, the Court

HELD: 1.1. The right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act as well as the Cooperative Societies re e

Registration of Cooperative Societies Act, etc. Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners' right to dispose of its flat is also well recognized, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ownership Acts. Such a legislation exists in the State of Maharashtra as well. [Para 10] [96-E-H]

1.2. Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat. [Para 11] [97-A-D]

1.3. The right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. The Articles of Association of a Company have no force

of a Statute and the right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association. [Para 13] [98-B-C]

1.4. Neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently there is no error with the warrant of attachment issued by the DRT on the flat in question. [Para 14] [98-D-E]

Ramesh Himatlal shah Vs. Harsukh Jadhavji Joshi **(1975) 2 SCC 105: 1975 (0) Suppl. SCR 270 and** *DLF Qutub Enclave Complex Educational Charitable Trus Vs. State of Haryana* **(2003) 5 SCC 622: 2003 (2) SCR 1 – relied on.**

Banch F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay **(1955) 1 SCR 876;** *Vodafone International Holdings B.V.Vs. Union of India & Anr.* **(2012) 6 SCC 613: 2012 (1) SCR 573 – cited.**

Case Law Reference:

(1955) 1 SCR 876	**cited**	**Para 7**
2012 (1) SCR 573	**cited**	**Para 7**
1975 (0) Suppl. SCR 270	**relied on**	**Para 7**
2003 (2) SCR 1	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7939 of 2013.

From the Judgment and Order dated 20.03.2012 of the High Court of Bombay in AL No. 185 o

Shyam Divan, Pratap Venugopal, Avishka Singhvi, Deepa Mani (for K.J. John & Co.) for the Appellant.

U.U. Lalit, Sushmita Banerjee, Rabin Mazumdar, Shiv Kumar Suri for the Respondents.

The Judgment of the Court was delivered by

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

2. We are in this case concerned with the saleability of Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, Malabar Hill, Mumbai – 400 006, which is under attachment in the execution proceedings before the Debt Recovery Tribunal (DRT), Mumbai.

3. Union Bank of India, Respondent No.1 herein, had advanced some financial assistance to the second respondent sometimes in the year 1992. Respondent Nos.3 and 4 stood as personal guarantors for repayment of the dues of Respondent No.2. Respondent No.5, being an associate company of Respondent No.2, mortgaged the aforementioned flat in favour of the Union Bank of India to secure repayment of the dues of Respondent No.2. For realization of the payment of the amount, proceedings were initiated under the Securitization Act before the DRT, Mumbai, and the flat in question was attached under the warrant of attachment on 23rd August, 2005.

4. The Hill Properties Ltd., Appellant herein, preferred Suit No.1627 of 2007 before the High Court of Judicature at Bombay (Ordinary Original Jurisdiction), to release the flat in question from attachment. Notice of Motion was taken out for injunction restraining the Bank and others from taking any steps in furtherance of warrant of attachment or transferring the suit property to third parties. Learned Single Judge rejected the Appellant's Notice of Motion seeking to release the flat from attachment by its order dated 25th January, 2012, giving liberty

to the Appellant to make its offer to purchase the suit flat at a price determined by the Valuer or the price determined by the Auditor of the Company, whichever is higher. Aggrieved by the order, the Appellant preferred Appeal (L) No.185 of 2012 before the Division Bench of the Bombay High Court contending that Respondent No.5, being only a shareholder of the Company, has only a right to occupy the flat and has no right to mortgage the same to the Bank without permission of the Company. Further, it was pointed out that Respondent No.5 is only holding "A" equity share (bearing Share Certificate No.45) in the Appellant Company. By virtue of Articles of Association of the Company, Respondent No.5 was only permitted to use and occupy the flat owned by the Appellant Company and, therefore, the same is not liable to be attached and sold.

5. The Application was resisted by Respondent No.9 contending that the right to occupy the suit flat is the valuable right and value in the share of the Company is nothing but the value of the flat and the same could be transferred for consideration. The flat was, therefore, rightly mortgaged to the Bank and the learned Single Judge was justified in rejecting the claim of the Appellant.

6. The Division Bench of the Bombay High Court found no illegality in the order passed by the learned Single Judge and dismissed the Appeal, so also the Notice of Motion. Various safeguards incorporated by the learned Single Judge were reiterated. Aggrieved of the said order, this appeal has been preferred.

7. Shri Shyam Divan, learned senior counsel appearing for the Appellant, submitted that Respondent No.5 is only a shareholder of the Appellant Company and hence only permitted to use and occupy one of the flats owned by the Company and all the rights, title and interest in respect of the flat in question exclusively vest in the Company. Learned senior counsel submitted that Respondent No.5 could not have

mortgaged the suit flat without the permission of the Company which is in violation of the provisions of the Articles of Association of the Company. Learned senior counsel referred to the Articles of Association of the Company and submitted that Respondent No.5 being a shareholder, is bound by the provisions of Articles of Association of the Company. Learned senior counsel placed reliance on the judgments of this Court in *Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay,* (1955) 1 SCR 876, and *Vodafone International Holdings B.V. Vs. Union of India & Anr.,* (2012) 6 SCC 613, Learned senior counsel also submitted that the ratio laid down by this Court in *Ramesh Himatlal Shah Vs. Harsukh Jadhavji Joshi,* (1975) 2 SCC 105, is not applicable to the case on hand, since in that case this Court was dealing with the interest of a member in an immovable property of a Cooperative Society governed by the provisions of the Maharashtra Cooperative Societies Act, 1960, which is inapplicable in the case of right of a shareholder in a limited liability company registered under the Indian Companies Act, 1956.

8. Shri U.U. Lalit, learned senior counsel appearing for the Respondents, on the other hand, submitted that the principle laid down in *Ramesh Himatlal Shah*'s case (supra), will clearly apply to the facts of this case. Learned senior counsel submitted that the question as to whether the flat belongs to a member of a Cooperative Society or a shareholder of a Company makes no difference, since the right, title and interest and the right to occupy is the species of property, which has the stamp of transferability. Learned senior counsel submitted that in the absence of any clear and unambiguous legal provisions to the contrary, such species of rights can always be transferred and there is no illegality in mortgaging the property to the Bank, as security for the loan transaction. Learned senior counsel submitted that the High Court has rightly rejected the suit as well as the Notice of Motion and the same calls for no interference by this Court.

DISCUSSION

9. The Appellant claims to be the owner of the property known as Flat No.23, Building No.2, Hill Park Estate, A.G. Bell Road, Malabar Hill, Mumbai – 400 006. Respondent No.5 is the shareholder of the Appellant Company holding one "A" equity share. Flat No.23 was allotted to Respondent No.5 who was holding the Share Certificate No.45. Respondent No.5 created an equitable mortgage to secure dues of Respondent No.2 to the Union Bank of India by depositing Share Certificate No.45. Union Bank of India filed Suit No.1079 of 1993 for recovery of the dues and also for enforcement of the security. The suit was later transferred to the DRT, Mumbai, and was numbered as OA No.245 of 2001. The DRT, Mumbai, later passed an order of attachment in respect of the flat in question. The question arose as to whether the property which was mortgaged to the Bank and the right of Respondent No.5 upon it could be attached and sold in execution of a decree.

10. We are of the view that the right, title, interest over a flat conveyed is a species of property, whether that right has been accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society. The people in this country, especially in urban cities and towns are now accustomed to flat culture, especially due to paucity of land. Multi-storeyed flats are being constructed and sold by Companies registered under the Companies Act as well as the Cooperative Societies registered under the Registration of Cooperative Societies Act, etc. Flats are being purchased by people by either becoming members of the Cooperative Society or shareholders of the Company and the flat owners have an independent right as well as the collective right over the flat complex. Flat owners' right to dispose of its flat is also well recognized, and one can sell, donate, leave by will or let out or hypothecate his right. These rights are even statutorily recognized by many State Legislatures by enacting Apartment Ow[illegible]a legislation exists in the State of Mahara[illegible]

11. Most of the flat owners purchase the flat by availing of loan from various banking institutions by mortgaging their rights over the purchased flat. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. So far as a builder is concerned, the flat owner should pay the price of the flat. So far as the Society or Company in which the flat owner is a member, he is bound by the laws or Articles of Association of the Company, but the species of his right over the flat is exclusively that of his. That right is always transferable and heritable. Of course, they will have charge over the flat if any amount is due to them upon the flat.

12. In *Ramesh Himatlal Shah*'s case (supra), this Court has clearly delineated the legal principle which is as follows :-

> "20. Multi-storeyed ownership flats on cooperative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are: ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats

> by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. We have failed to find one."

13. Reference may also be made to another judgment of this Court in *DLF Qutub Enclave Complex Educational Charitable Trust Vs. State of Haryana,* (2003) 5 SCC 622, wherein this Court held that the right of transfer of land indisputably is incidental to the right of ownership and such a right can be curtailed or taken away only by reason of a Statute. In our view, the Articles of Association of a Company have no force of a Statute and that the right of Respondent No.5 to mortgage could not have been restricted by the Articles of Association.

14. We find that neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest, in our view, will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability and consequently we find no error with the warrant of attachment issued by the DRT on the flat in question.

15. We may reiterate that the appellant will certainly have the right of pre-emption, but not at any value lesser than the market value of the suit flat at the time of the sale. Various directions already given by the High Court, therefore, will stand.

16. The appeal is, therefore, dismissed and the amount, if any, deposited by the Appellant be refunded to him. There will, however, be no order as to costs.

B.B.B. Appeal dismissed.

SHANMUGAM AND ANR.

v.

STATE REP. BY INSPECTOR OF POLICE, T. NADU

(Criminal Appeal No.1623 of 2009)

SEPTEMBER 11, 2013

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

FIR – Delay in lodging – Effect – Held: Delay in lodging of FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful – So long as there is cogent and acceptable explanation for the delay it loses its significance – Whether or not the explanation is acceptable will depend upon the facts of each case – On facts, no reason to disbelieve the prosecution case only because the FIR was delayed by a few hours especially when the delay was satisfactorily explained.

Evidence – Witness – Related witness – Appreciation of – To be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections – On facts, the deposition of PW-1 found reliable by the Trial Court as also the High Court, no matter he was related closely to the deceased – Version given by PW1 corroborated by medical evidence – Prosecution case as to the manner in which assaults started and the place of occurrence proved by the deposition of PW-1.

Penal Code, 1860 – s.302 / 304 Part II – Assault with sticks and stones leading to death of a person – Conviction of accused-appellants u/s.302 – Plea for altering the conviction from s.302 to s.304 Part II – Held: Not tenable – The manner in which the deceased was assaulted and the brutality of the assault shows that the accused formed an

unlawful assembly with the object of killing the deceased – The blow landed on the deceased had brought him to the ground whereupon the accused continued brutalising the deceased with the help of stones, in the process crushing his head and squeezing his testicles – Nature of injuries caused to the deceased clearly indicative of the accused having had the intention of killing him.

The prosecution case was that the accused-appellants and three other accused persons caught hold of the brother of PW1 and assaulted him with stick and stones and also squeezed his testicles which led to his death on the spot. The Trial Court convicted the accused persons under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life. The conviction and sentenced was upheld by the High Court. The Trial Court as also the High Court both placed reliance upon the deposition of PW-1 who was an eye witness to the occurrence. The Courts below also noted that while PW-4 and PW-5 turned hostile, they had nevertheless supported the prosecution case in the past. The Courts also found that enmity between the deceased and the accused persons was the motive for the commission of the crime which motive was satisfactorily established on the evidence adduced at the trial.

In the instant appeal, a three-fold submission was made on behalf of the appellants. Firstly, it was contended that there was un-explained delay not only in the lodging of the FIR but also in dispatching a copy of the same to the jurisdictional Magistrate. Secondly, it was contended that the prosecution case rests entirely on the deposition of PW-1 who was closely related to the deceased and the evidence of PW-1 did not inspire confidence. Thirdly, it was contended that even if the prosecution case was accepted *in toto* the offence could not go beyond Section 304 Part II o

Dismissing the appeal, the Court

HELD:1.1. Delay in the lodging of the FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it loses its significance. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut and dried formula for determining whether the explanation is or is not acceptable. [Para 7] [108-H; 109-A-B]

1.2. There is, in the instant case, delay of hardly a few hours which the prosecution has explained to the satisfaction of the Trial Court and the High Court both. PW-1, it appears, returned to the place of occurrence after the accused persons had left only to find his brother dead with his face and head severely injured. According to the witness, he travelled to Harur to inform his brother- PW-2 who accompanied him to the place of occurrence in a car and then to the police station where PW-1 lodged the first information report. Some time was obviously wasted in this process of travel to and from the place of occurrence and to the police station for lodging the report. The report gave a detailed account of the incident. No deficiency in terms of the omission of the names or the role played by the accused was pointed out. The version given by PW-1 has remained consistent with the version given in the first information report. There is, in that view, no reason to disbelieve the prosecution case only because the first information report was delayed by a few hours especially when the delay has been satisfactorily explained. [Para 8] [109-H; 110-A-E]

Meharaj Singh v. State of U.P **(1994) 5 SCC 188;** *Thulia Kali v. State of Tamil Nadu* **(1972) Crl.LJ 1296;** *State of*

Himachal Pradesh v. Gian Chand **(2001) 6 SCC 71; 2001 (3) SCR 247;** *Ramdas and Ors. v. State of Maharashtra* **(2007) 2 SCC 170;** *Kilakkatha Parambath Sasi and Ors. v. State of Kerala* **AIR 2011 SC 1064: 2011 (2) SCR 540;** *Harivandan Babubhai Patel v. State of Gujarat* **(2013) 7 SCC 45 – relied on.**

2.1. The essence of any appreciation of evidence is to determine whether the deposition of the witness on to the incident is truthful hence acceptable. While doing so, the Court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the Courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the Court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the Court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections. [Para 10] [111-E-H; 112-A-B]

2.2. In the case at hand, the deposition of PW-1 has been found to be reliable by the Trial Court as also the High Court, no matter he was related closely to the deceased. There is nothing in the cross-examination of the witness that could be said to have adversely affected the credibility of this witness nor [illegible] to

suggest that apart from his being a relative of the deceased he had any other reason to falsely implicate the accused persons or any one of them. The version given by the witness as to the manner in which the deceased was done to death by the accused persons gets support from the medical evidence led in the case. [Para 15] [114-E-G]

2.3. The other two witnesses namely PW-4 and PW-5 also supported the prosecution case, no matter only in part. The fact that the deceased was present at the cremation ground where the occurrence took place is proved from their depositions as well. Moreover, one of the accused persons, namely, Perumal (since deceased) had according to these two witnesses also picked up a stick and assaulted the deceased on his head as a result of which the deceased had collapsed to the ground. The rest of the prosecution case, on the role played by the other accused persons in the killing of the deceased, has not been supported by these two witnesses who were declared hostile and cross-examined by the prosecution. Even so, the prosecution case as to the manner in which assaults started and the place of occurrence was proved by the deposition of PW-1. [Para 16] [115-D-F]

Raju @ Balachandran and Ors. v. State of Tamil Nadu **AIR 2013 SC 983: 2012 (11) SCR 109;** *Dalip Singh v. State of Punjab* **(1954) 1 SCR 145;** *Masalti v. State of U.P.* **(1964) 8 SCR 133;** *Darya Singh v. State of Punjab* **(1964) 3 SCR 397;** *Takdir Samsuddin Sheikh v. State of Gujarat and Anr.* **(2011) 10 SCC 158;** *Amit v. State of Uttar Pradesh* **(2012) 4 SCC 107: 2012 (1) SCR 1009;** *Bur Singh and Anr. v. State of Punjab* **AIR 2009 SC 157: 2008 (14) SCR 334 and** *State of H.P. v. Kishanpal and Ors.* **2008 (11) SCALE 233 – referred to.**

Mahtab Singh & Anr. v. State of U.P. **(2009) 13 SCC 670: 2009 (5) SCR 848 – cited.**

3. There is no merit in the contention urged on behalf of the appellants that even if the prosecution version is accepted in *toto*, the case falls under Section 304 Part II IPC and not Section 302 IPC for which the appellants have been convicted. The manner in which the deceased was assaulted and the brutality of the assault shows that the accused formed an unlawful assembly with the object of killing the deceased. The blow landed on the deceased had brought him to the ground whereupon the accused continued brutalising the deceased with the help of stones, in the process crushing his head and squeezing his testicles. The nature of injuries caused to the deceased were clearly indicative of the accused having had the intention of killing him. The use of the words "with that he must go" by appellant No.2 is only a manifestation of that intention. There is, therefore, no room for altering the conviction from Section 302 to Section 304 Part II, IPC. [Paras 17, 18] [115-G-H; 116-A-D]

Camilo Vaz v. State of Goa **(2000) 9 SCC 1: 2000 (2) SCR 1088 –cited.**

Case Law Reference:

2009 (5) SCR 848	**cited**	**Para 5**
2000 (2) SCR 1088	**cited**	**Para 6**
(1994) 5 SCC 188	**relied on**	**Para 7**
(1972) Crl.LJ 1296	**relied on**	**Para 7**
2001 (3) SCR 247	**relied on**	**Para 7**
(2007) 2 SCC 170	**relied on**	**Para 7**
2011 (2) SCR 540	**relied on**	**Para 7**
(2013) 7 SCC 45	**relied on**	**Para 7**
2012 (11) SCR 109	**referred**	

(1954) 1 SCR 145	**referred to**	**Para 11**
(1964) 8 SCR 133	**referred to**	**Para 12**
(1964) 3 SCR 397	**referred to**	**Para 13**
(2011) 10 SCC 158	**referred to**	**Para 13**
2012 (1) SCR 1009	**referred to**	**Para 14**
2008 (14) SCR 334	**referred to**	**Para 14**
2008 (11) SCALE 233	**referred to**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1623 of 2009.

From the Judgment & Order dated 24.08.2006 of the High Court of Judicature of Madras at Madras in Criminal Appeal No. 857 of 2004.

Srilok N. Rath, Dr. Sushil Balwada for the Appellants.

M. Yogesh Kanna, A. Shantha Kumar, Sasi Kala, Soopadh Tyagi for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal arises out of a judgment and order dated 24th August, 2006 passed by the High Court of Judicature of Madras at Madurai, whereby Criminal Appeal No.857 of 2004 filed by the appellants and two others against their conviction for murder and sentence of life imprisonment has been dismissed.

2. On 5th January, 1999 at about 3.00 p.m. the deceased Asokan was one amongst 200 other mourners who had assembled to attend the cremation of a near relative who had passed away and was being cremated at village Veerappanayakan Patti. Adikesavan (PW-1), Rajendran (PW-4), Vellingiri (PW-5) and Paneer (PW-10) were also among

those present at the cremation ground. The prosecution case is that, that on account of strained relations between the accused and the deceased arising out of rivalry in relation to smuggling of sandalwood by the two groups, there was, a few days earlier to the date of occurrence, a quarrel between them which had turned ugly with the two groups assaulting each other. The accused were, therefore, looking for an opportunity to get even with deceased which opportunity came their way when the deceased who was a resident of another village joined the funeral and the cremation ceremony. It so happened that no sooner were the mortal remains of the departed soul consigned to flames, Perumal one of the accused (since deceased) saw Asokan standing near a coconut tree in the former's land, and started moving towards him with the remaining four accused including the appellants in this appeal. Perumal who had picked up a stick gave a blow to the deceased on the head because of which the deceased collapsed to the ground. Shanmugam (A-1), appellant in the present appeal, in the meantime picked up a stone and hit the deceased on his face repeatedly while Mahendran (A-2) caught hold of his legs. Raghu (A-3) squeezed the testicles of Asokan while Ramajayam (A-4), appellant No.2 in this appeal, assaulted the deceased with a heavy stone on his head exclaiming "with that he must go". The injuries so inflicted crushed Asokan's head and killed him on the spot. Adikesavan (PW-1), Rajendran (PW-4) and Vellingiri (PW-5) tried to intervene but were threatened by the accused persons that they would also meet the same fate. Scared, the witnesses ran for safety while the accused made their escape good. Those attending the cremation also ran away in panic. Adikesavan (PW-1) returned to the crime scene and found his younger brother lying dead with his head shattered. He informed Sudha (PW-3) about the incident and rushed to Harur to meet his younger brother Ramalingam (PW-2) who accompanied him back to the crime scene in a car. The incident was then reported at Harur Police Station in writing by Adikesavan (PW-1). The police swung into action, conc d

seized the stick and stones used by the accused persons for the assault and the blood stained clothes of the deceased. A chargesheet was eventually filed by the Investigating Officer that led to their trial before the Additional Sessions Judge, Dharamapuri who recorded the statements of as many as 11 witnesses produced on behalf of the prosecution. The defence did not choose to lead any oral evidence.

3. The Trial Court eventually came to the conclusion that the prosecution had brought home the guilt to the accused persons and accordingly convicted them for murder punishable under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life. Aggrieved by the judgment and order passed by the Trial Court the appellants and two other surviving accused persons filed Criminal Appeal No.857 of 2004 before the High Court of Judicature of Madras at Madurai, Perumal the fifth accused having passed away in the meantime. By its judgment and order impugned in this appeal the High Court has concurred with the view taken by the Trial Court and found the conviction and sentence to be perfectly justified upon a reappraisal of the evidence adduced before the Trial Court. The present appeal filed by two out of the four accused persons calls in question the correctness of the said judgment and order of the High Court.

4. We have heard learned counsel for the parties at considerable length who have taken us through the evidence on record. The Trial Court as also the High Court have both placed reliance upon the deposition of Adikesavan (PW-1) who was an eye witness to the occurrence. The Courts below have also noted that while Rajendran (PW-4) and Vellingiri (PW-5) have turned hostile, they have nevertheless supported the prosecution case in the past. The Courts also found that enmity between the deceased and the accused persons on account of smuggling of sandalwood was the motive for the commission of the crime which motive was satisfactorily established on the evidence adduced at the trial.

5. Appearing for the appellants Mr. Srilok N. Rath made a three-fold submission before us. Firstly, it was contended that there was un-explained delay not only in the lodging of the first information report but also in dispatching a copy of the same to the jurisdictional Magistrate. In the absence of any cogent and acceptable explanation for the delay the prosecution case was rendered doubtful. Secondly, it was contended that the prosecution case rests entirely on the deposition of Adikesavan (PW-1) who was closely related to the deceased and could not be said to be an independent witness. Relying upon the decision of this Court in *Mahtab Singh & Anr. v. State of U.P.* (2009) 13 SCC 670, it was contended that although the deposition of an interested witness was not by itself inadmissible in evidence, prudence demanded that his testimony be scrutinized more closely and carefully. A careful evaluation of the evidence of Adikesavan (PW-1) did not, according to the learned counsel, inspire confidence which was full of embellishments and improbabilities sufficient to demolish his credibility.

6. Thirdly, it was contended that even if the prosecution case was accepted *in toto* the offence could not go beyond Section 304 Part II of the IPC. Reliance was in support placed by the learned counsel upon the decision of this Court in *Camilo Vaz v. State of Goa* (2000) 9 SCC 1.

7. The incident in the case at hand took place at around 3.00 p.m. on the 5th of January, 1999 in a village. The first information report about the same was lodged by Adikesavan (PW-1) at 10.00 p.m. on the same day. The contention urged on behalf of the appellant was that the delay of seven hours in the lodging of the report by Adikesavan (PW-1) was inordinate in the facts and circumstances of the case and ought to render the prosecution version suspect on that count itself. We do not think so. Delay in the lodging of the FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the

informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it loses its significance. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut and dried formula for determining whether the explanation is or is not acceptable. Having said that, Courts need to bear in mind that delay in lodging of the FIR deprives it of spontaneity and brings in chances of embellishments like exaggerations and distortions in the story which if narrated at the earliest point of time may have had different contours than what is eventually recorded in a delayed report about the occurrence. On the flipside a prompt lodging of the report may not carry a presumption of truth with it. Human minds are much too versatile and innovative to be subject to any such strait-jacket inferences. Embellishments, distortions, and false implication of innocence may come not only out of deliberation which the victim party may hold among themselves or with their well-wishers and supporters, but also on account of quick thinking especially when all that it takes to do so is to name all those whom the informant or his advisors perceive to be guilty or inimical towards them. Decisions of this Court as to the advantage of a report lodged promptly and possibility of embellishment in cases where the report is delayed, as also the approach which the Courts ought to adopt while considering the effect of such delay in a given case are a legion and the principles of law much too well settled to require any elaboration or re-statement. Reference can all the same be made to *Meharaj Singh v. State of U.P* (1994) 5 SCC 188, *Thulia Kali v. State of Tamil Nadu* (1972) Crl.LJ 1296, *State of Himachal Pradesh v. Gian Chand* (2001) 6 SCC 71, *Ramdas and Ors. v. State of Maharashtra* (2007) 2 SCC 170, *Kilakkatha Parambath Sasi and Ors. v. State of Kerala* AIR 2011 SC 1064 and *Harivandan Babubhai Patel v. State of Gujarat* (2013) 7 SCC 45.

8. There is, in the case before us, delay of hardly a few hours which the prosecution has explained to the satisfaction

of the Trial Court and the High Court both. Adikesavan (PW-1), it appears, returned to the place of occurrence after the accused persons had left only to find his brother dead with his face and head severely injured. According to the witness, he travelled to Harur to inform his brother- Ramalingam (PW-2) who accompanied him to the place of occurrence in a car and then to the police station where Adikesavan (PW-1) lodged the first information report. Some time was obviously wasted in this process of travel to and from the place of occurrence and to the police station for lodging the report. The report gave a detailed account of the incident. No deficiency in terms of the omission of the names or the role played by the accused was pointed out to us by the learned counsel appearing for the appellants. The version given by Adikesavan (PW-1) has remained consistent with the version given in the first information report. There is, in that view, no reason for us to disbelieve the prosecution case only because the first information report was delayed by a few hours especially when the delay has been satisfactorily explained. The first limb of the argument advanced by counsel for the appellants has, therefore, failed and is hereby rejected.

9. That brings us to the question whether Adikesavan (PW-1) was a reliable witness. The contention, as seen earlier, is that since the witness happened to be the brother of the deceased, he must be taken as a partisan witness on account of his close relation with the victim. The difference between a partisan witness on one hand and an interested witness who is unrelated to the victim but has some beneficial interest in the outcome of a litigation on the other, remains obscure. This Court in *Raju @ Balachandran and Ors. v. State of Tamil Nadu* AIR 2013 SC 983, very recently attempted a possible categorization of witnesses and identified broadly four such categories in the following words:

> *"33. For the time being, we are concerned with four categories of witnesses - a third p... d unrelated witness (such as a byst... a*

third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required."

(emphasis supplied)

10. As bserved by this Court far more important than categorization of witnesses is the question of appreciation of their evidence. The essence of any such appreciation is to determine whether the deposition of the witness on to the incident is truthful hence acceptable. While doing so, the Court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the Courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the Court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the Court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of

evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections.

11. The approach which the Court ought to adopt in such matters has been examined by this Court in several cases, reference to which is unnecessary except a few that should suffice. In *Dalip Singh v. State of Punjab* (1954) 1 SCR 145 this Court observed:

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

(emphasis supplied)

12. The above was followed by this Court in *Masalti v. State of U.P. (1964) 8 SCR 133* where this Court observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses sho y

on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

13. We may also refer to the decision of this Court in D*arya Singh v. State of Punjab* (1964) 3 SCR 397 and a more recent reminder of the legal principles in *Takdir Samsuddin Sheikh v. State of Gujarat and Anr.* (2011) 10 SCC 158 where this Court observed:

*"(i) While appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason. (Vide: Kartik Malhar v. State of Bihar (*1996) 1 SCC 614; and *Rakesh and Anr. v. State of Madhya Pradesh* JT 2011 (10) SC 525).

(ii) This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence rather

than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. (See: Vadivelu Thevar v. The State of Madras AIR 1957 SC 614; *Sunil Kumar v. State Govt. of NCT of Delhi* (2003) 11 SCC 367; *Namdeo v. State of Maharashtra* (2007) 14 SCC 150; and *Bipin Kumar Mondal v. State of West Bengal* AIR 2010 SC 3638)."

(emphasis supplied)

14. To the same effect are the decisions of this Court in *Amit v. State of Uttar Pradesh* (2012) 4 SCC 107, *Bur Singh and Anr. v. State of Punjab AIR* 2009 SC 157, and *Sate of H.P. v. Kishanpal and Ors.* 2008 (11) SCALE 233.

15. In the case at hand the deposition of Adikesavan (PW-1) has been found to be reliable by the Trial Court as also the High Court, no matter he was related closely to the deceased. There is nothing in the cross-examination of the witness that could be said to have adversely affected the credibility of this witness nor is there anything to suggest that apart from his being a relative of the deceased he had any other reason to falsely implicate the accused persons or any one of them. The version given by the witness as to the manner in which the deceased was done to death by the accused persons gets support from the medical evidence led in the case. The doctor conducting the post-mortem examination found the death to be homicidal caused by the following injuries on the person of the deceased :

"External Injuries: Face – Mouth lacerated. Lower lip, lower jaw, nose – lacerated. Blood stained liquid oozing from the mouth. Mandible and all the teeth i the lower jaw broken into pieces. Neck – A skin

the neck present. Limbs – contusion over right shoulder. Abdomen – Left testicle crusted and exposed of the skin.

Internal Examination: Skull – Base of skull fracture in the post cranial fossa crossing the midline. Bain – Congested and contained about 100 ml of clotted blood. Neck – Hyoid bone intact. Thorax – Sternum intact. No rib fracture. Lungs – Congested. Right – 450 gms. Left – 420 gms. Heart – Congested. Empty 150 gms. Liver – Congested. Intact – 1100 gms. Kidney – Congested – intact – 120 gms. Each. Bladder – Empty. Stomach – contains about 50 gms. Of undigested food. Spleen – Congested – 90 gms.

