VEER PAL SINGH
v.
SECRETARY, MINISTRY OF DEFENCE
(Civil Appeal No. 5922 of 2012)

JULY 2, 2013

[G.S. SINGHVI, RANJANA PRAKASH DESAI AND SHARAD ARVIND BOBDE, JJ.]

Armed Forces - Pre-mature release/discharge of appellant from service for suffering from 'Schizophrenic Reaction' - Disability pension - Entitlement to - Expert opinion - Opinion of Medical Board - Scope of judicial review - Whether, on facts, the Medical Board had entirely relied upon an inchoate opinion expressed by the Psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment - Held: Although, the Courts and other judicial / quasi-judicial forums are extremely loath to interfere with the opinion of the experts, they cannot, in each and every case, refuse to examine the record of the Medical Board - In the case at hand, the Invaliding Medical Board simply endorsed the observation of the Psychiatrist that the case of appellant was that of "Schizophrenic Reaction" - Conclusion recorded by the Invaliding Medical Board was not well founded and required review in the context of the observation made by the Psychiatrist herself that with treatment, the appellant had improved - In the peculiar facts, the Tribunal should have ordered constitution of Review Medical Board for re-examination of the appellant - However, the Tribunal did not even bother to look into the contents of the certificate issued by the Invalidating Medical Board and mechanically observed that it cannot sit in appeal over the opinion of the Medical Board - Respondents directed to refer the case of appellant to Review Medical Board for re-assessing his medical condition and find out whether at the

time of discharge from service, he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension.

The appellant was enrolled in the Army (Corps of Signals) in Medical Category "AYE". He was subsequently downgraded to Medical Category "CEE" (Temporary), and thereafter, on recommendations of the Invaliding Medical Board, was discharged from service for suffering from 'Schizophrenic Reaction'.

The claim of appellant for disability pension was rejected on the ground that the disease, i.e., Schizophrenic Reaction, which caused his discharge was not attributable to military service. The appellant filed Writ Petition before the High Court which directed the competent authority to decide the appellant's representation. The representation filed by the appellant having been rejected, he filed another Writ Petition praying for directions to the respondents to constitute a Review Medical Board to re-evaluate his disease.

Meanwhile the Armed Forces Tribunal Act, 2007 was enacted and the second writ petition filed by the appellant was transferred to the Armed Forces Tribunal. The Tribunal held against the appellant observing that recommendations made by the Medical Board were binding and could not be subjected to judicial review, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1. Although, the Courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. The opinion of the experts deserves respect and not worship and the Courts and

other judicial / quasi- judicial forums entrusted with the task of deciding the disputes relating to premature release / discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable. [Para 11] [597-G-H; 598-A-B]

2. In the case at hand, at the time of enrolment in the Army, the appellant was subjected to medical examination and Recruiting Medical Officer found that he was fit in all respects. The doctor who examined the appellant i.e. the Recruiting Medical Officer did not find any disease or abnormality in the behaviour of the appellant. When the Psychiatrist - Dr. (Mrs.) Lalitha Rao examined the appellant, she noted he was quarrelsome, irritable and impulsive but he had improved with the treatment. The Invaliding Medical Board simply endorsed the observation made by Dr. Rao that it was a case of "Schizophrenic Reaction". [Para 12] [598-B-E]

Merriam- Webster Dictionary; Modi's Medical Jurisprudence and Toxicology (24th Edn. 2011) and "The Theory and Practice of Psychiatry" (1966 Edn.) by F.C.Redlich and Daniel X. Freedman - referred to.

3.1. The Tribunal did not even bother to look into the contents of the certificate issued by the Invalidating Medical Board and mechanically observed that it cannot sit in appeal over the opinion of the Medical Board. If the members of the Tribunal had taken pains to study the standard medical dictionaries and medical literature like "The Theory and Practice of Psychiatry" by F.C. Redlich and Daniel X. Freedman, and Modi's Medical Jurisprudence and Toxicology, then they would have definitely found that the observation made by Dr. Lalitha Rao was substantially incompatible with the existing

literature on the subject and the conclusion recorded by the Invaliding Medical Board that it was a case of Schizophrenic Reaction was not well founded and required a review in the context of the observation made by Dr. Lalitha Rao herself that with the treatment the appellant had improved. Having regard to the peculiar facts of this case, the Tribunal should have ordered constitution of Review Medical Board for re- examination of the appellant. [Para 17] [604-C-F]

3.2. The respondents are directed to refer the case to Review Medical Board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension. [Para 20] [605-C]

Controller of Defence Accounts (Pension) v. S. Balachandran Nair **(2005) 13 SCC 128: 2005 (4) Suppl. SCR 431 and** *Ministry of Defence v. A.V. Damodaran* **(2009) 9 SCC 140: 2009 (13) SCR 416 - distinguished.**

Case Law Reference:

2005 (4) Suppl. SCR 431	**distinguished**	**Para 18**
2009 (13) SCR 416	**distinguished**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5922 of 2012.

From the Judgment & Order dated 19.12.2011 of the Armed Forces Tribunal, Lucknow in Misc. Application No. 73 of 2011 in Review Application No. 22 of 2011 in Transferred Application No. 1431 of 2010.

Veer Pal Singh, in-person.

Chandan Kumar, Sashank Bajpai

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. This appeal is directed against order dated 19.12.2011 of the Armed Forces Tribunal, Lucknow Bench (for short, 'the Tribunal') dismissing the application filed by the appellant for grant of leave to file appeal against orders dated 14.7.2011 and 16.9.2011 passed in Transferred Application No.1431/2010 and Review Application No.22/2011 respectively.

2. The appellant was enrolled in the Army (Corps of Signals) on 20.6.1972 in Medical Category "AYE". Before his enrolment, the appellant was subjected to medical examination, the report (Annexure R-II) of which is reproduced below:

"PRIMARY MEDICAL EXAMINATION REPORT

1.	Service No.	14289930
2.	Name	VEER PAL SINGH
3.	Father's Name	SUKHBIR SINGH
4.	Date of birth	01.10.53
5.	Appellant Age	MA
6.	Service/Corps/ Air Force	SIGNALS
7.	Permanent address	Village – Dhanor Tikkri Teh. & Dist. Sardhana, Meerut.
8.	Identification Marks	
	1. A mole over middle of forehead	
	2. A mole 3 cm from Lt angle of mouth	
9.	Relevant family history	NIL

10.	Past medical history, Specially of fits		NIL
11.	EYES		
	a.	Distance Vision without Glass	R-6/9
		Without Glass	L-6/6 NIL
	Near Vision Any evidence of trachoma or its Complications		NIL
12.	Hearing		
	a.	R Ear 600 cms L Ear	
	b.	Any evidence of otitls media	NAD
13.	Upper Limbs and Locomoter System	(a) Upper Limbs	NAD
		(b) Locomotion	NAD
14.	Physical Developments:		
	Height:	174 cm	
	Weight:	54 Kgs.	
15.	Chest Measurements		
	(a)	Full expiration	81 cms
	(b)	Range of e	

16.	Urine		
(a)		Albumen	--
(b)		Sugar	--
(c)		Other abnormalities	
17.	Any evidence of skin		NIL
	Venereal disease(s)		
18.	Cardio-vascular system		
(a)	Pulse		76 pm
(b)	BP (if necessary)		NAD
19.	Central Nervous system		NAD
20.	Abdomen:		NAD
21.	Liver:		NP
22.	Spleen:		NP
23.	Hernia:		NIL
24.	Teeth:		
(a)	No dental points		16/16
(b)	Condition of gums		Healthy
25.	**Mental capacity and Emotional Stability**		
(a)	**Speech**		
(b)	**Evidence suggesting**		**NORMAL**

i.	**Mental backwardness**	**NIL**
ii.	**Emotional Instability**	**NIL**
26.	Slight Defects not sufficient of cause Rejection	NIL
27.	**Found fit in category**	**A (AYE)**

PLACE: MEERUT

Date: 22/5/72

Sd/-

[RK Gupta]
Captain AMC
Recruiting Medical Officer"

3. After completion of training, the appellant was posted in 54 Infantry Division Signals Regiment and his regular service commenced with effect from 21.2.1974. After about two years, he was admitted in Military Hospital, Secunderabad for the treatment of "INTESTINAL-COLIC". He was discharged from the hospital on 18.2.1976. Between March, 1976 to October, 1977 he was treated in different Army Hospitals at Pune, Secunderabad and Meerut. He was downgraded to Medical Category "CEE" (Temporary) for a period of six months with effect from 3.1.1977. His case was considered on 14.11.1977 by the Invaliding Medical Board held at Military Hospital, Meerut and on its recommendations, he was discharged from service. His claim for disability pension was rejected by Principal Controller of Defence Accounts (Pension), Allahabad on the ground that the disease, i.e., Schizophrenic Reaction, which was the cause of his discharge was not attributable to the military service.

4. The appellant challenged his discharge from military service and rejection of his claim for disability pension in Civil Misc. Writ Petition No.42946/1997 filed

High Court. He prayed that a fresh Medical Board be constituted to assess his disease and disability. The same was disposed of by the Allahabad High Court vide order dated 26.3.1998 and a direction was given to the competent authority to decide the appellant's representation. Thereafter, the Government of India, Ministry of Defence rejected the appellant's representation vide order dated 16.9.1998, paragraph 9 of which reads thus:

> "You have been diagnosed as a case of SCHIZOPHRENIC REACTION and not LUNATIC. As such your request to produce you before a medical board to examine you whether you are Lunatic or free from LUNACY does not arise. Therefore no resurvey medical board can be held in your case."

5. The appellant challenged the aforesaid order in Writ Petition No.40430/1999 and prayed that the respondents be directed to constitute a Review Medical Board to re-evaluate his disease.

6. The second writ petition filed by the appellant remained pending before the High Court for 13 years. On the establishment of Lucknow Bench of the Tribunal under the Armed Forces Tribunal Act, 2007 (for short, 'the Act'), the same was transferred to the Tribunal and was registered as Transferred Application No.1431/2010. The Tribunal examined the record of the Medical Board, referred to the judgment of this Court in Secretary, Ministry of Defence v. A.V. Damodaran (2009) 9 SCC 140 and dismissed the application by making the following observations:

> "In view of the aforesaid the Medical Board's opinion is to be accorded supremacy. We in exercise of our jurisdiction can not sit over the opinion expressed by the Medical Board which is an expert body. The disease that the applicant was suffering from has been found to be constitutional and not aggravated by military service. We can not hold anything contrary to the medical opinion."

7. The review application and the application filed by the appellant for grant of leave to appeal were dismissed by the Tribunal with a cryptic observation that the recommendations made by the Medical Board are binding and the same cannot be subjected to judicial review.

8. The appellant, who appeared in person, referred to report dated 22.5.1972 of the Recruiting Medical Officer as also report dated 14.11.1977 of the Invaliding Medical Board and argued that in the absence of evidence about his disease, i.e., Schizophrenic Reaction at the time of enrolment, the opinion of the Psychiatrist, who examined him, could not be relied upon for recording a finding that his disease is constitutional and is not attributable to military service. The appellant submitted that mere irritability or quarrelsome nature cannot lead to an inference that he was suffering from Schizophrenic Reaction and the Tribunal committed grave error by declining his prayer for making a reference to the Review Medical Board. He also invited the Court's attention to the averments contained in paragraph 5 of the counter affidavit filed before this Court to show that the disease had developed after entering the service and argued that it should be treated as directly attributable to the military service.

9. Learned counsel for the respondent fairly stated that except the opinion of the Psychiatrist-Major (Mrs.) N. Lalitha Rao, no other evidence is available to support the opinion of the Medical Board that the appellant was suffering from Schizophrenic Reaction. He also conceded that at the time of enrolment, the appellant was not suffering from any disease but argued that the Court cannot sit in appeal over the opinion formed by the experts who constituted Invaliding Medical Board.

10. We have considered the respective arguments. For the sake of convenience, the relevant portions of the proceedings of the Invaliding Medical Board which constituted the foundation of the appellant's discharge from Army and denial of disability pension read as under:

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MEDICAL BOARD PROCEEDING INVALIDING ALL RANKS

Authority for Board	Place	Date
AO 537/72	M.H. Meerut	14 Nov. 77

Name	Service No.	Rank/Rate	Unit/Ship	Date birth
Veerpal Singh	14289930	SIG/MAN	ip 676SIG (04 C1056 APO	01.10.53

Service	Army/Corps/ Branch/Trade	Total Service	Total flying hours/ Service afloat

Permanent address: ViQ Dhanaura (Tikri) P.O. Dhanaura The. Sardhana Dist. Meerut, U.P.

Identification marks: - i Mole over middle, of forehead. ii. Mole over the lt. cheek

Field/Operational/Overseas Service: Giving dates and place

From	To	Place	From	To	Place
		NIL			

PART – I

PERSONAL STATEMENT

(The questions should be answered in the individual's own words. This statement will be checked from official records as far as possible)

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1. Give particulars of previous service in ARMY/NAVY/ AIR/FORCE and state whether you were invalided out of Service.

2. Give particulars of any diseases, wounds or injuries from which you are suffering:-

---

Illness, wound, injury	First Stated		Where treated	Approximate dates and periods treated
	Date	Place		
Shizoph Renic Reaction (295)	Mar 76	Secunderbad	MH Secunde -rabad	25.3.76 to 12.5.76
			CHSE Pune	13.5.76 to 5.9.76
				23.11.76 to 5.1.77
			MH Secunde rabad	5.7.77 to 30.8.77
			MH Meerut	14.10.77 to DATE

3. Did you suffer from any disability mentioned in question 2 or anything like it before joining the Armed Forces? If so give details and dates. NIL

4. Give details of any incidents during your service which you think caused or made your disability worse? NIL

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5. In case of wound or injury, st d

and whether or not (a) Medical Board or Court of Inquiry was held, (b) Injury Report was submitted. N.A.

6. Any other information you wish to give about your health. NIL

I certify that I have answered as fully as possible all the questions about my service and personal history and that the information give is true to the best of my knowledge.

Witness : Signature

Sd/- Sd/- 14289930

(In case of illiterate persons thumb and fingers impressions of left hand will be taken here)

PART - II
STATEMENT OF CASE
(Not to be communicated to the Individual)

Disabilities	Date of origin	Place and unit where serving at the time
SCHIZOPHRENIC Reaction - 295	Mar. 76	676 SIG Coy C/056 APO

2. Clinical details

a. Give the salient facts of:-

i. Personal and relevant family history.

ii. Specialist report; and

iii.Treatment

b. State present condition in details.

c. In this statement and in answering questions in Part-III the Board will differentiae carefully between the Individuals statement and the evidence recorded in the medical documents.

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Sd/- Lt. Col.
Chief Record Officer
Signals Records

SUMMARY OF THE CASE

NO. 14289930	Rank:	Sigman:
Name: Veer Pal Singh	Time	24 years
Unit:	676 Signal Coy C/o 56 APO	
Diagnosis:	SCHIZOPHRENIC reaction (295)	

==========

A case of Schizophrenic Reaction admitted for review after sick leave from MH Secunderabad. At present he has no complaints.

Perusal of the documents show that this patient was treated earlier at the following hospitals for the same illness:-

1. MH Secunderabad - 25.3.76 to 12.5.76

2. From to CH (SC) Pune - 13.5.76 to 5.9.76 sent on sick leave

3. CH (SC) Pune - Nov. 76 Cat CEE Temp w.e.f. 3.1.77.

4. MH Secunderabad - 05.7.77 to 30.8.77 sick leave.

Observation in the Ward:-

Showed him to be irritable, impulsive quarrel some with a tendency to suspect the staff and other patients.