16. It is noteworthy that the other two witnesses namely Rajendran (PW-4) and Vellingiri (PW-5) also supported the prosecution case, no matter only in part. The fact that the deceased was present at the cremation ground where the occurrence took place is proved from their depositions as well. It is equally important to note that one of the accused persons, namely, Perumal (since deceased) had according to these two witnesses also picked up a stick and assaulted the deceased on his head as a result of which the deceased had collapsed to the ground. The rest of the prosecution case, on the role played by the other accused persons in the killing of the deceased, has not been supported by these two witnesses who were declared hostile and cross-examined by the prosecution. Even so, the prosecution case as to the manner in which assaults started and the place of occurrence was proved by the deposition of Adikesavan (PW-1) whom we find no reason to disbelieve.

17. That brings us to the contention urged on behalf of the appellants that even if the prosecution version is accepted in *toto*, the case falls under Section 304 Part II IPC and not Section 302 IPC for which the appellants have been convicted. There is, in our view, no merit in that contention either. We say so because of the manner in which the deceased was

assaulted and the brutality of the assault shows that the accused formed an unlawful assembly with the object of killing the deceased. The blow landed on the deceased by Perumal had brought the deceased to the ground whereupon the accused continued brutalising the deceased with the help of stones, in the process crushing his head and squeezing his testicles. We have no manner of doubt that the nature of injuries caused to the deceased were clearly indicative of the accused having had the intention of killing him. The use of the words "with that he must go" by appellant No.2 is only a manifestation of that intention.

18. There is, therefore, no room for altering the conviction from Section 302 to Section 304 Part II, IPC as argued by the learned counsel.

19. In the result this appeal fails and is hereby dismissed.

B.B.B. Appeal dismissed.

A.S.V. NARAYANAN RAO
v.
RATNAMALA & ANOTHER
(Criminal Appeal No. 1433 of 2013)

SEPTEMBER 13, 2013

[H.L. GOKHALE AND J. CHELAMESWAR, JJ.]

Code of Criminal Procedure, 1973 – s. 482 – Criminal proceedings u/s. 304A IPC for medical negligence – Quashing of – Denied by courts below – Held: The proceedings are liable to be quashed – Though doctors are not immune from criminal proceedings for their professional negligence, but in the interest of the society they are required to be protected from frivolous and unjust prosecution – In the facts of the case, case u/s. 304A not made out against the accused doctor – Penal Code, 1860 – s.304A.

Criminal proceedings were initiated against the appellant (a medical practitioner) u/s. 304A IPC at the behest of respondent No.1, who was the wife of appellant's patient who lost his life during treatment. Though the police after its investigation of the case, submitted its report stating that it was a case of no evidence, but the Magistrate took cognizance of the offence. The appellant approached the High Court seeking quashing of the proceedings, but the High Court declined to quash the proceedings. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the

society, it is necessary to protect doctors from frivolous and unjust prosecution. [Para 11] [122-A-B]

2. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the State Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records". However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthesian before conducting an angioplasty. According to the High Court, both the above-mentioned 'lapses' on the part of the appellant "clearly show the negligence" of the appellant. The High Court reached such conclusion on the basis of evidence of a doctor, given before the State Consumer Redressal Commission in the consumer dispute initiated by the respondent-wife of the deceased against the appellant and others. But the High Court failed to take into account another part of the same statement whereby the doctor stated that the time gap between the angioplasty failure and the surgery was not the factor for the death of the patient and that the time gap may or may not be a factor for the enhancement of the risk. This is most crucial in the context of criminal prosecution of the appellant. Therefore, the prosecution of the appellant is uncalled for. [Paras 12 to 16] [123-A-E; 124-B-D]

Jacob Mathew vs. State of Punjab and Anr. **(2005) 6 SCC 1: 2005 (2) Suppl. SCR 307 – relied on.**

Case Law Reference::

2005 (2) Suppl. SCR 307 relied on Para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1433 of 2013.

From the Judgment & Order dated 28.10.2010 of the High Court of Andhra Pradesh at Hyderabad in Criminal Petition No. 6506 of 2007.

P.S. Narasimha, M. Srinivas R. Rao, Sudha Gupta for the Appellant.

Mahabir Singh, Nikhil Jain, C.S.N. Mohan Rao, G.N. Reddy, Debojit, M. Bala Shivudu, D. Mahesh Babu for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. This appeal arises out of an order dated 28th October 2010 in Criminal Petition No.6506 of 2007 of the High Court of Andhra Pradesh.

3. The aforementioned criminal petition was filed praying that the proceedings initiated against the appellant herein in C.C. No.600 of 2006 on the file of the XIV Additional Chief Metropolitan Magistrate, Hyderabad for the offence punishable under section 304A IPC be quashed. The said petition along with another similar petition by one of the co-accused was heard and disposed of by a common order (order in appeal).

4. While the petition filed by the appellant herein was dismissed by the High Court, the other petition of the co-accused was allowed.

5. The appellant is a cardiologist. The husband of the first respondent (one Divakar) approached the appellant herein, complaining of a pain in the chest on 22.04.2002. Divakar was admitted in the hospital where the appellant was working and

kept in the Intensive Care Unit (ICU). Thereafter, the appellant informed the first respondent that Divakar had suffered a mild heart attack. On 23.04.2002, an angiogram was conducted which showed three blocks in the vessels carrying blood to the heart. On 25.04.2002 at 9.30 a.m., the appellant unsuccessfully attempted to perform an angioplasty on Divakar. Around 1.30 in the afternoon, the appellant informed the first respondent that the angioplasty failed as the blocks were calcified. Same day at around 3.30 p.m., by-pass surgery was conducted on Divakar in the same hospital. Subsequently, various complications developed and eventually Divakar died on 09.05.2002.

6. On 14.05.2002, the first respondent lodged a complaint against the appellant and others under section 304A IPC which came to be registered as FIR No.416 of 2002.

7. The police on investigation submitted a final report on 02.02.2005 treating the case to be one of lack of evidence. The respondent filed objections before the Metropolitan Magistrate to the final report and prayed the Magistrate to take cognizance of the offence. The learned Magistrate by his order dated 11.12.2006 came to the *prima facie* conclusion that there exists material to try the accused for the offence punishable under section 304A IPC. Challenging the said order the appellant approached the High Court by way of Criminal Petition No.6506 of 2007.

8. By judgment under appeal, the High Court opined that the material on record "clearly shows negligence on the part of A1"[1] and declined to quash the proceedings.

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1. The sworn statement of Dr. P.V.N. Rao also discloses that A1 without consulting the Anestheist and without a surgical stand conducted Angioplasty, which should be done by the Surgeon, as the surgeon was out of station which fact he came to know through the Anesthetist. The operation was delayed by 5 hours due to want of surgeon who has to come from New Delhi, which **clearly shows the negligence on the part of A1**. Further as the patient was a chronic smoker he should be prepared before undertaking Angioplasty and the Cardiac Anesthesian should be consulted for fitness of the patient before conducting th

9. Mr. P.S. Narasimha, learned senior counsel appearing for the appellant submitted that the High Court clearly erred in dismissing the petition of the appellant herein. Learned senior counsel argued that the law laid down by this Court in *Jacob Mathew Vs. State of Punjab & Anr.* (2005) 6 SCC 1 has completely been ignored by both the learned Magistrate and the High Court in deciding to proceed with the case against the appellant herein. On the other hand, learned counsel for the first respondent submitted that the conduct of the appellant in undertaking the angioplasty without having a standby surgical unit is clearly in violation of the established practice of the medical profession and therefore a clear case of negligence warranting punishment of the appellant.

10. This Court in the case of *Jacob Mathew* (supra) considered exhaustively the various aspects of negligence on the part of a doctor and laid down inter alia;

"48. ….(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word "gross" has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression "rash or negligent act" as occurring in Section 304-A IPC has to

The entire record adduced does not indicate as to whether A1 assessd the condition of the patient on consulation of the cardio Anasthesian and obtained the fitness certificate for going Angioplasty on the patient.

be read as qualified by the word "grossly"."

11. This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for prosecuting doctors on charges of criminal negligence. This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed:-

"52. …we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

12. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records".

13. However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthesian before conducting an angioplasty. According to the High Court, both the above-mentioned 'lapses' on the part of the appellant "clearly show the negligence" of the appellant.

14. The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr. Surajit Dan given before the A.P. State Consumer Redressal Commission in C.D. No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the above-mentioned Dr. Dan's evidence was recorded wherein Dr. Dan in his cross-examination stated as follows:-

"…Whenever Cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case…."

He further stated;

"…The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that increases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery…."

However, the same doctor also stated;

"….The time gap between the angioplasty failure and the surgery is not THE FACTOR for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

15. Unfortunately, the last of the above extracted statements of Dr. Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

16. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in *Jacob Mathew case* (supra) that the negligence, if any, on the part of the appellant cannot be said to be "gross". We, therefore, set aside the judgment under appeal and also the proceedings of the trial court dated 11.12.2006.

17. The appeal is allowed, however, there shall be no order as to costs.

K.K.T. Appeal allowed.

SUMIT MEHTA

v.

STATE OF N.C.T. OF DELHI

(Criminal Appeal No. 1436 of 2013)

SEPTEMBER 13, 2013

[P. SATHASIVAM, CJI AND RANJANA PRAKASH DESAI, J.]

Code of Criminal Procedure, 1973:

s.438 – Power under – Purpose and scope of – FIR u/s. 420, 467, 468 and 471 IPC – Anticipatory bail granted on the condition that the accused would deposit Rs. one crore in fixed deposit in the name of the complainant – Propriety of the condition – Held: Object of putting conditions while granting bail, is to avoid possibility of the person hampering the investigation – Thus any condition which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under law – Therefore, condition of deposit for grant of anticipatory bail is untenable – Accused, presumably an innocent person, entitled to right to liberty under Article 21 of the Constitution – Direction to deposit FDR set aside – Condition imposed on the accused to make himself available to police not to hamper with investigation and not to leave India without previous permission of Court – Constitution of India, 1950 – Article 21.

s.438 – Anticipatory bail – Grant of – Parameters for – Discussed.

The question for consideration in the present appeal was whether the condition of depositing an amount of Rs. 1,00,00,000/- in fixed deposit for anticipatory bail was sustainable in law and whether such condition is outside the purview of Section 438 Cr.P.C.

Disposing of the appeal, the Court

HELD: 1. The purpose of the provision in s.438 Cr.P.C. is that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. The grant of bail under Section 438(1) is dependent on the merits and circumstances of a case. While granting anticipatory bail, the Courts are expected to consider and keep in mind the nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the Court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. The Courts are duty bound to impose appropriate conditions as provided under sub-section (2) of Section 438 Cr.P.C. [Paras 8 and 14] [132-D; 134-F-G]

Shri Gurbaksh Singh Sibbia and Ors. vs. State of Punjab **(1980) 2 SCC 565: 1980 (3) SCR 383 – relied on.**

2.1. While exercising power under Section 438 Cr.P.C., the Court is duty bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2), so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he i[illegible]e

fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution. [Paras 12 and 13] [134-B-F]

2.2. The words "any condition" used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail. [Para 16] [135-C-D]

2.3. Therefore, fixed deposit of Rs. 1,00,00,000/- for a period of six months in the name of the complainant and to keep the FDR with the investigating officer as a condition precedent for grant of anticipatory bail is evidently onerous and unreasonable. [Paras 15] [134-H; 135-A-B]

Amarjit Singh vs. State of NCT of Delhi **(2009) 13 SCC 769;** *Sheikh Ayub vs. State of M.P.* **(2004) 13 SCC 457;** *I. Glaskasden Grace and Ors. vs. Inspector of Police and Anr.* **(2009) 12 SCC 769; 2009 (3) SCR 990;** *Ramathal and Ors. vs. Inspector of Police and Anr.* **(2009) 12 SCC 721: 2009 (3) SCR 981** *Sandeep Jain vs. National Capital Territory of Delhi Rep. by Secretary, Home Deptt.* **(2000) 2 SCC 66 – relied on.**

3. Setting aside the direction relating to deposit of FDR in the name of the complainant, the appellant-accused is directed to fulfill the following conditions i.e. the appellant shall make himself available for interrogation by a police officer as and when required; the appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

the appellant shall furnish his address to the Investigating Officer who shall verify it and submit it to the trial Court under his signature. In case of change of address, it must be communicated to the Investigating Officer who shall verify it and intimate the same to the court concerned under his signature; and the appellant shall not leave India without the previous permission of the trial Court. [Para 17] [135-E-H; 136-A-C]

Case Law Reference:

1980 (3) SCR 383	**relied on**	**Para 9**
(2009) 13 SCC 769	**relied on**	**Para 10**
(2004) 13 SCC 457	**relied on**	**Para 11**
2009 (3) SCR 990	**relied on**	**Para 11**
2009 (3) SCR 981	**relied on**	**Para 11**
(2000) 2 SCC 66	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1436 of 2013.

From the Judgment & Order dated 18.12.2012 of the High Court of Delhi at New Delhi in Bail Application No. 1479 of 2012.

K.V. Vishwanathan, ASG, Aman Lekhi, Jayant Kumar Mehta, Shailender Saini, Satya Sidiqui, D.S. Mahra, B. Vijay Kumar for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. Leave granted.

2. This appeal is directed against the order dated 18.12.2012 passed by the High Court of Delhi at New Delhi in Bail Application No. 1479 of 2012 whereby learned single Judge of the High Court while granting anticipatory bail to the appellant herein in a case registered ag[illegible].

104 dated 22.08.2012 for the offences punishable under Sections 420, 467, 468 and 471 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") directed him to deposit an amount of Rs.1,00,00,000/- (one crore) in fixed deposit in the name of the complainant in any nationalized bank and to keep the FDR with the Investigating Officer.

3. According to learned senior counsel for the appellant, the condition for depositing the amount in fixed deposit in the impugned order is untenable in law and is outside the purview of Section 438 of the Code of Criminal Procedure, 1973 (in short "the Code"). He further pointed out that learned single Judge, while imposing the condition for depositing the amount in fixed deposit, has failed to appreciate that the liberty for grant of anticipatory bail under Section 438 of the Code cannot be used for recovery of the alleged cheated amount to the complainant. He further pointed out that while passing the impugned order, learned single Judge failed to consider that imposing a condition of depositing an amount of Rs. 1 crore in fixed deposit would make the grant of anticipatory bail impossible for the appellant. He also pointed out that the said direction is contrary to Article 21 of the Constitution of India and results in denial of liberty to the appellant.

4. During the course of hearing, one Harnam Jaspal-the complainant, filed Criminal Misc. Petition 18718 of 2013 for intervention. Intervention application is allowed. Learned counsel appearing for the intervener, after highlighting the transaction between the intervener and the appellant-accused and various factual aspects, contended that the High Court is fully justified in imposing such condition and there is no need to interfere with the same.

5. On behalf of the respondent-State, learned Additional Solicitor General submitted that taking note of the dispute between the complainant and the appellant-accused, the condition imposed for grant of anticipatory bail cannot be construed as onerous.

6. We have carefully considered the rival contentions and perused all the relevant materials.

7. The only point for consideration in this appeal is whether the condition of depositing an amount of Rs. 1,00,00,000/- in fixed deposit for anticipatory bail is sustainable in law and whether such condition is outside the purview of Section 438 of the Code?

8. In order to answer the above question, it is useful to refer Section 438 of the Code which reads as under:

"438. Direction for grant of bail to person apprehending arrest:-

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia*, the following factors, namely:-*

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant o

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub- section (1)."

A reading of the above provision makes it clear that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. The grant of bail under Section 438(1) of the Code is dependent on the merits and circumstances of a case.

9. A Bench of five-Judges of this Court in *Shri Gurbaksh Singh Sibbia & Ors. vs. State of Punjab* (1980) 2 SCC 565, while dealing mainly with the question of considerations that can validly weigh with the courts while granting bail under Section 438, examined various facets of the issue and held as under:

"26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-[illegible]of

constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on, compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi [1978]2SCR621 that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it; is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not be found therein."

The aforesaid decision gives an abundant clarity as to the intention and the scope of Section 438 of the Code. Certainly, the power conferred must be exercised very sparingly and judiciously. However, this Court has always frowned on onerous condition being imposed as a condition precedent for granting anticipatory bail.

10. In *Amarjit Singh vs. State of NCT of Delhi* (2009) 13 SCC 769, this Court ruled as under:

"7. Having regard to the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that the imposition of condition to deposit the sum of Rs. 15 lacks in the form of FDR in the Trial Court is an unreasonable condition and, therefore, we set aside the said condition as a condition precedent for granting anticipatory bail to the accused/appellant."

11. In *Sheikh Ayub vs. State of M.P.* (2004) 13 SCC 457, it was held that a direction to pay a portion of the amount misappropriated by the accused to the complainant as a

condition for bail is unwarranted. Similar view was adopted by this Court in *I. Glaskasden Grace and Ors.* vs. I*nspector of Police and Anr.* (2009) 12 SCC 769, *Ramathal and Ors.* vs. *Inspector of Police and Anr.* (2009) 12 SCC 721 and *Sandeep Jain* vs*. National Capital Territory of Delhi Rep. by Secretary, Home Deptt.* (2000) 2 SCC 66.

12. While exercising power under Section 438 of the Code, the Court is duty bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint.

13. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution.

14. We also clarify that while granting anticipatory bail, the Courts are expected to consider and keep in mind the nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the Court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. It is needless to mention that the Courts are duty bound to impose appropriate conditions as provided under sub-section (2) of Section 438 of the Code.

15. Thus, in the case on hand,

1,00,00,000/- for a period of six months in the name of the complainant and to keep the FDR with the investigating officer as a condition precedent for grant of anticipatory bail is evidently onerous and unreasonable. It must be remembered that the Court has not even come to the conclusion whether the allegations made are true or not which can only be ascertained after completion of trial. Certainly, in no words are we suggesting that the power to impose a condition of this nature is totally excluded, even in cases of cheating, electricity pilferage, white-collar crimes or chit fund scams etc.

16. The words "any condition" used in the provision should not be regarded as conferring absolute power on a Court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail. We are of the view that the present facts and circumstances of the case do not warrant such extreme condition to be imposed.

17. In the light of the above discussion, while retaining the order granting anticipatory bail in favour of the appellant-accused, namely, Sumit Mehta, we set aside the direction relating to deposit of FDR in the name of the complainant. However, the appellant-accused has to fulfill the following conditions:

(i) The appellant shall make himself available for interrogation by a police officer as and when required;

(ii) The appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) The appellant shall furnish his address to the Investigating Officer who shall verify it and submit it to the trial Court under his signature. In case of change of address, it must be communicated to the Investigating Officer who shall verify it and intimate the same to the court concerned under his signature; and

(iv) The appellant shall not leave India without the previous permission of the trial Court.

18. The appeal is disposed of with the above directions.

K.K.T. Appeal disposed of.

STATE OF RAJASTHAN & ANR.

v.

BAL KISHAN MATHUR (D) THROUGH LRS. & ORS.

(Civil Appeal No 8243 of 2013)

SEPTEMBER 16, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND RANJAN GOGOI, JJ.]

Delay – Condonation of – Delay on part of the State in filing writ appeal before High Court – In the application for condonation of delay date of filing the appeal was inadvertently mentioned as 2.11.2006 instead of 8.11.2006 – Dismissal of the application on the ground that the delay of 6 days i.e. from 2.11.2006 to 8.11.2006 not explained – Held: It is not proper to terminate a proceeding on technical ground like limitation, where there is no gross negligence, or deliberate inaction or lack of bonafides – In the instant case, in view of the fact that error was occasioned by inadvertence and in view of period of delay, High Court ought to have condoned the delay – Matter remitted to High Court.

There was delay of 98 days in filing writ appeal before High Court, on behalf of the appellant-State. In the application for condonation of delay, date of filing the appeal was mentioned as 2.11.2006 while the actual date of filing was 8.11.2006. Division Bench of High Court refused to condone the delay on the ground that the State could not explain the delay of 6 days i.e. from 2.11.2006 to 8.11.2006. Hence the present appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1. It is correct that condonation of delay cannot be a matter of course; it is also correct that in seeking such condonation, the State cannot claim any

preferential or special treatment. However, in situation where there has been no gross negligence or deliberate inaction or lack of bonafides, a broad and liberal view needs to be taken so as to advance substantial justice instead of terminating a proceeding on a technical ground like limitation. Unless the explanation furnished for the delay is wholly unacceptable or if no explanation whatsoever is offered or if the delay is inordinate and third party rights had become embedded during the interregnum, the Courts should lean in favour of condonation. [Para 9] [141-E-G]

Postmaster General vs. Living Media India Ltd. **(2012) 3 SCC 563: 2012 (1) SCR 1045;** *Amalendu Kumar Bera vs. State of West Bengal* **(2013) 4 SCC 52: 2013 (2) SCR 484 – referred to.**

2. In the present case, the High Court seems to have accepted the explanation for the delay upto 02.11.2006. Thereafter, taking into account the statement made in the condonation application that the appeal has been filed on 02.11.2006, whereas it was actually filed on 08.11.2006, the High Court refused to condone the delay of the period between the two dates i.e. six days. The mention of the date 2.11.2006 is an error occasioned by inadvertence. The inadvertence or even if the above act is construed to be negligent, cannot be sufficient to justify a refusal of the adjudication of the appeal filed by the State on merits which is the ultimate consequence of the impugned order. Taking into account the totality of the facts of the case, particularly the period of the delay, the High Court should have condoned the delay. [Para 10] [143-B-C, D-F]

Case Law Reference:

2012 (1) SCR 1045	**referred to**	**Para 9**
2013 (2) SCR 484	**referred**	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8243 of 2013.

From the Judgment & Order dated 12.11.2008 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Special Appeal No. 02033 of 2007.

Dr. Manish Singhvi, AAG, Amit Lubhaya, Milind Kumar for the Appellants.

Shiv Sagar Tiwari for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. Though the only issue that arises in this appeal is with regard to the correctness of the order dated 12.11.2008 passed by the Division Bench of the Rajasthan High Court declining to condone the delay that had occurred in the institution of Special Appeal Writ No.02033 of 2007 by the appellant, a brief conspectus of the relevant facts would be appropriate.

3. An order of eviction dated 17.12.1980 under the Rajasthan Public Premises (Eviction of Unauthorized Occupants) Act, 1964 was passed by the Estate Officer against the respondent (Now represented by his legal heirs). The respondent was unsuccessful in the challenge made against the said order in an appeal before the learned District Judge. Thereafter, the respondent filed an application for review which was transferred to the court of learned Additional District Judge who heard the matter and decided the same on 17.12.1993 as if he was hearing an appeal against the initial order of the Estate Officer dated 17.12.1980. The State of Rajasthan, therefore, moved Civil Writ Petition No.3503 of 1995 before the High Court which was dismissed by the learned Single Judge holding that the tenancy of the respondent could not be determined except by following the provisions of Sections 106 and 111 of the Transfer of Property Act, 1882, as already held in another connected case.

4. Aggrieved by the said order of the learned Single Judge of the High Court dated 19.05.2006, D.B. Special Appeal Writ No.02033 of 2007 was filed by the State on 08.11.2006. The office reported a delay of 98 days in filing of the appeal. Considering the explanation furnished by the State for the delay that had occurred, the Division Bench took note of the statement made by the appellant in the condonation application that the appeal was filed on 02.11.2006 whereas it was actually filed on 08.11.2006. The Division Bench, therefore, thought it proper to conclude that the period of six days between 02.11.2006 and 08.11.2006 had not been explained. Accordingly, the delay in filing the D.B. Special Appeal Writ was not condoned. Resultantly, the appeal was dismissed. Aggrieved, the State has filed the present appeal.

5. We have heard Dr. Manish Singhvi, learned Additional Advocate General of Rajasthan for the appellant and Shri Shiv Sagar Tiwari, learned counsel for the respondent.

6. Learned counsel appearing for the appellant has urged that mention of the date 2.11.2006 as the date of filing of the appeal was inadvertent. Alternatively, it is contended that even if it is assumed that the State had failed to offer any explanation for filing the appeal on 08.11.2006 after making a statement that the same was filed on 02.11.2006, the period of six days' is too insignificant to justify the view taken by the High Court. Learned counsel has also tried to take us to the merits of the appeal filed by the State to show that the order of the learned Single Judge under challenge in the appeal is ex-facie incorrect being contrary to several pronouncements of this Court. It is, therefore, urged that the impugned order would justify interference so as to ensure that the Appeal filed by the State is heard on merits.

7. On the other hand, learned counsel appearing for the respondent has submitted that the learned Single Judge while passing the order dated 19.05.2006 in the Civil Writ Petition No.3503 of 1995 had exercised jurisdi[illegible]7

of the Constitution. Under the provisions of the Rajasthan High Court Ordinance 1949 and the Rules framed thereunder providing for intra court appeals, appeals are not contemplated against orders passed by a learned Single Judge in exercise of jurisdiction under Article 227. On the aforesaid basis it is submitted that the D.B. Special Appeal filed by the State before the High Court was not maintainable. The initial order of the learned Single Judge dated 19.05.2006 not being subject to any challenge in the present appeal before this Court, no interference is called for.

8. Having considered the rival submissions advanced on behalf of the parties, we deem it necessary to make it clear that in the present appeal we would not in any way be concerned with the merits of the dispute between the parties. As already observed by us in the earlier part of this order it is only the question of condonation of delay in filing the D.B. Special Appeal that would require our consideration. The facts in this regard have already been noticed.

9. It is correct that condonation of delay cannot be a matter of course; it is also correct that in seeking such condonation the State cannot claim any preferential or special treatment. However, in situation where there has been no gross negligence or deliberate inaction or lack of bonafides this Court has always taken a broad and liberal view so as to advance substantial justice instead of terminating a proceeding on a technical ground like limitation. Unless the explanation furnished for the delay is wholly unacceptable or if no explanation whatsoever is offered or if the delay is inordinate and third party rights had become embedded during the interregnum the Courts should lean in favour of condonation. Our observations in *Postmaster General v. Living Media India Ltd.*[1] and *Amalendu Kumar Bera v. State of West Bengal*[2] do not strike any discordant note and have to be understood in the context of facts of the respective cases.

1. (2012) 3 SCC 563.
2. (2013) 4 SCC 52.

Postmaster General v. Living Media India Ltd. (supra)

"**28.** Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

Amalendu Kumar Bera v. State of West Bengal (supra)

"**10**. ... True it is, that courts should always take liberal approach in the matter of condonation of delay, particularly when the appellant is the State but in a case where there are serious laches and negligence on the part of the State in challenging the decree passed in the suit and affirmed in appeal, the State cannot be a

objection under Section 47 till the decree-holder puts the decree in execution. ... Merely because the respondent is the State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in the absence of "sufficient cause" delay shall not be condoned."

10. In the present case, the High Court seems to have accepted the explanation for the delay upto 02.11.2006. Thereafter, taking into account the statement made in the condonation application that the appeal has been filed on 02.11.2006, whereas it was actually filed on 08.11.2006, the High Court refused to condone the delay of the period between the two dates i.e. six days. Reading the relevant paragraph of the condonation application it is obvious to us that there is an apparent error or mix up in the dates furnished by the State in its application for condonation of delay. The mention of the date 2.11.2006 in para 5 of the condonation application is by hand. Obviously it is an error occasioned by inadvertence. The date that should have been mentioned is 8.11.2006 and not 2.11.2006. The inadvertence or even if the above act is construed to be negligent, in our considered view, cannot be sufficient to justify a refusal of the adjudication of the appeal filed by the State on merits which is the ultimate consequence of the impugned order. Taking into account the totality of the facts of the case, particularly the period of the delay, we are of the view that in the present case, the High Court should have condoned the delay. The same not having been done we deem it appropriate to allow the appeal and set aside the order dated 12.11.2008 passed by the Division Bench of the High Court; condone the delay that had occurred in filing of D.B. Special Appeal Writ No.02033 of 2007 and remit the matter back to the High Court for disposal on merits. We make it clear that we have not expressed any opinion on the merits of the case of the parties before us.

K.K.T. Appeal allowed & Matter remitted to High Court.

GOVT. OF KARNATAKA AND ANR
v.
K.C.SUBRAMANYA AND ORS
(Civil Appeal No 10195 of 2013)

SEPTEMBER 16, 2013

[GYAN SUDHA MISRA AND PINAKI CHANDRA GHOSE, JJ.]

Code of Civil Procedure, 1908 – Or.XLI, r.27(1)(aa) – Conditions precedent before allowing a party to adduce additional evidence at the stage of appeal – Held: A party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within knowledge of the party and hence was fit to be produced by the appellant before the appellate forum – In the instant matter, the appellants are a public authority and sought to produce a road map which, it is unbelievable, was not within their knowledge indicating a road to the disputed land – Therefore, rejection of the application of the appellants to rely on the said map rightly not entertained at the stage of first appeal.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10195 of 2013.

From the Judgment & Order dated 26.07.2011 of the High Court of Karnataka at Bangalore in RFA No. 1765 of 2005.

V.N. Raghupathy, S.N. Bhat, Dharam Bir Raj Vohra, G.V. Chandrashekar, N.K. Verma, Anajana Chandrashekar, Girish Ananthamurthy, Vaijayanthi Girish for the appearing parties.

The following order of the Court was delivered

ORDER

1. Leave granted.

2. Application for impleadment is allowed.

3. Having gone through the impugned judgment and order dated 26.07.2011 passed by the High Court of Karnataka in RFA No. 1765/2005, we have noticed that the judgment and decree was passed in favour of the respondents by the Trial Court which had also been upheld by the High Court.

4. However, counsel for the appellants submitted that the appellants have sought permission of the High Court at the stage of first appeal seeking liberty to adduce additional evidence which is a map of the area indicating that the disputed land is a public road and in view of Order XLI Rule 27(1) (aa), the appellants were entitled to adduce such additional evidence at the appellate stage.

5. However, we do not feel impressed with this argument and deem it fit to reject it in view of Order XLI Rule 27(1) (aa) which clearly states as follows:

(a) .....

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) .....

6. On perusal of this provision, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at

the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within his knowledge and hence was fit to be produced by the appellant before the appellate forum.

7. It is thus clear that there are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specificcally incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will.

8. In the instant matter, the appellants are a public authority and has sought to produce a road map which, it is unbelievable, was not within the knowledge of the appellants indicating a road to the disputed land. Therefore, the rejection of the application of the appellants to rely on the said map has rightly not been entertained at the stage of first appeal. The impugned order thus do not suffer from legal infirmity so as to interfere with the same.

9. However, we deem it appropriate to observe further that the appellants are Government of Karnataka and, therefore, if it is of the view that the land in question requires construction of a public road, no one can stop it from acquiring the land in question. In fact, the appellants appear to have taken steps earlier for acquisition of the land in question but what prevailed upon the appellants to drop the acquisition proceeding is not quite clear.

10. The present appeal arises out of a simple suit of declaration and confirmation of possession which was decreed in favour of the respondents and was upheld by the High Court. The decree having been passed after contest, cannot be interfered with unless the counsel could prove perversity in the finding recorded concurrently by the courts below. It is clear that the appellants have miserably failed to do so and, therefore, it cannot bank upon the equity and good c rt

beseeching interference with a contested decree passed in favour of the respondents.

11. It is no doubt true that the courts at times can exercise its due diligence for taking the relevant aspects of the matter while exercising its discretion for application of equity and good conscience. But, insofar as the appellants in this appeal are concerned, that also is lacking as we fail to comprehend as to why the appellants dropped the acquisition proceeding if it thought that the land in question was so essential and viable for using it as a public road.

12. However, in spite of the aforesaid observations, the appellants obviously would be free to take recourse to any provision in accordance with law to declare the land in question as a public land of the appellant but insofar as this appeal is concerned, we cannot entertain it as we are not convinced that it is a fit case where we should interfere with the decree based on concurrent findings of fact recorded by the courts below.

13. The appeal, therefore, is dismissed.

B.B.B. Appeal dismissed.

CHANNABASAPPA (DEAD) BY LR & ANR.
v.
STATE OF KARNATAKA & ORS.
(Civil Appeal No. 8289 of 2013)

SEPTEMBER 17, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND RANJAN GOGOI, JJ.]

Karnataka Land Reforms Amandment Act, 1974 – Form No.7 – Application under – Respondent No.2 claiming to have sent application in Form No. 7 by post to Special Tehsildar, Land Reforms – Pursuant to direction of High Court enquiry u/s.48-A conducted by Land Tribunal after taking on record, the Xerox copy of the application produced by respondent No.2 – Tribunal held that no application under Form No.7 was on record – In Writ Petition, Single Judge of High Court remanded the matter to Land Tribunal for finding out whether respondent made application under Form No.7 and whether the same was on record – Order of Single Judge upheld in review as well as Writ Appeal – Held: The order of the Single Judge in remanding the matter to the Tribunal again, rendered the order passed by the Tribunal ineffective for no reason – It was not open to Single Judge to remand the matter to Land Tribunal.

The 2nd respondent (since deceased) filed an application before Special Tehsildar, Land Reforms, contending that he had sent an application on 23.6.1975 in Form No.7 for registering him as an occupant of the lands belonging to the appellants. The Special Tehsildar replied that there was no record having received such application. Respondent No.2 filed writ petition. High Court remitted the matter to Land Tribunal for enquiry u/s. 48-A of Karnataka Land Reforms Act, 1974. Land Tribunal accepted the xerox copy of the application in

Form No.7 produced by respondent No.2 for the enquiry. It rejected the application holding that the lands were in self-cultivation of the appellants and 2nd respondent was not their tenant. Respondent No.2 challenged the order of Land Tribunal. Single Judge of High Court remitted the matter to the Tribunal to find out whether application under Form No.7 existed on records and whether the 2nd respondent had filed the application in Form No.7. Review Petition as well as Writ Appeal against the order of Single Judge were dismissed. Hence the present appeal.

Allowing the appeal, the Court

HELD: The Land Tribunal admitted Form No.7 produced by the 2nd respondent in view of the High Court's direction dated 5th August, 1991 and on enquiry made under Section 48-A of Karnataka Land Reforms Act, 1974 gave definite finding that the 2nd respondent was not in occupation or cultivation of the suit land as a tenant as on 1st March, 1974 or prior thereto. In view of such finding of the Tribunal, it was not open for the Single Judge to remand the matter again to the Tribunal to enquire whether Form No.7 was on record or Form No.7 was produced by the 2nd respondent which in fact rendered the order dated 2nd June, 1997 passed by the Tribunal ineffective for no reason. The Division Bench of the High Court also failed to notice the above-said fact and thereby erred in affirming the order passed by the Single Judge. [Paras 12 and 13] [153-A-B; 154-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8289 of 2013.

From the Judgment & Order dated 02.06.2006 of the High Court of Karnataka at Bangalore in W.A. No. 3836 of 2005 (LR).

Rajesh Mahale, Krutin R. Joshi for the Appellants.

Sanjay R. Hegde, Kirit S. Javali, Azeem, Ankolekar Gurudatta for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. Leave granted.

1. This appeal has been preferred by the appellants against the judgment and order dated 2nd June, 2006 passed by the Division Bench of the High Court of Karnataka at Bangalore in W.A. No.3836/2005(LR). By the impugned judgment the Division Bench dismissed the appeal preferred by the appellants herein and affirmed the order passed by the learned Single Judge, whereby the learned Single Judge directed the Land Tribunal to verify the aspect of filing of Form No.7 by the tenant.

2. The factual matrix of the case is as follows:

The appellants claim to be the owners of lands in Sy. Nos. 33, 37, 38, 39, 40, 41 and 53 situated in village Halligeri, Dharward Taluk, Karnataka, having purchased the same in the year 1956. According to the appellants, the lands were in their personal cultivation since then.

3. The 2nd respondent, Gangappa (since deceased) filed an application before the Special Tahasildar, Land Reforms, Dharwad, contending therein that he had sent an application on 23rd June, 1975 in Form No.7 for registering him as an occupant of the lands belonging to the appellants. The Special Tahasildar, Land Reforms, on 31st October, 1987 replied that there was no record of having received such an application from the 2nd respondent in respect of the lands in question and no entry was made in the Register of Form No.7 maintained by the Land Tribunal.

4. The 2nd respondent filed Writ Petition No.4165/1988 in the High Court of Karnataka at Bangalore with the prayer for a direction to the Tribunal to conduct enquiry under Section 48-A of the Karnataka Land Reforms A[illegible]r

referred to as the "Land Reforms Act") and to grant him occupancy rights. In support of his claim for having sent the application, the 2nd respondent had produced a xerox copy of a postal receipt and acknowledgment. The High Court by its order dated 5th August, 1991 remanded the matter to the Land Tribunal to consider whether in fact the 2nd respondent had filed an application in Form No.7, and if it was found that he had made such an application, then to consider it on merits in accordance with law. The said order was challenged before the Division Bench of the High Court as well as by way of Special Leave Petition before this Court unsuccessfully.

5. After a detailed enquiry, by the order dated 2nd June, 1997, the Land Tribunal found, on evidence produced before it, that the 2nd respondent had not proved that he had in fact sent an application to the Land Tribunal in Form No.7.

Before the Land Tribunal, the 2nd respondent produced xerox copy of the Form No.7 on 27th November, 1993, claiming to be the one sent by him by post.

Although, the Land Tribunal came to the conclusion that there was no proof of filing of Form No.7 by the 2nd respondent, unanimously it decided to admit the copy produced by the 2nd respondent on 27th November, 1993 for enquiry under Section 48-A of the Land Reforms Act and, upon evidence, held that the lands were in self-cultivation of the appellants and the 2nd respondent was not a tenant of the lands in question as on 1st March, 1974 or immediately prior thereto and as such rejected his application on merits.

6. The 2nd respondent being aggrieved filed a writ petition being W.P. No.15722/1997 challenging the correctness of the order of the Land Tribunal. Though the learned Single Judge noticed that the Land Tribunal had admitted the xerox copy of the Form No.7 produced by the 2nd respondent on 27th November, 1993 and had conducted an enquiry thereon under Section 48-A of the Land Reforms Act, learned Single Judge,

by the judgment dated 3rd June, 2005 remitted the matter to the Tribunal to find out whether the application existed in the records and whether in fact the 2nd respondent had filed an application in Form No.7.

7. The appellants thereafter filed a review petition before the learned Single Judge bringing to the notice of the learned Single Judge that the copy of the application found in records was the one which the second respondent had filed on 27th November, 1993 and that the remand was unnecessary as the application was admitted and enquiry was conducted thereon. However, learned Single Judge did not appreciate the grounds for the review and dismissed the review petition on 1st July, 2005.

8. The appellants being not happy preferred the writ appeal in question before the Division Bench which dismissed the same by the impugned judgment on 2nd June, 2006.

9. Notices were issued to respondents. The legal representatives of the 2nd respondent who are party respondents appeared.

10. Learned counsel for the appellants submitted that the Land Tribunal having accepted the filing of the Form No.7 by the 2nd respondent, there is no question of remitting the matter again to the Tribunal to find out whether the Form No.7 is available on records and whether the Form No.7 was filed by the 2nd respondent.

11. Learned counsel for the respondents submitted that the 2nd respondent had produced the copy of the Form No.7 and made it available on records to the Land Tribunal and the case was rightly remanded to make a detailed enquiry under Section 48-A of the Land Reforms Act. However, such submission cannot be accepted in view of the finding already recorded by the Land Tribunal.

12. On perusal of order dated 2nd y

the Land Tribunal, we find that the Land Tribunal admitted Form No.7 produced by the 2nd respondent in view of the High Court's direction dated 5th August, 1991 passed in W.P.No.4165/1988 and on enquiry made under Section 48-A, held as follows:

".....In spite of this, in view of the directions dated 5-8-91 in W.P. No.4165, the Form No.7 produced by the applicant is admitted and enquiry upon the same is taken up by unanimous opinion of the Land Tribunal.

Applicant has not produced any document to prove that he was in possession and cultivation of the suit lands on 1-3-1974 or immediately prior thereto. Except his own statement, the applicant has not produced any evidence to establish that he held the lands on crop share basis. In this respect, he has not produced any acceptable evidence. But on the other hand, the opponents have produced pahani records for the years prior to 1974 as well as for subsequent years, in which nowhere the name of the applicant is appearing in the cultivator's column. It is apparent that all the lands were in self cultivation.

Apart from this, the opponents have produced tax paid receipts in respect of the suit lands. The opponents have also given a declaration regarding their holding under Section 86 of the Karnataka Land Reforms Act, claiming it to be under self cultivation and vide order NO.KLR:D:SR:752 dated 25-3-82, this Land Tribunal has accepted the declaration holding that he is not in possession of excess lands. In the said order there is no mention about the said lands being subject to tenancy. For all these reasons, the following order is passed by unanimous opinion of this Land Tribunal.

ORDER

It is decided unanimously that the applicant was not in occupation and cultivation of the suit lands as a tenant on 1-3-1974 or immediately prior thereto.

This order is pronounced and read out in open Court on 2-6-97.

Sd/-
Land Tribunal, Dharwad

Members:

1. Sd/-

2. Sd/-

3. Sd/-."

13. Thus, it is clear that the Tribunal admitted Form No.7 produced by the 2nd respondent and on an enquiry gave definite finding that the applicant-2nd respondent was not in occupation or cultivation of the suit land as a tenant as on 1st March, 1974 or prior thereto. In view of such finding of the Tribunal it was not open for the learned Single Judge to remand the matter again to the Tribunal to enquire whether Form No.7 is on record or Form No.7 was produced by the 2nd respondent which in fact rendered the order dated 2nd June, 1997 passed by the Tribunal ineffective for no reason. The Division Bench of the High Court also failed to notice the above-said fact and thereby erred in affirming the order passed by the learned Single Judge.

14. For the reasons aforesaid, we set aside the impugned order dated 2nd June, 2006 passed by the Division Bench in W.A.No.3836/2005(LR) and order dated 3rd June, 2005 passed by the learned Single Judge in W.P. No.15722/1997, order dated 2nd June, 1997 passed by the Land Tribunal, Dharwad is restored. The appeal is allowed. There shall be no order as to costs.

K.K.T. .

PUNJAB STATE POWER CORPORATION LTD. PATIALA & ORS.

v.

ATMA SINGH GREWAL

(Special Leave Petition (Civil) No. 29589 of 2009)

SEPTEMBER 17, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

GOVERNMENT LITIGATION:

Frivous and vexatious litigation by State Power Corporation – Division Bench of High Court imposing cost on appellant-Corporation to be recovered from the Officer who authorised filing of appeal – Held: Since appeal preferred by Corporation was totally frivolous, High Court has rightly awarded the cost – In spite of Government's own policy and reprimand from Supreme Court on numerous occasions, there is no significant positive effect on various Government officials who continue to take decision to file frivolous and vexatious appeals – It imposes unnecessary burden on courts—The opposite party which has succeeded in the court below is also made to incur avoidable expenditure – Further, it causes delay in allowing the successful litigant to reap the fruits of the judgment rendered by the court below — Imposition of cost on State/PSUs alone is not going to make much difference, as officers taking such irresponsible decisions to file appeals are not personally affected because cost, if imposed, comes from government's coffers – Time has, therefore, come to take next step, viz., recovery of cost from such officers who take such frivolous decisions of filing appeals even after knowing well that these are totally vexatious and uncalled for appeals – It is clarified that such an order of recovery of cost from officer concerned be passed only in those cases where appeal is found to be ex-facie

frivolous and the decision to file appeal is also found to be palpably irrational and uncalled for — Punjab Civil Service Rules — r. 2.2(B), second proviso – Costs — National Litigation Policy, 2010 of Government of India.

ADMINISTRATIVE LAW:

Frivolous litigation — By State/its instrumentality – Cost to be recovered from Officer(s) who authorise filing of such litigation.

Gurgaon Gramin Bank vs. Khazani **2012 (8) SCR 225 = (2012) 8 SCC 781;** *Mundrika Prasad Singh vs. State of Bihar* **1980 (1) SCR 759 = 1979 (4) SCC 701;** *Urban Improvement Trust, Bikaner v. Mohan Lal* **2009 (15) SCR 550 = 2010 (1) SCC 512;** *Rameshwari Devi and Ors. vs. Nirmala Devi and Ors.* **2011 (8) SCR 992 = (2011) 8 SCC 249 – referred to.**

126th Report (1988) of the Law Commission of India; 54th Report (1973) of Law Commission of India; and National Litigation Policy, 2010 formulated by Central Government

Case Law Reference:

2012 (8) SCR 225	**referred to**	**para 7**
1980 (1) SCR 759	**referred to**	**Para 8**
2009 (15) SCR 550	**referred to**	**para 13**
2011 (8) SCR 992	**referred to**	**para 15**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 29589 of 2009.

From the Judgment & Order dated 20.08.2009 of the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 752 of 2009 (O&M).

Harinder Mohan Singh for the Petitioners.

A. Venayagam Balan for the Respondent.

The Order of the Court was delivered by

ORDER

1. Petitioner No. 1 is the Punjab State Electricity Board (PSEB); Petitioner No. 2 is the Chief Engineer, HRD-cum-Inquiry Officer and Petitioner No. 3 is the Senior Executive Engineer working in PSEB. Respondent was the employee of PSEB who retired from service, with effect from 30.4.2004. He had given the notice on 27.2.2004 for voluntary retirement which was accepted. As a result, the respondent stood voluntary retired from 30.4.2004. However, almost 4 years after his retirement i.e. on 7.1.2008, the respondent was served with the charge sheet levelling certain allegations against him, allegedly committed between 15.5.2002 to 3.12.2002. These charges which were for the period May 2002 to December 2002 were obviously of a period much earlier than 4 years before the serving of the charge sheet dated 7.1.2008 and much after his retirement when he had ceased to be the employee of PSEB.

2. The Respondent filed the Writ Petition in the High Court seeking quashing of the said charge sheet on the ground that it was barred in view of Rule 2.2.(B) of the Punjab Civil Service Rules 2 reserves right with the Government to withhold or withdraw a pension or a part of it under certain circumstances viz. when in judicial proceedings or departmental proceedings, such an employee is found to have committed grave misconduct or negligence. It also provides for recovery of peculiar loss, if caused. However, second proviso to the aforesaid provision stipulates the time limit within which the departmental inquiry can be instituted, in respect of an ex-employee if it was not stated while such a Government officer was in service. The precise language of second proviso is as follows:-

"Such departmental proceedings, if not instituted while the

officer was in service whether before his retirement or during his re-employment:-

(i) shall not be instituted save with the sanction of the Government;

(ii) shall not be in respect of any event which took place more than four years before such institution; and if he has retired, the event should not be more than 4 years old.

(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service.

3. In the present case since the changes were of the year 2002 and charge sheet served in the year 2008, it was manifest that the alleged event took place much more than 4 years before the serving of charge sheet and after his retirement. In this ground the learned Single Judge quashed the said chargesheet dated 7.1.2008. The petitioners chose to file appeal before the Division Bench which has also been dismissed by the Division Bench vide impugned judgment dated 20.8.2009.

4. After hearing the Counsel for the parties we are of the opinion that in view of aforesaid admitted facts, second proviso of Rule 2 states at the face of the petitioner and no fault can be found in the judgment of the High Court.

5. Virtually accepting the aforesaid position the learned Counsel for the petitioner made a fervent plea the cost of Rs. 10,000/- which the Division Bench of the High Court has imposed upon the PSEB, with direction that PSEB shall recover the same from the officer who authorised the filing of the said appeal. He submitted that in any case such a direction for recovery of the amount from the concerned officer should be done away with.

6. The reason given by the High Court while imposing the cost is as under:

> "This is yet another instance of a frivolous appeal filed at the hands of a statutory body. There was absolutely no merit and no cause to file the instant appeal. Despite the same, the Punjab State Electricity Board, chose to prefer the instant appeal without application of mind. In this case, the Punjab State Electricity Board has not only incurred unnecessary expenses, but also wasted precious Court time.
>
> In view of the above, we are of the view, that the instant appeal deserves to be dismissed with costs. The instant appeal is, accordingly, dismissed with costs quantified at Rs. 10,000/-. the aforesaid costs shall not be borne by the Electricity Board, but shall be recovered from the officer who authorized the filing of the instant appeal. The aforesaid costs shall, in the first instance, be deposited by the appellant with the Legal Services Authority, Punjab, within one month from today. The recovery thereof shall be made from the concerned officer within a further period of two months.
>
> In case, the aforesaid recovery is made from an officer who feels that the actual responsibility for filing the instant appeal rested on the shoulders of some other officer, it would be open to such officer to approach this Court by moving a civil miscellaneous application (in the instant Letters Patent Appeal) so as to require this Court to determine the accountability of the officer concerned".

Since the provisions of the aforesaid statutory rule are crystal clear, we are in agreement with the High Court that the appeal preferred by the petitioners was totally frivolous. Therefore, the High Court has rightly awarded the cost while dismissing such a merit less appeal. The only question is of recovery of this cost from the officer who authorised the filing of the said appeal.

7. Here we may note that the Courts are burdened with unnecessary litigation primarily because of the reason that the Government or PSUs etc. decide to file the appeals even when there is absolutely no merit therein. Commenting on such a tendency to file frivolous appeals, this Court in a recent judgment in a case of *Gurgaon Gramin Bank v. Khazani;* (2012) 8 SCC 781, speaking through one of us (K.S. Radhakrishnan, J.) expressed its discomfiture in the following words:

> "The number of litigations in our country is on the rise, for small and trivial matters, people and sometimes the Central and the State Governments and their instrumentalities like banks, nationalised or private, come to Courts may be due to ego clash or to save the officers skin. The judicial system is overburdened which naturally causes delay in adjudication of disputes. Mediation Centres opened in various parts of our country have, to some extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than on occasion, this Court has reminded the Central Government, the State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. At times, some give and take attitude should be adopted or both will sink. Unless serious questions of law of general importance arise for consideration or a question which affects a large number of persons or the stakes are very high, the courts jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of the Supreme Court of India and this case falls in that category".

8. It is not the first time that the Court had to express its anguish. We would like to observe that the mind set of the Government agencies/ undertakings [illegible] y appeals was taken note of by the Law [illegible] a

way back in 1973, in its 54th report. Taking cognizance of the aforesaid report of the Law Commission as well as National Litigation Policy for the States which was evolved at an All India Law Ministers Conference in the year 1972, this Court had to emphasize that there should not be unnecessary litigation or appeals. It was so done in the case of *Mundrika Prasad Singh v. State of Bihar;* 1979 (4) SCC 701. We would also like to reproduce the following words of wisdom expressed by Justice V.R. Krishna Iyer, who spoke for the Bench, in *Dilbagh Rai Jarry v. Union of India and Ors.;* 1974 (3) SCC 554.

> "But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf".

9. In its 126th Report (1988), the Law Commission of India adversely commented upon the reckless manner in which appeals are filed routinely. We quote hereunder the relevant passage therefrom:

> "2.5. The litigation is thus sometimes engendered by failing to perform duty as if discharging a trust. Power inheres a kind of trust. The State enjoys the power to deal with public property. That power has to be discharged like a trust keeping in view the interests of the *cesti que* trust. Failure on this front has been more often commented upon by the court which, if it was taken in the spirit in which it was made, would have long back energised the Government and the public sector to draw up its litigation policy. **When entirely frivolous litigation reaches the doorsteps of the Supreme Court, one feels exasperated by the inaction and the policy to do nothingness evidenced by blindly following litigation from court to court.** Dismissing a Special Leave Petition by the State of Punjab, the Court observed that the deserved defeat of the State in the courts below demonstrates the gross indifference of the administration towards litigative diligence. The court then suggested effective remedial measures. It may be extracted:
>
> > We would like to emphasize that Government must be made accountable by parliamentary Social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under section 80CPC is intended to alert the state to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now section 80 has become a ritual because the administration is often unresponsive and hardly lives up to the parliament's expectation in continuing section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for setting the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of

in a fighting mood. **Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in court. We are constrained to make these observations because much of the litigation in which governments are involved adds to the case load accumulation in courts for which there is public criticism.** We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in courts of cases which deserve to be attended to.

Nearly a decade has passed since the observations but not a leaf has turned, not a step has been taken, and the Law Commission is asked to deal with the problem.

2.6. **A little care, a touch of humanism, a dossier of constitutional philosophy and awareness of futility of public litigation would considerably improve the situation which today is distressing.** More often it is found that utterly unsustainable contentions are taken on behalf of Government and public sector undertakings."

10. Even when Courts have, time and again, lamented about the frivolous appeals filed by the Government authorities, it has no effect on the bureaucratic psyche. It is not that there is no realisation at the level of policy makers to curtail unwanted Government litigation and there are deliberations in this behalf from time to time. Few years ago only, the Central Government formulated National Litigation Policy, 2010 with the "vision/ mission" to transform the Government into an efficient and responsible litigant. This policy formulated by the Central Government is based on the recognition that it was its primary responsibility to protect the rights of citizens, and to respect their fundamental rights and in the process it should become "responsible litigant". The policy even defines the expression 'responsible litigant' as under:-

"Responsible litigant" means

- That litigation will not be resorted to for the sake of litigating.
- That false pleas and technical points will not be taken and shall be discouraged.
- Ensuring that the correct facts and all relevant documents will be placed before the Court.
- That nothing will be suppressed from the Court and there will not attempt to mislead any court or tribunal.

That Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the Court decide", must be eschewed and condemned.

The purpose underlying this policy is also to reduce government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the national legal mission to reduce average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles incorporated int eh national mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary government cases.

Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority".

11. This policy recognises the fact that its success will depend upon its strict implementation. Pertinently there is even a provision of accountability on the part of the officers who have to take requisite steps in this behalf.

12. The policy also contains the provision for filing of appeals indicating as to under what circumstances appeal should be filed. In so far as service matters are concerned, this provision lays down that further proceedings will not be filed in service matters merely because the order of the Administrative Tribunal affects a number of employees. Also, appeals will not be filed to espouse the cause of one section of employees against another.

13. The aforesaid litigation policy was seen as a silver living to club unnecessary and uncalled for litigation by this Court in the matter of *Urban Improvement Trust, Bikaner v. Mohan Lal;* 2010 (1) SCC 512 in the following manner:-

> "The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the Government and for filing appeals and revisions against adverse decisions, thereby eliminating unnecessary litigation. But it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and th4e statutory authorities, who have more litigations than the Central Government, should also make genuine efforts to eliminate unnecessary litigations. Vexatious and unnecessary litigations have been clogging the wheels of justice for too long, making it difficult for courts and tribunals to provide easy and speedy access to justice to bona fide and needy litigants".

14. Alas, inspite of the Government's own policy and reprimand from this Court, on numerous occasions, there is no significant positive effect on various Government officials who continue to take decision to file frivolous and vexatious appeals. It imposes unnecessary burden on the Courts. The opposite party which has succeeded in the Court below is also made to incur avoidable expenditure. Further, it causes delay in allowing the successful litigant to reap the fruits of the judgment rendered by the Court below.

15. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See *Rameshwari Devi and Ors. v. Nirmala Devi and Ors*.; (2011) 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We don't think so. We are of the firm opinion that imposition of cost on the State/ PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals. We clarify that such an order of recovery of cost from the concerned officer be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for.

16. In a case like the present, where the concerned officer took the decision to file the appeal, direction of the High Court to recover the cost from him cannot be faulted with. Sense of responsibility would drawn on such officers only when they are made to pay the costs from their pockets, instead of burdening the exchequer.

17. We are, therefore, not inclined to recall the aforesaid direction of the High Court to recover the cost from the officer concerned.

18. Dismissed with further cost of Rs. 10,000/-.

R.P. SLP dismissed.

EDUCARE CHARITABLE TRUST
v.
UNION OF INDIA & ANR.
(Special Leave Petition (Civil) No. 22910 of 2013)

SEPTEMBER 17, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Educational Institutions – Dental College – Increase of admission capacity for academic year, 2013-14 – Applicant did not fulfill the mandatory criteria of its being recognized for its existing admission capacity – After the cut-off date for sending the application to Dental Council of India (DCI), Central Government rejected the application on the ground of non-fulfillment of eligibility criteria – Writ petition challenging the rejection – On the ground that delay in sending the order recognizing the college for its existing capacity was on the part of DCI, and hence, Central Government in exercise of its discretionary powers provided under the Regulations, should have extended the cut-off date and forwarded the application to DCI for increase of its admission capacity – Petition dismissed – On appeal, held: There was no delay in sending the recognition order (as regards existing capacity of the college), by DCI to Central Government – The cut-off date for sending the application to DCI could not have been extended by Central Government – It is not possible to change the time schedule – Sanctity to time schedule has to be attached – Cut-off date for starting professional courses, particularly medical courses should not be tinkered with – Dental Council of India (Establishment of New Dental Colleges, Opening of New Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006 – Regulations 4, 18, 19 and 20.

Petitioner-Trust submitted a scheme to the Government of India for increasing the admission capacity of dental college run by it, from 50 to 100, for the academic year 2013-14. Central Government could not process the same as the petitioner had yet to get the recognition of the BDS course with its existing capacity, which was a pre-condition for forwarding the application, and asked the petitioner to fulfill the condition. Since the petitioner failed to fulfill the condition upto the last date, Central Government dismissed the scheme.

Petitioner filed writ petition challenging the rejection of the scheme. The plea of the petitioner was that there was delay on the part of DCI in forwarding the order of recognition (regarding the existing capacity) as the recognition was accorded much prior to the last date; that right of petitioner to seek enhancement, could not be defeated due to delay on the part of DCI; and that as per Note (2) to the schedule appended to DCI ((Establishment of New Dental Colleges, Opening of New Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006, last date for forwarding the application, in view of the facts of this case, should have been relaxed. High Court dismissed the writ petition. Hence the present Special Leave Petition.

Dismissing the petition, the Court

HELD: 1. Regulation 18 of the DCI (Establishment of New Dental Colleges, Opening of New Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006 is made subject to Regulation 19. Regulation 19 states that a dental college "shall qualify to apply under regulation 18" if the conditions stipulated in Regulation 19 are fulfilled. It clearly follows that a dental college which does not satisfy the conditions laid down in Regulation 19 is not

qualified to make an application under Regulation 18. Clause (a) of Regulation 19 lays down a specific condition, namely existing admission capacity should be recognized. On the date of application, the petitioner did not have this recognition and thus, it did not fulfill the stipulations contained in Clause (a) of Regulation 19. In the absence thereof, it was not qualified to make the application. It, thus, follow that the application was incomplete. As per regulation 20(2), incomplete application or scheme can be returned by the Central Government to the applicant. [Paras 10 and 11] [176-F-H; 177-A-B]

2. There is no delay in sending its approval to the Central Government. It has been duly explained by the DCI that there are about 40 Members of the Governing Council spread throughout the country. The Governing Council meets twice a year and in every meeting the business transacted by the Governing Council is huge. After the meeting, minutes are to be prepared in respect of all the items in the agenda. By the time minutes are prepared, the Members go back to their respective places of residence. Getting signatures of the Members of the Council is, therefore, a time consuming process. 40 days time is earmarked for sending the recommendation to the Central Government, after it is approved by the Governing Council. In the instant case, the Governing Council did its job within the stipulated time. [Para 12] [177-D-G]

3. The High Court did not commit any error in holding that in the given circumstances mandamus could not be issued to the Central Government to exercise its discretionary powers in a particular manner to modify the time-schedule. After an application is forwarded to the DCI, DCI is supposed to evaluate the scheme for increasing admission capacity as per the procedure laid

down in Regulation 21 which lays down that the DCI is required to ascertain the desirability and *prima facie* feasibility for increasing the admission capacity at the Dental College. It is also required to satisfy itself about the capability of the Dental College to provide necessary resources and infrastructure for the scheme. DCI is even required to conduct physical inspection of the college before forming an opinion as to whether the applicant satisfies the condition of -feasibility of increasing the admission capacity. This process, naturally, is time consuming. As per the time-schedule time upto 15th June is given for the DCI to make recommendation to the Central Government. Thereafter, Central Government is required to go into the said recommendation and if it is found that applicant-college deserves the permission to increase the admission capacity, Letter of Permission is to be issued by 15th July. This time frame is to ensure timely admissions of students. In view of this position, it is not possible to accede to the request of the petitioner to change the time-schedule when the last date for admitting the students, which was July 15, 2013, expired long ago. If the Central Government forwards the application to the DCI at this juncture, DCI shall hardly have any time to look into the feasibility of the scheme as per the requirements contained in Regulation 21. In the schedule annexed to the Regulations 2006, six to eight months time is given to the DCI for this purpose. Sanctity to the time-schedule has to be attached. The cut off date for starting the professional courses, particularly medical courses, is important and such deadline should not be tinkered with. [Paras 14 and 15] [179-E-H; 180-A-F]

Priya Gupta vs. State of Chhattisgarh **(2012) 7 SCC 433: 2012 (5) SCR 768;** *Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P.* **(2013) 2 SCC 617: 2012 (13) SCR 810 – relied on.**

Case Law Reference:

2012 (5) SCR 768	**relied on**	**Para 15**
2012 (13) SCR 810	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 22910 of 2013.