Past Illness:
Nil significant

Family History
Belong to U.P. Father - farmer - healthy. Mother healthy. He has three brothers. No history of mental illness to the family.

Personal History:
Youngest, Studied up to BA. Unmarried Gives history of heterosexual experience. Smokes but does not rink.

Service:
6 years, Nil Punishment

On Exam:
GC fair, TPR - Normal, Lungs, Heart and Abdomen-NAD

Treatment:
Antipaychotic drugs-
-Improvement - Not maintained.

OPINION OF MAJOR (MRS) N LALITHA RAO, CLASSIFIED SPECIAL BT (PSYCHIATRY) MH MEERUT DATED 09. NOV. 77.

A case of Schizophrenic Reaction (ICD 295) in cat 'CEE' Temp w.e.f. 3.1.77 was admitted and treated at MH Secunderabad with self inflicted.

Injuries, in Jul 77, while in the hospital there, he had

become quarrels irritable and impulsive with treatment he improved when he was sent in six weeks sick leave. Review as admission, now shows him to be still irritable and argumentative with persecutory delusions and suspicious. Residual features of psychosis persist

- Therefore he is recommended invalidment from service.

Recommended Cat 'CEE'

Sd/- x x x x
[N LALITHA RAO]
MAJOR, AMC
PSYCHIATRIST

I view of the above, the individual is brought before Invaliding Medical Board.

[N LALITHA RAO]
MAJOR, AMC

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PART – III
OPINION OF THE MEDICAL BOARD
(Not to be communicated to the Individual)

Note: Clear and decisive answers should be filed in by the Board, Expressions such as 'night', 'may', probably', should be avoided.

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1. Did the disability/ies exist before entering service. NO

2. In respect of each disability the Medical Board on the evidence before it will express its views as to whether:-

   i. It is attributable to service during peace or under field service conditions; or

ii. It has been aggravated thereby and remains so; or

iii. It is not connected with service.

The Board should state fully the reasons in regard to each disability on which its opinion is based.

Disability	A	B	C
SCHIZOP-HRENIC REACTION	NO	NO	NO

b. In respect of each disability shown as attributable under A, the Board should state fully, the specific condition and period in service which caused the disability. N.A.

c. In respect of each disability shown as attributable under A, the Board should state fully:- N.A.

i. The specific condition and period in service which aggravated the disability. N.A.

ii. Whether the effects of such aggravation still persist. N.A.

iii. If the answer to (ii) is in the affirmative, whether effect of aggravation will persist for a material period. N.A.

d. In the case of a disability under C, the Board should state what exactly in their opinion is the cause thereof.

The disease is constitutional and is unconnected with service.

3. a. Was the disability, attributable to the individual's

own negligence or misconduct? If so, in what way? NO

b. If not attributable, was it aggravated by negligence or misconduct? If so, in what way and to what percentage of the total disablement? N.A.

c. Has the individual refused to undergo operation/treatment? If so, individual's reasons will be recorded. N.A.

NOTE: In case of refusal of operation/treatment a certificate from the individual will be attached.

d. Has the effect of refusal been explained to and fully understood by him/her, viz., a reduction in, or the entire withholding of, any disability pension to which he/she might otherwise be entitled? N.A.

e. Do the Medical Board consider it probable that the operation/treatment would have cured the disability or reduced its percentage? N.A.

f. If the reply to (e) is in affirmative, what is the probable percentage to which the disablement could be reduced .by operation/ treatment? N.A.

g. Do the Medical Board consider the operation to be server and dangerous to life? N.A.

h. Do the Medical Board consider the individual's refusal to submit to operation/ treatment reasonable? Give reasons in support of the opinion specifying he operation/treatment recommended. N.A.

4. What is present degree of disablement as compared with a healthy person of the same age and sex? (Percentage will be expressed as Nil or as follows:-

1-5%, 6-19%, 11-14%, 15-90% and thereafter in multiples of ten from 10% to 100%.

Disability (as numbered in question I, part II)	Percentage of disablement	Probable duration of this degree of disablement	Composite assessment (all disabilities)
SCHIZOPHR-ENIC REACTION (295)	30% THIRTY PERCENT	2 YEARS	30% THIRTY PERCENT

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CERTIFICATE

No.14289930 Rank Sigman Name VEER PAL SINGH

The disability will not interfere with the performance of normal/sabentuary suitable civil employment.

Disability SCHIZOPHERNIC REACTION

Sd/-
[OM PRAKASH]
Lt. Col. AMC
President Medical Board

Dated: 14 Nov. 77"

11. Although, the Courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial / quasi-judicial forums entrusted with the task

of deciding the disputes relating to premature release / discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable.

12. A recapitulation of the facts shows that at the time of enrolment in the Army, the appellant was subjected to medical examination and Recruiting Medical Officer found that he was fit in all respects. Item 25 of the certificate issued by the Recruiting Medical Officer is quite significant. Therein it is mentioned that speech of the appellant is normal and there is no evidence of mental backwardness or emotional instability. It is, thus, evident that the doctor who examined the appellant on 22.5.1972 did not find any disease or abnormality in the behaviour of the appellant. When the Psychiatrist - Dr. (Mrs.) Lalitha Rao examined the appellant, she noted he was quarrelsome, irritable and impulsive but he had improved with the treatment. The Invaliding Medical Board simply endorsed the observation made by Dr. Rao that it was a case of "Schizophrenic Reaction".

13. In Merriam-Webster Dictionary "Schizophrenia" has been described as a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as in delusions), perception (as in hallucinations), and behavior – called also dementia praecox; Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history.

14. National Institute of Mental Health, USA has described "Schizophrenia" in the following words:

"Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history. People with the disorder may hea e

don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may not make sense when they talk. They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking. Families and society are affected by schizophrenia too. Many people with schizophrenia have difficulty holding a job or caring for themselves, so they rely on others for help. Treatment helps relieve many symptoms of schizophrenia, but most people who have the disorder cope with symptoms throughout their lives. However, many people with schizophrenia can lead rewarding and meaningful lives in their communities."

Some of the symptoms of schizophrenia are:

Positive symptoms

Positive symptoms are psychotic behaviors not seen in healthy people. People with positive symptoms often "lose touch" with reality. These symptoms can come and go. Sometimes they are severe and at other times hardly noticeable, depending on whether the individual is receiving treatment. They include the following:

Hallucinations – "Voices" are the most common type of hallucination in schizophrenia. Hallucinations include seeing people or objects that are not there, smelling odors that no one else detects, and feeling things like invisible fingers touching their bodies when no one is near.

Delusions - The person believes delusions even after other people prove that the beliefs are not true or logical. They may also believe that people on television are directing special messages to them, or that radio stations are broadcasting their thoughts aloud to others. Sometimes they believe they are

someone else, such as a famous historical figure. They may have paranoid delusions and believe that others are trying to harm them.

Thought disorders - are unusual or dysfunctional ways of thinking. One form of thought disorder is called "disorganized thinking". This is when a person has trouble organizing his or her thoughts or connecting them logically, a person with a thought disorder might make up meaningless words, or "neologisms".

Movement disorders - may appear as agitated body movements. A person with a movement disorder may repeat certain motions over and over. In the other extreme, a person may become catatonic. Catatonia is a state in which a person does not move and does not respond to others. Catatonia is rare today, but it was more common when treatment for schizophrenia was not available.

Negative symptoms

Negative symptoms are associated with disruptions to normal emotions and behaviors. These symptoms are harder to recognize as part of the disorder and can be mistaken for depression or other conditions. These symptoms include the following:

* "Flat affect" (a person's face does not move or he or she talks in a dull or monotonous voice)
* Lack of pleasure in everyday life
* Lack of ability to begin and sustain planned activities
* Speaking little, even when forced to interact.

15. In Modi's Medical Jurisprudence and Toxicology (24th Edn. 2011) the following varieties of Sc[illegible]n noticed:

Simple Schizophrenia – the illness begins in early adolescence. There is a gradual loss of interest in the outside world, from which the person withdraws. There is an all round impairment of mental faculties and he emotionally becomes flat and apathetic. He loses interest in his best friends who are few in number and gives up his hobbies. He has conflicts about sex, particularly masturbation. He loses all ambition and drifts along in life, swelling the rank of chronically unemployed. Complete disintegration of personality does not occur, but when it does, it occurs after a number of years.

Hebephrenia- hebephrenia occurs at an earlier age than either the katatonic or the paranoid variety. Disordered thinking is the outstanding characteristic of this kind of schizophrenia. There is great incoherence of thought, periods of wild excitement occur and there are illusions and hallucinations. Delusions which are bizarre in nature, are frequently present. Often, there is impulsive and senseless conduct as though in response to their hallucination or delusions. Ultimately the whole personality may completely disintegrate.

Katatonia - katatonia is the condition in which the period of excitement alternates with that of katatonic stupor. The patient is in a state of wild excitement, is destructive, violent and abusive. He may impulsively assault anyone without the slightest provocation. Homicidal or suicidal attempts may be made. Auditory hallucinations frequently occur, which may be responsible for their violent behaviour. Sometimes, they destroy themselves because they hear God' voice commanding them to destroy themselves. This phase may last from a few hours to a few days or weeks, followed by stage of stupor.

The katatonic stupor begins with a lack of interest, lack of concentration and general apathy. He is negative, refuses to take food or medicines and to carry out his daily routine activities like brushing his teeth, taking bath or change his clothes…. The activities are so very limited that he may confine himself in one place and assume one posture however

uncomfortable, for hours together without getting fatigued. His face is expressionless and his gaze vacant…. They may understand clearly everything that is going on around them, and sometime without warning and without any apparent cause, they suddenly attack any person standing nearby.

Paranoid Schizophrenia, Paranoia and Paraphrenia - Paranoia is now regarded as a mild form of paranoid schizophrenia. The main characteristic of this illness is a well elaborated delusional system in a personality that is otherwise well preserved. The delusions are of a persecutory type. The true nature of the illness may go unrecognized for a long time because the personality is well preserved, and some of these paranoiacs may pass off as social reformers or founders of queer pseudo-religious sects. The classical picture is rare and generally takes a chronic course.

Paranoid schizophrenia, in the vast majority of cases, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow which in the beginning, start as sounds or noises in the ears, but become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations, which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions.

Since so many people are against him and are interested in his ruin, he comes to believe that he must be a very important man. The nature of delusions thus, may change from persecutory to grandiose type. He entertains delusions of grandeur, power and wealth, and generally conducts hi[illegible]d

overbearing manner. The patient usually retains his money and orientation and does not show signs of insanity, until the conversation is directed to the particular type of delusion from which he is suffering. When delusions affect his behaviour, he is often a source of danger to himself and others.

The name paraphrenia has been given to those suffering from paranoid psychosis who, in spite of various hallucinations and more or less systemized delusions, retain their personality in a relatively intact state. Generally, paraphrenia begins later in life than the other paranoid psychosis.

Schizo Affective Psychosis - Schizo affective psychosis is an atypical type of schizophrenia, in which there are moods or affect disturbances unlike other varieties of schizophrenia, where there is blunting or flattening of affect. Attacks of elation or depression, unmotivated rage, anxiety and panic occur in this form of schizophrenic illness.

Pseudo-Neurotic Schizophrenia - schizophrenia may start with overwhelmingly neurotic symptoms, which are so prominent that in the early stages, it may be diagnosed as neurosis. When schizophrenia begins in an obsessional personality, it may for a long time remain disguised as an apparently obsessional illness.

16. In F.C.Redlich and Daniel X. Freedman in their book titled "The Theory and Practice of Psychiatry" (1966 Edn.) observed:

> *"Some schizophrenic reactions, which we call psychoses, may be relatively mild and transient; others may not interfere too seriously with many aspects of everyday living..."(p. 252)*
>
> Are the characteristic remissions and relapses expressions of endogenous processes, or are they responses to psychosocial variables, or both? Some patients recover, apparently completely, when such

> recovery occurs without treatment we speak of spontaneous remission. The term need not imply an independent endogenous process; it is just as likely that the spontaneous remission is a response to non-deliberate but nonetheless favourable psychosocial stimuli other than specific therapeutic activity . . . . (p. 465)
>
> (emphasis supplied)

17. Unfortunately, the Tribunal did not even bother to look into the contents of the certificate issued by the Invalidating Medical Board and mechanically observed that it cannot sit in appeal over the opinion of the Medical Board. If the learned members of the Tribunal had taken pains to study the standard medical dictionaries and medical literature like "The Theory and Practice of Psychiatry" by F.C. Redlich and Daniel X. Freedman, and Modi's Medical Jurisprudence and Toxicology, then they would have definitely found that the observation made by Dr. Lalitha Rao was substantially incompatible with the existing literature on the subject and the conclusion recorded by the Invaliding Medical Board that it was a case of Schizophrenic Reaction was not well founded and required a review in the context of the observation made by Dr. Lalitha Rao herself that with the treatment the appellant had improved. In our considered view, having regard to the peculiar facts of this case, the Tribunal should have ordered constitution of Review Medical Board for re-examination of the appellant.

18. In *Controller of Defence Accounts (Pension) v. S. Balachandran Nair* (2005) 13 SCC 128 on which reliance has been placed by the Tribunal, this Court referred to Regulations 173 and 423 of the Pension Regulations and held that the definite opinion formed by the Medical Board that the disease suffered by the respondent was constitutional and was not attributable to Military Service was binding and the High Court was not justified in directing payment of disability pension to the respondent. The same view was reiterated in *Ministry of Defence v. A.V. Damodaran* (2009) 9 S[illegible]n

neither of those cases, this Court was called upon to consider a situation where the Medical Board had entirely relied upon an inchoate opinion expressed by the Psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment.

19. As a corollary to the above discussion, we hold that the impugned order as also orders dated 14.7.2011 and 16.9.2011 passed by the Tribunal are legally unsustainable.

20. In the result, the appeal is allowed. The orders passed by the Tribunal are set aside and the respondents are directed to refer the case to Review Medical Board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension.

B.B.B. Appeal allowed.

NANA KESHAV LAGAD

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 1010 of 2008)

JULY 3, 2013

[CHANDRAMAULI KR. PRASAD AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - s.302 r/w s.34 and s.324 r/w s.34 - Murder - Common intention - Dispute over land - Leading to assault with cycle chain and stone - Multiple injuries to complainant (PW4) and death of his father - Conviction of accused-appellants - Justification - Held: On facts, justified - The conviction was not based on the solitary statement of PW4 alone - The evidence of PW4, read along with the version of PW5 and medical evidence, as well as the expert opinion, discloses the involvement of the appellants in the crime, apart from their common intention to eliminate the deceased, as well as PW4 - PW4 fortunately escaped though he also suffered multiple injuries, which ultimately happened to be not serious - In the circumstances, it cannot be said that s.34 was not attracted -The medical evidence substantially establishes the intention of the accused to eliminate the deceased and the injuries sustained by the deceased discloses the coordinated vengeance with which the assault was caused by the appellants, in order to ensure that the deceased did not survive.

Witness - Appreciation of - Credibility - Murder case - Number of accused - In his oral evidence before the Court, PW4-complainant fully supported his version, barring the presence of two accused - PW4 admitted that those two accused were not present at the time of the incident and to that extent, his statement in the complaint was incorrect -

Held: However, on that score, it cannot be held that the whole of the evidence of PW4 has to be rejected - Since the evidence of PW4 in every other respect fully supports his version in the complaint and which was also to a very great extent supported by the medical evidence and version of another eyewitness PW5, no reason to disbelieve his version in order to reject the case of the prosecution.