From the Judgment & Order dated 02.07.2013 of the High Court of Kerala at Ernakulam in W.P. (Civil) No. 13586 of 2013 (W).

P.S. Patwalia, Geeta Luthra, E.M.S. Anam, Naina Dubey, Gaurav Sharma, Sumeet Bhatia for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. In this petition, invoking the provisions of Article 136 of the Constitution of India, the petitioner seeks leave to appeal against the judgment dated 2nd July 2013 passed by the High Court of Kerala. Writ Petition of the petitioner has been dismissed by the aforesaid judgment.

2. The petitioner, which is a Charitable Trust working in the field of education, has established a Dental College which was established few years ago. During the Academic Year 2007-08, course in Bachelor of Dental Surgery (BDS) was started by it with an annual intake of 50 students. This was done after taking due -permission from the Central Government under Section 10-A of the Dentists Act, 1948 on the recommendation of Dental Council of India (DCI). The Government of Kerala has issued requisite Essentiality Certificate. The college run by the petitioner is affiliated with University of Calicut as that University had granted necessary Consent of Affiliation. The Dental College also stands affiliated to the Kerala University of Health Sciences, established by the Kerala University of Health Science Act, 2010.

3. In the year 2012, the petitioner wanted to expand the

size of BDS, being desirous of increasing the capacity from 50 to 100 seats. Intention was to do so with effect from current Academic Year i.e. 2013-14. The scheme was rejected by the Government vide order dated 31.12.2012 on the ground that it did not fulfil the eligibility criteria for such an increase. Against this order of refusal of the Central Government, the petitioner had approached the High Court of Kerala seeking quashing of the said order and for issuance of Writ of Mandamus commanding the Central Government to forward the application of the petitioner for intake of students, to the DCI for technical scrutiny and further to direct the DCI to make appropriate recommendation to the Central Government for issuance of letter of permission during the Academic Year 2013-14 itself. As pointed out in the beginning of this order, the said Writ Petition has been dismissed by the High Court.

4. In order to appreciate the controversy and the grievance of the petitioner, it would be necessary to traverse few facts.

5. On 8th August 2012, the petitioner had submitted the scheme to the Government of India for increasing the admission capacity. This request of the petitioner was considered but the Central Government could not process the same as at the time of submission of the application, the petitioner had yet to get the recognition of the BDS course with 50 seats i.e. the existing capacity, which is a pre-condition for forwarding the application. The Central Government had issued various letters, last of which was dated 19th December 2012, asking the petitioner to obtain the recognition. Last date for forwarding the application by the Central Government to DCI for approval of such scheme was 31.12.2012. Since the petitioner could not bring the said "Essential Documents" even upto the last date i.e. 31-12-2012, the Central Government returned the application with liberty to the petitioner to apply afresh in the next Academic Year i.e. 2014-15.

6. As per the petitioner, its college fulfil[illegible]s

required for increase of intake of students from 50 to 100 seats. In so far as matter of recognition is concerned, the petitioner squarely blames the DCI for dragging its feet and, therefore, it is pleaded that the petitioner could not be made to suffer for no fault on its part. In this behalf, it was pointed out that the Executive Committee of the DCI in its meeting held on 26.11.12 had duly recommended to accord recognition. -- Recommendation of the Executive Committee was considered by the General Council of the DCI which met on 27/28.11.2012. This Governing Council also approved the proposal. Nothing further was to be done by the DCI but to send letter of recommendation to the Central Government. Had it been done immediately or within few days thereafter, the petitioner could have got the recognition of the BDS course much before 31st December 2012, which was the last date. The grudge of the petitioner is tht the DCI slept over the matter and sent the communication regarding recognition of the petitioner –college to the Central Government only on 7th January 2013 thereby causing the last date to expire. The Central Government had notified the recognition on 23rd January 2013 but with effect from July 2012. In this conspectus, it was the submission of the petitioner that the right of the petitioner to seek enhancement of seats from 50 to 100 could not be defeated by the respondents when the delay was at their end. It was pleaded that though as per the time frame set out in the Schedule, last date for forwarding the application was 31st December, 2012, Note (2) appended beneath the said Schedule enables the Central Government to modify the same in respect of any class or category of applicants. In the present case, there was valid reason to exercise such discretion but it was not done. For this reason, another prayer was made in the Writ Petition to the effect that the Central Government be directed to -modify the time schedule for the petitioner by invoking the power under Note (2) to the Regulations.

7. The aforesaid plea of the petitioner did not cut any ice with the High Court. It held that as per Regulation 18 of the DCI

(Establishment of New Dental Colleges, Opening of New Higher Course of Study or Training and Increase of Admission Capacity in Dental Colleges) Regulations, 2006, the applicant has to submit application in Form 3 when it wants to increase of seats. Qualifying criteria is laid down in Regulation 19 and as per Clause (a) thereof, it is mandatory that the college is recognized with the existing admission capacity. This condition was not fulfilled by the petitioner and it was not possible for the Central Government to forward the application to the DCI for technical scrutiny. In these circumstances, if the Central Government did not exercise its discretion to modify the time schedule, in terms of Note (2) of the Regulations, direction could not be issued to the Central Government to exercise that power in a particular manner as it was purely within the discretion of the Central Government and Central Government refused to exercise the discretion for valid reason.

8. Before us as well, the case was argued on the same lines which was taken before the High Court. It was submitted by Mr. Patwalia, the learned senior counsel appearing for the petitioner that in the absence of any fault of the petitioner and when the petitioner has taken all steps well within time, it was a fit case for -exercising discretion by the Central Government and non-exercise of such a discretion was clearly arbitrary. Mr. Patwalia emphasized and reemphasized, with lots of vehemence that when the Governing Council had approved the case of recognition of the petitioner-college in respect of existing seats on 27/28 November 2012, there was no reason for it to delay forwarding of this proposal to the Central Government. Had it been done immediately thereafter, the Central Government would have granted the recognition much before 31st December, 2012 thereby removing the only handicap which was coming in the way of the petitioner and its scheme containing proposal of increase of seats from 5o to 100 could have been forwarded to the DCI well in time. He, thus, made a passionate plea that it was a fit case for exercise

of power to extend the time Schedule under Note (2) of the Regulations, 2006.

9. We are not persuaded by these submissions of the petitioner. Regulations, 2006 are framed by the DCI, with the previous approval of the Central Government, in exercise of powers conferred by Section 10A read with Section 20 of the Dentists Act, 1948. These Regulations, thus, have statutory force. These Regulations deal with the procedure for obtaining permission of the Central Government to establish new Dental College, for starting new or higher courses or training in a Dental College as well as for increase in admission capacity in a Dental College. Regulation 18 deals with "Permission of the Central Government -to increase admission capacity in the dental college" which is the subject matter of the present proceedings. Under Regulation 18, the applicant, a Dental College desirous to increase the admission capacity has to make requisite application in Form 3. Regulation 19 lays down the qualifying criteria and the conditions which are to be necessarily fulfilled to enable that college to apply under Regulation 18. As per Regulation 20, application is to be submitted in Form 3 and the application fee with the particulars mentioned in the said Regulation. Relevant portions of Regulations 18,19 and 20, with which we are concerned, are reproduced herein below:

"18. Application for increasing the admission capacity:-

For increasing the admission capacity (number of seats) at the under-graduate or post-graduate level (degree or diploma), a dental college shall, subject to regulation 19, submit to the Central Government the scheme in this regard in Form 3, as annexed, for obtaining its permission.

19. Qualifying Criteria:-

A dental college shall qualify to apply under regulation 18, if the following conditions are fulfilled:

(a) the dental qualification granted to the students of the college and in respect of which the capacity is sought to be increased is recognized with the existing admission capacity;

(b) xxxxxxxxxxxxxxxxxx

(c) xxxxxxxxxxxxxxxxxxx

(d)xxxxxxxxxxxxxxxxxxx

(e)xxxxxxxxxxxxxxxxxx

20. Submission of the application in Form 3 and the application fee:-

(1) xxxxxxxxxxxxxxxxxx

(2) Incomplete application or scheme will not be accepted and will be returned by the Central Government to the applicant along with enclosures and processing fee.

(3)xxxxxxxxxxxxxxxx"

10. It is clear from the above that Regulation 18 is made subject to Regulation 19. Regulation 19 states, in no uncertain terms, that a dental college "shall qualify to apply under regulation 18" if the conditions stipulated in Regulation 19 are fulfilled. It clearly follows that a dental college which does not satisfy the conditions laid down in Regulation 19 is not qualified to make an application under Regulation 18. Clause (a) of Regulation 19 lays down a specific condition, namely existing admission capacity should be recognized

11. Admittedly, as on the date of application, the petitioner did not have this recognition and thus, it did not fulfill the stipulations contained in Clause (a) of e

absence thereof, it was not qualified to make the -application. It, thus, clearly follow that on the date of application i.e. 8th August 2012, the application was incomplete. As per regulation 20(2) incomplete application or scheme can be returned by the Central Government to the applicant,

12. No doubt, instead of returning the application, the Central Government gave chances to the petitioner to obtain the recognition from DCI and furnish the same to it. Mr. Patwalia may be correct, to some extent, that had such a recommendation been forwarded by the DCI before December 2012, probably Central Government would have acted thereupon. It is also correct that the Governing Council in its meeting held on 27/28 November 2012 approved the case of the petitioner and sent the same to the Central Government only on 7.1.2013. However, merely from these facts, the blame cannot be foisted upon the DCI. It has been duly explained by the DCI that there are about 40 Members of the Governing Council spread throughout the country. The Governing Council meets twice a year and in every meeting the business transacted by the Governing Council is huge. After the meeting, minutes are to be prepared in respect of all the items in the agenda. By the time minutes are prepared, the Members go back to their respective places of residence. Getting signatures of the Members of the Council is, therefore, a time consuming process. It was pointed out also by the learned counsel for the DCI, which could not be disputed by the petitioner, that 40 days time is earmarked for sending the recommendation to the Central -Government, after it is approved by the Governing Council. In the instant case, the Governing Council did its job within the stipulated time. Therefore, there is no delay in sending its approval to the Central Government on 7th January 2013.

13. As per Regulation 4 of Regulations, 2006, the scheme or proposal has to be submitted within the time frame as appended in the Schedule annexed to the said Regulations. The Schedule gives the following time frame:

SCHEDULE

(See Regulation 4(2))

Schedule for receipt of Applications for Establishment of New Dental Colleges, Opening of Higher Course of Study & Increase of admission capacity in the recognized Dental Colleges and processing of the applications by the Central Government and the Dental Council of India.

S.No.	Stage of Processing	Time Schedule for BDS	Time Schedule for MDS
1	2	3	4
1.	Receipt of applications by the Central Govt.	From 1st August to 30th Sep.(both days inclusive) of any year.	From 1st May to 30th June (both days inclusive)of any year
2.	Forwarding of applications by the Central Government to the Dental Council of India for technical scrutiny.	Upto 31st October	Upto 31st July
3.	Recommendations of DCI to the Central Govt.	Upto 15th June	Upto 28th February
4.	Issue of Letter of Permission by Central Government	Upto 15th July	Upto 31st March

Note (1)If any clarification is sought by the Central Government on the recommendation of the Council, the same will be furnished by the Council forthwith, if necessary after conducting inspection.

(2) The time-schedule indicated above may be modified by the Central Government, for reason to be recorded in writing, in respect of any class or category of applications."

14. As per the aforesaid time-schedule, the applicant-college desirous of increasing the admission capacity is to submit the application from 1st August to 30th September. This was done by the petitioner. However, what was found that the petitioner was not meeting the qualifying criteria as on that date because with respect to existing admission capacity, it had not been recognized so far. The applications are to be forwarded by the Central Government, once they are found to be in order and meeting the qualifying criteria laid down in Regulation 19, by 31st October in respect of BDS course. This time was extended upto 31st December in this year. After an application is forwarded to the DCI, DCI is supposed to evaluate the scheme for increasing admission capacity as per the procedure laid down in Regulation 21 which lays down that the DCI is required to ascertain the desirability and prima facie feasibility for increasing the admission capacity at the Dental College. It is also required to satisfy itself about the capability of the Dental College to provide necessary resources and infrastructure for the scheme. DCI is even required to conduct physical inspection of the college before forming an opinion as to whether the applicant satisfies the condition of -feasibility of increasing the admission capacity. This process, naturally, is time consuming. As per the time-schedule referred to above, time upto 15th June is given for the DCI to make recommendation to the Central Government. Such a report containing its recommendation is to be given in terms of Regulation 22. Thereafter, Central Government is required to go into the said recommendation and if it is found that

applicant-college deserves the permission to increase the admission capacity, Letter of Permission is to be issued by 15th July. This time frame is to ensure timely admissions of students.

15. Having regard to the above, it is not possible to accede to the request of the petitioner to change the time-schedule when the last date for admitting the students, which was July 15, 2013, expired long ago. If the Central Government forwards the application to the DCI at this juncture, DCI shall hardly have any time to look into the feasibility of the scheme as per the requirements contained in Regulation 21. We have to keep in mind that in the schedule annexed to the Regulations 2006, six to eight months time is given to the DCI for this purpose. We are, thus, of the view that the High Court did not commit any error in holding that in the given circumstances mandamus could not be issued to the Central Government to exercise its discretionary powers in a particular manner to modify the time-schedule. Sanctity to the time-schedule has to be attached. It is too late in the day, in so far as present academic session is concerned, to give any direction.- This Court has highlighted the importance of cut off date for starting the professional courses, particularly medical courses, and repeatedly impressed upon that such deadline should be tinkered with. (See: *Priya Gupta vs. State of Chhattisgarh* (2012) 7 SCC 433 and *Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P.* (2013) 2 SCC 617.

16. We, thus, do not find any error in the impugned judgment of the High Court. This petition is bereft of any merit and is accordingly dismissed.

K.K.T. SLP dismissed.

GOTHAMCHAND JAIN

v.

ARUMUGAM @ TAMILARASAN

(Civil Appeal No. 8308 of 2013)

SEPTEMBER 18, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Limitation Act, 1963 – Art. 54 – Law of limitation in the Union Territory of Pondicherry, erstwhile French Establishment – Suit for specific performance of contract filed at Pondicherry in 1991 – Suit resisted on the ground of limitation – Applicability of the provisions of the Limitation Act, 1963, vis-à-vis, Article 2262 of the French Code Civil – Held: The Limitation Act was passed by the Parliament on 5.10.1963 – Since by that time, the Union Territory of Pondicherry had become part of India, the Limitation Act automatically extended to the then Pondicherry and consequently, came into force in the Union Territory of Pondicherry on 1.1.1964 – Consequently, it is not Article 2262 of the French Code Civil that applied to the suit in question, but Art.54 of the Limitation Act – Said suit having been filed beyond the period of limitation prescribed u/Art.54 of the Limitation Act, was clearly barred by limitation – French Code Civil – Art. 2262.

The applicability of the provisions of the Indian Limitation Act, 1963, vis-à-vis, Article 2262 of the French Code Civil, said to be the governing law of limitation in the Union Territory of Pondicherry, erstwhile French Establishment, came to be considered in the instant appeals.

The appellant had filed a suit for specific performance of the contract before the Additional Subordinate Judge, Pondicherry in the year 1991. The suit was resisted, *inter*

A *alia,* on the ground of limitation. The trial Court held that Article 2262 of French Code Civil was applicable to the Union Territory – Pondicherry which provided that the limitation for original cause of action is thirty years and accordingly, the suit claim was not time barred. The High B Court, however, held that it is Article 54 of the Indian Limitation Act, 1963 that would apply in the matter of filing of the suit in Pondicherry and not Article 2262 of the French Code Civil and that consequently, the suit filed for specific performance of the contract, was not saved by C Article 54 of the Indian Limitation Act which provided that the suit be filed within three years of the date of agreement. Hence the present appeal.

Dismissing the appeal, the Court

D HELD:1.1. The *de jure* merger of the erstwhile French Territory of Pondicherry took place on 16.8.1962 following the Treaty of Cession concluded between France and India on 28.5.1956 establishing the cession of the French Establishments by France to India in full sovereignty. The E Limitation Act, 1963 was passed by the Parliament on 5.10.1963. By that time, the Union Territory of Pondicherry had become part of India. Clause 2 of Section 1 of the Limitation Act, 1963 says that it extends to the whole of India except the State of Jammu and Kashmir. Since the F Union Territory of Pondicherry having become part of India, the Limitation Act automatically extended to the then Pondicherry. The Limitation Act, 1963, consequently, came into force in the Union Territory of Pondicherry on 1.1.1964. [Paras 8, 10] [186-B-C; 187-F-H]

G 1.2. By virtue of the Limitation Act, 1963, the French Law of Limitation which had been in force till 1.1.1964, was impliedly repealed by the Limitation Act, 1963. The Pondicherry (Extension of Laws) Act, 1968, as amended, has adopted several legislations in the State of

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Pondicherry, but the Act which governs limitation is the general law of the land that is the Indian Limitation Act. Consequently, it is not Article 2262 of the French Code Civil that applies to the suit in question, but Section 54 of the Indian Limitation Act, 1963. Under such circumstances, as rightly held by the High Court, the suit filed beyond the period of limitation prescribed under Article 54 of the Indian Limitation Act, 1963 is clearly barred. [Paras 11, 14] [188-A-B; 189-H; 190-A-C]

Syndicate Bank v. Prabha D. Naik and Another **(2001) 4 SCC 713: 2001 (2) SCR 714 – relied on.**

Justiniano Augusto De. Piedade Barreto v.Antonio Vicente Da Fonseca **(1979) 3 SCC 47: 1979 (3) SCR 494 – held overruled.**

Case Law Reference:

2001 (2) SCR 714	**relied on**	**Para 5**
1979 (3) SCR 494	**held overruled**	**Para 12**

CIVIL APPELLATE JURISDICITON : Civil Appeal No. 8308 of 2013.

From the Judgment & Order dated 25.08.2011 of the High Court of Judicature at Madras in S.A. No. 383 of 2010.

R. Nedumaran, Movita for the Appellant.

V. Prabhakar, R. Chandrachud, Jyoti Prashar for the Respondent.

The Judgment of the Court was delivered by

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

2. We are, in this appeal, concerned with the applicability of the provisions of the Indian Limitation Act, 1956, vis-à-vis,

Article 2262 of the French Code Civil, said to be the governing law of limitation in the Union Territory of Pondicherry, erstwhile French Establishment.

3. Appellant herein preferred a suit, being OS No. 295 of 1991 before the Additional Subordinate Judge, Pondicherry. The suit was resisted, *inter alia,* on the ground of limitation, which was ultimately decreed in favour of the plaintiff. However, on the plea of limitation, the trial Court held as follows:

> "12. On Issue No. 3: - Article 2262 of French Code Civil shows that the limitation for original cause of action is thirty years and it is a well settled law that the said provision is applicable to the Union Territory – Pondicherry. Accordingly, suit claim is not time barred. Hence this issue is answered in the negative and in favour of the plaintiff."

4. Defendant took up the matter in appeal before the IInd Additional District Judge, Pondicherry, but the judgment/decree of the trial Court dated 25.11.1994 was confirmed. The matter was carried in appeal to the High Court by filing Second Appeal No. 383 of 2010. Following substantial questions of law were framed by the High Court:

> "1. Whether the lower appellate Court has committed an error in law in pronouncing a Judgment without considering and answering the question regarding readiness and willingness on the part of the respondent/plaintiff to perform his part of the contract?
>
> 2. Whether the lower appellate Court has committed an error in not adverting to the issue regarding limitation when the same has been specifically raised in the trial Court and also in the grounds of appeal?
>
> 3. Whether the Courts below have erroneously held that the Limitation Act, 1963 is not applicable to the case?"

5. The question of limitation was th h

was raised before the High Court. It was submitted that provisions of the Indian Limitation Act govern the law of limitation, so far as the Union Territory of Pondicherry is concerned and not Article 2262 of the French Code Civil. Placing reliance on the judgment of this Court in *Syndicate Bank v. Prabha D. Naik and Another* (2001) 4 SCC 713, which dealt with the applicability of the provisions of the Indian Limitation Act, 1963, vis-à-vis, Article 535 of the Portuguese Civil Code in the Union Territory of Goa, Daman and Diu, the High Court took the view that it is Article 54 of the Indian Limitation Act, 1963 that would apply in the matter of filing of the suit in Pondicherry and not Article 2262 of the French Code Civil. Consequently, it was found that the suit filed for specific performance of the contract, was not saved by Article 54 of the Indian Limitation Act which provided that the suit be filed within three years of the date of agreement. The appeal was accordingly allowed and the judgment and decree of the trial Court was reversed by the High Court. Hence the present appeal.

6. Shri R. Nedumaran, learned counsel appearing for the appellant, submitted that the High Court was not justified in reversing the concurrent finding arrived at by the trial Court without examining the other two substantial questions of law framed by the High Court. Learned counsel also submitted that the concurrent finding of facts ought not have been reversed by the High Court, placing reliance on the judgment of this Court in *Syndicate Bank* (supra). That was a case where this Court was examining the scope of the Limitation Act, vis-à-vis, the Portuguese Civil Code and not the provisions of the French Code Civil, which is one applicable to the present case.

7. Shri V. Prabhakar, learned counsel appearing for the respondent, on the other hand, contended that the ratio of the decision in *Syndicate Bank* (supra) would squarely apply to the facts of the present case and the provisions are *pari materia* and the High Court has rightly held that the law that is applicable is the Limitation Act, 1963 and, if that be so, the suit was

hopelessly barred. Under such circumstances, learned counsel further submitted that there was no reason for considering the other two substantial questions of law, since the suit was rightly dismissed on the ground of limitation.

Discussion

8. We may notice that *de jure* merger of the erstwhile French Territory of Pondicherry took place on 16.8.1962 following the Treaty of Cession concluded between France and India on 28.5.1956 establishing the cession of the French Establishments by France to India in full sovereignty. The Parliament enacted the Pondicherry (Administration) Act, 1962 (Act 49 of 1962) to provide for the administration of Pondicherry and for matters connected therewith. The said Act came into force on 15.12.1962. Section 4 of the Pondicherry (Administration) Act, 1962 deals with continuance of existing laws and their adaptation, which reads as under:

> "**4.Continuance of existing laws and their adaptation.-** (1) All laws in force immediately before the appointed day in the former French Establishments or any part thereof shall continue to be in force in Pondicherry until amended or repealed by a competent Legislature or other competent authority:
>
> Provided that references in any such law to the President or Government of the French Republic shall be construed as references to the Central Government, references to the Governor of the French Establishments in India, to the Commissioner of the Republic for the French Establishments in India, to the Chief Commissioner for the French Establishments, to the Chief Commissioner of the State of Pondicherry or to the Chief Commissioner, Pondicherry shall be construed as references to the Administrator of Pondicherry and references to the State of Pondicherry shall be construed as references to Pondicherry.

(2) For the purpose of facilitating the application of any such law in relation to the administration of Pondicherry and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the Central Government may, within three years from the appointed day, by order, make such adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient and thereupon every such law shall have effect subject to the adaptations and modifications so made**.**"

9. By the Fourteenth Amendment to the Constitution, which came into force on 20.12.1962, in the First Schedule to the Constitution under the heading "II. The Union Territories", after entry 8, the following entry was inserted, namely:

"9. Pondicherry : The territories which immediately before the sixteenth day of August, '96, were comprised in the French Establishments in India known as Pondicherry, Karaikal, Mahe and Yanam."

Later, by the Pondicherry (Alteration of Name) Act, 2006, instead of "Pondicherry", the word "Puducherry" was inserted with effect from 1.10.2006.

10. The Government of Union Territories Act, 1963 (Act 20 of 1963) was enacted to provide for Legislative Assemblies and Ministries for the Union Territories. It received the assent of the President on 10.5.1963. The Limitation Act, 1963 was passed by the Parliament on 5.10.1963. By that time, the Union Territory of Pondicherry had become part of India. Clause 2 of Section 1 of the Limitation Act, 1963 says that it extends to the whole of India except the State of Jammu and Kashmir. Since the Union Territory of Pondicherry having become part of India, the Limitation Act automatically extended to the then Pondicherry. The Limitation Act, 1963, consequently, came into force in the Union Territory of Pondicherry on 1.1.1964.

11. The question that we have to consider is whether, by virtue of the Limitation Act, 1963, the French Law of Limitation which had been in force till 1.1.1964, was in any manner repealed or modified by the Limitation Act, 1963. We can draw considerable sustenance from the ratio laid down by this Court in *Syndicate Bank* (supra), wherein, we have already indicated, this Court considered the interaction between the provisions of the Indian Limitation Act, 1963 vis-à-vis Article 535 of the Portuguese Civil Code. In that case, this Court held as follows:

"**20.** …….. In any event, as noticed above, the Portuguese Civil Code, in our view, could not be read to be providing a distinct and separate period of limitation for a cause of action arising under the Indian Contract Act or under the Negotiable Instruments Act since the Civil Code ought to be read as one instrument and cause of action arising therefrom ought only to be governed thereunder and not otherwise. The entire Civil Code ought to be treated as a local law or special law including the provisions pertaining to the question of limitation for enforcement of the right arising under that particular Civil Code and not dehors the same and in this respect the observations of the High Court in *Cadar Constructions* that the Portuguese Civil Code could not provide for a period of limitation for a cause of action which arose outside the provisions of that Code, stands approved. A contra approach to the issue will not only yield to an absurdity but render the law of the land wholly inappropriate. There would also be repugnancy insofar as application of the Limitation Act in various States of the country is concerned: Whereas in Goa, Daman and Diu, the period of limitation will be for a much larger period than the State of Maharashtra — the situation even conceptually cannot be sustained having due regard to the rule of law and the jurisprudential aspect of the Limitation Act."

12. This Court also held that it can[illegible]e

wake of the factum of the Limitation Act coming into existence from 1.1.1964, Article 535 of the Portuguese Civil Code cannot but be termed to be impliedly repealed and it is on this score that the decision of this Court in *Justiniano Augusto De. Piedade Barreto v. Antonio Vicente Da Fonseca* (1979) 3 SCC 47, stood overruled. This Court also held that there is one general law of limitation for the entire country, being the Act of 1963, and the Portuguese Civil law cannot be termed to be a local law or a special law applicable to the State of Goa, Daman and Diu, prescribing a different period of limitation within the meaning of Section 29(2) of the Limitation Act and the question of saving of local law under the Limitation Act, 1963 does not and cannot arise.

13. We may, in this case, refer to the Pondicherry (laws) Regulation, 1963 (No. 7 of 1963) which deals with the regulation to extend certain laws to the Union Territory of Pondicherry. Reference may also be made to the Pondicherry (Extension of Laws) Act, 1968. By virtue of those legislations, the Indian Contract Act, 1872, the Transfer of Property Act, 1882 and various other enactments were brought into force in Pondicherry. It is, therefore, to be seen as to whether specific legislations containing the subjects under which the cause of action had arisen, would govern the field or the procedural law assuming it would have its due application in replacement of the governing statute. This question was also pointedly considered by this Court in *Syndicate Bank* (supra) and the Court took the view that the cause of action of the suit, namely, money lent and advanced in terms of the agreement stands squarely governed by the Contract Act read with the Negotiable Instruments Act by reason of the admitted execution of the promissory note and, as such, cannot be said to be governed by the Portuguese Civil Code. The Court held that the Portuguese Civil Code cannot be read to be providing distinct and separate period of limitation for cause of action arising under the Indian Contract Act and other related laws.

14. Pondicherry (Extension of Laws) Act, 1968, as

amended, has adopted several such legislations in the State of Pondicherry, but the Act which governs limitation is the general law of the land that is the Indian Limitation Act. Consequently, it is not Article 2262 of the French Code Civil that applies to the suit in question, but Section 54 of the Indian Limitation Act, 1963. Under such circumstances, as rightly held by the High Court, the suit filed beyond the period of limitation prescribed under Article 54 of the Indian Limitation Act, 1963 is clearly barred. Since the suit itself is barred by the law of limitation, the other questions of law framed by the High Court were rightly not answered. The appeal, therefore, lacks in merits and accordingly dismissed.

B.B.B. Appeal dismissed.

COMMISSIONER OF INCOME TAX, GUJARAT

v.

GUJARAT FLUORO CHEMICALS

(Special Leave Petition (C) No. 11406 of 2008 etc.)

SEPTEMBER 18, 2013

[H.L. DATTU, SUDHANSU JYOTI MUKHOPADHAYA AND M.Y. EQBAL, JJ.]

*Income Tax Act, 1961 – s. 214 and 244A – Whether Revenue liable to pay interest to assessee, if aggregate of instalments of Advance Tax of TDS paid, exceeds the assessed tax – The question referred by Division Bench of Supreme Court for consideration – Doubting the correctness of judgment passed in *Sandvik Asia Ltd. case, whereby it was held that the assessee was entitled to be compensated by the Revenue for delay in payment of interest on the amount admittedly due to the assessee – Held: In Sandvik case, the Court had directed the Revenue to pay compensation for the delay in payment of statutory interest and the same was not an interest on interest – s.244A (as inserted by Act No. 4 of 1988) provides for interest on refunds under various contingencies – Thus, it is only that interest provided under the statute which may be claimed by the assessee from the Revenue and no other interest on such statutory interest – Question answered accordingly.*

Sandvik Asia Limited vs. Commissioner of Income Tax and Ors. **(2006) 2 SCC 508: 2006 (2) SCR 811 – referred to.**

Case Law Reference:

2006 (2) SCR 811 referred to Para 1

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 11406 of 2008.

From the Judgment and Order dated 03.07.2007 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 12855 of 1994.

WITH

SLP (C) Nos. 14048, 14050, 14051, 14049, 14768, 20154, 21851, 25727, 27453, 27454, 27455, 27456, 27457, 27458, 27459, 27460, 27461, 27462, 27463, 27677 of 2012 & 5730, of 2013, C.A. Nos. 6301 of 2011, 2534, 2535, 2536, 2537, 2539, 2540, 2541, 2542, 2543, 2944, 2945, 3436, 3437, 3445, 3446, 5408, 7596, 7772 of 2012, 2589, 5478 of 2013, 4630, 3825, 3826 of 2012, 7217 of 2011, 4335, 4336, 4337, 4338, 4339, 4340, 4341, 4342, 4343, 4344, 4345, 4346, 4347, 4348, 4349, 4350, 4351, 4352, 4353, 4354, 4355, 4356, 4357, 4358, 4359, 4360, 4361, 4362, 4363, 4364, 4365 & 4366 of 2012.

Rajiv Dutta, R.P. Bhatt, M.S. Syali, Arijit Prasad, Rahul Kaushik, Sadhna Sandhu, B.V. Balaram Das, Anil Katiyar, Bhargava V. Desai, Shreyas Mehrotra, Priteesh Kapoor, Ranjit Raut, Anuj Dhir, Bina Gupta, Mohit Chaudhary, Harsh Sharma, Damini Chawla, Puja Sharma, Akshat Shrivastava, Siddharth Shrivastava, Manjeet Kripal Jayashree Wad, Ashish Wad, Tamali Wad, Kanika Baweja, Niharika Bapna (for J.S. Wad & Co.), Sunil Kumar Jain, Shiv Kumar Suri, Rustom B. Hathikhanawala, G.C. Srivastava, Preeti Bhardwaj, Vijay Kumar, Vabhav Kulkarni, Kavita Jha, Ruby Singh Ahuja, Neha Gupta, Naomi Chandra, Manik Karanjawala (for Karanjawala & Co.) for the appearing parties.

The following Order of the Court was delivered

ORDER

1. Doubting the correctness or otherwise of the decision of this Court in the case of *Sandvik Asia Limited vs. Commissioner of Income Tax & Ors.,* (2006) 2 SCC 508, a bench of two learned Judges has referred the following question

of law for our consideration and authoritative pronouncement by order dated 28.08.2012:

> "The question which arises in this case is, whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax OF TDS paid exceeds the assessed tax?"

2. In the aforesaid order of reference, this Court has briefly noticed the facts and the discussion in *Sandvik case (supra)* wherein, the main issue for consideration and determination by this Court was, whether the assessee is entitled to be compensated by the Revenue for delay in payment of the amount admittedly due to the assessee. This Court has noticed *inter alia* the provisions of Section 214 of the Income Tax Act, 1961 (for short 'the Act') and in light of the same has doubted the correctness of the decision in *Sandvik case* (supra).

3. In order to answer the aforesaid issue before us, we have carefully gone through the judgment of this Court in *Sandvik case* (supra) and the order of reference. We have also considered the submissions made by the parties to the *lis.*

4. We would first throw light on the reasoning and the decision of this Court on the core issue in *Sandvik case* (supra). The only issue formulated by this Court for its consideration and decision was whether an assessee is entitled to be compensated by the Income Tax Department for the delay in paying interest on the refunded amount admittedly due to the assessee. This Court in the facts of the said case had noticed that there was delay of various periods, ranging from 12 to 17 years, in such payment by the Revenue. This Court had further referred to the several decisions which were brought to its notice and also referred to the relevant provisions of the Act which provide for refunds to be made by the Revenue when a superior forum directs refund of certain amounts to an assessee while disposing of an appeal, revision etc.

5. Since, there was an inordinate delay on the part of the Revenue in refunding the amount due to the assessee this Court had thought it fit that the assessee should be properly and adequately compensated and therefore in paragraph 51 of the judgment, the Court while compensating the assessee had directed the Revenue to pay a compensation by way of interest for two periods, namely; for the Assessment Years 1977-78, 1978-79, 1981-82, 1982-83 in a sum of Rs.40,84,906/- and interest @ 9% from 31.03.1986 to 27.03.1998 and in default, to pay the penal interest @ 15% per annum for the aforesaid period.

6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in *Sandvik case* (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in *Sandvik case* (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

8. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 01.04.1989) has inserted Section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an

assessee from the Revenue and no other interest on such statutory interest.

9. With the aforesaid clarification we now refer back all the matters before a Two Judge Bench of this Court to consider each case independently and take an appropriate decision one way or the other.

Ordered accordingly.

K.K.T. Matter referred to Two Judge Bench.

KAINI RAJAN

v.

STATE OF KERALA

(Criminal Appeal No.1467 of 2013)

SEPTEMBER 19, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Penal Code, 1860 – s.376 – Rape – Allegation that appellant raped PW2 – PW2 had previous acquaintance with appellant, he being her elder brother's friend – Conviction of appellant by Courts below – Propriety – Held: The alleged incident occurred early morning at 8.30 AM and the place of the alleged incident was on the side of a public road – If PW2 had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality – Further the FIR was lodged 10 months after the alleged incident – All these factors cast some shadow of doubt on the version of PW2 – Further, strange behaviour of the parents of PW2 viz. PW3 and PW4 – They stated that they came to know about the relations between the appellant and PW2 when they found her pregnant – PW2 had told them that appellant had agreed to marry her – They knew the appellant and his family already, however, they did not approach the appellant or his family members for marrying PW2 – Instead they straightaway went to the police station to lodge the report, that too after the birth of the child – All these factors cast a doubt on the prosecution version – Version of a rape victim commands great respect and acceptability, but, if there are some circumstances which cast some doubt in the mind of the court about the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape – Conviction and sentence imposed on the appellant accordingly set aside.

Penal Code, 1860 – s.375 – Rape – Consent – Meaning of.

According to the prosecution, in the morning when PW2 was proceeding to the Khadi Centre from her house, the accused-appellant, a friend of her brother, caught hold of her by hand and forcibly took her to a nearby compound and committed rape on her, without her consent. She tried to make a hue and cry, but was silenced by the accused by stating that he would marry her. Even after this incident, he had sexual relationship with her on more than one occasion. PW2, later, became pregnant and gave birth to a boy. Appellant not only did not kept his promise to marry her, but even disputed the paternity of the child. PW2 then lodged a complaint in Police Station.

PW2 deposed that she had previous acquaintance with the appellant, he being her brother's friend. As per her version, on few occasions there were sexual encounters between the parties, after the first alleged incident. She accepted that they were consensual and she was a willing party, though she did so on the promise of the appellant that he would marry her. In respect of these subsequent acts between the parties, the appellant was charged with the offence under Section 417 IPC. In regard to the first incident, the appellant was charged under Section 376 IPC, as the prosecution case was that it was forcible and without the consent of PW2.

The trial Court acquitted the appellant of the charge under Section 417 IPC, but convicted him under Section 376 IPC and sentenced to him undergo rigorous imprisonment for seven years. The High Court upheld the order of conviction and sentence, and therefore the instant appeal.

Allowing the appeal, the Court

HELD:1. Section 375 IPC defines the expression "rape". "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. [Para 12] [203-F; 204-A-C]

State v. Mango Ram **(2000) 7 SCC 224: 2000 (2) Suppl. SCR 626 – relied on.**

2.1. The consistent version of PW2, her mother (PW3), and her father (PW4) is that PW2 had previous acquaintance with the accused being her elder brother's friend for a period of more than two years before the date of incident. The place of the alleged incident and the time is very crucial, so for as this case is concerned. It was early morning at 8.30 AM and the place of the alleged incident was on the side of a public road. If she had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality. Further the first information report was lodged after a period of 10 months of the alleged incident. All these factors cast some shadow of doubt on the version of PW2. [Para 18] [206-C-E]

2.2. Behaviour of the parents of PW2 viz. PW3 and PW4 also appears to be strange. On their evidence they stated that they came to know about the relations between the appellant and PW2 when they found her pregnant. PW2 had told them that the appellant had agreed to marry her. They knew the appellant and his family already. However, there is not even a whisper that they approached the appellant or his family members for marrying PW2. They straightaway went to the police station to lodge the report, that too

child. All these factors cast a doubt on the prosecution version. The version of victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some doubt in the mind of the court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape. [Para 19] [206-F-H; 207-A]

Deelip Singh alias Dilip Kumar v. State of Bihar **(2005) 1 SCC 88: 2004 (5) Suppl. SCR 909;** *Ramdas and Others v. State of Maharashtra* **(2007) 2 SCC 170;** *Vijayan v. State of Kerala* **(2008) 14 SCC 763;** *K. P. Thimmappa Gowda v. State of Karnataka* **(2011) 14 SCC 475: 2011 (4) SCR 200 – referred to.**

3. The trial Court as well as the High Court committed an error in holding that the accused-appellant is guilty of the offence punishable under Section 376 IPC. In such circumstances, the conviction and sentence imposed on the appellant is set aside. [Para 20] [207-A]

Case Law Reference:

2000 (2) Suppl. SCR 626	**relied on**	**Para 12**
2004 (5) Suppl. SCR 909	**referred to**	**Para 14**
(2007) 2 SCC 170	**referred to**	**Para 15**
(2008) 14 SCC 763	**referred to**	**Para 16**
2011 (4) SCR 200	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1467 of 2013.

From the Judgment & Order dated 13.07.2009 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 1139/2003.

E.M.S. Anam for the Appellant.

K.K. Sudheesh (for Jogy Scaria) for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal has been filed by the accused who was convicted for an offence punishable under Section 376 IPC and sentenced to undergo Rigorous Imprisonment for seven years. Facts leading to this appeal are as follows:

3. PW2, the prosecutrix, was employed in a Khadi Centre, Kayoor and residing at Arakachal along with her parents, brothers and sisters. According to the prosecution, on 17.9.1997 at about 8.30 AM, when she was proceeding to the Khadi Centre from her house, the accused, a friend of her brother, caught hold of her by hand and forcibly took her to the nearby property of one Karunakaran and committed rape on her, without her consent. She tried to make a hue and cry, but was silenced by the accused by stating that he would marry her. Even after this incident, he had sexual relationship with her on more than one occasions.

4. PW2, later, became pregnant and gave birth to a boy on 24.6.1998 in the Government Hospital, Payyannur. Accused not only not kept his promise to marry her, but even disputed the paternity of the child. PW2 then lodged a complaint on 26.7.1998 before the Assistant Sub-Inspector of Police, Cheemeni Police Station and on the basis of that complaint, police registered Crime No. 64 of 1998. After investigation, the police filed a report charging offences under Sections 376 and 417 IPC against the accused. The case was tried by the Additional Sessions Judge, Kasaragod. From the side of the prosecution, PWs1 to 8 were examined and Exh. P1-P4 were marked. When questioned under Section 313 Cr.P.C., the accused denied all incriminating evidence.

5. PW2 deposed that she had previous acquaintance with the accused being his brother's friend. [illegible]e

incident, even though she made a hue and cry, she was threatened and told not to disclose the incident to anybody and also made to believe that he would marry her. PW3, mother of PW2, as well as PW4, the father, deposed that they came to know of the incident only when PW2 became pregnant and only after the delivery of the child they approached the police station to lodge a complaint.

6. The trial Court after appreciating the evidence took the view that subsequent contact of the parties cannot be taken as a ground to infer consent for the incident, which occurred in August 1997. The trial Court also noticed that the accused had spoiled the future of PW2 and disputed the paternity of the child and he cannot escape on the loophole of consent. The trial Court, however, found nothing to attract Section 417 IPC, but convicted the accused under Section 376 IPC and sentenced to him undergo rigorous imprisonment for seven years, together with a fine of Rs.25,000/- with default clause.

7. The accused took up the matter in appeal before the High Court in Criminal Appeal No. 1139 of 2003. The High Court noticed that both in the chief-examination as well as in the cross-examination PW2 has stated that the initial sexual act was without her consent, and though she tried to resist, she was threatened that she would be killed and that the accused promised that he would marry her. PW2, according to the High Court, had no reason or motive to falsify the accused and there is no reason to disbelieve version of PW2 regarding the paternity of the child. The High Court upheld the order of conviction and sentence awarded by the trial Court and dismissed the criminal appeal, against which this appeal has been filed.

8. We may indicate that from the reading of the judgments of the Trial Court as well as the High Court, it becomes clear that even as per the version of the prosecutrix, on few occasions there were sexual encounters between the parties, after the first allegd incident in 1997. She accepted that they were

consensual and she was a willing party, though she did so on the promise of the appellant that he would marry her. In respect of these subsequent acts between the parties, the appellant was charged with the offence under Section 417 IPC but exonerated by the trial Court itself. The conviction is related to the first incident which is treated as rape, believing the prosecution version that it was forcible and without the consent of the prosecutrix. Entire case is to be examined on this limited aspect.

9. Shri E.M.S. Anam, learned counsel appearing for the appellant, submitted that it is evident from the FIR as well as the evidence of PW2 that grievance of PW2 was mainly against the breaking of the promise of marriage alleged to have been made by the accused and there is absolutely no independent evidence to show that the alleged sexual act, stated to have been committed on 17.9.1997 was without her consent. Learned counsel also submitted that absence of injuries on PW2 and the accused, would rule out forcible intercourse without consent. If she had made any hue and cry, that would have been heard by the neighbours of the locality and none was examined by the prosecution. Learned counsel submitted that the very fact that no one had seen the incident or heard any hue or cry for help, it has to be presumed that no such incident had occurred, as alleged by the prosecution. Learned counsel also submitted that there is a considerable delay in lodging the FIR and also no DNA test was conducted even after the accused had disputed the paternity of the child. Learned counsel also submitted that the conviction is only based on the testimony of PW2 which cannot be relied on in the absence of any corroboration, especially in the facts and circumstances of the present case.

10. Shri K. K. Sudheesh, learned counsel appearing for the State, on the other hand, contended that there is no reason to disturb the findings recorded by the trial Court, affirmed by the High Court. Learned counsel subm[illegible]of this nature, it is difficult to get any di[illegible]e-

witnesses, especially when PW2 has stated that on the date of the incident, even though she tried to resist, she was threatened that she would be killed and that the accused had promised to marry her. Learned counsel pointed out that the evidence of PW2 that the first sexual act was committed by the accused without her consent, can be accepted safely even without any corroboration.

11. We have three crucial witnesses in this case. The first and foremost is the prosecutrix herself. We have gone through her evidence with great care. She has stated in her cross-examination that the accused used to come to her house to meet her elder brother, quite often. In the cross-examination also, she has deposed that the accused used to come to her house frequently since two to three years prior to the date of the incident and that she used to talk to the accused. PW3, mother of PW2, has also deposed in the cross-examination that the accused is her son's friend. PW4, father of PW2, has also deposed that the accused is the friend of his son. Evidence of PW2 to PW4 would, therefore, clearly indicate that the accused was having close acquaintance with the family of PW2 and he was not a stranger to her on the date of the incident.

12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of.

Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. [See *State v. Mango Ram* (2000) 7 SCC 224]

13. We are, in this case, concerned with a situation where the incident alleged to have occurred at 8.30 AM in day light and at a place near the compound of one Karunakaran, not within the four walls of a house or a building. Accused was not a stranger. The The prosecutrix had previous acquaintance with the accused or else in all probability she would have resisted forcefully, attracting passersby or people from the neighbourhood. She has stated that she was threatened and made to believe that the accused would marry her. She later became pregnant and delivered a child, and the paternity of the child is disputed by the accused. FIR was lodged after a period of 10 months from the date of incident.

14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court in *Deelip Singh alias Dilip Kumar v. State of Bihar* (2005) 1 SCC 88. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representa

intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC. This Court further held that if, on facts, it is established that at the very inception of the making of promise the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of the second clause of Section 375 IPC. In the facts of that case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.

15. In *Ramdas and Others v. State of Maharashtra* (2007) 2 SCC 170, this Court held that the conviction in case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity.

16. *Vijayan v. State of Kerala* (2008) 14 SCC 763 was a case where the complaint was made by the prosecutirx after the alleged commission of rape on her by the accused. At the time of making the case, the prosecutrix was pregnant for about seven months. This Court did not place reliance on the sole testimony of the prosecutrix. The Court noticed that flaw that no DNA test was conducted to find out whether the child was born out of the said incident and the accused was responsible for the said child.

17. *K. P. Thimmappa Gowda v. State of Karnataka* (2011) 14 SCC 475, was a case where the accused had assured the prosecutrix that he would marry her and had sexual affair, which was repeated on several occasions as well. But he did not marry and she became pregnant. That was a case where there was delay of eight months in filing the complaint. The accused was given the benefit of doubt holding that it would not be possible to conclude that the alleged sexual act was committed without the consent of the prosecutrix.

18. We have already referred to the evidence of PW2 to PW4 and that their consistent version is that PW2 had previous acquaintance with the accused being her elder brother's friend for a period of more than two years before the date of incident. The place of the alleged incident and the time is very crucial, so for as this case is concerned. It was early morning at 8.30 AM and the place of the alleged incident was on the side of a public road. If she had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality. Further the first information report, as already indicated, was lodged after a period of 10 months of the alleged incident. All these factors cast some shadow of doubt on the version of PW2.

19. Behaviour of the parents of the prosecutirix viz. PW3 and PW4 also appears to be strange. On their evidence they stated that they came to know about the relations between the appellant and the prosecutrix when they found her pregnant. Prosecutrix had told them that the appellant had agreed to marry her. They knew the appellant and his family already. However, there is not even a whisper that they approached the appellant or his family members for marrying the prosecutrix. They straightaway went to the police station to lodge the report, that too after the birth of the child. All these factors cast a doubt on the prosecution version. The version of victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some d e

court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape.

20. The trial Court as well as the High Court has committed an error in holding that the accused is guilty of the offence punishable under Section 376 IPC. In such circumstances, we are inclined to allow this appeal and set aside the conviction and sentence imposed on the appellant and order accordingly.

B.B.B. Appeal allowed.

KISHOREBHAI GANDUBHAI PETHANI
v.
STATE OF GUJARAT & ANR.
(Criminal Appeal No. 1451 of 2013)

SEPTEMBER 20, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Code of Criminal Procedure, 1973 – ss. 195/340 – Applicability of – Held: If documents have been forged and fabricated prior to filing of those documents in the Court, provisions of ss. 195/340 are not attracted.

On the basis of evidence of a witness in a criminal case against the appellant that some manipulation had been done by the appellant in medical report, the complainant lodged a complaint u/ss. 463, 465, 468, 471 and 114 IPC in respect of the tampering with the medical report. Appellant's application u/s.482 Cr.P.C. for quashing the complaint, was dismissed by High Court, rejecting the contention of the appellant that such a complaint was not maintainable unless it was made by the Court itself under the provisions of s.195 Cr.P.C. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. Perjury is an obstruction of justice. Deliberately making false statements which are material to the case, and that too under oath, amounts to crime of perjury. Thus, perjury has always to be seen as a cause of concern for the judicial system. It strikes at the root of the system itself and disturbs the accuracy of the findings recorded by the court. Therefore, any person found guilty of causing perjury, has to be dealt with

seriously as it is necessary for the working of the court as well as for the benefit of the public at large. [Para 7] [213-C-D]

Mohan Singh vs. Late Amar Singh (through LR's) **AIR 1999 SC 482: 1998 (1) Suppl. SCR 252 – relied on.**

2. In the instant case, the documents had been forged and fabricated. The manipulation, if any, had been made prior to filing of those documents in the court. Therefore, in such a fact-situation, provisions of Sections 195 and 340 Cr.P.C. are not attracted. Therefore, no fault can be found with the impugned judgment rendered by the High Court. The facts and circumstances of the case do not warrant any interference. [Paras 8 and 14] [213-D-E; 217-C]

Iqbal Singh Marwah and Anr. vs. Meenakshi Marwah and Anr. **AIR2005 SC 2119: 2005 (2) SCR 708 – followed.**

Ram Dhan vs. State of U.P. and Anr. **AIR 2012 SC 2513: 2012 (3) SCR 1059;** *Sachida Nand Singh and Anr. vs. State of Bihar and Anr.* **(1998) 2 SCC 493: 1998 (1) SCR 492;** *P. Swaroopa Rani vs. M. Hari Narayana @ Hari Babu* **AIR 2008 SC 1884: 2008 (3) SCR 900;** *Mahesh Chand Sharma vs. State of U. P. and Ors.* **AIR 2010 SC 812: 2009 (13) SCR 922;** *C. Muniappan and Ors. vs. State of Tamil Nadu.* **AIR 2010 SC 3718: 2010 (10) SCR 262;** *Institute of Chartered Accountants of India vs. Vimal Kumar Surana and Anr.* **(2011) 1 SCC 534: 2010 (14) SCR 248;** *C.P. Subhash vs. Inspector of Police Chennai and Ors.* **JT (2013) 2 SC 270: 2013 SCR 545;** *Rugmini Ammal (Dead by L.Rs.) vs. V. Narayana Reddiar and Ors.* **AIR 2008 SC 895: 2007 (13) SCR 587 – relied on.**

M.S. Ahlawat vs. State of Haryana and Anr. **AIR 2000 SC 168: 1999 (4) Suppl. SCR 160 – referred to.**

Case Law Reference:

1999 (4) Suppl. SCR 160	**referred to**	**Para 3**

1998 (1) Suppl. SCR 252	**relied on**	**Para 6**
2005 (2) SCR 708	**followed**	**Para 10**
2012 (3) SCR 1059	**relied on**	**Para 11**
1998 (1) SCR 492	**relied on**	**Para 11**
2008 (3) SCR 900	**relied on**	**Para 12**
2009 (13) SCR 922	**relied on**	**Para 12**
2010 (10) SCR 262	**relied on**	**Para 12**
2010 (14) SCR 248	**relied on**	**Para 12**
2013 SCR 545	**relied on**	**Para 12**
2007 (13) SCR 587	**relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1451 of 2013.

From the Judgment and Order dated 12.09.2011 of the High Court of Gujarat at Ahmedabad in CRMA No. 3213 of 2011.

Sushil Kumar Jain, Puneet Jain, Chhaya Kirti, Chisti Jain, Pratibha Jain for the Appellant.

Nirav C. Thakkar, Mohit D. Ram, Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 12.9.2011, passed by the High Court of Gujarat in Criminal Misc. Application No.3213 of 2011 dismissing the appellant's application for quashing the complaint lodged by the respondent No.2 being ICR No.180 of 2010 dated 5.7.2010 under Sections 463, 465, 468, 471 and 114 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

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

A. A complaint bearing ICR No.271 of 2003 was lodged by respondent no.2 before Madhavpura Police Station for the offences punishable under Sections 323, 324, 294A, 506(2) and 114 IPC read with Section 135(1) of the Bombay Police Act, 1951, naming the appellant and one other individual. Subsequently, considering the nature of injuries, Section 307 IPC was also added and the chargesheet was submitted after having investigated with respect to the said offences wherein the appellant as well as his wife had been arrayed as accused. After committal of the case to the learned Sessions Court, the Sessions Case No.175 of 2007 is being tried.

B. During the hearing of the Sessions Case No.175 of 2007, the prosecution examined one Dr. Ghanshyam Chunilal Patel (PW.3) on 12.5.2010, wherein he deposed that he had treated the complainant and also produced a copy of the injury certificate, Exh.105. It was alleged that some portion of the documents produced by the said witness had been tampered with and as the appellant herein had been a beneficiary of the same, it was suggested that some manipulation had been done by the appellant. Thus, the complainant filed an application to enquire into the matter of tampering with the medical report.

C. An application for cancellation of bail was also filed alleging that the appellant had tampered with the documents produced before the Sessions Court for obtaining the bail.

D. Subsequent thereto, a complaint was lodged on 5.7.2010 being FIR No.180 of 2010 under Sections 463, 465, 468, 471 and 114 IPC in respect of tampering with the aforesaid medical report.

E. The appellant filed Criminal Misc. Application No.3213 of 2011 under Section 482 of Criminal Procedure Code 1973

(hereinafter referred to as 'Cr.P.C.') to quash the complaint lodged before Shahibaug Police Station being ICR No.180 of 2010. The High Court dismissed the said application rejecting the contention of the appellant that such a complaint was not maintainable unless it is made by the court itself under the provisions of Section 195 Cr.P.C.

Hence, this appeal.

3. Shri Sushil Kumar Jain, learned senior counsel for the appellant submitted that it is a settled legal proposition that in view of the provisions of Sections 195/340 Cr.P.C. where the forgery is alleged to have been made in the court, the complaint is not maintainable unless it is made by the court itself. In support of this proposition, he has placed a very heavy reliance upon the judgment of this Court in *M.S. Ahlawat v. State of Haryana & Anr.*, AIR 2000 SC 168. It has been submitted that the appeal deserves to be allowed and the complaint is liable to be quashed.

4. On the contrary, Shri Nirav C. Thakkar, learned counsel appearing for respondent no.2 and Ms. Hemantika Wahi, learned counsel for the State, have submitted that in case the documents have been forged outside the court before being filed and relied upon in the court proceedings, the provisions of Section 195 Cr.P.C. are not attracted. To buttress their case, they have placed reliance on the judgment of this Court in *Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr.*, AIR 2005 SC 2119. It has been suggested by them that the appeal lacks merit and is liable to be dismissed.

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

6. In *Mohan Singh v. Late Amar Singh* (through LR's), AIR 1999 SC 482, while dealing with a case of perjury, this Court held as under:

".....Tampering with the record of ju

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filing of false affidavit, in a Court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of unsoiled stream of justice and aims at striking a blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity….."

7. Perjury is an obstruction of justice. Deliberately making false statements which are material to the case, and that too under oath, amounts to crime of perjury. Thus, perjury has always to be seen as a cause of concern for the judicial system. It strikes at the root of the system itself and disturbs the accuracy of the findings recorded by the court. Therefore, any person found guilty of causing perjury, has to be dealt with seriously as it is necessary for the working of the court as well as for the benefit of the public at large.

8. In the instant case, admittedly, the documents had been forged and fabricated. The manipulation, if any, had been made prior to filing of those documents in the court. Therefore, the question arises whether in such a fact-situation, provisions of Sections 195 and 340 Cr.P.C. are attracted.

9. In *M.S. Ahlawat* (supra), this Court held as under:

"5. Chapter XI IPC deals with "false evidence and offences against public justice" and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (CrPC) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC etc. or to an offence relating to documents actually used in a court, private prosecutions are barred absolutely and only the court in relation to which the offence was committed may initiate proceedings.

Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section. It is settled law that every incorrect or false statement does not make it incumbent upon the court to order prosecution, but (sic) to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice.

6. Section 340 CrPC prescribes the procedure as to how a complaint may be preferred under Section 195 CrPC. While under Section 195 CrPC it is open to the court before which the offence was committed to prefer a complaint for the prosecution of the offender, Section 340 CrPC prescribes the procedure as to how that complaint may be preferred. Provisions under Section 195 CrPC are mandatory and no court can take cognizance of offences referred to therein (sic). It is in respect of such offences the court has jurisdiction to proceed under Section 340 CrPC and a complaint outside the provisions of Section 340 CrPC cannot be filed by any civil, revenue or criminal court under its inherent jurisdiction."

10. However, a Constitution Bench of this Court in *Iqbal Singh Marwah* (supra) after considering a large number of judgments on the issue held as under:

"23. That apart, the section which we are required to interpret is not a penal provision but is part of a procedural law, namely, the Code of Criminal Procedure which elaborately gives the procedure for trial of criminal cases. The provision only creates a bar against taking cognizance of an offence in certain specified situations except upon complaint by court. A penal statute is one upon which an action for penalties can be brought by a public officer or by a person aggrieved and a penal Act in its wider sense includes ever

offence against the State, whatever is the character of the penalty for the offence. The principle that a penal statute should be strictly construed, as projected by the learned counsel for the appellants can, therefore, have no application here.

xx xx xx xx

25. In view of the discussion made above, we are of the opinion that Sachida Nand Singh has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed ***with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in custodia legis.***

26. In the present case, the Will has been produced in the court subsequently. It is nobody's case that any offence as enumerated in Section 195(1)(b)(ii) was committed in respect to the ***said Will after it had been produced or filed in the Court of District Judge.*** *Therefore,* ***the bar created*** *by Section 195(1)(b)(ii) CrPC* ***would not come into play and there is no embargo on the power of the court to take cognizance of the offence on the basis of the complaint filed by the respondents…..''***

(Emphasis added)

11. This Court in *Ram Dhan v. State of U.P. & Anr.,* AIR 2012 SC 2513 considered this very aspect of the matter and relying upon the earlier judgment of this Court in *Sachida Nand Singh & Anr. v. State of Bihar & Anr.,* (1998) 2 SCC 493 came to the conclusion that if the fabrication of false evidence takes place or the document is tampered with before filing in court, the provisions of Section 195 Cr.P.C. would not be attracted.

It is only when the document is tampered with after filing in court then the bar provided in Section 195 Cr.P.C. would be attracted.

12. A similar view has been reiterated on the issue by this Court in *P. Swaroopa Rani v. M. Hari Narayana* @ Hari Babu, AIR 2008 SC 1884; *Mahesh Chand Sharma v. State of U. P. & Ors.,* AIR 2010 SC 812; *C. Muniappan & Ors. v. State of T. N.*, AIR 2010 SC 3718; Institute of Chartered Accountants of India v. Vimal Kumar Surana & Anr., (2011) 1 SCC 534; and *C.P. Subhash v. Inspector of Police Chennai & Ors.,* JT (2013) 2 SC 270.