Witness - Panch witness - Appreciation - Held: Merely because the panch witness in question had tendered evidence in another case, it cannot be held that on that score alone his evidence should be rejected - Version of the said witness was truthfully and fully corroborated, and hence, was acceptable.

Evidence - Murder case - Defence plea with reference to bloodstains found on the clothes of the accused that the prosecution failed to satisfactorily establish the same through independent evidence - Held: Not tenable - It was for the accused-appellants to have explained as to how the clothes worn by them contained human blood - In s.313 questioning, no explanation was forthcoming from the appellants - Code of Criminal Proccedure, 1973 - s.313.

The accused party as well as the complainant party were residents of the same village; and owned and possessed agricultural lands adjacent to each other. There were disputes between them, as regards the use of way to their respective lands. It was alleged that on account of the said enmity, the accused persons attacked PW4-complainant and his father with cycle chain and stone, as a result of which the father of PW4 sustained bleeding injuries over his head and other parts of the body, and died. PW4 also was injured in the incident.

The trial court convicted the accused-appellants under Section 302 read with Section 34 and Section 324

read with Section 34 of I.P.C, and sentenced them to undergo rigorous imprisonment for life. The conviction and sentence was affirmed by the High Court.

In the instant appeal, the appellants challenged their conviction contending that the same was mainly based on the sole eye-witness, P.W.4 and having regard to the various discrepancies in his evidence, he could not have been present and witnessed the incident. The appellants contended that in the F.I.R., P.W.4 named six persons, while in his oral evidence, he left out two of the names; and that the evidence of P.W.3, a panch witness for the recovery of cycle chain and stone, was not fully established. It was further contended that the trial Court without any supporting expert evidence concluded that the shirt of two accused contained human blood, which was not true; and that Section 34 of I.P.C. was not attracted in the facts and circumstances of the case.

Dismissing the appeals, the Court

HELD: 1. The injuries found on the body of the deceased were noted in the postmortem report Ex.35. There were as many as 19 injuries on the dead body. Apart from the 19 external injuries, Ex.35 has also referred to 4 internal injuries. P.W.4, the injured eyewitness, suffered as many as 11 injuries, which have been noted by the very same doctor, P.W.6, in the injury certificate marked as Ex.37. The doctor in his evidence has stated that all the injuries on the body of the deceased were ante-mortem in nature; and also that the injuries on the body of the deceased were caused by hard and blunt objects and that injuries Nos.1, 2, 3, 4 and 16 were possible due to assault by cycle chain, while the other injuries were possible due to pelting of stones. He specifically stated that injuries Nos.18, 19 and 20 were possible due to assault by a stone [illegible]d

before the Court. Ultimately, the doctor stated that the injuries were sufficient in the ordinary course to cause the death of a person. Insofar as the injuries found on the body of P.W.4 is concerned, P.W.6 doctor deposed that these injuries were caused by hard and blunt objects and cycle chain. [Paras 17, 18, 19, 20, 21] [618-C-D; 619-G-H; 620-B-C; 621-C, D-F]

2.1. P.W.4 narrated the enmity that was prevailing between his family, headed by his father, the deceased, and the accused in regard to the right of way to reach their agricultural land and as to what exactly transpired on 04.10.2002 at 7.00 a.m. The material facts stated by him were that, while in the morning when P.W.4 and his father wanted to reach their field for sowing maize seeds, they were obstructed by the first accused, abused and threatened not to use the way and therefore they returned back home. Thereafter, according to him, the deceased father went to attend the Court proceedings, while he had gone to the field along with his cattle. It was further stated that in the evening, he returned back by 5.15 p.m. and that through his neighbor, Bapu Dada Ghadage, his sister informed him about the factum of the appellants, along with other accused waiting at Kolgaon Lagadwadi road, with an intention to assault his father and that he reached the said place in a bicycle and before he could reach the place of occurrence, he noticed all the accused beating his father with cycle chain and stone, while simultaneously abusing him. He stated that he was able to notice the same, while he was about 200 meters away from the actual place of occurrence and that the appellants and the other accused turned towards him and started assaulting him also with cycle chain and stone and that only at the intervention of Raju, he could escape from the assault of the accused and reach his father, but found him having suffered serious bleeding injury on his head, as well as beating marks all over his body and

was asking for water. Thereafter, according to him, he went back to his village in the bicycle and got a jeep belonging to Rajendra Ujagare, in whose vehicle he took his father to the rural hospital, where the doctor after examining his father, declared him dead. The said statement of the complainant, PW4, contained relevant factors, which were necessary for the registration of the FIR against the accused. [Paras 23, 24] [621-G-H; 622-A-G]

2.2. In his oral evidence, before the Court, P.W.4 fully supported his version, barring the presence of two of the accused, namely, Ganesh and Sandeep. P.W.4 fairly admitted that they were not present at the time of the incident and to that extent, his statement in the complaint was incorrect. However, on that score, it cannot be held that the whole of the evidence of P.W.4 has to be rejected. Since the evidence of P.W.4 in every other respect fully supports his version in the complaint and which was also to a very great extent supported by the medical evidence and version of other eyewitness P.W.5, there is no reason to disbelieve his version in order to reject the case of the prosecution. [Paras 25, 26] [623-A-B, E-F]

3. The submission relating to the evidence of P.W.3, the panch witness, who supported the recovery of cycle chain etc., covered by Exs.22, 23, 24, 25 and 26, was too trivial in nature, the said submission being on the footing that he was a stock witness. The Trial Court also rejected the said submission by pointing out that merely because the said witness had tendered evidence in another case, it cannot be held that on that score alone his evidence should be rejected. The Trial Court found that his version, as regards the recovery was truthfully and fully corroborated, was acceptable and there was no reason to reject the version of the said witness. The detailed reasoning adduced by the Trial Court and accepted by the High Court, makes it clear tha

ground to interfere with their ultimate conclusion. [Para 28] [623-H; 624-A-C]

4. Another submission made on behalf of the appellants was with reference to the human blood found in the clothes worn by A1 and A4. It was contended that the prosecution failed to satisfactorily establish through any independent evidence about the bloodstains found in their clothes. However, in fact, as rightly noted by the Trial Court, it was for the appellants to have explained as to how the clothes worn by them contained human blood. In Section 313 questioning, no explanation was forthcoming from the appellants. [Paras 29, 30] [624-D-E; 625-G-H]

5. In the case at hand, the conviction was not based on the solitary statement of P.W.4 alone, but was also supported by other eyewitness viz., P.W.5, whose evidence merited acceptance on par with the evidence of P.W.4, apart from the medical evidence fully supporting the case of the prosecution. The evidence of P.W.4, read along with the version of P.W.5 and the other medical evidence, as well as the expert opinion, discloses the involvement of the appellants in the crime, apart from their common intention to eliminate the deceased, as well as P.W.4. P.W.4 fortunately escaped though he also suffered multiple injuries, which ultimately happened to be not serious. In such circumstances, it cannot be said that Section 34 was not attracted to the case on hand. The medical evidence substantially establishes the intention of the accused to eliminate the deceased and the injuries sustained by the deceased discloses the coordinated vengeance with which the assault was caused by the appellants, in order to ensure that the deceased did not survive. [Paras 31, 32 and 33] [626-B-C, D-G]

Vadivelu Thevar vs. The State of Madras **AIR 1957 SC 614: 1957 SCR 981;** *Abdul Sayeed vs. State of Madhya Pradesh* **(2010) 10 SCC 259: 2010 (13) SCR 311 - held inapplicable.**

Case Law Reference:

1957 SCR 981	**held inapplicable**	**Paras 12, 31**
2010 (13) SCR 311	**held inapplicable**	**Para 12 and 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1010 of 2008.

From the Judgment & Order dated 16.01.2006 of the High Court of Bombay at Aurangabad in Criminal Appeal No. 611 of 2003.

WITH

Criminal Appeal No. 1011 of 2008.

Sushil Karanjkar, M.Y. Deshmukh, Nikilesh Kumar, Shrikand R. Deshmukh, Rameshwar Prasad Goyal for the Appellant.

Shankar Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. These two appeals are against the common judgment of the High Court of Bombay at Aurangabad, in Cri.A.No.611 of 2003, dated 16.01.2006.

2. The appellant in Crl.A.No.1010 of 2008 is A4 and the appellants in Crl.A.No.1011 of 2008 are A2 and A3. In all, four accused were prosecuted and convicted by the learned Sessions Judge. The accused preferred an appeal before the High Court against the conviction and sentence imposed on them by the learned Sessions Judge in Sessions Case No.191 of 2002, by its judgment dated 21.08.2

3. All the accused were convicted for offences under Section 302 read with Section 34 and Section 324 read with Section 34 of I.P.C. They were sentenced to undergo rigorous imprisonment for life, apart from payment of fine of Rs.500/- and in default to undergo further rigorous imprisonment for six months for the offence under Section 302 read with Section 34 of I.P.C. and one year rigorous imprisonment, along with fine of Rs.300/- and in default to undergo one month rigorous imprisonment for the offence under Section 324 read with Section 34 of I.P.C. The appellants stated to have paid the fine amount on 21.08.2003 itself. The High Court having upheld the conviction and sentence imposed against the appellants, they have come forward with these appeals. The first accused-Keshav died and the remaining accused are before us.

4. As the genesis of the case of the prosecution goes, all the accused persons, the complainant Santosh Ramchandra Lagad, who is the son of the deceased Ramachandra Lagad, were all residents of the same village, Lagadwadi. They owned and possessed agricultural lands adjacent to each other. There were disputes, as regards the use of way to their respective lands. The deceased Ramachandra Lagad stated to have filed a suit against the appellants at Shrigonda Court for injunction. They also approached other authorities wirh regard to protection of their right of way to go to their agricultural lands. It appears that at one stage they resorted to hunger strike for the redressal of their grievances. At that time, the police interfered and the accused were directed to allow the deceased and his family members, including the complainant to use the old way as an access to their land, till a decision was arrived at in the Civil Court.

5. It was alleged that in spite of such direction by the police, there was violation at the instance of the accused persons. On 04.10.2002, at about 7.00 a.m., when the complainant P.W.4 and his deceased father, were proceeding towards their field for sowing maize seeds, the first accused

stated to have obstructed them from proceeding on the disputed way. He also stated to have abused and threatened the complainant and his deceased father. P.W.4 and his father returned back to their house. Thereafter, the deceased went to Shrigonda Court to attend the hearing of the civil case, while the complainant P.W.4 went out looking after his cattle.

6. At about 5.15 p.m., on the same day, after the complainant P.W.4 returned to his house after watering onion crops, his sister came to know from one Bapu Dada Ghadage that the accused persons were waiting at Kolgaon Lagadwadi road for her father, Ramachandra Lagad, to return to his village with an intention to assault him. The complainant was therefore, asked to rush to the spot immediately. The complainant P.W.4, stated to have reached the spot in a bicycle and that according to him, when he was about to reach the spot i.e., from a distance of about 200 meters from the spot, he saw all the four accused persons along with one Ganesh Sambhaji Lagad and Sandeep Sambhaji Lagad, beating his father Ramachandra Lagad, while at the same time abusing him. It is also claimed that P.W.4 himself along with his deceased father, Ramachandra Lagad, was attacked with cycle chain and stone. The accused also stated to have threatened the complainant and his father to face dire consequences if they continue to use the disputed pathway. At that time, one Raju came to the rescue of P.W.4 in his motorcycle, who interfered and separated the complainant from the clutches of the accused. The complainant noted his father having sustained bleeding injuries over his head and other parts of the body, returned back to his village to fetch a jeep taxi, in which he took his father to Shrigonda police station. As directed by the police, P.W.4 took his father to the rural hospital where, the doctors declared him dead. P.W.4 was also examined by the doctor who gave him first-aid treatment and thereafter, P.W.4 lodged a complaint with the police.

7. The complaint was registered as CR No.249 of 2002, against the accused for the offences pur[illegible]s

302, 324, 504, 506, 143, 147, 148, 149 of I.P.C., as well as Section 37(a) read with Section 135 of the Bombay Police Act.

8. P.W.16, A.P.I. Rajendra Narhari Padwal conducted the inquest, visited the spot of the incident, collected his blood stained shirt and soil, recorded the statement of the witnesses and arrested the accused. Based on the admissible portion of the confession statement made by the appellants, cycle chain and stones were seized in the presence of panch witnesses. The clothes of the accused Keshav, which contained blood stains, the clothes of the deceased and the blood mixed soil collected from the spot, the weapons used for the crime and the blood sample, along with the clothes of the deceased were sent for chemical analysis. Charge-sheet came to be filed before the learned Judicial Magistrate First Class, Shrigonda, who committed the case to the Sessions Court.

9. Before the Sessions Court, 16 witnesses were examined in support of the prosecution. P.W.1 and P.W.2 who were panch witnesses, turned hostile. P.W.3 was another panch witness to support the recovery of cycle chain in Exs.22, 23, 24, 25 and 26. P.W.4 is the complainant who is the son of the deceased and injured eyewitness. P.W.5 is another eye-witness. P.W.6 was Dr. Namdeo Sopan Shinde, who conducted the postmortem of the deceased, and who also treated P.W.4. Ex.35 is the postmortem certificate and Ex.37 is the injury certificate of P.W.4. P.W.7 is another panch witness through whom Exs.38 and 39 were marked. P.W.13 is the mother of the complainant. P.W.16 is another witness to prove the inquest report Ex.50 and arrest panchanama Exs.54, 55, 56, 57, 58, 61 and 62.

10. The Trial Court on a detailed analysis of the evidence, as well as the submissions made on behalf of the appellants and other accused, found all the accused guilty of the offence falling under Section 302 read with Section 34 of I.P.C. and for offence punishable under Section 324 read with Section 34 of

I.P.C. The High Court having confirmed the conviction and sentence, the appellants are before us.

11. We heard Mr. Sushil Karanjkar, learned counsel for the appellants. We also heard Mr. Shankar Chillarage, learned counsel for the respondent State.

12. Mr. Sushil Karanjkar, learned counsel for the appellants in his submissions contended, after making reference to the F.I.R., that in the case on hand the conviction was mainly based on the sole eye-witness, P.W.4 and that having regard to the various discrepancies in his evidence, he could not have been present and witnessed the incident. The learned counsel contended that in the F.I.R., P.W.4 did not make any reference as to which weapon was used by which accused and that he named six persons, while in his oral evidence, he left out two of the names. The learned counsel for the appellants contended that the injuries on the deceased, as well as P.W.4 and the weapons used, do not correlate with each other. The learned counsel by referring to the evidence of P.W.3, who was a panch witness for the recovery of cycle chain and stone, contended that the same was not fully established. The learned counsel pointed out that the Trial Court without any supporting expert evidence concluded that the shirt of the appellant in Crl.A.No.1010 of 2008 and the first accused in Crl.A.No.1011 of 2008, contained human blood, which was not true. It was also contended that the whole conviction was based on the evidence of P.W.4, as an injured eyewitness and that the version of the said witnesses was not correlated by any other legally acceptable evidence. Lastly, it was contended that Section 34 of I.P.C. was not attracted and, therefore, on that ground as well the conviction was liable to be set aside. The learned counsel relied upon *Vadivelu Thevar vs. The State of Madras* - AIR 1957 SC 614 and *Abdul Sayeed vs. State of Madhya Pradesh* - (2010) 10 SCC 259, in support of his submissions.