13. This Court while considering the issue in *Rugmini Ammal* (Dead by L.Rs.) *v. V. Narayana Reddiar & Ors.,* AIR 2008 SC 895 reiterated a similar view while placing reliance upon *Sachida Nand Singh* (Supra) explaining as under:

"25. An enlarged interpretation to Section 195(1)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the document is subsequently produced in court, is capable of great misuse. As pointed out in Sachida Nand Singh 2 after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or through someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at the instance of a private party or the police until the court, where the document has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the actual trial of such a person may be delayed indefinitely. Such an interpretation would be highly detrimental to the interest of the society at large.

26. Judicial notice can be taken of the fact that the courts are normally reluctant to direc al

complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in clause (b)(ii) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided….."

14. In view of the above, we do not hesitate to hold that no fault can be found with the impugned judgment rendered by the High Court. The facts and circumstances of the case do not warrant any interference. The appeal lacks merit and is accordingly dismissed.

K.K.T. Appeal dismissed.

BHEEMRAYA

v.

SUNEETHA

(Civil Appeal No.8572 of 2013)

SEPTEMBER 23, 2013

[SURINDER SINGH NIJJAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Family Law – Matrimonial dispute – Two suits by wife, one for restraining the husband from marrying during her lifetime and another for perpetual injunction restraining the husband and his father from alienating suit property as she herself and her daughter (born out of the marriage) were entitled to 1/3rd share – She also filed petition u/s. 9 of Hindu Marriage Act – Trial court decided the suit on merits – Order affirmed by first appellate court – Petition u/s. 9 dismissed by trial court – High Court held that suits were not maintainable because the plaintiff was a minor at the time of filing the suits – As regards the petition u/s. 9, High Court held that, in view of the fact that both the parties were minor at the time of marriage, the marriage would be void – However, the court gave liberty to the wife to initiate criminal proceedings u/s. 376 IPC against the husband – On appeal, held: The relief sought by the wife, in effect, was for restitution of conjugal rights and maintenance for her child – The dispute was essentially a matrimonial dispute – Therefore, the court erred in making the observation giving her liberty to initiate criminal proceedings, rather than encouraging and persuading the parties to reconcile – In matrimonial matters it is paramount duty of the Court to restore peace in family – Only as a last resort, the case should be decided on merits – The appropriate course, in the instant case, would have been that the case was referred for conciliation/mediation.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8572 of 2013.

From the Judgment & Order dated 16.12.2010 of the High Cour of Karnataka Circuit Bench at Gulbarga in Misc. First Appeal No. 31408 of 2009 (MC).

Sudha Gupta for the Appellant.

Shirish K. Deshpande for the Respondent.

The following Order of the Court was delivered by

ORDER

1. Delay condoned.

2. Leave granted.

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

4. Undoubtedly, both the parties were minor at the time when the respondent claims that they were married. She further alleges that she gave birth to a daughter when the parties lived together as husband and wife.

5. Respondent filed a suit with a prayer that the appellant be restrained from marrying anyone else during her life time. She also filed another suit claiming that she and her daughter are entitled to 1/3rd share of the property owned by the appellant and his father. She, therefore, prayed for a perpetual injunction restraining the appellant and his father from alienating the suit property.

6. In the two suits filed by the respondent, the trial Court in spite of recording findings of fact that parties were minor at the time of the alleged marriage, proceeded to decide the two suits on merits. The first appellate Court affirmed the findings of the trial Court in both the suits.

7. The respondent filed two Regular Second Appeals in the High Court. The finding that the plaintiff (respondent) was minor at the time of the marriage was affirmed by the High Court. However, the High Court held that since the plaintiff/ respondent was a minor, at the time when the suits were filed, they were not maintainable. Therefore, the trial Court had no jurisdiction to decide the same on merits. The findings recorded on merits were set aside. The Regular Second Appeals were partly allowed as indicated above.

8. The respondent had also filed a petition under Section 9 of the Hindu Marriage Act, 1955, which was dismissed. She then filed Misc. First Appeal No.31408 of 2009, in which the High Court passed the impugned order, dismissing the same. Whilst dismissing the appeal, the High Court held that in view of Section 5(iii) of the Hindu Marriage Act, 1955, clearly, the marriage would be void. In view of this finding, the High Court further observed that it would be open to the respondent to initiate criminal proceedings for prosecution of the appellant for an offence punishable under Section 376 of the Indian Penal Code. In our opinion, the High Court was not justified in making such observations. The only relief sought by the respondent was for restitution of conjugal rights and maintenance for the child. The High Court had rightly observed that even an illegitimate child would be entitled to maintenance. The High Court failed to appreciate that essentially it was seized of a matrimonial dispute between the parties. The attitude of the Court in such matters should be to encourage and persuade the parties to reconcile. It was an ideal case to be referred to conciliation/ mediation. Having perused all the orders in various proceedings between the parties, we do not see any reference to any effort made by the Court to adopt such a course. Instead the observations made in Paragraph 4 of the impugned judgment would push the parties further into conflict. Paramount duty of the Court in matrimonial matters should be to restore peace in the family. The attitude should not be to further encourage the parties to litigate. Only as

ought to decide the suit/proceeding on merits. Therefore, we are unable to approve the observations made by the High Court in the impugned judgment.

9. In that view of the matter, the appeal is allowed; the observations made in Para 4 of the impugned judgment are deleted.

No costs.

K.K.T. Appeal allowed.

HARSHA V. RAI
v.
STATE OF KARNATAKA & ANR.
(Civil Appeal No. 9031 of 2013)

OCTOBER 7, 2013

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

Karnataka Land Reforms Act, 1961 – s.45 – Entitlement of respondent no. 2 to be registered as an occupant u/s.45 – Tribunal by majority upheld the claim of respondent no.2 holding that the land in question was not agricultural land on the date of inspection but concluded that it was used as agricultural land 35-40 years ago – Order upheld by High Court – On appeal, held: To satisfy the requirement of s.45 to be registered as an occupant, the claimant has to satisfy that he was the tenant in respect of land which he was cultivating personally on the appointed day (1st March, 1974) – Neither the tribunal nor the High Court went into the question as to whether the property said to have been given on lease to the tenant on the appointed day, came within the definition of land under the Act – Further, the tribunal and the High Court did not address the issue as to whether the same was an agricultural land and was being cultivated on or before the appointed day by the tenant personally – Tribunal made spot inspection much later than the appointed day on 15th December, 1987 which had no relevance at all with the rights of the parties – Rights of the parties have to be crystallized on the basis of what existed on the appointed day – Matter remitted back to tribunal.

Respondent no.2, filed application, inter alia, alleging that there was tenancy in respect of agricultural land and she was cultivating the same prior to 1st March, 1974 and,

therefore, she was entitled to be registered as an occupant in terms of Section 45 of the Karnataka Land Reforms Act, 1961. Section 45 was substituted in the Act with effect from 1st of March, 1974.

The tribunal rejected the claim of respondent no.2, but the same was set aside by the High Court and the matter was remitted back to the tribunal for reconsideration. After remand, the tribunal conducted spot inspection and found existence of a dwelling house, a firewood-depot and a few coconut trees. The tribunal by majority held that the land was not an agricultural land on the date of inspection but concluded that it was used as agricultural land 35-40 years ago and accordingly upheld the claim of respondent no.2. The order was upheld by the High Court.

In the instant appeal, the question which arose for consideration was whether respondent no. 2 was entitled to be registered as an occupant under Section 45 of the Karnataka Land Reforms Act, 1961 in respect of land in question.

Allowing the appeal, the Court

HELD: 1. Section 45 of the Karnataka Land Reforms Act, 1961, inter alia, provides that a tenant holding the land and cultivating it personally on and from the date of vesting shall be entitled to be registered as an occupant. The expression 'to cultivate personally', 'land' and 'tenant' have been defined under Section 2(11), 2(18) and 2(34) of the Act. The person claiming to be registered as a tenant has to satisfy that he is not only a tenant but also an agriculturist who cultivates personally the land held on lease. Section 2(34) defines 'tenant'. It is an inclusive definition. To come within the definition of tenant, a person has to be an agriculturist and such a person is required personally to cultivate the land he holds on

lease. The expression 'cultivate personally' has been defined under Section 2(11) of the Act. To satisfy the requirement of Section 45 of the Act to be registered as an occupant, the claimant has to satisfy that he is the tenant in respect of land which he is cultivating personally on the appointed day (1st March, 1974). Neither the tribunal nor the High Court has gone into the question as to whether the property said to have been given on lease to the tenant on the appointed day, came within the definition of land under the Act. Further, the tribunal and the High Court have not addressed the issue as to whether the same was an agricultural land and was being cultivated on or before the appointed day by the tenant personally. The tribunal has made spot inspection much later than the appointed day on 15th December, 1987 which has no relevance at all with the rights of the parties. Here, the rights of the parties have to be crystallized on the basis of what existed on the appointed day. Neither the Tribunal nor the High Court has gone into this question in the right perspective. The impugned orders of the High Court as also of the Tribunal deserve to be set aside and the matter remitted back to the tribunal for its consideration in accordance with law. [Paras 6, 7, 8, 9] [227-A; 228-C-E; 229-C-D; 230-B-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9031 of 2013.

From the Judgment & Order dated 20.12.2005 of the High Court of Karnataka at Bangalore in W.A. No. 3714 of 2005.

Basav Prabhu S. Patil, B. Subrahmanya Prasad, Anirudh Sanganeria, Venkatakrishna Kunduru, R.D. Upadhyay, S.N. Bhat, Vishruti Vijay (for Anitha Shenoy) for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. By the orders impugned the claim of respondent no. 2 Bhagirathi Bai, since deceased, to be registered as an occupant under Section 45 of the Karnataka Land Reforms Act, 1961 in respect of the land measuring 14 cents in Survey Nos. 353/1 and 353/2 in the Village Attavar in Taluka Mangalore in the District of Dakshina Kannada has been upheld.

2. Leave granted.

3. According to the appellant, his mother was the owner of the land measuring in all 14 cents in Survey No. 353/1 and 353/2 at Village Attavar within Taluka Mangalore in the District of Dakshina Kannada. She gave on lease the aforesaid land to Bhagirathi, respondent no. 2 herein by a registered deed dated 26th of October, 1953 on an yearly rent of Rs. 42 and the deed styled as vacant land "chalageni" was executed. According to the appellant, the land at the time of lease contained five standing coconut trees and respondent no. 2, hereinafter referred to as the tenant, was entitled to make improvement therein to an extent of only Rs. 5,000/-. It is the case of the appellant that in terms of the lease the tenant constructed a residential house on the demised property and continued to be in occupation of the same.

4. By Section 34 of the Karnataka Land Reforms (Amendment) Act, 1973 (Karnataka Act 1 of 1974) Section 44 and Section 45 were substituted with effect from 1st of March, 1974 in the Karnataka Land Reforms Act, 1961, hereinafter referred to as 'the Act'. Section 44 of the Act, inter alia, provides that all land held by or in possession of the tenants with effect from 1st of March, 1974(hereinafter to be referred to as the appointed day), shall stand transferred to and vest in the State Government. Section 45 of the Act, inter alia, provides that the land which a tenant has been cultivating personally before the date of vesting shall be entitled to be registered as an occupant. A tenant entitled to be registered as an occupant was required to file a petition before a tribunal under Section 48A of the Act.

5. Respondent no. 2, filed an application in the prescribed form, inter alia, alleging that the tenancy in question is in respect of agricultural land and she was cultivating the same prior to 1st of March, 1974 and, therefore, she is entitled to be registered as an occupant in terms of Section 45 of the Act. The appellant, hereinafter referred to as 'the land owner', resisted her claim and the tribunal rejected the tenant's claim, but the same was set aside by the High Court in a petition filed by the tenant and the matter was remitted back to the tribunal for reconsideration. While doing so, the High Court observed that the tribunal shall consider the "chalageni". After the remand the tribunal conducted spot inspection on 15th of December, 1987 and found existence of a dwelling house, a firewood-depot and a few coconut trees. The tribunal by majority held that the land was not an agricultural land on the date of inspection but concluded that it was used as agricultural land 35-40 years ago and accordingly upheld the claim of the tenant. The dissenting Member, however, observed that the land in question cannot be said to be an agricultural land. The learned Member found that part of the land was leased out by tenant's husband for firewood depot and he is a truck owner. The dissenting Member expressed his view in the following words:

> ".....It is learnt from the enquiry that the petitioner's husband is a truck (lorry) owner, the main source of income of the petitioner is from the income derived from the rent and selling the fire-wood from the fire-wood depot. The petitioner is not an agriculturist, at any time. Apart from this the petitioner has no cultivable lands also, because there are 5 coconut trees in the courtyard that cannot be treated the petition land as agricultural lands"

6. Mr. Basava Prabhu S.Patil, learned Senior counsel appears on behalf of the appellant and submits that the land in question was not an agricultural land on the appointed day. Further the tenant was not an agriculturist and not cultivating the land personally on the said date and, [illegible]e

registered as an occupant in terms of Section 45 of the Act. Mr. S.N. Bhat appearing for the tenant as also Ms. Vishruti Vijay, learned counsel representing the State submit that the land in question was an agricultural land which was being cultivated personally by the tenant and, therefore, she was rightly registered as an occupant by the tribunal and the said order has rightly been affirmed by the High Court. In view of the submission advanced it is advisable to refer to the scheme of the Act. As the claim is raised under Section 45 of the Act, we deem it expedient to reproduce the same which reads as follows:

"**45. Tenants to be registered as occupants of land on certain conditions**.—(1) Subject to the provisions of the succeeding sections of this Chapter, every person who was a permanent tenant, protected tenant or other tenant or where a tenant has lawfully sub-let, such sub-tenant shall, with effect on and from the date of vesting be entitled to be registered as an occupant in respect of the lands of which he was a permanent tenant, protected tenant or other tenant or sub-tenant before the date of vesting and which he has been cultivating personally.

(2) If a tenant or other person referred to in sub-section (1),—

(i) holds land partly as owner and partly as tenant but the area of the land held by him as owner is equal to or exceeds a ceiling area he shall not be entitled to be registered as an occupant of the land held by him as a tenant before the date of vesting;

(ii) does not hold and cultivate personally any land as an owner, but holds land as tenant, which he cultivates personally in excess of a ceiling area, he shall be entitled to be registered as an occupant to the extent of a ceiling area;

(iii) holds and cultivates personally as an owner of any land the area of which is less than a ceiling area, he shall be entitled to be registered as an occupant to the extent of such area as will be sufficient to make up his holding to the extent of a ceiling area.

(3) The land held by a person before the date of vesting and in respect of which he is not entitled to be registered as an occupant under this section shall be disposed of in the manner provided in section 77 after evicting such person."

7. The aforesaid section, inter alia, provides that a tenant holding the land and cultivating it personally on and from the date of vesting shall be entitled to be registered as an occupant. The expression 'to cultivate personally', 'land' and 'tenant' have been defined under Section 2(11), 2(18) and 2(34) of the Act. The person claiming to be registered as a tenant has to satisfy that he is not only a tenant but also an agriculturist who cultivates personally the land held on lease. Section 2(34) defines 'tenant' as follows:

"2.Definitions.- (A) In this Act, unless the context otherwise requires,-

xxx xxx xxx

(34) **"Tenant"** means an agriculturist who cultivates personally the land he holds on lease from a landlord and includes—

(i) a person who is deemed to be a tenant under section 4;

(ii) a person who was protected from eviction from any land by the Karnataka Tenants (Temporary Protection from Eviction) Act, 1961;

(ii-a) a person who cultivates n

lease under a lease created contrary to the provisions of section 5 and before the date of commencement of the Amendment Act;

(iii) a person who is a permanent tenant; and

(iv) a person who is a protected tenant.

Explanation.—A person who takes up a contract to cut grass, or together the fruits or other produce of any land, shall not on that account only be deemed to be a tenant;"

8. It is an inclusive definition and in the present case, we are concerned with the main provision. To come within the definition of tenant a person has to be an agriculturist and such a person is required personally to cultivate the land he holds on lease. The expression 'cultivate personally' has been defined under Section 2(11) of the Act, which reads as follows:

"2.Definitions.- (A) xxx xxx xxx

(11) **"To cultivate personally"** means to cultivate land on one's own account,—

(i) by one's own labour; or

(ii) by the labour of any mamber of one's family or;

(iii) by hired labour or by servants on wages payable in cash or kind, but not in crop share, under the personal supervision of oneself or by member of one's family;

Explanation I.— In the case of an educational, religious or charitable institution or society or trust, of a public nature capable of holding property, formed for educational, religious or charitable purpose, the land shall be deemed to be cultivated personally if such land is cultivated by hired labour or by servants under the personal

supervision of an employee or agent of such institution or society or trust;

Explanation II.— In the case of a joint family, the land shall be deemed to be cultivated personally, if it is cultivated by any member of such family.;"

9. As stated earlier, to satisfy the requirement of Section 45 of the Act to be registered as an occupant, the claimant has to satisfy that he is the tenant in respect of land which he is cultivating personally on the appointed day. Neither the tribunal nor the High Court has gone into the question as to whether the property said to have been given on lease to the tenant on the appointed day, came within the definition of land under the Act. Further, the tribunal and the High Court have not addressed the issue as to whether the same was an agricultural land and was being cultivated on or before the appointed day by the tenant personally. The tribunal has made spot inspection much later than the appointed day on 15th December, 1987 which, in our opinion, has no relevance at all with the rights of the parties. Here, the rights of the parties have to be crystallized on the basis of what existed on the appointed day. Neither the Tribunal nor the High Court has gone into this question in the right perspective. We are of the opinion that the impugned orders of the learned Single Judge and that of the Division Bench as also of the Tribunal deserve to be set aside and the matter remitted back to the tribunal for its consideration in accordance with law. We make it clear that the observation made in this order is for the purpose of its disposal and shall have no bearing on the merit of the case.

10. In the result, we allow this appeal, set aside the impugned judgment and remit the matter back to the tribunal for reconsideration in accordance with law bearing in mind the observations aforesaid. In the facts and circumstances of the case there shall be no order as to costs.

B.B.B. .

SHEILA KAUL THROUGH MS. DEEPA KAUL
v.
STATE THROUGH C.B.I.
(Criminal Appeal Nos.1676-77 of 2013)

OCTOBER 8, 2013

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Prosecution for commission of offences punishable u/ss.7, 9, 13 (2) r/w s.13(1)(d) of the Prevention of Corruption Act and s.120-B r/w s.384 IPC – Application filed by accused-appellant seeking exemption from personal appearance to answer charges framed against her – Dismissed by trial Court – Order affirmed by High Court in petition filed by appellant u/s.482 CrPC – Held: Trial Court, despite the report of medical board and deposition of Doctor, came to the conclusion that appellant was not of 'unsound mind' nor was she incapacitated by her age and illness – Since said finding had been specifically questioned by the appellant, High Court should have adverted to that aspect of the matter also – Process of appreciation of material concerning medical condition of appellant and her alleged incapacity to make her defence was inevitable – Inasmuch as the same escaped the attention of High Court, order passed by it unsustainable – Matter remitted back to High Court for fresh disposal in accordance with law.

The appellant is being prosecuted for commission of offences punishable under Sections 7, 9, 13 (2) read with Section 13 (1) (d) of The Prevention of Corruption Act and Section 120-B read with Section 384 IPC. The trial court (Special Judge, CBI) directed framing of charges against all the accused including the appellant by his order dated 2nd February, 2012. By another order dated 9th May, 2012, the trial Court directed the appellant to appear in

person to answer the charges framed against her. That direction came despite an application filed by the appellant in which it was, *inter alia,* pointed out that she was nearly 98 years of age and suffering from severe heart ailment and dementia which confined her to bed. The trial Court concluded that the appellant was capable of understanding questions put to her and giving appropriate answers although such questions may have to be repeated. The application filed by the appellant seeking exemption from personal appearance to answer the charges framed against her was, on the above basis, dismissed and the appellant directed to appear in person in the trial Court by Order dated 9th May, 2012.

Aggrieved, the appellant filed Crl. M.C. No.1816 of 2012 before the High Court under Section 482 CrPC in which she assailed not only Order dated 2nd February, 2012 but also the latter Order dated 9th May, 2012. The same was dismissed by the High Court.

In the instant appeal, the appellant contended that the High Court had while dismissing Crl.M.C. No.1816 of 2012 completely lost sight of the fact that apart from order dated 2nd February, 2012, the appellant had also assailed the correctness of order dated 9th May, 2012; that the High Court did not advert to the said latter order nor recorded any reason for declining to interfere with the same.

Allowing the appeals, the Court

HELD: 1. The High Court did not examine the question whether the trial Court was justified in holding that the appellant was capable of understanding the questions that may be put to her and answering the same appropriately. While it is true that the application filed by the appellant did not, strictly speaking, bring her case under Section 329 CrPC, yet it i e

averments made in the application that the appellant was alleged to be incapable of making her defence on account of her old age and multiple medical problems including senile dementia. The report of the medical board also *prima facie* suggested that the plea raised by the appellant was not wholly without any basis. The trial Court had despite that report and the deposition of Dr. Khandelwal come to the conclusion that the appellant was not of 'unsound mind' nor was she incapacitated by her age and illness. All the same since the said finding had been specifically questioned by the appellant the High Court should have adverted to that aspect of the matter also. Whether or not the appellant can be described to as a person of unsound mind would largely depend upon the value which the High Court attached to the report submitted by the medical board and the deposition of Dr. Khandelwal. The process of appreciation of material concerning the medical condition of the appellant and her alleged incapacity to make her defence was inevitable. Inasmuch as the same escaped the attention of the High Court, the order passed by it is rendered unsustainable. The order passed by the High Court insofar as the same dismissed Crl. M.C. No.1816 of 2012 *qua* order dated 9th May, 2012 passed by the trial Court is set aside and the matter is remitted back to the High Court for fresh disposal in accordance with law. [Paras 8, 9 & 10] [236-G-H; 237-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1676-1677 of 2013.

From the Judgment & Order dated 20.02.2013 of the High Court of Delhi at New Delhi in Crl. M.C. No. 1816 & 6432 of 2012 (stay)

Dr. Sumant Bhardwaj, Archana Pathak Dave, Mridula Ray Bhardwaj for the Appellant.

Rakesh K. Khanna, ASG, B.V. Balaram Das, C.K. Sharma, P.L. Nigam, Syeed Tanweer Ahmad for the Respondent.

The Judgment of the Court was delivered by

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

2. The appellant, a former minister in the Central Government is being prosecuted for commission of offences punishable under Sections 7, 9, 13 (2) read with Section 13 (1) (d) of The Prevention of Corruption Act and Section 120-B read with Section 384 of the Indian Penal Code. Special Judge, CBI-I, Central Delhi, before whom the accused are being tried has directed framing of charges against all of them including the appellant herein by his order dated 2nd February, 2012. By another order dated 9th May, 2012, the trial Court directed the appellant to appear in person to answer the charges framed against her. That direction came despite an application filed by the appellant in which it was, *inter alia,* pointed out that she was nearly 98 years of age and is suffering from severe heart ailment and dementia which has confined her to bed. She further stated that the appellant required help and support even for her daily activities. She was, therefore, unable to travel to the Court for getting her plea recorded. A medical certificate as to her condition and state of health was also filed along with the application that alleged that it was not clear whether the applicant was in a condition to understand the consequences of the order passed against her and whether she was, in fact, suffering from dementia. The trial Court had entertained that application and directed SP, CBI to produce the appellant before a medical board on 23rd April 2012 for examination.

3. The Medical Board comprising of six doctors, headed by Dr. S.K. Khandelwal, appears to have kept the appellant under observation for four days and submitted a report dated 27th April, 2012 in which it was concluded that the appellant was not suffering from any major psy e

possibility of senile dementia could not, however, be ruled out. It was also stated that the appellant was unable to comprehend simple questions and provided monosyllabic responses after prolonged reaction time, despite questions being repeated to her a number of times. The report further suggested that the appellant's memory for immediate, recent and remote events and information about day-to-day events was impaired. She was also found to be suffering from hypertension, coronary artery disease, anaemia and bilateral medical kidney disease.

4. The trial Court on receipt of the above report asked the Director, AIIMS to depute two members of the medical board to the Court to obtain a clearer picture of the situation. Pursuant to that direction Dr. Achal Srivastava, Dr. Vijaydeep Siddharth and Dr. S.K. Khandelwal appeared before the Court on 7th May, 2012 to make their statements. Dr. S.K. Khandelwal alone, it appears, was examined by the trial Court who concluded that the appellant was capable of understanding questions put to her and giving appropriate answers although such questions may have to be repeated. The Court observed:

> *"11. So it becomes very clear that accused Sheila Kaul is capable of understanding questions put to her and giving appropriate answers. Though, the questions might have to be repeated. Unfortunately for her, law does not prescribe any immunity for aged people. She might be quite old but, but there is no way out. Her absence has caused considerable delay and is holding up the trial. I, therefore, direct accused Sheila Kaul to appear in person in the Court on the next date of hearing. She may attend the Court in the same manner, she visited AIIMS. She is to answer the charge to be framed against her and let the matter proceed."*

5. The application filed by the appellant seeking exemption from personal appearance to answer the charges framed against her was, on the above basis, dismissed and the appellant directed to appear in person in the trial Court by Order

dated 9th May, 2012.

6. Aggrieved by the refusal of the relief prayed for by her, the appellant filed Crl.M.C. No.1816 of 2012 before the High Court of Delhi under Section 482 of the Code of Criminal Procedure in which she assailed not only Order dated 2nd February, 2012 passed by the trial Court directing framing of charges but also latter Order dated 9th May, 2012 by which the trial Court directed the appellant to appear in person for getting her plea recorded. The High Court has by its Order dated 20th February, 2013 dismissed the said petition holding that there was no room for interfering with the order passed by the trial Court directing framing of charges against the appellant. The present appeals assail the correctness of the said order.

7. When this matter initially came up for admission before us on 2nd April, 2013, we issued notice to the respondent limited to prayer (b) mentioned in Crl. M.C. No.1816 of 2012 filed before the High Court. We have accordingly heard Dr. Sumant Bhardwaj, learned Counsel for the appellant who argued that the High Court had while dismissing Crl.M.C. No.1816 of 2012 completely lost sight of the fact that apart from order dated 2nd February, 2012, the appellant had also assailed the correctness of order dated 9th May, 2012 before it. The High Court has not, argued Mr. Bhardwaj, adverted to the said order nor recorded any reason for declining to interfere with the same. The impugned order, to the extent it dismissed Crl.M.C. No.1816 of 2012 without even addressing the question raised by the appellant relating to prayer (b) in the petition, was bad and deserved to be set aside on that count alone.

8. There is in our opinion considerable merit in the submission made by Mr. Bhardwaj. The order passed by the High Court has not examined the question whether the trial Court was justified in holding that the appellant was capable of understanding the questions that may be put to her and answering the same appropriately. While it is true that the application filed by the appellant did not, [illegible] g

her case under Section 329 of the Code of Criminal Procedure, yet it is evident from the averments made in the application that the appellant was alleged to be incapable of making her defence on account of her old age and multiple medical problems including senile dementia.

9. The report of the medical board also *prima facie* suggested that the plea raised by the appellant was not wholly without any basis. The trial Court had despite that report and the deposition of Dr. Khandelwal come to the conclusion that the appellant was not of 'unsound mind' nor was she incapacitated by her age and illness. All the same since the said finding had been specifically questioned by the appellant the High Court should have adverted to that aspect of the matter also. Whether or not the appellant can be described to as a person of unsound mind would largely depend upon the value which the High Court attached to the report submitted by the medical board and the deposition of Dr. Khandelwal. Suffice it to say that the process of appreciation of material concerning the medical condition of the appellant and her alleged incapacity to make her defence was inevitable. In as much as the same has escaped the attention of the High Court, the order passed by it is rendered unsustainable.

10. In the result, we allow these appeals set aside the order passed by the High Court in so far as the same dismissed Crl. M.C. No.1816 of 2012 *qua* order dated 9th May, 2012 passed by the trial Court and remit back the matter to the High Court for a fresh disposal of the matter in accordance with law. We express no opinion as to whether the appellant can be said to be of unsound mind within the meaning of Section 329 of the Cr.P.C. as also the question whether the provisions of Section 318 Cr.P.C. can be invoked in case the appellant cannot be said to be of unsound mind. It follows that the High Court shall be free to take an appropriate view in the matter after hearing learned counsel for the parties.

11. Since the trial of other accused persons is also delayed on account of the pendency of the present proceedings, the High Court is requested to expedite the disposal of the matter and pass orders as far as possible within a period of three months from today.

B.B.B. Appeals allowed.

KUNWAR PAL
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 1643 of 2013)

OCTOBER 8, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Penal Code, 1860 – s. 304 (Part II) – Prosecution and conviction of accused u/s. 304 by courts below – On appeal, held: The Intention of the acused to kill the deceased not proved beyond reasonable doubt – However, it can be held that he had knowledge that his act was likely to cause death – Hence his conviction altered to one u/s. 304 (Part II) – Sentence of life imprisonment reduced to 7 years.