13. As against the above submissio el

for the State contended that the case squarely fell under Section 300 thirdly, which is duly established by the evidence of the doctor who had made a categorical statement that the injuries caused the death. The learned counsel for the State further contended that apart from the evidence of P.W.4, the evidence of P.W.5 who was another eyewitness, supported the case of the prosecution, apart from the medical evidence and the proof of the weapons used by the accused. The learned counsel therefore contended that the conviction and sentence imposed on the appellants was fully justified and the judgment impugned therefore, does not call for interference.

14. Having heard the learned counsel for the appellants, as well as the learned counsel for the State and having perused the impugned judgment of the High Court, as well as that of the Trial Court and the other material papers placed on record, we find force in the submissions of the learned counsel for the State.

15. When we consider the submissions of the learned counsel for the appellants, the sole contention was that the only evidence of P.W.4, who was examined as an eyewitness to the incident was closely related to the deceased and since there were so many contradictions in his version, in the absence of proper corroboration by any other witnesses or other evidence, the Trial Court as well as the High Court ought not to have relied upon his sole testimony for the purpose of convicting the appellants.

16. We considered the said submission and we find that the said submission does not merit acceptance. We can briefly summarize the case of the prosecution based on the evidence placed before the Trial Court. We must state that the Trial Court has considered the submissions made on behalf of the appellants very minutely and has given justifiable reasons with supporting factors in order to reject each and every one of the submissions made on behalf of the appellants. We also find

that the Trial Court, as well as the High Court have not only relied upon the sole testimony of P.W.4, but upon very many other supporting materials such as oral, documentary, as well as material objects to support its conclusions. It has also made a detailed reference to the medical evidence and has found that the medical evidence fully supported the ocular evidence and therefore, the ultimate conclusion of finding the appellants guilty of the offence, was fully established.

17. In order to appreciate the submissions, as well as the conclusions arrived at by the Trial Court, in the foremost, it will be appropriate to refer to the injuries sustained by the deceased, as well as the complainant. The injuries found on the body of the deceased were noted in the postmortem report Ex.35. There were as many as 19 injuries on the dead body of Ramachandra Lagad viz.,

"(1) Whole of scapular, inter-scapular and intra-scapular region with linear abrasion like left scapula and 2 in numbers of size 10 cm x 1 cm of 7 cm x 1 cm.

(i) Left scapular region 3 in numbers each 12 cm x 10 cm

(ii) Inter-scapular region 2 in numbers of size 10 cm x 1 cm each.

(iii) Intra-scapular region 2 in no. each of 15 cm x 1 cm.

(2) Contusion on right lumber region of back extending lower region on back with abrasion on surface.

(3) Contusion on left lumber region brownish with abrasion on surface.

(4) Contusion on upper part of left thigh posteriorally 10 cm x ½ cm with abrasion on surface

(5) Lenear abrasion on right buttock 4 cm x 2 cm.

(6) Abrasion on post surface of right thigh 4 in numbers each of 1 cm x 1 cm.

(7) Abrasion on post surface of left knee 5 cm x 1 cm.

(8) C.L.W. on upper part of occiput 2 cm x ½ cm by bone deep oozing was present.

(9) Contusion on lateral region of right thigh 7 in no. each of 1 cm x ½ cm

(10) C.L.W. on right thigh laterally lower part 2 cm x ½ cm x ½ cm clot present.

(11) Contused abrasion on right calf 5 cm x 1 cm.

(12) Abrasion on post region of right elbow 5 in no. each of 1 cm x 1 cm.

(13) Abrasion below left knee 2 cm x 1 cm.

(14) Contusion on right arm laterally 1 ½ cm x ½ cm.

(15) Abrasion on scrotum right side 2 cm x 2 cm.

(16) Contused abrasion right shoulder 6 cm and 1 cm.

(17) Abrasion shin of tibia right leg 16 cm x 1 cm with abrasions on surface.

(18) Abrasion on upper part of right eye-brow 2 cm x ½ cm.

(19) Abrasion on lateral region of left elbow 3 cm x 1 cm."

Apart from the 19 external injuries, Ex.35 has also referred to 4 internal injuries, which are as under:

"(1) Fracture of tibio fibula on upper part of left ankle joint.

(2) Fracture of right mandibular angle and left mandibular angle.

(3) Fracture of right 3rd, 4th and 5th rib anteriorly.

(4) Fracture of left 3rd, 4th, 5th rib anteriorly."

18. As far as P.W.4, the injured eyewitness is concerned, he has suffered as many as 11 injuries, which have been noted by the very same doctor, P.W.6, in the injury certificate marked as Ex.37. The injuries were as under :

"(1) Contused abrasion on posterior region of left forearm 4 in No. each of 1 ½ cm x 1 cm redness present.

(2) Contusion on lateral region of left arm 8 cm x 1 cm chain mark seen.

(3) Contusion on posterior region of left shoulder extending on back 11 cm x 1 cm redness was present. Chain mark was also present.

(4) Contusion on anterior region of right shoulder near axilla 3 cm x ½ cm and swelling was present.

(5) Contused abrasion on lateral region of chest lower part left side 10 cm x 1 cm bleeding was present.

(6) Contused abrasion on left suprascapular region 5 in No. each of 12 cm x 1 cm chain mark seen.

(7) Contusion on lumber region of back right side extending on left lumber region 24 cm x 1 cm. Chain mark present.

(8) Contusion abrasion on medial region of right scapula extending obliquely to intrascapular and supra scapular region 2 in no. each of size 20 cm x 1 cm redness was present. Chain mark present.

(9) Contused abrasion on right lumber region vertical 6 cm x 1 cm. chain mark present.

(10) Contused abrasion right scapular 2 in no. each of 2 ½ cm and 2 cm and bleeding was present.

(11) Contusion on middle of right arm posteriorly 6 cm x 1 cm swelling present."

19. The doctor in his evidence has stated that all the injuries on the body of the deceased were ante-mortem in nature; that there was intra cerebral hemorrhage and that the cause of death was shock due to hemorrhage in intra cerebral region and thoracic cavity due to injury through thoracic and head.

20. He also stated that the injuries on the body of the deceased were caused by hard and blunt objects and that injuries Nos.1, 2, 3, 4 and 16 were possible due to assault by cycle chain, while the other injuries were possible due to pelting of stones. He specifically stated that injuries Nos.18, 19 and 20 were possible due to assault by a stone, which was marked before the Court. Ultimately, the doctor stated that the injuries were sufficient in the ordinary course to cause the death of a person.

21. In so far as the injuries found on the body of P.W.4 is concerned, P.W.6 doctor deposed that these injuries were caused by hard and blunt objects and cycle chain.

22. On behalf of the appellants, it was contended that the evidence of P.W.4, does not merit any credence, in as much as there were lot of discrepancies as between his complaint dated 04.10.2002 and his evidence submitted before the Court.

23. To consider the said submission, when we examine the statement found in the complaint of P.W.4, we find that he has narrated the enmity that was prevailing between his family, headed by his father, the deceased, and the accused in regard

to the right of way to reach their agricultural land and as to what exactly transpired on 04.10.2002 at 7.00 a.m. The material facts stated by him were that, while in the morning when P.W.4 and his father wanted to reach their field for sowing maize seeds, they were obstructed by the first accused, abused and threatened not to use the way and therefore they returned back home. Thereafter, according to him, the deceased father went to attend the Court proceedings, while he had gone to the field along with his cattle. It was further stated that in the evening, he returned back by 5.15 p.m. and that through his neighbor, Bapu Dada Ghadage, his sister informed him about the factum of the appellants, along with other accused waiting at Kolgaon Lagadwadi road, with an intention to assault his father and that he reached the said place in a bicycle and before he could reach the place of occurrence, he noticed all the accused beating his father with cycle chain and stone, while simultaneously abusing him. He stated that he was able to notice the same, while he was about 200 meters away from the actual place of occurrence and that the appellants and the other accused turned towards him and started assaulting him also with cycle chain and stone and that only at the intervention of Raju, he could escape from the assault of the accused and reach his father, but found him having suffered serious bleeding injury on his head, as well as beating marks all over his body and was asking for water. Thereafter, according to him, he went back to his village in the bicycle and got a jeep belonging to Rajendra Ujagare, in whose vehicle he took his father to the rural hospital, where the doctor after examining his father, declared him dead.

24. It is relevant to note that the said statement of the complainant, P.W.4, contained relevant factors, which were necessary for the registration of the F.I.R. against the accused.

25. With this when we examine his oral evidence before the Court, it was pointed out that while in the complaint he had

named six persons as the assaulting party of his father and himself, per contra, in the oral evidence, he had only referred to four of them. In his oral evidence, before the Court, P.W.4 fully supported his version, barring the presence of two of the accused, namely, Ganesh and Sandeep. P.W.4 fairly admitted that they were not present at the time of the incident and to that extent, his statement in the complaint was incorrect.

26. Though, on behalf of the appellants by making reference to certain insignificant statements contained in the evidence of P.W.4, vis-à-vis the complaint, it was sought to be contended that the whole of the evidence of P.W.4 should be eschewed from consideration, we find there is absolutely no substance in the said submission. On a detailed reading of the complaint, as well as the evidence of P.W.4, we find that every one of the statements other than the reference to Ganesh and Sandeep, were fully supported by P.W.4 without any deviation. Even his statement before the Court about Ganesh and Sandeep, should be accepted as a very fair submission, as he did not want to unnecessarily rope in persons who were not involved in the crime. On that score, it cannot be held that the whole of the evidence of P.W.4 has to be rejected. Since the evidence of P.W.4 in every other respect fully supports his version in the complaint and which was also to a very great extent supported by the medical evidence and version of other eyewitness P.W.5, there is no reason to disbelieve his version in order to reject the case of the prosecution.

27. In this respect, when we look into the judgment of the Trial Court, we find that the Trial Court has analyzed every one of the submissions relating to the evidence of P.W.4 in detail and has found no substance in the contention made on behalf of the appellants. Therefore, based on the said submissions, regarding the evidence of P.W.4, we do not find any scope to interfere with the judgment impugned in these appeals.

28. The other submissions related to the evidence of

P.W.3, the panch witness, who supported the recovery of cycle chain etc., covered by Exs.22, 23, 24, 25 and 26, were too trivial in nature, as we find that the submission was on the footing that he was a stock witness. The Trial Court has also rejected the said submission by pointing out that merely because the said witness had tendered evidence in another case, it cannot be held that on that score alone his evidence should be rejected. The Trial Court has found that when his version, as regards the recovery was truthfully and fully corroborated, was acceptable and there was no reason to reject the version of the said witness. Having perused the detailed reasoning adduced by the Trial Court and accepted by the High Court, we do not find any good ground to interfere with the ultimate conclusion on that ground.

29. The other submission made on behalf of the appellants was with reference to the human blood found in the clothes worn by A1 and A4. It was contended that the prosecution failed to satisfactorily establish through any independent evidence about the bloodstains found in the clothes of A1, as well as the appellant in Crl.A.No.1010 of 2008. In that respect instead of reiterating the details, it will be sufficient to refer to the conclusion reached by the Trial Court, while dealing with the said contention, which are found in paragraph 63. The relevant part of it reads as under:

> *"63. In the present case, the evidence of API Padwal in this respect is not seriously challenged or shattered. After all the accused are arrested under Panchanama and at the time of arrest panchanama of accused Nana blood stained clothes were seized. It is not in any way contended or for that matter even whispered that I.O.API Padwal was having any rancor against the accused or he was motivated or interested in one sided investigation with the sole object of implicating the accused. As a matter of fact, the investigation in this case appears to be totally impartial. When it was transpired*

name Sandeep and Ganesh, the juvenile delinquent have not taken part in the assault, their names were deleted from the prosecution case by filing report U/s 169 of Cr.P.C. Therefore, here the investigation as proceeded impartially and it is also not even for the sake of it, is suggested to API Padwal that, no such blood stained clothes were recovered from the accused Nana, moreover, as per the settled position of law, there is no presumption in law that a Police Officer acts dishonestly and his evidence cannot be acted upon. Therefore, here the evidence of API Padwal is sufficient to prove the recovery of the blood stained clothes of the accused. His evidence also goes to prove that, all these articles blood stained clothes etc., were sent to C.A. and as per the C.A. report Exh.61 the blood was detected on the clothes of the accused and deceased and this blood was human blood……..In the present case, though the C.A. report, Exh.61 shows that, the said human blood was of group "B", C.A. report Exh.62 about the blood sample of the accused states that, the blood group could not be ascertained as the results were inconclusive, moreover, there is no C.A. of the blood sample of the deceased to prove that, he was having blood group "B". However, the fact remains that, the stains of human blood were found on the clothes of accused Nana and he has not explained how this blood stains were on his clothes and therefore, as observed in this authority, it becomes one more highly incriminating circumstance against the accused."

30. In fact, as rightly noted by the Trial Court, it was for the appellants to have explained as to how the clothes worn by them contained human blood. In Section 313 questioning, no explanation was forthcoming from the appellants. In these circumstances, the said contention also does not merit any consideration.

31. The learned counsel for the appellants placed reliance upon Vadivelu Thevar (supra), to support the contention that since the conviction was based on the solitary evidence of P.W.4, without proper corroboration, the same cannot be sustained. As we have found that it was not based on the solitary statement of P.W.4 alone, but was also supported by other eyewitness viz., P.W.5, whose evidence merited acceptance on par with the evidence of P.W.4, apart from the medical evidence fully supporting the case of the prosecution, the said decision can have no application to the facts of this case.

32. As far as the reliance placed on the decision in *Abdul Sayeed* (supra), we find that the said decision does not support the case of the appellants, since in the case on hand, the evidence of P.W.4, read along with the version of P.W.5 and the other medical evidence, as well as the expert opinion, discloses the involvement of the appellants in the crime, apart from their common intention to eliminate the deceased, as well as P.W.4. P.W.4 fortunately escaped though he also suffered multiple injuries, which ultimately happened to be not serious. In such circumstances, we do not find any substance in the said submission to hold that Section 34 was not attracted to the case on hand. Therefore, the reliance placed upon the said decision also does not help the appellants.

33. As rightly contended by the learned counsel for the State, the medical evidence substantially establishes the intention of the accused to eliminate the deceased and the injuries sustained by the deceased discloses the coordinated vengeance with which the assault was caused by the appellants, in order to ensure that the deceased did not survive.

34. Having regard to our above conclusion, we do not find any merit in these appeals. These appeals fail and the same are dismissed.

B.B.B.

KASHI VISHWANATH
v.
STATE OF KARNATAKA
(Criminal Appeal No. 175 of 2007)

JULY 3, 2013

[A.K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Penal Code, 1860 - ss. 498A and 302 r/w s.34 - Married woman died due to burn injuries - Deceased gave three dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29) - Three accused viz. the deceased's husband, his mother and another woman ('L') with whom the deceased's husband allegedly had illicit relations - Trial court convicted appellant-husband and 'L' u/ss.498A and 302 r/w 34 - High Court confirmed the conviction of appellant-husband but acquitted 'L' - Held: Comparison of the three dying declarations show glaring contradictions - In the first dying declaration (Ex.P.12) the deceased stated that her husband instigated her to pour kerosene on her body, therefore, she poured the kerosene on her body and her husband further poured kerosene on her and put on fire using a match box - In the second dying declaration (Ex.P.22), the deceased stated that her husband alongwith 'L' poured kerosene on her body and put on fire by using match stick - In the third dying declaration (Ex.P.29), the deceased stated that her husband poured kerosene on her and 'L' lit the match stick and thrown upon her body - Apart from the contradictions, credibility of the three dying declarations also doubtful - In the first dying declaration (Ex.P.12), thumb impression of victim has been shown whereas in the second dying declaration (Ex.P.22) given on the same day and the third dying declaration (Ex.P.29) given on the next day, the victim stated that she had not given her signatures since her hand was completely burnt - Prosecution also failed to state as to why

the three dying declarations were recorded in Kannada, if the deceased was talking in Telugu - Not clear as to who amongst the Tehisldar, PSI or SI or the Doctors who signed in Ex.P.12, Ex.P.22 and Ex.P.29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those exhibits -Doubt as to truthfulness of the contents of the dying declarations as possibility of the deceased being influenced by somebody in making the dying declarations not ruled out - Prosecution did not establish its case beyond reasonable doubt - Hence, conviction of appellant set aside.

The wife of appellant died due to burn injuries. The deceased gave three dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29). The case of the prosecution was that the appellant had illicit intimacy with another lady 'L' on account of which he ill-treated and harassed his wife. There were in all three accused - the appellant, his mother and 'L'. While PW-10, Tahsildar recorded dying declaration Ex.P.12, the second dying declaration Ex.P.22 was recorded by PW23, the PSI. The said two dying declarations were recorded on the date of the incident. The third dying declaration - Ex.P.29 was recorded by the Police the next day in the presence of PW-25. The trial court convicted the appellant and 'L' under Sections 498-A and 302 read with 34 IPC. The High Court confirmed the conviction of the appellant but acquitted 'L'.

In the instant appeal, the appellant contended that the prosecution absolutely failed to establish any of the charges, much less, the charge under Section 302 IPC in view of the multiple dying declarations brought on record which were contrary to each other. The appellant also raised doubt relating to contents of Ex.P.12, Ex.P.22 and Ex.P.29, the three dying declarations which were originally recorded in Kannada contending that the deceased had no knowledge of Kannada language and could speak only Telugu.

Allowing the appeal, the Court

HELD: 1. A comparison of the three dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29) shows certain glaring contradictions. In the first dying declaration (Ex.P.12), she (deceased) stated that her husband instigated her to pour kerosene on her body, therefore, she poured the kerosene on her body and her husband further poured kerosene on her and put on fire using a match box. In the second dying declaration (Ex.P.22), she (deceased) stated that her husband along with 'L' poured kerosene on her body and put on fire by using match stick. In the third dying declaration (Ex.P.29), she (deceased) stated that her husband poured kerosene on her and 'L' lit the match stick and thrown upon her body. [Paras 23, 24] [642-H; 643-A, F-G]

2. Apart from the contradictions, the credibility of three dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29) is to be doubted. In the first dying declaration (Ex.P.12) dated 14th January, 2000 the thumb impression of victim has been shown. Whereas in the second dying declaration (Ex.P.22) taken on the same day, i.e, 14th January, 2000 and the third dying declaration (Ex.P.29) given on the next day, i.e., 15th January, 2000, the victim had stated that she had not given her signatures since her hand was completely burnt. PW-22(Dr.), who signed the Ex.P.22, in his cross-examination stated that he was not aware whether deceased was talking in Telugu. PW-20 (Dr.), who signed Ex.P.12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that deceased was talking in Telugu language. PW-8, mother of the deceased, in her cross-examination stated that deceased was not knowing the correct writing in Telugu. But she was writing some Telugu. [Para 25] [643-H; 644-A-D]

3. The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased was talking in Telugu. It has also not made clear as to who amongst the Tehisldar, PSI or SI or the Doctors who has signed in Ex.P.12, Ex.P.22 and Ex.P.29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those exhibits and that in the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu that the deceased understood the contents of the same. The above mentioned facts create doubt as to the truthfulness of the contents of the dying declarations as the possibility of she being influenced by somebody in making the dying declarations cannot be ruled out. [Para 26] [644-E-G]

4. It cannot be said that the prosecution in this case has established its case beyond reasonable doubt to base a conviction on the appellant. Hence, both the courts below have erred in coming to the contra conclusion. [Para 27] [644-H; 645-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 175 of 2007.

From the Judgment & Order dated 27.07.2004 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 347 of 2001.

Sakesh Kumar (A.C.) for the Appellant.

K. Parameshwar, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. The appellant, who is accused No.1, by this appeal has challenged the judgment dated 27th July, 2004 in C 7

of 2001 passed by the Division Bench of the High Court of Karnataka at Bangalore whereby the High Court affirmed the conviction and sentenced imposed by the trial court under Section 498-A and 302 read with 34 IPC. So far as accused No.2 is concerned, the High Court acquitted her of all the charges levelled against her.

2. The appellant along with other accused faced charges punishable under Section 498-A and 302 read with 34 IPC. The First Additional Sessions judge, Dharwad, sitting at Hubli by his judgment dated 1st February, 2001 in Sessions Case No.119 of 2000, acquitted accused No.2 under Section 235(1) Cr.P.C. of the offences under Sections 498-A and 302 IPC but convicted accused Nos.1 and 3 under Section 235(2) Cr.P.C. for the offences under Sections 498-A and 302 read with Section 34 IPC. They were sentenced to undergo rigorous imprisonment for one year by each and to pay fine of Rs.1,000/- by each, in default to undergo further rigorous imprisonment for one month, for offence under Section 498-A IPC. They were sentenced to undergo life imprisonment and to pay find of Rs.2,000/- by each, in default, to undergo rigorous imprisonment for three months by each for the offence under Section 302 IPC.

In appeal, the High Court by its judgment dated 27th July, 2004 allowed the appeal in part. The judgment of conviction and sentence passed by the Sessions Judge as against accused No.1 (first appellant before the High Court) for the offence under Section 498-A and 302 read with 34 IPC was confirmed giving rise to this appeal and as against accused No.2 (second appellant before the High Court), she was acquitted of all the charges levelled against her.

3. The case of the prosecution, in brief, as unfurled before the trial court is as follows:

The deceased, Neelamma (alias Leelamma) got married

to the appellant herein 13 years prior to the incident. The date of the incident is 14th January, 2000. Out of the wedlock, they have two sons and a daughter and they were all living at Mantur Road, Ambedkar Colony, Hubli. According to the prosecution, the relationship between the husband and wife was cordial till two years prior to the incident. The disruptions started in the family on account of the appellant developing intimacy with one Lakshmi, who was accused No.3 and was the second appellant before the High Court. In this regard, in spite of intervention of the family members of the parental house of the deceased and persistent resistance of the deceased, the said affair of intimacy continued. There used to be bickering and quarrels between the husband and wife in this regard. Though accused No.2, the mother of the appellant was living with them, she never tried to patch up the differences between the husband and wife. Ultimately, on 14th January, 2000, at about 10.00 a.m. in the matrimonial home of the deceased, accused Nos.1 and 3 doused deceased Neelamma and set her ablaze while accused No.2 was watching outside. On the same day in the afternoon, she was shifted to K.M.C. Hospital, Hubli and on admission, the Hospital authorities intimated the police who came into picture at about 9.30-10.00 p.m. in the night. Prior to that, the Taluka Executive Magistrate, PW-10, recorded her statement as per Ex.P.12. One more statement, Ex.P.22 – dying declaration, came to be recorded by Rayappa, Police Sub Inspector (PW-23), in the form of complaint in the presence of Dr. Bhimappa (PW-22) and during the course of treatment, deceased Neelamma succumbed to burns on 18th January, 2000 at about 6.15 p.m. On 15th January, 2000, at about 5.30 p.m., Ashok (PW-24), the Investigation Officer recorded the dying declaration Ex.P.29 in the presence of Dr. Komal Prasad (PW-25). On the basis of Ex.P.22, investigation of the case commenced as against accused No.1 to 3. The kith and kin of the deceased are examined as Pullayya (PW.5) - maternal uncle; Eliya (PW-6) – father; Grasamma (PW-7) – maternal aunt; Padmavathi (PW-8) – mother and –

uncle of the deceased. The purpose of examining these witnesses was to establish harassment, motive and oral dying declaration implicating accused Nos.1 to 3. The independent witnesses, who were the neighbours of the appellant i.e. Mansuresh (PW-11), Savakka (PW-13), Kanechanamma(PW-14), (M. Saloman)PW-15 and Perumal (PW-16) were also examined. Unfortunately, none of them have supported the case of the prosecution.

4. Ex.P.1, is the spot mahazar drawn in the kitchen of the matrimonial home of the deceased where burnt clothes, burnt gunny bag, match box, match stick, a kerosene stove, kerosene can were found. PW-2 and PW-3 were examined to support the contents of Ex.P.2 to Ex.P.6 – mahazars seizing caste certificate and marriage certificate revealing the relationship and the case of the deceased and accused Nos.1 and 2. Ex.P.3 is the recovery of bed sheet alleged to have been used by accused No.2 to extinguish the fire. Letters i.e. Ex.P8 & Ex.P9 alleged to have been written by the appellant to the wife and parents in law, Ex.P.5 is the seizure mahazar of letters (Exs.P.10 to P.11) alleged to have been written by the deceased to her parents aunt and uncle and lastly Ex.P.6 is mahazar seizure of photographs of the deceased revealing the burns. Peshalal (PW.4) was examined to speak the inquest over the dead body as per Ex.P.7 but turned hostile. Prabhakar (PW.21) was also turned hostile. Dr. Radha (PW.17) was the Doctor at the casualty ward in K.M.C. Hospital who entered the details in M.L.C. register and the relevant document is at Ex.P.18. Dr. Jagadish (PW-18), conducted autopsy on the dead body and issued Ex.P.19, the postmortem report opining that the death of the deceased Neelamma was due to septicemia as a result of burns. Ex.P.20 is the sketch drawn by PW-19. Dr. Bhimappa (PW-22) is the Head of Department of the Burns Ward in whose presence Rayappa (PW-23), PSI, Bendigeri P.S., Hubli recorded the complaint as per Ex.P.22 on 14th January, 2000 and sent FIR to the Court.

5. As noticed above, the learned Sessions Court based on the oral and documentary evidence held accused No.1 and 3 guilty of the offence punishable under Section 498-A and 302 read with 34 IPC. Accused No.2 mother-in-law of the deceased was acquitted of all the charges levelled against her.

6. Learned counsel for the appellant contended that the prosecution absolutely failed to establish any of the charges, much less, the charge under Section 302 IPC in view of four dying declarations brought on record which are contrary to each other. It was further contended that the oral declarations made before the kith and kin of the deceased are not at all important or relevant in the light of the four dying declarations. According to the learned counsel, the contents of Ex.P.18, Ex.P.12, Ex.P.22 and Ex.P.29, if looked into carefully, would indicate the purpose of so many dying declarations coming into existence i.e. only to ensure that all the accused are somehow roped in. Learned counsel for the appellant placed reliance on the decisions of this Court in *Mehiboobsab Abbasabi Nadaf vs. State of Karnataka,* (2007) 13 SCC 112, etc. which will be referred to in this judgment at the appropriate stage.

7. In reply, learned counsel for the State submitted that Ex.P.18 was not a dying declaration but the entries in the M.L.C. Register made immediately on the admission of the patient to the Hospital. Ex.P.12 was the actual dying declaration recorded by the Taluka Executive Magistrate (PW-10). Ex.P.22 was a complaint recorded by Rayappa, PSI (PW-23), in the presence of Dr. Bhimappa (PW.22) and further investigation was taken up. Therefore, the contents of Ex.P.12, according to the counsel for the State have to be taken into consideration which is the earliest dying declaration. He further contended that Ex.P.29 is more reliable because after treatment for almost a day, when the patient was physically and mentally fit, the same came to be recorded.

8. Learned counsel appearing on

also raised doubt relating to contents of Ex.P.12, Ex.P.22 and Ex.P.29, the three dying declarations which were originally recorded in Kannada. According to the learned counsel for the appellant, the deceased had no knowledge of Kannada language and could speak only Telugu.

9. We have heard the learned counsel for the parties at length and gone through the entire material placed before us.

10. The kith and kin of the deceased who examined are: as Pullayya (PW.5) - maternal uncle, Eliya (PW-6) – father, Gracemma (PW-7) – maternal aunt, Padmavathi (PW-8) – mother and Prabhudas (PW-9) – uncle of the deceased. Their deposition corroborates the case of the prosecution that one or two years prior to the death of the deceased, everything seemed to be cordial between the husband and wife (deceased). After the appellant joined the Railway services on compassionate ground after the death of his father, the bickering and quarrel commenced because of developing intimacy with a co-worker by name Lakshmi who was the third accused. Ex.P.8 to P.11 are inland letters produced by the uncle and father of the deceased, PW-5 and PW-6 and the letters pertaining to the year 1995 written by the deceased which say that except some harassment and ill-treatment, there was no serious harassment to the deceased at the hands of her husband and mother-in-law of the deceased. The letter written in the year 1999 only would indicate that on account of the appellant developing intimacy with Lakshmi, he ill-treated and harassed her to the maximum extent possible. Accused No.2, mother-in-law was only a spectator. This was her complaint or depression recorded in her letters written to the kith and kin.

11. When we look into the statement of independent witnesses produced by the prosecution, who are neighbours of the appellant i.e. Mansuresh (PW-11), Savakka (PW-13), Kanechanamma(PW-14), (M. Saloman)PW-15 and Perumal

(PW-16), we find that none of them have supported the case of the prosecution.

12. In this case, we have noted that there is no eye-witness to the incident in question. The prosecution primary relies on three dying declarations Ex.P.12, Ex.P.22 and Ex.P.29. In support of those Exhibits the prosecution relied on the statements of Tahsildar, Hubli (PW-10), Dhanjaya Kumar, PG student (PW-20) present at the time of arrival of Maharudrappa, Tahasildar (PW-10) to the Burns Ward. Dr. Radha (PW-17) who examined the deceased, Dr. Jagdish (PW-18), who was working as Medical Officer on 14th January, 2000 and conducted the postmortem, Dr. Bhimappa (PW-22), in whose presence Ex.P.22 was recorded, Rayappa (PW-23), PSI, Bendigeri Police Station, Crime Branch, Hubli who recorded the dying declaration (Ex.P.22) and registered the case, Dr. Komal Prasad (PW-25), in whose presence Ex.P.29 was recorded, etc.

In *Mehiboobsab Abbasabi Nadaf vs. State of Karnataka,* (2007) 13 SCC 112, having noticed multiple dying declarations this Court held:

> ***"7.*** *Conviction can indisputably be based on a dying declaration. But before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied."*

13. We will now examine the contents of three different dying declarations i.e. Ex.P.12, Ex.P.22 and Ex.P.29 and the related prosecution witnesses who deposed in support of such dying declarations.