Appellant-accused was prosecuted for killing one person. The prosecution case was that the appellant-accused alongwith three others, had gone with 3 double barrel guns to a marriage ceremony. Due to negligent firing, a cartridge hit the deceased and resulted in his death. PW-2 (the nephew of the deceased) lodged FIR. Trial court convicted the appellant u/s. 304 IPC and sentence him to life imprisonment and imposed fine of Rs.1000/- with default clause. High Court confirmed the conviction and sentence. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. From the evidence on record, it is difficult to accept that the shot which killed the deceased came from the gun of the appellant only. This assumes importance because admittedly there were three other persons in the ceremony, who were firing their guns. It is not possible therefore to attribute the act of killing to the appellant, or attributing any intention to cause the

death of the deceased. The High Court in its judgment has found intention to kill only with the observation that the DBBL gun was carried to the ceremony with a view to create wild disorder (pandemonium) and to do some harm to some people. This observation is not sufficient to attribute the intention to kill a particular person. This observation is also made in disregard of the practice in this part of the country to use guns while celebrating marriages in some communities. Therefore, it cannot be said that in the instant case, the gun was carried to the marriage ceremony only to kill someone. [Para 9] [244-G-H; 245-A-D]

2. Thus the intention of the appellant to kill the deceased has not been proved beyond a reasonable doubt and the appellant is entitled to the benefit of doubt. Therefore, the sentence under Section 304 (Part I) of the IPC, which requires that the act by which death is caused, must be done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death is not sustainable. Though it is not possible to attribute intention, it is equally not possible to hold that the act was done without the knowledge that it is likely to cause death. [Para 10] [245-E-G]

3. The appellant is guilty of committing the act which caused the death of the deceased since the act was done with the knowledge that it is likely to cause death within the meaning of Section 304 (Part II) of the IPC. However, the sentence imposed upon the appellant is reduced to a period of 7 (seven) years without making any alteration in the fine amount imposed by the trial court and confirmed by the High Court. [Para 13] [246-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1643 of 2013.

From the Judgment & Order dated 06.12.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 198 of 2005.

Jayant Bhushan, Gyanendra Kr. Mishra, Pawash Piyush, Gyan Prakash Srivastava for the Appellant.

Rajiv Nanda for the Respondent.

The Judgment of the Court was delivered by

S.A. BOBDE, J.1. The appellant has approached this Court challenging the concurrent finding of the Trial Court and the High Court convicting and sentencing him to rigorous life imprisonment under Section 304 of the Indian Penal Code, 1860 [for short 'IPC'] and imposing a fine of Rs. 1,000/-, in default, to undergo further imprisonment for one year.

2. According to the prosecution the appellant is guilty of the said offence for having caused the death of one Ramayan Prasad, who was present in the marriage ceremony of one Kaushalya, daughter of Shyam Sunder. The incident took place on 22.05.1998 in the courtyard (aangan) inside the house of Shyam Sunder, father of the bride, where around 30 people were present to attend the ceremony while about 60 people were outside the house having snacks. The appellant was sitting at one side of the courtyard in the verandah on a trunk box. Four persons, namely, Hanuman Prasad, Ram Sewak, Mangal Singh and the appellant –Kunwar Pal, had brought double barrel guns, ostensibly for celebration. Ramayan Prasad prohibited them from firing but they did not listen. Due to negligent firing a cartridge hit the neck of the deceased, who fell down. The deceased was taken to Gadarpur Government Hospital in a Tractor Trolley where a doctor declared him dead. Ram Sewak ran away from the spot leaving behind his double barrel gun. Mangal Singh ran away with his double barrel gun. Hanuman Prasad and the appellant did not run away.

3. A first information report (FIR) was lodged on the same

day i.e. on 22.05.1998 by one Kamlesh Kumar nephew of Ramayan Prasad, the deceased. In the FIR the informant alleged that three persons had brought guns and though prohibited they fired their gun. Due to negligent firing a cartridge hit the neck of the Ramayan Prasad, who fell down. The person who fired and the other instigators were caught by the villagers, who beat them. He named the appellant – Kunwar Pal. He further stated that from one barrel of the gun one empty cartridge was found and from the other barrel a live cartridge was found. He further stated that Ram Sewak and Mangal Singh, who were Barati, had fired from their guns and ran away. Ram Sewak left behind his gun at the spot.

4. After conclusion of the investigation, a charge sheet was filed naming the appellant and one Hanuman Prasad under Section 304 read with Section 120-B IPC.

5. The learned trial Judge recorded the evidence and heard the matter and convicted the appellant as aforesaid on the basis of the statements recorded from PW-1, PW-2, PW-4, PW-5 and PW-6. The High Court dismissed the appeal carried by the appellant and confirmed the finding of the learned Trial Judge.

6. Shri Jayant Bhushan, learned senior counsel, appearing for the appellant submitted that the impugned judgment as well as the judgment of the Trial Court is erroneous and illegal. According to the learned counsel no attempt was made by the prosecution to co-relate the fatal shot, which killed Ramayan Prasad with the gun of the appellant. No Ballistic Expert was consulted. According to the learned counsel this was crucial since even according to the prosecution 3 people had been firing from their gun and there was absolutely no motive for the appellant to kill Ramayan Prasad. Assuming without admitting that the appellant was guilty no reasons whatsoever have been recorded by the High Court for coming to the conclusion that the appellant is liable to be convicted and sentenced under Part I of Section 304 of the IPC instead of

Without prejudice it is submitted assuming that the appellant is responsible for causing the death of the deceased it can only be attributed to a rash and negligent act within the meaning of Section 304A of the IPC. On the other hand, learned counsel for the prosecution supported the conviction and sentence. According to the learned counsel it is established that the appellant was carrying a gun and had fired it. There was no reason for him to carry a gun to a celebration of a marriage and it has been rightly found that he did so only with the intention of killing.

7. We have heard the learned counsel for the parties and perused the record. The prosecution has mainly relied on the FIR and the deposition of PW-2, who is the nephew of the deceased and PW-1, who was the priest called for performing the marriage rites. A perusal of the evidence of PW-2, who also lodged the FIR, shows that at least 3 persons were firing from 3 guns. Though they were prohibited by his uncle, they continued firing. One shot hit the neck of his uncle. Ram Sewak ran away leaving his gun. Mangal Singh ran away with his gun. He identified the gun used by the appellant. He also stated that one empty and one live cartridge were found in the barrels of gun of Ram Kunwar. He stated that his uncle, the deceased, was sitting facing the east and he was sitting facing the west. From this evidence, it is not at all clear that he saw the appellant or anyone else firing. He does not say he saw. It is difficult to read the deposition of this witness to mean that he saw the appellant firing at his uncle or anyone else in particular. The witness does not state where the other persons, who were also firing, were located and in which direction they were firing.

8. PW-1, the priest, states that he was invited to perform the marriage rituals of the daughter of Shyam Sunder and the incident took place in the courtyard where the wedding rituals were to be performed. He deposed that he heard firing and in two-three minutes a shot from Kunwar Pal hit the right side of neck of the deceased. This happened though Ramayan Prasad

had asked the gun toting guests not to fire. According to this witness, the appellant was instigated by Ram Sewak and Hanuman Prasad to fire. Thereafter accused Ram Sewak and Hanuman Prasad were caught with a gun on the spot. It is difficult from the evidence of this witness to infer the veracity of his claim that it was the cartridge of Kunwar Pal that hit the deceased. He does not say whether all those firing from their gun were in his field of vision and whether he was watching each person. At another place he said that he was waiting for the bride when he "heard" the sound of fire. He did not say he saw the firing. PW-6, the investigating officer, deposed that he identified the live cartridge and empty cartridge shown to him and that he obtained the statement of FIR writer, namely, Rishi Pal Singh and complainant Kamlesh Kumar. He deposed that on the day of the incident he recorded the statement of accused persons, appellant- Kunwar Pal and Hanuman Prasad. He inspected the place of incident and prepared a site plan. He stated that he investigated the matter against Ram Sewak and Mangal Singh, who had run away. He said that he does not know from whom he enquired nor their details were mentioned in the case diary. He said that he had not taken the guns of Ram Sewak and Mangal Singh in his possession. He said that gun of the accused person was sent to the Ballistic Expert but he does not remember the report. Then he said that he does not remember whether the guns were sent or not to the Ballistic Expert. It is apparent from the deposition that the investigation was slipshod and careless. Why, without investigation about the notice of the others, the I.O. only chose to proceed against the appellant is not known. Why a ballistic report was not obtained is not known.

9. From the evidence on record, we find much substance in the submissions made on behalf of the appellant. It is difficult to accept that the shot which killed the deceased came from the gun of the appellant only. This assumes importance because admittedly there were three other persons in the ceremony, who were firing their gun. It is e

to attribute the act of killing to the appellant, leave alone attributing any intention to import causing the death of the deceased. The High Court in its judgment has found intention to kill only with the observation that "a person, who goes to holy ceremony along with DBBL gun, which is used for killing animals, must be said to be going there with the intention to create ruckus and to kill someone in the holy ceremony. What for the DBBL gun was taken to the marriage ceremony then? The obvious inference was that the same was carried to the ceremony with a view to create wild disorder (pandemonium) and to do some harm to some people." This observation is not sufficient to attribute the intention to kill a particular person. It is also made in disregard of the practice in this part of the country to use guns while celebrating marriages in some communities. We must say at once that we do not mean to approve of this practice in any way. It is not possible to agree with the High Court that in the instant case the gun was carried to the marriage ceremony only to kill someone.

10. In these circumstances, we find that the intention of the appellant to kill the deceased, if any, has not been proved beyond a reasonable doubt and in any case the appellant is entitled to the benefit of doubt which is prominent in this case. It is not possible therefore to sustain the sentence under Section 304 Part I of the IPC, which requires that the act by which death is caused, must be done with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. Though it is not possible to attribute intention it is equally not possible to hold that the act was done without the knowledge that it is likely to cause death. Everybody, who carries a gun with live cartridges and even others know that firing a gun and that too in the presence of several people is an act, is likely to cause death, as indeed it did. Guns must be carried with a sense of responsibility and caution and are not meant to be used in such places like marriage ceremonies.

11. It was argued by Shri Jayant Bhushan, learned senior

counsel that the appellant might at the most, be guilty of doing a rash and negligent act not amounting to culpable homicide under section 304A. Section 304A reads as follows:

> "304A. **Causing death by negligence** - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

12. It is not possible to accept this submission since, for an act to be construed as an act not amounting to culpable homicide it is necessary that the act be done without the knowledge that the act is likely to cause death. Section 299 of the IPC reads as under:

> "299. **Culpable homicide**.— Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

13. In the present case, we are of the view that the appellant is guilty of committing the act which caused the death of the deceased since the act was done with the knowledge that is it likely to cause death within the meaning of Section 304 Part II of the IPC. In the circumstances, the appeal is allowed in part, however, we reduce the sentence imposed upon the appellant to a period of 7 (seven) years without making any alteration in the fine amount imposed by the trial court and confirmed by the High Court.

K.K.T. Appeal partly allowed.

T.C. GUPTA & ANR.
v.
HARI OM PRAKASH & ORS.
(Civil Appeal No.9095 of 2013)

OCTOBER 8, 2013

[P. SATHASIVAM, CJI AND RANJAN GOGOI, J.]

Contempt of Courts Act, 1971 – s.12(1) r/w Explanation thereto – Contempt proceedings against appellants for not furnishing requisite information to the High Court – Challenge to – Held: The High Court had required the appellants-State officials to furnish names of such land owners who had not filed their objections u/s.5A of the Land Acquisition Act, and yet their lands were released from acquisition – Though information furnished in the written statement filed by the appellant was just the reverse (as information was furnished in respect of landowners who had filed their objections), circumstances of the case do not lead to the sole conclusion that there was a deliberate or wilful attempt on the part of the appellant not to furnish the requisite information or to furnish wrong information to the High Court – Rather, failure to furnish requisite information to the Court may have been occasioned by a momentary error of judgment on the part of appellant – For the said lapse, he tendered his unqualified apology in affidavit alongwith which he also furnished the requisite information – Situation calls for a broad and magnanimous view of the matter and acceptance of the unconditional apology tendered by the appellant – Order of the High Court holding appellant guilty of contempt of Court, set aside – Land Acquisition Act, 1894 – s.5A.

Contempt of Courts Act, 1971 – Exercise of contempt jurisdiction – Scope – Held: The power to punish for contempt is a rare specie of judicial power which by the very nature calls for exercise with great care and caution.

The respondents 1 & 2 filed writ petition in the High Court challenging the acquisition of land belonging to them under the provisions of the Land Acquisition Act, 1894. The High Court made a query in its order dated 17-1-2011 requiring the appellants- State officials to furnish the names of such land owners who had not filed their objections under Section 5A of the Act and yet their lands were released from acquisition. However, the information furnished by the appellant in the written statement dated 19-01-2011 was just the reverse i.e. he furnished information in respect of landowners who had filed their objections. The High Court issued notice to the appellants to show cause as to why contempt proceedings should not be initiated against them for not furnishing the requisite information to the Court.

The appellant filed affidavit on 28-01-2011 tendering unconditional and unqualified apology, and, in the affidavit filed, also furnished the requisite information. The appellant further stated that the lapse on his part was bona fide and unintentional. The High Court, however, placing reliance upon email dated 17-01-2011 alongwith attachment sent by the appellant to his subordinate officials, came to the conclusion that the appellants had wilfully disobeyed the order of the Court for which they were liable to be punished and accordingly, held the appellants guilty of commission of contempt. Aggrieved, the appellants filed the present appeal.

Allowing the appeal, the Court

HELD: 1.1. A reading of the e-mail dated 17-01-2011 alongwith attachment sent by the first appellant to his subordinate officials, would seem to indicate that on the very day of the order i.e. 17.01.2011 the first appellant understood the said order to be requiring him to lay before the High Court information as to whether the land

owners in favour of whom land has been released had filed objections under Section 5A of the Act or not. This is how the first appellant understood the order of the High Court. At that point of time the order of the Court was not available to the first appellant. On such understanding of the order dated 17.01.2011 the first appellant directed the concerned subordinate official to furnish information in the prescribed format in respect of the land owners who had filed their objections under Section 5A of the Act so that the same could be placed before the Court on the date fixed. [Para 12] [256-B-D]

1.2. The e-mail dated 17.01.2011 partially bears out the stand taken by the first appellant that he understood the order of the Court as requiring him to furnish information in respect of land owners who had filed their objections. Admittedly, a copy of the order of the court dated 17.01.2011 became available to the first appellant only at 6.00 p.m. on 18.01.2011. In his affidavit the first appellant had also stated that it would have been better if, on 19.01.2011, he had sought more time to furnish the requisite information against query No.1. However, he did not do so as the information in respect of other queries were available. The circumstances in which the events have unfolded, does not lead to the sole conclusion that there was a deliberate or wilful attempt on the part of the first appellant not to furnish the requisite information or to furnish wrong information to the Court. Rather, it appears probable that the failure to furnish the requisite information to the Court may have been occasioned by a momentary error of judgment on the part of the first appellant. For the said lapse he had tendered his unqualified apology in the affidavit dated 28.01.2011 along with which he had also furnished the requisite information i.e. name and particulars of the land owners who had not filed their objections under Section 5A of the Act. The above situation called for a broad and

magnanimous view of the matter and the acceptance of the unconditional apology tendered. Such a course of action would have better served the dignity and majesty of the institution. In fact, under Section 12(1) of the Contempt of Courts Act read with Explanation thereto an apology ought not to be rejected merely on the ground that it is accompanied by an explanation for the lapse that had occurred. The power to punish for contempt is a rare specie of judicial power which by the very nature calls for exercise with great care and caution. The power to punish for contempt ought to be exercised only where "silence is no longer an option." The conclusion reached by the High Court in the impugned order is not sustainable. The order passed by it is set aside. [Paras 13, 15, 16] [256-F-H; 257-A-D; 258-C-D, E-G]

Special Reference No. 1 of 1964 **AIR 1965 SC 745: 1965 SCR 413;** *Perspective Publications (P) Ltd. & Anr. Vs. The State of Maharashtra* **AIR 1971 SC 221: 1969 SCR 779** *In Re: S. Mulgaokar* **(1978) 3 SCC 339: 1978 (3) SCR 162 – relied on.**

Case Law Reference:

1965 SCR 413	**relied on**	**Para 14**
1969 SCR 779	**relied on**	**Para 15**
1978 (3) SCR 162	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9095 of 2013.

From the Judgment & Order dated 31.01.2011 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 5104 of 2006.

K.K. Venugopal, Govind Goel, Ankur Talwar, Sanjay Kr. Yadav, Ankit Goel, Mohan Lal Sharma, S.S. Shamshery, Arun

Bhardwaj, Bhakti Vardhan, V.M. Vishnu, Bharat Sood, Dr. Kailash Chand for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. By an order dated 31.01.2011 the High Court of Punjab & Haryana has held the appellants guilty of commission of contempt and had adjourned the matter to a subsequent date for hearing on the question of sentence. Aggrieved, this appeal has been filed.

3. The facts, in brief, may be noticed.

The respondents 1 & 2 had filed a writ petition (C.W.P. No.5104 of 2006) in the High Court of Punjab & Haryana challenging the acquisition of land belonging to them under the provisions of the Land Acquisition Act, 1894 (hereinafter for short "the Act"). By the impugned Notification(s) issued under the Act, over 500 acres of land belonging to different land owners, including respondents-writ petitioners, was sought to be acquired. According to the respondents-writ petitioners, nearly 80% of the acquired area was subsequently released from acquisition. Consequently, the remaining land (which included the land of the respondents-writ petitioners) had ceased to be viable for the purpose for which the impugned acquisition was made, namely, for development of residential and commercial sectors 8-19 at Sonepat. It was the further case of the respondents-writ petitioners before the High Court that the release of the land proposed for acquisition was at the instance of one Omaxe Housing and Developing Company Ltd. which had arrived at some understandings with the land owners and had executed agreements of sale with such land owners even after publication of the notification under Section 6 of the Act.

4. The writ petition filed by the respondents was resisted by the State by contending, inter-alia, the same to be not

maintainable on the ground that the respondents-writ petitioners had not filed their objections under Section 5A of the Act. What happened thereafter is not very relevant save and except that on 17.01.2011 the following order came to be passed by the High Court:

> "Mr. Sehgal seeks time to file additional affidavit on the following points:
>
> 1. In how many cases the land of the landowners who had not filed objections under Section 5-A of the Land Acquisition Act, 1894 was released through the mechanism of collaboration agreements?
>
> 2. What are the norms to grant licence to construct a Plotted Colony/Group Housing Colony?
>
> 3. What are the rules regarding classification of zones i.e. high potential, medium potential and low potential zones, and when those norms were amended?
>
> 4. Whether the policy/rules/norms were relaxed to grant licence to any of the 11 collaborations in this case?
>
> Adjourned to 19.1.2011."

5. On the date fixed i.e. 19.01.2011, the first appellant filed a duly verified written statement wherein, after setting out the order of the High Court dated 17.01.2011, the appellant had submitted the details of the land owners who had filed their objections under Section 5A of the Act and whose land was released from acquisition. This was in response to the first query made by the High Court in the order dated 17.01.2011. In so far as the second, third and fourth queries are concerned, information was duly furnished by the first appellant. No issue with regard to the said part of the order dated 17.01.2011 having been raised the same may be understood as not requiring any further attention.

6. On consideration of the written statement filed by the first appellant, the High Court took exception to the information placed before it in response to the first query. What was required to be furnished in response to the said query were the names of such land owners who had not filed their objections under Section 5A of the Act and yet their lands were released from acquisition whereas the information furnished by the first appellant in the written statement dated 19.01.2011 was the reverse. Consequently, notice was issued to both the appellants to show cause as to why contempt proceedings should not be initiated against them for not furnishing the requisite information to the Court. The case was adjourned to 24.01.2011 and then to 28.01.2011.

7. Separate affidavits were filed by both the appellants on 28.01.2011 wherein they had tendered unconditional and unqualified apology for not furnishing the necessary information as required in terms of the order of the High Court dated 17.01.2011. In the affidavit of the first appellant, it was also stated that as many as 483 land owners had not filed their objections under Section 5A of the Act despite which their lands were released and only in 30 instances objections had been filed pursuant to which the lands of such land owners were released from acquisition. All particulars in this regard were also furnished. The first appellant, in the affidavit filed, also sought to explain why the requisite information could not be furnished on the earlier date fixed i.e. 19.01.2011 along with the written statement filed on the said date. In this regard it was contended that though the first appellant was personally present in court on 17.01.2011 he had not fully comprehended the order as pronounced in Court. A copy of the order of the court dated 17.01.2011 was made available to him only at about 6.00 p.m. on 18.01.2011 and the written statement was filed in the next morning i.e. 19.01.2011. It was further stated by the first appellant that, through hindsight, it would have been prudent on his part to seek further time to furnish the information against the first query contained in the order dated 17.01.2011.

However, as the first appellant was in a position to furnish all the requisite information in respect of the other queries, the written statement dated 19.01.2011 came to be filed. It was further stated by the first appellant that the lapse on his part was bona fide and unintentional and he did not have the remotest intent to withhold any information from the court.

8. The second appellant who had filed a separate affidavit also owned responsibility for placing inaccurate information before the court though, according to him, he was entrusted with the duty to collect information pertaining to query Nos. 2, 3 and 4 made by the order dated 17.01.2011 whereas the information in respect of query No.1 was to be gathered by another official.

9. The matter was considered on 31.01.2011. The High Court after noticing the terms of the order dated 17.01.2011; the written statement filed by the appellant No. 1 on 19.01.2011; the order dated 19.01.2011 passed by it and the separate affidavits of the appellants filed on 28.01.2011 reiterated that the first query raised by it was with regard to the particulars of the land owners whose land was released from acquisition though they had not filed their objections under Section 5A of the Act. According to the High Court as the query raised by it was "simple and straight" it is incomprehensible that the appellants, who are senior officers and were personally present in court, could not have understood the question(s) raised. Placing reliance on the correspondence dated 17.01.2011 enclosed as annexure A2 and A3 to the affidavit dated 28.01.2011 filed by the first appellant, the High Court came to the conclusion that from the said correspondence (letters issued to subordinate officers) authored by the first appellant himself it is evident that the first appellant understood the query of the court in clear terms. The projections in the affidavit dated 28.01.2011 were accordingly understood by the High Court to be afterthoughts. In view of the above, coupled with the fact that the first appellant had conducted himself similarly on earlier occasions, the High Court took the view [illegible]e

wrong information was deliberately furnished to the Court which amounted to an "interference with the due process of law and judicial proceedings." Accordingly, the impugned order came to be passed holding that the appellants had wilfully disobeyed the order of the Court for which they are liable to be punished. Aggrieved by the aforesaid developments and the order passed, the present appeal has been filed.

10. We have heard Shri K.K. Venugopal, learned senior counsel appearing for the appellants and Shri S.S. Shamshery, learned counsel appearing for the respondents.

11. The material facts indicating the unfolding of the relevant events leading to the eventual decision of the High Court has been narrated in seriatim in the preceding paragraphs. The information sought for by the High Court; the response of the appellants and their explanation with regard to the answers provided in the first instance and the reasons which had occasioned the errors therein have all been set out in detail. Notwithstanding the above, the High Court has come to the conclusion that the explanation provided by the appellants is a mere eyewash and wrong information was deliberately furnished and correct information was withheld by the appellants which make them liable in contempt. The basis for the above conclusion reached by the High Court is the contents of annexure A2 and A3 to the affidavit dated 28.01.2011 filed by the first appellant, namely, the email dated 17.01.2011 alongwith attachment sent by the first appellant to his subordinate officials. The relevant part of the aforesaid communication which has been extracted by the High Court in its order dated 31.01.2011 is as follows:

> "The Hon'ble High Court during the hearing today has directed to file an affidavit whether the landowners, in favour of whom, above land has been released and licence has been granted, filed objections under Section 5-A or not. You are, therefore, directed to supply this information

> in following format in respect of those who had filed objections under Section 5-A……."

12. A reading of the above extract would seem to indicate that on the very day of the order i.e. 17.01.2011 the first appellant understood the said order to be requiring him to lay before the High Court information as to whether the land owners in favour of whom land has been released had filed objections under Section 5A of the Act or not. This is how the first appellant understood the order of the High Court. At that point of time the order of the Court was not available to the first appellant. On such understanding of the order dated 17.01.2011 the first appellant directed the concerned subordinate official to furnish information in the prescribed format in respect of the land owners who had filed their objections under Section 5A of the Act so that the same could be placed before the Court on the date fixed. While it may be correct that the first appellant ought to have sought information not only in respect of land owners who had filed their objections but also as regards the land owners who had not filed their objections, the question that arises is whether the said lapse, by itself, will make the first appellant liable in contempt?

13. The e-mail dated 17.01.2011, extracted above, partially bears out the stand taken by the first appellant that he understood the order of the Court as requiring him to furnish information in respect of land owners who had filed their objections. Admittedly, a copy of the order of the court dated 17.01.2011 became available to the first appellant only at 6.00 p.m. on 18.01.2011. In his affidavit the first appellant had also stated that it would have been better if, on 19.01.2011, he had sought more time to furnish the requisite information against query No.1. However, he did not do so as the information in respect of other queries were available. The circumstances in which the events have unfolded, in our considered view, does not lead to the sole conclusion that there was a deliberate or wilful attempt on the part of the first app

requisite information or to furnish wrong information to the Court. Rather, it appears probable that the failure to furnish the requisite information to the Court may have been occasioned by a momentary error of judgment on the part of the first appellant. For the said lapse he had tendered his unqualified apology in the affidavit dated 28.01.2011 along with which he had also furnished the requisite information i.e. name and particulars of the land owners who had not filed their objections under Section 5A of the Act. The above situation, in our considered view, called for a broad and magnanimous view of the matter and the acceptance of the unconditional apology tendered. Such a course of action, according to us, would have better served the dignity and majesty of the institution. In fact, under Section 12(1) of the Contempt of Courts Act read with Explanation thereto an apology ought not to be rejected merely on the ground that it is accompanied by an explanation for the lapse that had occurred.

14. Before parting, we consider it apt to quote hereunder certain observations of this Court in its opinion rendered in the *Special Reference No. 1 of 1964*[1] (under Article 143(1) of the Constitution) made to this Court in the matter arising out of notice of breach of privilege of the State Legislature issued to two Hon'ble Judges of the Allahabad High Court as, according to us it is in the aforesaid spirit that the contempt jurisdiction ought to be viewed and exercised.

> "142. Before we part with this topic, we would like to refer to one aspect of the question relating to the exercise of power to punish for contempt. So far as the courts are concerned, Judges always keep in mind the warning addressed to them by Lord Atkin in Andre Paul v. Attorney-General of Trinidad, AIR 1936 PC 141. Said Lord Atkin, "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though out-spoken comments of ordinary men." We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct. ……."

1. AIR 1965 SC 745.

15. That the power to punish for contempt is a rare specie of judicial power which by the very nature calls for exercise with great care and caution had been reiterated by this Court in *Perspective Publications (P) Ltd. & Anr. Vs. The State of Maharashtra*[2] whereas in *In Re: S. Mulgaokar*[3]**,** Justice V.R. Krishna Iyer while noticing the principles of the exercise of power of contempt had outlined the first of such principles to be "wise economy of the use of the contempt power by the court". Reiteration of the aforesaid principle has been made in several subsequent pronouncements of this Court, reference to which would not be necessary in view of the unanimity of opinion on the issue that the power to punish for contempt ought to be exercised only where "silence is no longer an option."

16. For the aforesaid reasons we are unable to sustain the conclusion reached by the High Court in its order dated 31.01.2011. We therefore deem it appropriate to set aside the order dated 31.01.2011 passed by the High Court and allow the present appeal.

B.B.B. Appeal allowed.

2. AIR 1971 SC 221.
3. (1978) 3 SCC 339.

BADSHAH

v.

SOU.URMILA BADSHAH GODSE & ANR.

CRIMINAL MISCELLANEOUS PETITION No.19530/2013

IN

SPECIAL LEAVE PETITION (CRL.) No.8596/2013

OCTOBER 18, 2013

[RANJANA PRAKASH DESAI AND A.K. SIKRI, JJ.]

Code of Criminal Procedure, 1973 – s.125 – Application under, of respondent no.1 for maintenance – Contested by petitioner on ground of maintainability – Plea of petitioner that he was already married and the said marriage was subsisting on the date of his alleged marriage with respondent no.1, who, therefore was not the legally wedded wife of petitioner and therefore had no right to move application u/s.125 CrPC – Held: In the instant case, the marriage between the parties was proved – However, the petitioner was already married – He duped respondent no.1 by suppressing the factum of alleged first marriage – On these facts, the petitioner cannot be permitted to deny the benefit of maintenance to respondent no.1, taking advantage of his own wrong – The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision - "libre recherché sceintifique" i.e. "free Scientific research" – Purposive interpretation needs to be given to the provisions of s.125,CrPC – At least for the purpose of s.125 CrPC, respondent no.1 would be treated as the wife of the petitioner – If this interpretation is not accepted, it would amount to giving a premium to the petitioner for defrauding respondent no.1 – Maxims – "construction ut res magis valeat guam pereat" – Hindu Law.

The respondents filed application under Section 125,

Cr.P.C. alleging that respondent No.1 was the wife of the petitioner and respondent No.2 was their daughter, who was born out of the wedlock.

The petitioner contended that he never entered with any matrimonial alliance with respondent No.1 in 2005, as claimed by respondent No.1 and also denied co-habitation with her and claimed that he was not the father of respondent No.2 either. According to the petitioner, he had married 'S' in 1979 and from that marriage he had two children and 'S' had been residing with him ever since their marriage.

The trial court arrived at the finding that the petitioner was married to 'S' and was having two children out of the wedlock, however, at the time of solemnizing the marriage with respondent No.1, the petitioner intentionally suppressed this fact from her and co-habited with respondent No.1; and awarded maintenance to respondent No.1 at the rate of Rs.1000/- per month and to respondent No.2 (daughter) at the rate of Rs.500/- per month. The order was upheld by the revisional Court and the High Court, and therefore the present petition.

Before this Court, the petitioner disputed the legal obligation qua respondent No.1 only. The petitioner contended that since he had proved that he was already married and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 Cr.P.C.