Maharudrappa (PW-10), Tahasildar, Hubli recorded dying declaration Ex.P.12, at 8.30 p.m. on 14th January, 2000 in Ward No.202, The deceased stated that she was conscious to give answer the questions. She got married with the appellant at the age of 26 years, about 13 years back. She had two sons and one daughter. She was a housewife and her husband was working in Railways and used to come home once in a week. She was staying at Mantur Road, Ganesh Pet, Hubli. She stated that she had been brought at KMC Hospital, Hubli by her mother-in-law, Smt. Polamma by auto rickshaw, after she being sustained burn injuries at about 8.30 a.m. in her residence. At about 12 p.m. she had been admitted there for treatment by her mother-in-law. Her husband had not come to see her after the incident. Her mother-in-law was accompanying her in the Hospital. She further stated that her husband (appellant herein) had illicit relations with one Lakshmi. Every week he used to come home and for one or the other reason, used to fight and beat her ruthlessly. Her mother-in-law used to keep quiet without objecting for such acts of her son. It is stated in Ex.P.12 on the said date **(14th January, 2000) at about 8.30 a.m., when her children had gone out of the residence, her husband had a fight with her and instigated her to pour kerosene upon her body. She poured the kerosene on her body and her husband further poured kerosene upon her and put on fire with match box.** At that time her mother-in-law was out of the residence. When the flame was catching her sari and burning her body, her husband has not tried to douse the fire. Neighbouring people rushed to her residence on hearing her screams and doused the fire by pouring water. Thereafter, her mother-in-law had brought her to the Hospital by auto and admitted for treatment. Both her husband and Lakshmi are responsible for her condition. In the bottom of the Ex.P.12 where thumb impression of the victim is taken it is written "read over and accepted to be correct".

14. The Tahasildar (PW-10) in his statement stated that

while he was working as Tahasildar in Hubli, on 14th January, 2000 at 7.25 p.m., he received a requisition from Town Police Station, Hubli, to record dying declaration of Neelamma wife of Kashi Vishwanath Murari. He had recorded the dying declaration of the said Neelamma on 14th January, 2000 from 8.30 p.m. to 9.00 p.m. Doctor opined that she was in condition to give dying declaration. He put the questions to Neelamma and she answered. After recording it, it was read over to her. Admitting its contentions she put her thumb impression on it and Doctor also singed. Dying declaration is marked at Ex.P.12, and the signatures of witness is marked at Ex.P.12(a).

15. Dr. Dhanjaya Kumar (PW-20), who was working as P.G. student in K.M.C. Hubli stated that on 14th January, 2000 at about 8.30 p.m. Tahasildar, Hubli came to K.M.C. Ward No.202. He was on duty there. The Tahasildar asked him about the patient's condition. He examined the patient and she was fit to give statement. The Tahasildar recorded the statement of the injured and he examined again and found her alright. He was present when Tahasildar recorded the statement of the injured. He had also signed on that statement. The signatures of the witness are marked at Ex.P.12(b) and the certificate of the witness is marked at Ex.P.12(c). In the cross-examination he stated that Dr. A.S. Bekanalkar, Unit Chief did not give anything in writing asking him to be present and examine the injured lady. The Tahasildar, Hubli did not give requisition in writing with a request to be present there and examine that injured lady. He has not given in writing separately about the fitness condition of injured Neelamma. From 8.00 a.m. he was on duty in Ward No.202 of K.M.C. on 14th January, 2000. He had not given treatment to Neelamma but his colleague had given treatment. On Ex.P.12, it is not specifically written that Neelamma was examined twice. **He specifically, stated that he can understand Kannada language. He does not know Telugu language. Neelamma was talking in Telugu**

language. He further stated that it is incorrect to suggest that at that time Neelamma was not in fit condition.

16. The second dying declaration is Ex.P.22 recorded by the PSI, Bendigeri P.S., Hubli at 9.45 p.m. on 14th January, 2000. In the said dying declaration, the deceased disclosed her name and address as Neelamma @ Lilamma w/o Kashi Vishwanath of Mantoor Road, Ambedkar Colony, Hubli. She along with her husband-Kashi Vishwanath, mother-in-law-Polamma, and her children-Sandya, Prasanna and Naveen were staying at home. Her husband had illicit and immoral relation with one Laxmi, who has been working as sweeper in Railways. Her husband and mother-in-law used to quarrel with her and on 14th January, 2000 at about 10.00 a.m. **her husband started quarreling with her at the behest of Laxmi and along with Laxmi poured Kerosene on her body and put on fire by using match stick.** She further stated that she could not put her signatures since her hand was completely burnt. In the bottom of it, it was mentioned that dying declaration was "read over and accepted to be correct"

17. Rayappa, PW.23, PSI, Bendigeri, P.S. Hubli who recorded dying declaration Ex.P.22 stated that while he was working as PSI, Bendigeri Crime Branch on 14th January, 2000 as the Police Inspector gave an order and directed me to go to K.M.C. and record statement of Neelamma. He went to KMC Hubli at 9.45 p.m. and gave the order to the Doctor. Doctor opined that she was in condition to give statement. He recorded the statement of Neelamma in the presence of Doctor. The statement is Ex.P.22. He has signed on it and Doctor has also signed on Ex.P.22.

18. Dr. Bhimappa (PW.22), Medical Officer, District Hospital Bagalkot stated that on 14th January, 2000 he was Medical Officer in K.M.C., Hubli. On 14th January, 2000 he was on duty in K.M.C. Bendigeri Police recorded the statement of injured. The statement is marked at Ex.P.22. It bears his

signatures at Ex.22(a). The injured was in a position to give statement. Ex.P.22 was recorded in his presence. In cross-examination he accepted that the Police Officer of Bendigeri P.S. had not given any requisition in writing requesting him to be present while recording such statements. He further accepted that on Ex.P.22 he had not endorsed that Neelamma was in fit condition to give statement. **He further stated that he was not aware whether Neelamma was talking in Telugu.**

19. Padmavathi (PW-8), coolie by occupation, is the mother of Neelamma. She stated that after marriage of the appellant and her daughter, Neelamma, their relationship was good, later appellant used to complain that Neelamma had not brought any dowry. Neelamma was complaining that she was ill treated and harassed by the appellant and he was intending to marry another woman. They convened a Panchayat and advised the appellant. Even after advice harassment was continued. Her daughter was beaten 2-3 times, and she left her matrimonial home and resided with her mother. The appellant took her back to his house. The appellant was suspecting her daughter. She stated that Pullayya had phoned her about the incident. She along with her husband, son-in-law came to Hubli. When they went to K.M.C. Neelamma was talking properly, when they asked Neelamma she told that accused No.1(appellant) to 3 closed the door of the house, accused No.3 poured kerosene and accused No.1 set her on fire. Accused No.2, mother-in-law was outside the house, closing the door. During her cross-examination, **PW-8, specifically stated that Neelamma did not know correct writing in Telugu but she used to write some Telugu. She had some written letters which have been given to the police. She does not know that those letters were written by Neelamma or not.**

20. The contents of the third dying declaration – Ex.P.29 was recorded by the Bendigeri Police on 15th January, 2000 in the presence of Dr. Komal Prasad (P

in KMC, Hubli. In the said dying declaration (Ex.P.29), deceased Neelamma stated that she had been residing at the above-mentioned address, i.e., Mantur Road, Ambedkar Colony, Hubli along with her husband, mother-in-law, Polamma, and three children. She was a house wife. Her husband Vishwanath was working in SNI Division, Railways at present employed at Karat. Often he visited the house. Two days prior i.e. Thursday, 13th January, 2000, she was confronted and slapped on the right cheek by one Laxmi of Mantur Road, Hanchandra Colony, who had illicit relation with her husband. She returned to her house having decided to inform about the incident to her husband. She had informed her husband about the incident when he came to house at 7.30 p.m. on the same day. Then he had scolded, thrashed her by saying that why you had spoken to Laxmi. She kept quiet. **Next morning i.e. Friday, 14th January, 2000 while she was cleaning the utensils, her husband came along with Laxmi, and thrashed her by saying that what can she do if he kept Laxmi in the said house. Then he dragged her inside the house and closed the door. Her mother-in-law also supported her husband and went outside. At that time Laxmi was inside the house. Her husband poured kerosene on her and Laxmi lit the match stick and thrown on her body, due to the flames, fire spread all over her body, she rushed outside the house screaming for help. Then neighbours and workers who were at site came and doused the fire by wrapping her body with blanket. After being scolded by the neighbours her mother-in-law had taken her to KMC Hospital by auto. The incident took place at around 10.00 a.m. She further stated that she had been harassed and tormented quite often by her husband and mother-in-law since one year and Laxmi was responsible for the said incident. She further stated that she could not put her signatures since her hand was burnt. Her children had been to school at the time of the incident. Below the dying declaration it was written that**

the same was "read over & accepted to be correct".

21. Dr. Komal Prasad (PW-25), in his statement stated that on 15th January, 2000 he was on duty in K.M.C. Hubli. Bendigeri Police Officer had come to KMC on 15th January, 2000 and asked his opinion about the fit condition of one Neelamma injured to give statement. He examined her, and stated that she was in fit condition to give statement. Police Officer recorded her statement in his presence and he had also signed on that statement. The statement is Ex.P.29. The signature of witness is marked at Ex.P.29(a). The statement was recorded at 5.25 p.m. In his cross-examination, he stated that Neelamma had sustained burn injuries nearly 90 to 95 per cent. She was admitted on previous day and it was 1 ½ day when he gave his opinion. She was given with sedative injunction.

22. Dr. Radha (PW.17), Assistant Surgeon, KMC, Hubli, in her deposition stated that she was working as Medical Officer in KMC, Hubli. On 14th January, 2000 at 11.45 a.m., **she examined one Neelamma wife of Kashi Vishwanath Murari, who had sustained burn injuries. The history is self afflicted burns due to a quarrel at home at 11 a.m. with her husband. Patient was conscious.** On examination she noticed superficial deep burns over the lower part of face, lower half of chest and abdomen. Both the upper limbs and both the lower limbs were also burnt, sparing the face, neck, upper part of chest, parts of back in patches, groin and soles of the feet. She had sustained burn injuries from 70 to 75 per cent. Eye brows and hair of Neelamma were singed. She was admitted to female surgical ward. The patient was brought by her mother-in-law namely Polamma Venkatayya. In her cross-examination, she stated that such burn injuries are possible if fire catches to the lower end of saree of a woman.

23. We have noticed the three dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29). A compariso g

declarations, in our opinion, shows certain glaring contradictions. In the first dying declaration (Ex.P.12), we have noticed that deceased, Neelamma stated that she sustained burn injuries in the early morning at 8.30 a.m., when her children had gone out of the residence, her husband had a fight with her and instigated her to pour kerosene upon her body. She poured the kerosene on her body and her husband had also further poured kerosene upon her and put on fire match box. While in the second dying declaration (Ex.P.22), Neelamma (deceased) stated that her husband and mother-in-law used to quarrel with her and on 14th January, 2000 at about 10.00 a.m. her husband had started fight with her at the behest of Laxmi and along with Laxmi poured kerosene on her body and put on fire by using match stick. In the third dying declaration (Ex.P.29), Neelamma (deceased) stated that next morning i.e. Friday, 14th January, 2000 while she was cleaning the utensils, her husband came along with Laxmi, and thrashed her by saying that what can you do if he kept Laxmi in the said house. Then he dragged her inside the house and closed the door, her mother-in-law also supported her husband went outside. At that time Laxmi was inside the house. Her husband poured kerosene on her and Laxmi lit the match stick and thrown upon her body, due to the flames, fire spread all over her body, she rushed outside the house screaming for help.

24. In the first dying declaration (Ex.P.12), she (deceased) stated that her husband instigated her to pour kerosene on her body, therefore, she poured the kerosene on her body and her husband further poured kerosene on her and put on fire using a match box. In the second dying declaration (Ex.P.22), she (deceased) stated that her husband along with Laxmi poured kerosene on her body and put on fire by using match stick. In the third dying declaration (Ex.P.29), she (deceased) stated that her husband poured kerosene on her and Laxmi lit the match stick and thrown upon her body.

25. Apart from the contradictions, the credibility of three

dying declarations (Ex.P.12, Ex.P.22 and Ex.P.29) is to be doubted. In the first dying declaration (Ex.P.12) dated 14th January, 2000 the thumb impression of victim has been shown. Whereas in the second dying declaration (Ex.P.22) taken on the same day, i.e, 14th January, 2000 and the third dying declaration (Ex.P.29) given on the next day, i.e., 15th January, 2000, the victim had stated that she had not given her signatures since her hand was completely burnt. Dr. Bhimappa (PW-22), who signed the Ex.P.22, in his cross-examination stated that he was not aware whether Neelamma (deceased) was talking in Telugu. Dr. Dhanjaya Kumar (PW-20), who signed Ex.P.12, in his cross-examination specifically stated that he can understand Kannada but does not know Telugu language and that Neelamma was talking in Telugu language. Padmavathi (PW-8), mother of the deceased, in her cross-examination stated that Neelamma (deceased) was not knowing the correct writing the Telugu. But she was writing some Telugu.

26. The prosecution has failed to state as to why three dying declarations were recorded in Kannada, if the deceased, Neelamma was talking in Telugu. It has also not made clear as to who amongst the Tehisldar, PSI or SI or the Doctors who has signed in Ex.P.12, Ex.P.22 and Ex.P.29 had knowledge of Telugu and translated the same in Kannada for writing dying declarations in those exhibits and that in the bottom of three dying declarations it has not been mentioned that they were read over in Kannada and explained in Telugu that the deceased understood the contents of the same. The above mentioned facts create doubt in our mind as to the truthfulness of the contents of the dying declarations as the possibility of she being influenced by somebody in making the dying declarations cannot be ruled out.

27. On careful perusal of the materials on record, we are unable to come to the conclusion that the prosecution in this

case has established its case beyond reasonable doubt to base a conviction on the appellant. Hence, we are of the opinion that both the courts below have erred in coming to the contra conclusion.

28. For the reasons stated above, this appeal succeeds and the judgment and conviction recorded by the courts below are set aside. The appeal is allowed. The appellant, who is in jail, is directed to be released forthwith.

B.B.B. Appeal allowed.

STATE OF HIMACHAL PRADESH
v.
JAI CHAND
(Criminal Appeal No. 269 of 2007)

JULY 3, 2013

[A.K. PATNAIK AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Penal Code, 1860 - s. 302 - Murder of wife - Conviction by trial court - Acquittal by High Court - Held: Order of High Court was unsustainable as the same was passed in disregard of the medical evidence and the material witnesses - In view of the medical evidence, evidence of the independent witness and the conduct of the accused, he is liable to be convicted - Order of conviction restored.

Respondent-accused No.1 was prosecuted for the offences punishable u/ss. 302 r/w. s. 34 and 498-A IPC, alongwith accused Nos.2 and 3. The prosecution case was that the respondent brought his wife (deceased) to hospital in serious condition, for medical treatment. On information by the Medical Officer, police official reached the hospital and, on the basis of the statement of PW-1 (father of the deceased), recorded FIR. Respondent-accused No.1 and accused No.3 made disclosure statements to the effect that accused No.1 dipped the head of the deceased in a bucket full of water and then throttled her with his hands with the help of accused Nos.2 and 3. Thereafter, all the accused hung the body of the deceased. Trial court convicted respondent-accused No.1 for the offences charged and acquitted accused Nos. 2 and 3. In appeal, High Court acquitted the respondent-accused. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1. The findings by the Division Bench of the High Court, rejecting the evidence of PW-10, the doctor who conducted post mortem and other material witnesses including PW-3 and PW-5 are clearly unsustainable, whereas those given by the trial court, accepting the evidence of these witnesses were weighty and sound. [Para 28] [663-E-F]

2. The High Court was clearly in error, in formulating its own opinion based on conjectural premises and deciding the case on the basis of that, discarding the opinion of the medical experts regarding the nature of the injury and cause of death. The High Court proceeded on erroneous premise to hold that PW-10, the doctor, who conducted the post-mortem, might have acquired some experience as Medical Officer but he was not a forensic expert to give the level of an expert witness examined in the Court. It is true that post-mortem report (PW-10/A) is not a substantive piece of evidence. But the evidence of such doctor cannot be insignificant. In the present case, the post-mortem was conducted by a team of doctors, i.e. PW-10 and PW-8. PW-10 conducted the post mortem and the forensic expert (PW-8) conducted the viscera test. In cross-examination, no suggestion was made on behalf of the defence that they were not competent or that they had not expertised to perform post mortem of a body. [Paras 19,20,21 and 22] [660-D-E, G-H; 661-A-D]

State of Haryana v. Ram Singh **(2002) 2 SCC 426: 2002 (1) SCR 208 - relied on.**

3. Medical evidence completely falsifies the case of accused No. 1 that the ligature mark of 10cm long and 1.5 cm. wide in horizontal position cannot be caused by hanging but could have been caused by strangulation.

The conduct of the accused No. 1 was also not natural. When he found his wife hanging, he neither made hue and cry nor called the villagers nearby. He along with others brought down the body of the deceased. He, even thereafter, did not report the matter immediately on his own to police. The act of bringing his wife, to the hospital cannot absolve the guilt of accused No. 1 of an offence committed by him. He was the best person who could have explained the reasons for the horizontal ligature mark of 10 cm. x 1.5cm. on the neck of the deceased and as to why he did not inform the matter to the villagers before bringing down the body of the deceased. [Paras 26 and 27] [663-B-D]

4. PW-3 is an independent witness. In his testimony, he inter alia deposed that he met accused No. 1 and 'D', carrying the deceased on the cot to the road side for carrying her to the hospital and it was the accused No. 1 who told him that as the deceased was ill, hence being taken to the hospital. The accused No. 1 has thus, misrepresented the factual position to PW-3 which shows guilty intention on his part. Accused No.1, in reply to question No. 11, though denied having represented so to PW-3 and as per his version, the said witness was told that deceased had strangulated herself, but there is no reason to disbelieve the testimony of PW-3, as a matter of fact, PW-3 is an independent witness. Reply to question No. 11 shows that accused No. 1 also accepted that PW-3 met him on the spot in the early morning. Therefore, it cannot be said that the PW-3 was interested in the case of either of the parties. Not only this, as per version of PW-3, the deceased at that time was silent and there was no movement in her body, meaning thereby that she was already dead in the house itself and in order to mislead the village folks and to create evidence that he made efforts to s[illegible]e

took her dead body to the hospital. Such conduct on his part amply demonstrates that it is the accused No. 1 alone who caused the death of his wife. [Para 25] [662-C-H]

5. It is true that PW-1, father of the deceased, PW-2, brother of the deceased and PW-5 belonged to the same village. However their being related to each other and being residents of the same place is not fatal to the prosecution case, because they have deposed about the facts which are not in controversy save and except that the deceased was being tortured by the accused persons. However, the present case is not a case of suicidal death of the deceased on being fed-up with the torture of the accused persons, but a case of homicidal death and as such, the version of PWs. 1 and 2 in this behalf is not so material. [Para 23]

6. The recovery of bucket(Ex.P-8) has been proved, as the same has been produced by accused No. 1 himself before the police as recorded in memo (Ex.PW-5/C) recorded at his instance in the presence of PW-5 and 'P'. As a matter of fact, the bucket was lying in the courtyard where it was identified by accused No. 1 and thereafter, was taken into possession by the police. The recovery of an incriminating article from a place which is open and accessible to others, alone cannot vitiate such recovery under Section 27 of the Evidence Act. Thus, in the present case it can be held that the bucket (Ex.P-8) is the same which was used by the respondent for drowning and strangulating his wife, (the deceased). [Para 24] [661-G-H; 662-B-C]

Case Law Reference:

2002 (1) SCR 208 relied on Para 19

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 269 of 2007.

From the Judgment & Order dated 16.11.2004 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 392 of 2002.

Varinder Kumar Sharma, Varun Thakur, Himinder Lal for the Appellant.

Dr. Krishan Singh Chauhan, Ajit Kumar Ekka, Chand Kiran, Ravi Prakash for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal is preferred by the State of Himachal Pradesh against the judgment dated 16th November, 2004 in Criminal Appeal No. 392 of 2002. By the impugned judgment the Division Bench of the Himachal Pradesh High Court at Shimla, acquitted the accused-respondent by allowing the appeal and set aside the order of conviction under Section 302 IPC and Section 498-A IPC with sentence thereunder, passed by the Sessions Judge, Hamirpur, HP on 13th June, 2002.

2. The respondent(herein) Jai Chand, along with two others were tried for offence punishable under Section 302 (r/w Section 34)IPC and Section 498-A IPC. Learned Sessions Judge, Hamirpur found Jai Chand, accused no. 1 to be guilty under Section 302 and 498-A IPC. He was sentenced to undergo Imprisonment for life and to pay fine of Rs.5000/-, in default of payment of fine, to undergo imprisonment for one year. No separate sentence under Section 498-A IPC was imposed upon the accused. The two other accused, namely, Prem Chand and Smt. Nimmo Devi were acquitted.

3. The record reveals that accused no. 1, Jai chand (respondent herein) and accused no. 2, Prem Chand are real brothers whereas accused no.3, Nimmo Devi is their sister-in-law (Bhabhi), the wife of their elder brother Prakash Chand.

4. The prosecution version as unfolded during the trial may briefly be stated as follows:

Smt. Vidya Devi (since deceased) was wife of Jai Chand, accused no. 1(respondent herein). She was married to Jai Chand in the year 1996. On 13th July, 2001, Smt. Vidhya Devi was brought to District Hospital, Hamirpur in serious condition by accused no. 1 for medical treatment. The Medical Officer on duty had informed the police, Police Station at Sadar vide Rapat No. 3 dated 13th July, 2001(Ex.PW-8/A) that one woman was brought to the hospital for medical treatment under suspicious circumstances. On the said information, Sansar Chand (PW-8), Inspector/S.H.O. accompanied by other police officials went to the hospital where he found the dead body of Vidya Devi lying in the Varanda. Roshan Lal, (PW-1), father of the deceased was standing near the dead body. He made statement (Ex.PW-1/A) that his son-in-law, Jai Chand(accused No.1) is a habitual drunkard and under the influence of liquor, he was in the habit of beating and treating his daughter with cruelty. Prem Chand (accused no.2) and Smt. Nimmo Devi (accused no.3) also used to taunt and abuse the deceased. Two years ago, accused no. 1, left the deceased at her parents' house. PW-1 pacified his daughter that all this happens in joint families and sent her back to matrimonial house. In these circumstances, Vidhya Devi committed suicide due to mal-treatment and torture by all the accused persons. On 13th July, 2001 at about 8.30A.M. one Kashmir Singh, resident of his Village Kot, informed PW-1 that his daughter Vidhya Devi had been brought to the hospital at Hamirpur where she expired. PW-1 alongwith his son, Ajit Singh(PW-2) went to the hospital and found Vidhya Devi dead. PW-1 had noticed injuries on her person. The statement of PW-1 (Ex.PW.1/A) was forwarded by PW-8 (vide Ex.PW-8/A) to the Police Station for registration of the case. First Information Report (Ex.PW-6/A) was recorded by PHC Ramesh Chand(PW-6) P.S. Sadar Hamairpur, H.P.. Investigation was conducted initially by PW-8. He prepared

inquest reports (Ex.PW-2/A) and Ex.PW-2/B). He wrote an application (Ex.PW-8/B) to the Senior Medical officer, Zonal Hospital, Hamirpur for conducting the post-mortem to the dead body of the deceased. Photographs (Ex.P-9 to Ex.P-14) of the dead body were also taken. Jai Chand (accused no. 1) was present in the hospital and he handed over 'dupattas' (Ex.P-2),'shirt' (Ex.P-3) and 'Salwar' (P-6) of the deceased to PW-8 which were taken into possession vide memos; (Ex.PW-2/C and PW-2/D) respectively. Thereafter, PW-8 handed over the file for investigation to Hari Ram (PW-9). PW-9 collected the post-mortem repot(Ex.PW-10/A). On the basis of the report, the case was converted from Section 306 IPC to under Section 302 IPC.

5. Jai Chand, accused no. 1 made the alleged disclosure statement (Ex.PW-5/A) under Section 27 of the Evidence Act to the effect that he alongwith co-accused had hanged the deceased with 'Barli' (a wooden kari placed horizontally on the walls of the room). To the same effect, disclosure statements (Ex.PW.5/B and Ex.PW-5/D) were made by accused no. 3. Jai Chand, accused no. 1 also got recovered one iron bucket (Ex.P-7) which was taken into possession vide disclosure memo(PW-5/C). PW-9 prepared the site map(Ex. PW-9/A) depicting the place where the accused person had put the face of the deceased in the bucket filled with water and pointed the place where her body was tied with 'barli' by accused persons.

6. As per, the disclosure statement of Jai Chand, (accused no. 1) and Nimmo Devi (accused no. 3), on the intervening night of 12th/13th July, 2001, Vidhya Devi came out of the room and went to a place where the cattle were used to be kept. Her husband, Jai Chand, accused no. 1 also followed her and asked his wife to go to bed but she did not respond thereto. Both of them entered into verbal fight. Accused no. 1 at that time dipped the head of the deceased in the bucket full of water lying there. As a result thereof, she felt suffocated and the water

entered into her mouth as well as in stomach. Accused no. 1 then lifted her from that place and laid her on the cot. Accused no. 1 called accused nos. 2 and 3. Accused no. 3 caught hold of arms of the deceased whereas accused no. 2 caught hold of her legs. Accused no. 1 throttled the deceased with hands and caused her death. On finding no movement in her body, all the accused hanged the deceased with dupattas and thereafter laid the dead body of the deceased Vidhya Devi on a cot. On the following morning, Jai Chand, accused no. 1 told his mother that his wife had become unconscious during the night and now she is not speaking anything. Jai Chand, accused no. 1 then took her wife to the courtyard and laid her body on a cot lying there. The residents of the village were informed about the death of Vidhya Devi. One Smt. Damodri Devi brought some milk from her house but the deceased could not inhale the same. Thereafter, accused no. 1 accompanied by Kartar Singh and Deepak Kumar brought the deceased on the cot to the road side. Prakash Chand, brother of accused no.1 who had gone to call the doctor, had brought the taxi and the deceased was thus taken to the Zonal Hospital, Hamirpur where she was declared dead. The body of the deceased was sent for post mortem. PW-10, Dr. K. C. Chopra submitted post mortem report (Ex.PW-10/A). The stomach contents including viscera etc. preserved by the team of doctors has been got analysed and as per report Ext. PW-8/B, neither the contents of any poison nor intoxicant could be detected on analysis thereof. Thus, no case of poisoning was found.

7. On receipt of post mortem report (Ex.PW-10/A) and report of the Chemical Examiner(Ex.PW-8/D), it was found that the deceased had not committed suicide but she was killed by the accused no. 1 by dipping her face into a bucket of water and strangulating her. All the three accused were sent for trial for the office under Section 302 read with Section 34 IPC and 498-A IPC.

8. PW-10, Dr. K. C. Chopra, Medical officer, Zonal

Hospital, Hamirpur, H.P., in his statement stated that he alongwith Dr. K.S. Dogra conducted post mortem of the dead body of Smt. Vidhya Devi, wife of Jai Chand and observed as follows:

"***EXTERNAL APPEARANCE:***

Dead body was lying in supine with face in the centre (there was no turning of face to either side). White leathorty foam seen at both nostrils which was more on pressing the epigastriun. No sticky saliva was present on the angle of the mouth. No postmortem staining was present over the back and legs. No petechcial haemorrages seen over the chest or legs. Two contusions 3x2 cm present on the left upper arm, reddish blue in colour. No stretching and elongation of neck, head inclined to neither side.

LIGATURE MARK

There was 10 cm long ligature mark of dark brown colour extending from left sternocleide mastoid to the right sternocleide mastoid below cricoids cartilage, reddish brown in colour, abrasion to be on the right side. Ligature mark encircles the neck only on front side. No encircling of the neck on the back and away from sternecleid mastoid. There was ligature of 1.5 cm wide or less than it at places (ligature used was not presented by the police at the time of postmortem examination). It was not with the body either. No abrasion/brusises on the mouth, nose, cheeks, forehead. Lips were blue. Tongue was in drawn, plinching of teeth, on opening base of tongue swollen. No injury to tough, clinching of hands present.

DISSECTION OF NECK

On dissection, there was extra vasation of blood into sub-subcutanous tissue under

side present. Platysma and right sternocloide mastoid muscle lacerated. No laceration of sheath of carotid artries. No fracture of hyoid bone or thyroid cartilage. Epiglottis not cyanosed Trachea and larynx were congested and have forthy mucous. First 2-3 rings of trachea fractured.

ABDOMEN:

Walls and peritoneum were normal. Mouth Pharynx and oasophagus had whitish fluid. Stomach was containing 500 cc of fluid mixed with mucous and small sticky material. Small Intestine was containing semi-digested food but no fluid are present. Faecal matters were present in large intestine. Liver was normal, it was dark in colour, on cutting dark fluid came out. The spleen was dark in colour and was congested. Kidney was normal in size and was congested. The bladder was empty. Organ of generation was normal. There was no evidence of rape or any injury.

CRANIUM SPINAL CORD

There was no fracture of skullbone. Brain was congested and also the membrane.

THORAX:

Walls, ribs, cartilages and pleurae were normal. Larynx and trachea was congested and contained white fluid, no sand or mud seen, no food particles present. Right and left lung were distended, pale grey, indented by the ribs, heavy cedemataous, spongy, pite on pressure. On pressing, frothy whitish fluids came through bronchials. Heart was normal, left side was empty and the right was full. No fracture/dislocation of bones were found.

9. Dr. K.C. Chopra (PW-10) also stated their opinion as to cause of death of the deceased. The same is quoted hereunder:

"In our opinion deceased died due to asphyxia caused by drowning and strangulation. The probable time between injury and death was immediate and between death and postmortem within 24 hours.

x x x x x x x x x

In our opinion as mentioned in Ex.PW-10/A strangulation in this case was not caused by suspending the body. The chances of dupatta as ligature mark in the case were minimum, i.e. dupatta like Ex P-2 and P-3. Drowning and strangulation are possible in this case while putting the face/mouth of deceased in bucket Ex-P-8 filled with water and with pressure being applied."

10. Dr. K.C. Chopra (PW-10) further stated that the post mortem report was written by Dr. K.S. Dogra (PW-8) and was signed by both of them.

11. The accused no. 1 (respondent herein) made a plain denial of the prosecution case. In statement under Section 313 Cr.P.C., accused no. 1(respondent herein) alleged that witnesses have falsely deposed against him being relative of the deceased and due to enmity with him. In reply to question no. 26, the accused no. 1 stated as follows:

"Q.26 Anything else you want to say?

Ans. The deceased had illicit relations with my nephew Banku Ram, S/o Shri Rohli Ram. On one occasion when I came on leave to the house, came across few love letters written by said Banku Ram to the deceased; on this I inquired from her about such relations and asked her to discontinue such relations. On this she went to the house of her parents and stayed there for about 3 months and when brought to my house by her parents, she used to remain depressed. She has, thus committed suicide due to her own problems and not on account of the alleged torturing attributed to him.

implicated falsely in this case. It is, however, submitted that those letters were burnt by me with the idea to maintain cordial relations with the deceased and also to forget whatever as happed in the past."