Dismissing the petition, the Court

HELD: 1. In so far as respondent No.2 is concerned, who is proved to be the daughter of the petitioner, in no

case he can shun the liability and obligation to pay maintenance to her. [Para 8] [268-D-E]

2.1. The marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent no.1 by suppressing the factum of alleged first marriage. On these facts, the Petitioner cannot be permitted to deny the benefit of maintenance to the respondent no.1, taking advantage of his own wrong. At least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner. [Paras 14, 16] [272-B-C; 273-B]

2.2. Further, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society. The Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour. [Paras 17, 18 & 19] [273-E-G; 274-A-B, E-F]

Yamunabai Anantrao Adhav vs. Anantrao Shivram

Adhay & Anr. **(1988) 1 SCC 530: 1988 (2) SCR 809;** *Savitaben Somabai Bhatiya vs. State of Gujarat & Ors.* **(2005) 3 SCC 636: 2005 (2) SCR 638 – held inapplicable.**

Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & Anr. **(1999) 7 SCC 675: 1999 (3) Suppl. SCR 684;** *Chanmuniya vs. Virendra Kumar Singh Kushwaha & Anr.* **(2011) 1 SCC 141: 2010 (12) SCR 223 – referred to.**

3.1. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. Indeed, when social reality changes, the law must change too. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision—"libre recherché sceintifique" i.e. "free Scientific research". There is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. [Paras 20, 22 & 23] [274-G; 276-B-D]

3.2. While interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon's Case which became the historical source of purposive interpretation. The court would also invoke the legal maxim *construction ut res magis valeat guam pereat,* in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is

between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. One should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife. [Para 25] [276-F-G; 277-A-D]

Mohd. Ahmed Khan v. Shah Bano Begum. **AIR (1985) SC 945: 1985 (3) SCR 844;** *Shabana Bano v. Imran Khan* **AIR (2010) SC 305: 2009 (16) SCR 190 and** *Rameshchandra Daga v. Rameshwari Daga* **AIR 2005 SC 422: 2004 (6) Suppl. SCR 888 – relied on.**

"The Nature of Judicial Process", by Cardozo; *"The Nature and Sources of the Law"* **by John Chipman Gray – referred to.**

4. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance. [Para 26] [277-D-F]

Capt.Ramesh Chander Kaushal vs. Veena Kaushal **(1978) 4 SCC 70: 1978 (3) SCR 782 – relied on.**

Case Law Reference:

1988 (2) SCR 809	**held inapplicable**	**Para 9**
2005 (2) SCR 638	**held inapplicable**	**Para 9**
1999 (3) Suppl. SCR 684	**referred to**	**Para 10**
2010 (12) SCR 223	**referred to**	**Para 12**
1985 (3) SCR 844	**relied on**	**Para 23**
2009 (16) SCR 190	**relied on**	**Para 23**
2004 (6) Suppl. SCR 888	**relied on**	**Para 24**
1978 (3) SCR 782	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Miscellaneous Petition No. 19530/2013

IN

Sepical Leave Petition (CRL.) No.8596/2013.

From the Judgment & Order dated 28.02.2013 of the High Court of Bombay, Bench at Aurangabad in Crl. Writ Petition No. 144 of 2012.

Prity Kumar (for Shivaji M. Jadhav) for the Petitioner.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. There is a delay of 63 days in filing the present Special Leave Petition and further delay of 11 days in refilling Special Leave Petition. For the reasons contained in the application for condonation of delay, the delay in filing and refilling of SLP is condoned.

2. The petitioner seeks leave to appeal against the judgment and order dated 28.2.2013 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Writ Petition No.144/2012. By means of the

High Court has upheld the award of maintenance to respondent No.1 at the rate of Rs.1000/- per month and to respondent No.2 (daughter) at the rate of Rs.500/- per month in the application filed by them under Section 125 of the Code of Criminal Procedure (Cr.P.C.) by the learned Trial Court and affirmed by the learned Additional Sessions Judge. Respondents herein had filed proceedings under Section 125, Cr.P.C. before Judicial Magistrate First Class (JMFC) alleging therein that respondent No.1 was the wife of the petitioner herein and respondent No.2 was their daughter, who was born out of the wedlock.

3. The respondents had stated in the petition that respondent No.1 was married with Popat Fapale. However, in the year 1997 she got divorce from her first husband. After getting divorce from her first husband in the year 1997 till the year 2005 she resided at the house of her parents. On demand of the petitioner for her marriage through mediators, she married him on 10.2.2005 at Devgad Temple situated at Hivargav-Pavsa. Her marriage was performed with the petitioner as per Hindu Rites and customs. After her marriage, she resided and cohabited with the petitioner. Initially for 3 months, the petitioner cohabited and maintained her nicely. After about three months of her marriage with petitioner, one lady Shobha came to the house of the petitioner and claimed herself to be his wife. On inquiring from the petitioner about the said lady Shobha, he replied that if she wanted to cohabit with him, she should reside quietly. Otherwise she was free to go back to her parents house. When Shobha came to the house of petitioner, respondent No.1 was already pregnant from the petitioner. Therefore, she tolerated the ill-treatment of the petitioner and stayed alongwith Shobha. However, the petitioner started giving mental and physical torture to her under the influence of liquor. The petitioner also used to doubt that her womb is begotten from somebody else and it should be aborted. However, when the ill-treatment of the petitioner became intolerable, she came back to the house of her parents.

Respondent No.2, Shivanjali, was born on 28.11.2005. On the aforesaid averments, the respondents claimed maintenance for themselves.

4. The petitioner contested the petition by filing his written statement. He dined his relation with respondent Nos.1 and 2 as his wife and daughter respectively. He alleged that he never entered with any matrimonial alliance with respondent No.1 on 10.2.2005, as claimed by respondent No.1 and in fact respondent No.1, who was in the habit of leveling false allegation, was trying to blackmail him. He also denied co-habitation with respondent No.1 and claimed that he was not the father of respondent No.2 either. According to the petitioner, he had married Shobha on 17.2.1979 and from that marriage he had two children viz. one daughter aged 20 years and one son aged 17 years and Shobha had been residing with him ever since their marriage. Therefore, respondent No.1 was not and could not be his wife during the subsistence of his first marriage and she had filed a false petition claiming her relationship with him.

5. Evidence was led by both the parties and after hearing the arguments the learned JMFC negatived the defence of the petitioner. In his judgment, the JMFC formulated four points and gave his answer thereto as under:

1. Does applicant no.1 Urmila proves that she is a wife and applicant No.2 Shivanjali is daughter of non applicant?	Yes
2. Does applicant No.1 Urmila proves that non-applicant has deserted and neglected them to maintain them through having sufficient means?	Yes
3. Whether applicant No.1 Urmila and Applicant No.2 Shivanjali are entitled to get maintenance from non-applica	Yes

4. If yes, at what rate?	Rs. 1,000/- p.m. to Applicant No. 1 and Rs. 500/- p.m. to Applicant No. 2.

6. It is not necessary to discuss the reasons which prevailed with the learned JMFC in giving his findings on Point Nos.1 and 2 on the basis of evidence produced before the Court. We say so because of the reason that these findings are upheld by the learned Additional Sessions Judge in his judgment while dismissing the revision petition of the petitioner herein as well as the High Court. These are concurrent findings of facts with no blemish or perversity. It was not even argued before us as the argument raised was that in any case respondent No.1 could not be treated as "wife" of the petitioner as he was already married and therefore petition under Section 125 of the Cr.P.C. at her instance was not maintainable. Since, we are primarily concerned with this issue, which is the bone of contention, we proceed on the basis that the marriage between the petitioner and respondent No.1 was solemnized; respondent No.1 co-habited with the petitioner after the said marriage; and respondent No.2 is begotten as out of the said co-habitation, whose biological father is the petitioner. However, it would be pertinent to record that respondent No.1 had produced overwhelming evidence, which was believed by the learned JMFC that the marriage between the parties took place on 10.2.2005 at Devgad Temple. This evidence included photographs of marriage. Another finding of fact was arrived at, namely, respondent No.1 was a divorcee and divorce had taken place in the year 1997 between her and her first husband, which fact was in the clear knowledge of the petitioner, who had admitted the same even in his cross-examination.

7. The learned JMFC proceeded on the basis that the petitioner was married to Shobha and was having two children out of the wedlock. However, at the time of solemnizing the marriage with respondent No.1, the petitioner intentionally suppressed this fact from her and co-habited with respondent No.1 as his wife.

8. The aforesaid facts emerging on record would reveal that at the time when the petitioner married the respondent No.1, he had living wife and the said marriage was still subsisting. Therefore, under the provisions of Hindu Marriage Act, the petitioner could not have married second time. At the same time, it has also come on record that the petitioner duped respondent No.1 by not revealing the fact of his first marriage and pretending that he was single. After this marriage both lived together and respondent No.2 was also born from this wedlock. In such circumstances, whether respondents could filed application under Section 125 of the Cr.P.C., is the issue. We would like to pin point that in so far as respondent No.2 is concerned, who is proved to be the daughter of the petitioner, in no case he can shun the liability and obligation to pay maintenance to her. The learned counsel ventured to dispute the legal obligation qua respondent No.1 only.

9. The learned counsel for the petitioner referred to the judgment of this Court in *Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhay & Anr.*[1] In that case, it was held that a Hindu lady who married after coming into force Hindu Marriage Act, with a person who had a living lawfully wedded wife cannot be treated to be "legally wedded wife" and consequently her claim for maintenance under Section 125, Cr.P.C. is not maintainable. He also referred to later judgments in the case of *Savitaben Somabai Bhatiya vs. State of Gujarat & Ors.*[2] wherein the aforesaid judgment was followed. On the strength of these two judgments, the learned counsel argued

1. (1998) 1 SCC 530.
2. (2005) 3 SCC 636.

that the expression "wife" in Section 125 cannot be stretched beyond the legislative intent, which means only a legally wedded-wife. He argued that Section 5(1) (i) of the Hindu Marriage Act, 1955 clearly prohibits 2nd marriage during the subsistence of the 1st marriage, and so respondent No.1 cannot claim any equity; that the explanation clause (b) to Section 125 Cr.P.C. mentions the term "divorce" as a category of claimant, thus showing that only a legally wedded-wife can claim maintenance. He, thus, submitted that since the petitioner had proved that he was already married to Shobha and the said marriage was subsisting on the date of marriage with respondent No.1, this marriage was void and respondent No.1 was not legally wedded wife and therefore had no right to move application under Section 125 of the Cr.P.C.

10. Before we deal with the aforesaid submission, we would like to refer two more judgments of this Court. First case is known as *Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & Anr.*[3] In this case it was held:

> "The validity of the marriage for the purpose of summary proceeding under s.125 Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under section 494 of the IPC. If the claimant in proceedings under s.125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouse, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu Rites in the proceedings under S.125,Cr.P.C. From

3. (1999) 7 SCC 675.

> the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under S.125, Cr.P.C. which are of summary nature strict proof of performance of essential rites is not required.

It is further held:

> It is to be remembered that the order passed in an application under section 125 Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed Civil Suit which is spending before the trial court. In such a situation, this Court in S.Sethurathinam Pillai vs. Barbara alias Dolly Sethurathinam, (1971) 3 SCC 923, observed that maintenance under section 488, Cr.P.C. 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties."

11. No doubt, it is not a case of second marriage but deals with standard of proof under Section 125, Cr.P.C. by the applicant to prove her marriage with the respondent and was not a case of second marriage. However, at the same time, this reflects the approach which is to be adopted while considering the cases of maintenance under Section 125,Cr.P.C. which proceedings are in the nature of summary proceedings.

12. Second case which we w

Chanmuniya vs. Virendra Kumar Singh Kushwaha & Anr.[4] The Court has held that the term "wife" occurring in Section 125, Cr.P.C. is to be given very wide interpretation. This is so stated in the following manner:

> "A broad and expansive interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for reasonably long period of time, and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of the Cr.P.C. so as to fulfill the true spirit and essence of the beneficial provision of maintenance under Section 125."

13. No doubt, in Chanmuniya (supra), the Division Bench of this Court took the view that the matter needs to be considered with respect to Section 125,Cr.P.C., by larger bench and in para 41, three questions are formulated for determination by a larger bench which are as follows:

> "1. Whether the living together of a man and woman as husband and wife for a considerable period of time would raise the presumption of a valid marriage between them and whether such a presumption would entitle the woman to maintenance under Section 125,Cr.P.C.?
>
> 2. Whether strict proof of marriage is essential for a claim of maintenance under Section 125,Cr.P.C. having regard to the provisions of the Domestic Violence Act, 2005?
>
> 3. Whether a marriage performed according to the customary rites and ceremonies, without strictly fulfilling the requisites of Section 7(1) of the Hindu Marriage Act, 1955, or any other personal law would entitle the woman to maintenance under Section 125,Cr.P.C.?"

4. (2011) 1 SCC 141.

14. On this basis, it was pleaded before us that this matter be also tagged along with the aforesaid case. However, in the facts of the present case, we do not deem it proper to do so as we find that the view taken by the courts below is perfectly justified. We are dealing with a situation where the marriage between the parties has been proved. However, the petitioner was already married. But he duped the respondent by suppressing the factum of alleged first marriage. On these facts, in our opinion, he cannot be permitted to deny the benefit of maintenance to the respondent, taking advantage of his own wrong. Our reasons for this course of action are stated hereinafter.

15. Firstly, in Chanmuniya case, the parties had been living together for a long time and on that basis question arose as to whether there would be a presumption of marriage between the two because of the said reason, thus, giving rise to claim of maintenance under Section 125,Cr.P.C. by interpreting the term "wife" widely. The Court has impressed that if man and woman have been living together for a long time even without a valid marriage, as in that case, term of valid marriage entitling such a woman to maintenance should be drawn and a woman in such a case should be entitled to maintain application under Section 125,Cr.P.C. On the other hand, in the present case, respondent No.1 has been able to prove, by cogent and strong evidence, that the petitioner and respondent No.1 had been married each other.

16. Secondly, as already discussed above, when the marriage between respondent No.1 and petitioner was solemnized, the petitioner had kept the respondent No.1 in dark about her first marriage. A false representation was given to respondent No.1 that he was single and was competent to enter into martial tie with respondent No.1. In such circumstances, can the petitioner be allowed to take

wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C. as respondent No.1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the purpose of Section 125 Cr.P.C., respondent No.1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized.

17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

18. Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice

adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:[5]

> "It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."[5]

19. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.

20. The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to

5. Delivered a key note address on "Legal Edu

stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.

21. **Cardozo** acknowledges in his classic[6]

"….no system of jus scriptum has been able to escape the need of it", and he elaborates: "It is true that Codes and Statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however, obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a stature."

Says **Gray** in his lecture[7]

"The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine that the legislature did mean on a

6. The Nature of Judicial Process.

7. From the Book "The Nature and Sources of the Law" by John Chipman Gray.

point which was present to its mind, but to guess what is would have intended on a point not present to its mind, if the point had been present."

22. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision—"libre recherché sceintifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfill its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances.

23. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from **Shah Bano to**[8] **Shabana Bano**[9] guaranteeing maintenance rights to Muslim women is a classical example.

24. In *Rameshchandra Daga v. Rameshwari Daga*[10], the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

25. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in *Heydon's* Case[11] which became the historical source of purposive interpretation. The

8. AIR 1985 SC 945.

9. AIR 2010 SC 305.

10. AIR 2005 SC 422.

11. (1854) 3 Co.Rep. 7a, 7b.

court would also invoke the legal maxim *construction ut res magis valeat guam pereat,* in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

26. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

27. In taking the aforesaid view, we are also encouraged by the following observations of this Court in *Capt.Ramesh Chander Kaushal vs. Veena Kaushal*[12]:

> *"The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts."*

28. For the aforesaid reasons, we are not inclined to grant leave and dismiss this petition.

B.B.B. Petition dismissed.

12. (1978) 4 SCC 70.

BHARAT SANCHAR NIGAM LTD. (B.S.N.L.) & ANR.
v
S.K. BHATNAGAR & ORS.
(Civil Appeal No. 9644 of 2013)

OCTOBER 24, 2013

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

Service Law – Pension – Commutation of – Respondent retired from service of appellant-company – Prior to retirement, he had applied for commutation of his pension – 17 years after retirement, grievance raised by respondent in regard to non-receipt of commuted pension amount – Held: Tribunal proceeded in haste in not addressing the dispute in detail – High Court also passed a laconic order – Matter remanded back to High Court for complete and detailed consideration of the matter.

Respondent no.1 retired from the service of appellant-company on 31-5-1990. He had applied for commutation of his pension prior to his retirement but he had not received the commuted pension amount of Rs.87,400/- and was not receiving his full pension. Application was filed by respondent no.1 before the Tribunal in the year 2007. The Tribunal observed that disputed questions of fact had arisen and, therefore, it would not be proper for the Tribunal to decide the case, and yet went on to hold that it could not be concluded that the amount of Rs.87,400/- had been paid to respondent no.1. On appeal, the High Court passed the impugned order which was challenged before this Court.

Allowing the appeal, the Court

HELD: 1. While one appreciates that Respondent no.1-claimant cannot prove the negative, viz., that he did

not receive the cheque allegedly dispatched to him, the factum of the passage of 17 years would be good ground not to cast a presumption of law against the Appellants. Before this Court, a photocopy of the Cash Book maintained by the Appellants, presumably in the ordinary course of business, has been furnished. It purportedly indicates that three Demand Drafts had been got issued, ostensibly against cash deposit. The Tribunal proceeded in haste in not addressing the dispute in detail. [Para 2] [282-C-E]

2. Two facts are important – (a) that it is the case of Respondent no.1 himself that he applied for commutation of his pension before his retirement; and (b) that he was not receiving his full pension. This should have alerted any Adjudicating Authority to consider the veracity of his claim without invoking the principle of 'presumption in law'. [Para 3] [282-G-H; 283-A]

3. There is no alternative but to remand the matter back to the High Court of Judicature at Allahabad for a complete and detailed consideration of the matter. It must consider all the evidence collected by both the adversaries and come to a definite answer without resorting to fastening a 'presumption in law' on either party keeping the long passage of time in perspective. It must also consider whether the claim stood barred by limitation, or was pregnant of the possibility of being rejected for delay and laches. [Para 4] [283-B-C]

Union of India v. Tarsem Singh, **(2008) 8 SCC 648 – held inapplicable.**

Case Law Reference:

(2008) 8 SCC 648	**held inapplicable**	**Para 3**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9644 of 2013.

From the Judgment & Order dated 22.11.2010 of the High Court of Judicature at Allahabad, Lucknow Bench at Lucknow in Writ Petition No. 1580 (S/B) of 2010.

Dr. A.K. Gautam, Ashok Mathur for the Appellants.

Y.S. Lohit, Dr. Sumant Bhardwaj, Mridula Ray Bharadwaj, Siddharth Sangal, Anil Kumar Sangal for the Respondents.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. This Appeal assails the Order passed on 22.11.2010 by the Division Bench of the High Court of Judicature at Allahabad in Writ Petition No.1580 (S/B) of 2010. Regretfully, it is a laconic order in respect of an extremely cryptic decision of the Central Administrative Tribunal (CAT), Lucknow Bench, Lucknow rendered on 7.1.2008 in Original Application No.153 of 2007. In the impugned Order it has been noted that Respondent no.1 retired from the service of the Appellant-company on 31.5.1990; he was serving as Telecom District Engineer (Chambal), Gwalior. It is also duly noted that Respondent no.1 had applied for commutation of his pension. It stands admitted that he was receiving pension predicated on the commutation viz., not full pension. Neither of the Orders state the date of the application for commutation of pension, but in the hearing before us it has been indicated that this request was made in 1988. The Appellants' submission before the Division Bench of the High Court was that a Cheque No.312436 dated 18.12.1990 had been dispatched to Respondent no.1 at his Lucknow address. Before this Court, the contention is that payment was made by a Demand Draft bearing even number. It was in 2007 that Respondent no.1 filed the abovementioned Original Application before the CAT, Lucknow Bench which passed the aforementioned cryptic Order on 7.1.2008. Since Respondent no.1 had retired on 31.5.1990 his grievance of having not received the commuted pension

amount of Rs.87,400/- has come after the passage of 17 long years. It is palpably clear that this inordinate delay has been glossed over in the impugned Order. So far as the CAT, Lucknow Bench is concerned it has firstly observed that disputed questions of fact have arisen and, therefore, it would not be proper for the Tribunal to decide the case yet, inexplicably it has gone on to opine that it cannot be concluded that the aforesaid amount of Rs.87,400/- had been paid to Applicant-Respondent no.1. It has directed B.S.N.L. to furnish within one month valid proof of receipt of cheque by the Applicant-Respondent no.1, failing which an adverse inference would be drawn in law. While we appreciate that Respondent no.1-claimant cannot prove the negative, viz., that he did not receive the cheque allegedly dispatched to him, the factum of the passage of 17 years would be good ground not to cast a presumption of law against the Appellants. It appears that the State Bank of India has pleaded that the records, being more than ten years old, stand destroyed, and therefore no information in this regard could be furnished. In these circumstances how is the dispute to be decided. Before us, a photocopy of the Cash Book maintained by the Appellants, presumably in the ordinary course of business, has been furnished. It purportedly indicates that three Demand Drafts had been got issued, ostensibly against cash deposit. The Tribunal proceeded in haste in not addressing the dispute in detail.

3. Learned counsel for Respondent no.1 has drawn our attention to *Union of India & Ors. v. Tarsem Singh* (2008) 8 SCC 648 wherein this Court has held that normally service matter claims are rejected either on limitation or on the grounds of delay/laches; the exception being cases of continuing wrong. We cannot appreciate how this advances the case of Respondent no.1. Two facts are important – (a) that it is the case of Respondent no.1 himself that he applied for commutation of his pension before his retirement; and (b) that he was not receiving his full pension. This should have alerted any Adjudicating Authority to consider th m

without invoking the principle of 'presumption in law'. Tarsem Singh, therefore, does not assist the case of Respondent no.1 a wit.

4. We find that there is no alternative but to remand the matter back to the High Court of Judicature at Allahabad for a complete and detailed consideration of the matter. It must consider all the evidence collected by both the adversaries and come to a definite answer without resorting to fastening a 'presumption in law' on either party keeping the long passage of time in perspective. It must also consider whether the claim stood barred by limitation, or was pregnant of the possibility of being rejected for delay and laches.

5. The impugned Order is accordingly set aside and the matter is remanded to the High Court for fresh adjudication. The Appeal is allowed accordingly. We hasten to clarify that nothing contained in these presents shall be construed to indicate our views on the merits of the case.

B.B.B. Appeal allowed.

SUDAM CHARAN DASH

v.

STATE OF ORISSA & ANR.

(Criminal Appeal No. 1862 of 2013)

OCTOBER 25, 2013

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

Code of Criminal Procedure, 1973 – ss.438 and 439 – Scope and purport of – Application for anticipatory bail – Rejected by High Court but further direction issued by it to trial court to release respondent 2-accused on bail – Propriety – Held: After rejecting the prayer for anticipatory bail, the High Court should not have negated its own order by directing that respondent 2 should be released on bail – This is contradiction in terms – It dilutes the order rejecting anticipatory bail – Such order is not legally sound and overlooks the scope and purport of ss.438 & 439 CrPC – The Magistrate released respondent 2 on bail solely on the ground that the High Court had issued such direction – The Magistrate had no alternative but to do so – Thus, there was no consideration of the application for bail filed by respondent 2 on merits – Order passed by Magistrate therefore quashed – Direction issued that if respondent 2 appears and surrenders before the Magistrate and prefers application for bail, the Magistrate shall decide his application on merits and in accordance with law.

The appellant's son was murdered in a hotel. It is the appellant's case that the police did not investigate the case properly. The appellant ultimately filed writ petition in the High Court. Subsequently, non-bailable warrant was issued against accused-respondent 2, by the Magistrate. Respondent 2 preferred application for anticipatory bail.

The High Court disposed of the application by the impugned order. The Court observed that considering the nature of the allegations made against respondent 2, it was not a fit case for grant of anticipatory bail, however, it gave direction that in the event respondent 2 surrenders before the Magistrate within four weeks and moves an application for bail, he shall be released on bail on such terms and conditions as the Magistrate deems fit and proper. Pursuant to this direction, respondent 2 surrendered before the Magistrate and was released on bail.

Disposing of the appeal, the Court

HELD: 1.1. When the High Court rejected the application for anticipatory bail, it was sufficient indication that the High Court thought it fit not to put a fetter on the investigating agency's power to arrest respondent 2. In such a situation, the investigating agency, if it so desired and if it thought that the custodial interrogation of respondent 2 was necessary, could have arrested him. Therefore, after rejecting the prayer for anticipatory bail, the High Court should not have negated its own order by directing that respondent 2 should be released on bail. This is contradiction in terms. It dilutes the order rejecting anticipatory bail. Such order is not legally sound. It overlooks the scope and purport of Sections 438 and 439 of the Code of Criminal Procedure, 1973. Such orders put restriction on the power of the trial court to consider the bail application on merits and grant or reject prayer for bail. Such orders should never be passed. [Paras 3, 5] [287-E-G; 289-D]

1.2. The Magistrate released respondent 2 on bail solely on the ground that the High Court had issued the above mentioned direction. The Magistrate had no alternative but to do so. Thus, there was no consideration

of the application for bail filed by respondent 2 on merits. The consequential order passed by the Magistrate is therefore quashed. In the circumstances, if respondent 2 appears and surrenders before the Magistrate and prefers an application for bail, the Magistrate shall decide respondent 2's application on merits and in accordance with law. [Para 7] [289-E-H]

Rashmi Rekha Thatoi & Anr. v. State of Orissa & Ors. **(2012) 5 SCC 690: 2012 (5) SCR 674;** *Gurbaksh Singh Sibbia v. State of Punjab* **(1980) 2 SCC 565: 1980 (3) SCR 383 and** *Savitri Agarwal v. State of Maharashtra* **(2009) 8 SCC 325: 2009 (10) SCR 978 – relied on.**

Case Law Reference:

2012 (5) SCR 674	**relied on**	**Para 4**
1980 (3) SCR 383	**relied on**	**Para 4**
2009 (10) SCR 978	**relied on**	**Para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1862 of 2013.

From the Judgment & Order dated 17.05.2013 of the High Court of Orissa in BLAPL No. 8671 of 2013.

Aditya C.B., Amarjit Singh Bedi, Avijit Patnaik for the Appellant.

R. Venkat Raman, Shivaji M. Jadhav for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant's son – Rajib Das was murdered on 5/1/2009 in a hotel. FIR was lodged in respect thereof on 6/1/2009.

PS Case No. 4 of 2009 was registered. It is the appellant's case that the police did not investigate the case properly. The appellant ultimately filed a writ petition in the Orissa High Court. Thereafter, the investigation gained momentum. On 3/1/2013, non-bailable warrant was issued against Mr. Sweekar Nayak, who is respondent 2, by the SDJM, Rayagada. Respondent 2 preferred an application for anticipatory bail in the Orissa High Court. The High Court disposed of the said application by the impugned order. We notice that in the impugned order, the High Court has made a categorical observation that considering the nature of the allegations made against respondent 2, it did not think it to be a fit case for grant of anticipatory bail. Surprisingly, however, the High Court gave a direction that in the event respondent 2 surrenders before the learned SDJM, Rayagada within four weeks and moves an application for bail, he shall be released on bail on such terms and conditions as the learned Magistrate deems fit and proper. Pursuant to this direction, respondent 2 surrendered before the learned Magistrate and was released on bail on 11/06/2013.

3. We are surprised at the direction issued by the High Court to the trial court to release respondent 2 on bail. When the High Court rejected the application for anticipatory bail, it was sufficient indication that the High Court thought it fit not to put a fetter on the investigating agency's power to arrest respondent 2. In such a situation, the investigating agency, if it so desired and if it thought that the custodial interrogation of respondent 2 was necessary, could have arrested him. Therefore, after rejecting the prayer for anticipatory bail, the High Court should not have negated its own order by directing that respondent 2 should be released on bail. This is contradiction in terms. It dilutes the order rejecting anticipatory bail. Such order is not legally sound. It overlooks the scope and purport of Sections 438 and 439 of the Code of Criminal Procedure, 1973.

4. In a similar situation in *Rashmi Rekha Thatoi & Anr. v.*

State of Orissa & Ors.,[1] this Court took a strong view of the matter and observed that such orders have no sanctity in law. Relevant observations of this Court could be quoted:

> *"33. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab,*[2] *had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative pronouncement and the principles that have been culled out in Savitri Agarwal v. State of Maharashtra*[3] *there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in Gurbaksh Singh Sibbia and the principles culled out in Savitri Agarwal".*

The operative portion of the order passed in that case reads as follows:

> *"Judging on the foundation of aforesaid well-settled*

1. (2012) 5 SCC 690.
2. (1980) 2 SCC 565.
3. (2009) 8 SCC 325.

principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons, namely, Uttam Das, Abhimanyu Das and Murlidhar Patra by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently, the bail bonds of the aforenamed accused persons are cancelled and they shall be taken into custody forthwith. It needs no special emphasis to state that they are entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits."

5. We respectfully agree with these observations. We also feel that such orders put restriction on the power of the trial court to consider the bail application on merits and grant or reject prayer for bail. We are of the opinion that such orders should never be passed.

6. In the circumstances, we set aside the impugned order.

7. We have perused the order passed by the SDJM, Rayagada granting bail to respondent 2 pursuant to the impugned order. Obviously, the SDJM released respondent 2 on bail solely on the ground that the High Court had issued the above mentioned direction. The SDJM had no alternative but to do so. Thus, there is no consideration of the application for bail filed by respondent 2 on merits. We, therefore, quash the consequential order dated 11/6/2013 passed by the SDJM, Rayagada. Ordinarily, we would have directed respondent 2 to surrender today. But, we refrain from giving any such direction. In the circumstances, if respondent 2 appears and surrenders before the SDJM, Rayagada on 29/10/2013 and prefers an application for bail, we direct the SDJM, Rayagada to decide respondent 2's application on merits and in accordance with law. The appellant may remain present in the court and oppose the bail application if he so desires.

8. We direct the Registry of this Court to forward a copy of this judgment to the Chief Justice of the Orissa High Court. We request the Chief Justice of Orissa High Court to circulate a copy of this order to the learned Judges of the Orissa High Court.

9. The appeal is disposed of in the aforestated terms.

B.B.B. Appeal disposed of.