12. The Trial Court considered the version of Kartar Chand (PW-3) posted as Primary Education Teacher in Government High School, Barhi, an independent witness, Post Mortem Report (PW-10/A), statement of Dr. K.C. Chopra (PW-10), report and the testimony of PW-1 and PW-2 and held that "the circumstances reveal that the deceased has been done away to death by the said accused and none else"...."The circumstances appearing in the prosecution evidence are conclusive in nature and leads to the only conclusion that it is accused no.1 who has caused the death to the deceased."

13. The Division Bench of the High Court rejected the evidence of the prosecution witnesses for the reasons which may be summed up as below:

(1) Dr. K.C. Chopra (PW-10) had no experience as a forensic expert, therefore, his evidence cannot be read under Section 45 of the Evidence Act.

(2) The Division Bench appreciated the medical evidence itself and held that there was no sign of injuries suggestive of resistance on the part of the deceased to establish that the face of the deceased was forcibly thrust into iron bucket filled in with water. Only 500cc of fluid mixed with mucous and small sticky material was found in the stomach. The hairs of the deceased was not found wet. Dr. K.C. Chopra (PW-10) found marks of injuries on the neck of the deceased but in his cross examination he stated that if the force was applied, in that event, the bucket which was used as ligature could touch both the ears. But no injuries were found on the ears

of the deceased or on any part of her mouth or head.

(3) The conduct of Jai Chand, accused no.1 would go to show that he tried very hard to save the life of his wife by taking her to the Zonal Hospital, Hamirpur for medical treatment. Had Smt. Vidhya Devi been killed by her husband, he would not have dare to take the dead body of the deceased to the hospital to get the medical opinion against himself.

14. Learned Counsel on behalf of the appellant-State submitted that the High Court was wrong in ignoring the medical evidence which clearly established that it was not a case of suicide but a case of homicide which ultimately has been caused by the husband of the deceased. The High Court also failed to notice the statement of Jai Chand, accused no. 1 (respondent herein), husband of the deceased under Section 313 which is self explanatory that he had been keeping a hatred attitude towards his wife due to her illicit relation with his nephew and which resulted in motive and intention to kill her during night. This statement coupled with other circumstantial evidence leave no doubt that the accused no.1 cannot escape himself from the commission of offence. Further according to the appellant as deceased Vidhya Devi was staying with the respondent and died unnatural death, it was for Jai Chand (respondent) being husband to explain the circumstances under which she died. Learned counsel also contended that the High Court failed to appreciate that although there is no direct evidence, chain of circumstances appeared on record is so complete to fetch conviction to the husband of the deceased if not to all the accused. It is on the basis of disclosure statement of accused no.1 a bucket which is most relevant evidence relating to the medical evidence is recovered, which is sufficient to convict the respondent.

15. Learned counsel appearing on behalf of the

respondent referred to the findings of the Division Bench of the High Court in support of the respondent.

16. The principal contention raised in support of the appeal filed on behalf of the State is that the medical evidence available on record completely supports the prosecution case. Let us, therefore, have a look at medical evidence available on record. Post-Mortem Report(PW-10/A) has already been noticed above. The plea raised by accused no. 1(respondent herein) was that the deceased died due to suicidal hanging cannot be accepted for the reason that her body was not found stretched. If she had strangulated herself, her body should have been stretched and the fracture of hyoid bones and thyroid cartilages should have been there. Post mortem Report clearly shows that there is no such fracture and the testimony of Dr. K.C. Chopra(PW-10) supports the same. In a death case, by way of hanging, the tongue of the deceased should not have been indrawn as has been noticed in the post mortem report(Ex.PW-10/A), but the same should have been out of the mouth. There being the evidence of 2-3 rings of trachea fractured, trachea, larynx, spleen and kidney being congested is also suggestive of the fact that it was not a suicidal death, but a homicidal one. The team of doctors after observing so, during the examination, have come to the conclusion that the cause of death was Asphyxia caused by drowning and strangulation. The probable time between injury and death had been recorded minimum. The death by way of drowning and strangulation can be caused instantaneously. Admittedly, it is not the case of either of the parties that the death is caused by way of poisoning, however, in order to rule out the possibility in this behalf also, the stomach contents including viscera etc. preserved by the team of doctors got analysed and as per report (Ex.PW-8/D), neither the contents of any poison nor any intoxicant could be detected on analysis thereof.

17. Dr. K.C. Chopra (PW-10) is specific while deposing in his examination-in-chief that strangulation in this case has

not been found to be caused by suspending the body. He also ruled out the chances of dupattas (Ex.P-2 and P-3) being the ligature used for strangulation by the deceased and to the contrary, he specifically stated that drowning and strangulation are possible in this case by dipping the face/mouth of the deceased into the bucket (Ex.P-8) filled with water and by applying force in pressing her mouth therein.

18. Much stress was made by learned counsel appearing on behalf of the respondent that there is no possibility of the ears touching the top of bucket, even if mouth of anyone is dipped therein and pressed with force. An effort was thus been made to discard the testimony of PW-10. However, in our view, it is not so relevant as to whether the bucket used as a ligature was touching the ears or not.

19. It is true that post-mortem report(PW-10/A) is not a substantive piece of evidence. But the evidence of such doctor cannot be insignificant. This Court in *State of Haryana v. Ram Singh,* (2002) 2 SCC 426 held as under:

> *"1. While it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-a-vis the injuries appearing on the body of the deceased person and likely use of the weapon therefor and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses."*

20. In the present case, the post-mortem was conducted by a team of doctors, namely, Dr. K.C. Chopra and K.S. Dogra. In cross-examination, no suggestion was made on behalf of the defence that they were not competent or that Dr. K.C. Chopra and Dr. K.S. Dogra have not expertised to perform post mortem

of a body. The viscera test was done by forensic expert (PW-8), who submitted the report.

21. From the aforesaid evidence, it is clear that Dr. K.C. Chopra (PW-10) conducted the post mortem and the forensic expert (PW-8) conducted the viscera test. The High Court proceeded on erroneous premise to hold that "Dr. K.C. Choopra might have acquired some experience as Medical Officer but he is not a forensic expert to give the level of an expert witness examined in the Court."

22. The High Court was thus, clearly in error, in formulating its own opinion based on conjectural premises and deciding the case on the basis of that, discarding the opinion of the medical experts regarding the nature of the injury and cause of death. The conclusions are not sustainable otherwise also .

23. It is true that PW-1, father of the deceased, PW-2, brother of the deceased and PW-5 Prem Chand belong to the same village. However they being related to each other and being residents of the same place is not fatal to the prosecution case, because they have deposed about the facts which are not in controversy save and except that the deceased was being tortured by the accused persons. However, the present case is not a case of suicidal death of the deceased on being fed-up with the torture of the accused persons, but a case of homicidal death and as such, the version of PWs. 1 and 2 in this behalf is not so material.

24. The recovery of bucket(Ex.P-8) has been proved as the same has been produced by accused no. 1(respondent herein) himself before the police as recorded in memo (Ex.PW-5/C) recorded at his instance in the presence of Prem Chand (PW-5) and Pyare Lal. As a matter of fact, the bucket was lying in the courtyard where it is identified by accused no. 1(respondent herein) and thereafter, was taken into possession by the police. The reference in this behalf can be made to the statement of Prem Chand(PW-5) who stated that accused no.

1 had shown the bucket to the police which was sealed in a parcel and thereafter taken into possession vide recovery memo ((Ex.PW-5/C). Not only this, he even identified the bucket(Ex.P-8) to be the same. The recovery of an incriminating article from a place which is open and accessible to others, alone cannot vitiate such recovery under Section 27 of the Indian Evidence Act. Thus, the present is the case where there is no difficulty in holding that the bucket(Ex.P-8) is the same which was used by the respondent(herein) for drowning and strangulating his wife, Vidhya Devi.

25. Kartar Chand(PW-3) is an independent witness. In his testimony, he deposed that on his way to school on 13th July, 2001 from his village, when he reached Village Ulehra, (native place of the accused) around 7.15 A.M., he met accused no. 1(respondent) and Deepak carrying the deceased on the cot to the road side for carrying her to the hospital and it was the accused no. 1(respondent herein) who told Kartar Chand(PW-3) that as she was ill, hence being taken to the hospital. The accused no. 1 has thus, misrepresented the factual position to PW-3 which shows guilty intention on his part. No doubt, in reply to question no. 11, he denied having represented so to Kartar Chand(PW-3) and as per his version, the said witness was told that deceased had strangulated herself, but there is no reason to disbelieve the testimony of PW-3, as a matter of fact, PW-3 is an independent witness. Reply to question no. 11 shows that accused no. 1 also accepted that PW-3 met him on the spot in the early morning. Therefore, it cannot be said that the PW-3 was interested in the case of either of the parties. Not only this, as per version of PW-3, the deceased at that time was silent and there was no movement in her body, meaning thereby that she was already dead in the house itself and in order to mislead the village folks and to create evidence that he made efforts to save his wife's life he took her dead body to the hospital. Such conduct on his part amply demonstrates that it is the accused no. 1 (respondent herein) who caused the death of his wife, Vidhya Devi.

26. Post mortem report(PW-10/A) prepared by Dr. K.C. Chopra(PW-10) shows that there was ligature mark on the neck of the deceased. The opinion of the doctor is clear and definite that the ligature mark of 10cm long and 1.5 cm. wide in horizontal position cannot be caused by hanging but could have been caused by strangulation. Medical evidence, therefore, completely falsify the case of accused no. 1(respondent herein). The conduct of the accused no. 1 was also not natural. When he found his wife hanging, he neither made hue and cry nor called the villagers nearby. He along with others brought down the body of the deceased. He, even thereafter, did not report the matter immediately on his own to police.

27. The act of bringing his wife, Vidhya Devi to the hospital cannot absolve the guilt of accused no. 1(respondent herein) of an offence committed by him. He was the best person who could have explained the reasons for the horizontal ligature mark of 10 cm. x 1.5cm. on the neck of the deceased and as to why he did not inform the matter to the villagers before bringing down the body of the deceased.

28. Therefore, we find that all the findings by the Division Bench of the High Court, rejecting the evidence of Dr. K.C. Chopra (PW-10) and other material witnesses including Kartar Chand (PW-3) and Prem Chand (PW-5) are clearly unsustainable, whereas those given by the Trial Court accepting the evidence of these witnesses were weighty and sound.

29. Hence, we allow the appeal and set aside the impugned order of acquittal passed by the Division Bench of the High Court of Himachal Pradesh on 16th November, 2004 and convict the accused-respondent under Section 302 IPC for the murder of his wife, Vidhya Devi and sentence him to imprisonment for life. We, thereby restore the order of conviction passed against the accused-respondent by the Trial Court. The accused-respondent shall surrender immediately to serve out the remainder of the sentence.

K.K.T. Appeal allowed.

SWARN KAUR
v.
GURMUKH SINGH AND ORS.
(Criminal Appeal No. 1624 of 2008)

JULY 3, 2013

[CHANDRAMAULI KR. PRASAD AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - s. 304 (Part II) - Conviction under ss. 302/34 and 201/34 by trial court - Acquittal by High Court - Held: Inflicting of injury by the accused and the ultimate death of the deceased due to the said injury has been proved without any iota of doubt - The conduct of the accused in deliberately failing to identify the dead-body of the deceased, lodging missing report of the deceased and the conduct of negotiating with the wife of the deceased, go against the accused - They are guilty of causing death of the deceased - However, nature of injury and weapons used do not suggest intention of causing death - Hence conviction altered to one under s.304 (Part II) - Accused sentenced to 7 years RI and fine of Rs.50,000/- each imposed - Direction to pay Rs. 2 lakhs to the complainant (wife of the deceased) out of the fine amount.

Respondents-accused, alongwith two other accused, were prosecuted for the offences punishable u/ ss. 302/34 and 201/34 IPC. The prosecution case was that respondent-accused No.2 had taken the deceased alongwith his group on pilgrimage tour, as a cook. The deceased was beaten by the accused party as they were not satisfied with the quality of food prepared by him. Thereafter, he was taken towards a rivulet in a jeep-taxi belonging to PW-6. On the next morning, the body of the deceased was found near the rivulet. Information about the same was given to the police. In the meantime,

accused persons also gave missing report of the deceased to the police. PW 17 (police official) directed them to go to the rivulet so as to find out whether the dead-body was that of their missing companion. The accused persons, after inspecting the body said that it was not that of the deceased. The accused persons, after returning home, initially told the appellant-complainant (wife of the deceased) that the deceased was missing. Two of the accused again met her and told about the death of the deceased. They also negotiated for a settlement by way of payment of a sum of Rs. 1,00,000/- as compensation. The appellant-complainant thereafter lodged FIR. She identified the deceased from the photo of the dead-body which was found near the rivulet.

Trial court found the respondents-accused Nos.1 to 5, guilty of the charges u/ss. 302/34 and 201/34 IPC. Accused Nos. 6 and 7 were acquitted of all the charges. High Court set aside the conviction of the respondents-accused. Hence the present appeal by the complainant.

Allowing the appeal, the Court

HELD: 1.1. In view of the admitted facts of the case, the High Court failed to analyze all the circumstances which were existing, while only a few of them were noted by the High Court while examining the correctness of the judgment of the trial court. Each one of the circumstances which were demonstrated to have been proved, sufficiently established the guilt of the accused and consequently, the conclusion of the trial court in having found the accused guilty, was perfectly justified and the interference with the same by the High Court without sufficient reasoning was therefore, liable to be set aside. [Paras 20 and 37] [678-F; 685-H; 686-A]

Brahm Swaroop and Anr. vs. State of Uttar Pradesh

(2011) 6 SCC 288: 2010 (15) SCR 1; *Podda Narayana and Ors. vs. State of Andhra Pradesh* **AIR 1975 SC 1252: 1975 Suppl. SCR 84;** *Gurnam Kaur vs. Bakshish Singh and Ors.* **AIR 1981 SC 631: 1980 Suppl. SCC 567 - referred to.**

1.2. There is no dispute about the engagement of the services of the deceased as a cook to go along with the pilgrimage tour organised by the second accused on 27.03.2002. Therefore, the said circumstance was fully established. As far as the second circumstance viz., that the deceased was found in the company of the accused when they were travelling together in the jeep taxi is concerned, the evidence of P.W.6 was unassailable. When once the travel undertaken by the accused along with the deceased in the jeep taxi belonging to P.W.6 was found to be true, there is no reason to disbelieve the version of P.W.6, as regards the brutal assault and the injuries inflicted upon the deceased at the instance of the accused. In the course of the cross examination of P.W.6, it was not brought forth as to why he was enemically disposed of towards the accused or as to why P.W.6 was harbouring any other grudge against the accused in order to unnecessarily implicate the accused to the alleged assault on the deceased. The vehicle was a jeep, therefore, when five of them were sitting together along with the deceased in the jeep and when a brutal assault was inflicted upon the deceased, there is every possibility of P.W.6 noticing the assault inflicted upon the deceased. If that be so, his version that the deceased was beaten repeatedly and mercilessly below the knees and other parts of the body as stated by him, have to be accepted in toto, without any scope for contradiction. [Para 24, 25 and 26] [680-H; 681-A-B, C-G]

1.3. Once the factum of the assault cannot be doubted, the further evidence of P.W.23 viz., the postmortem doctor, read along w

certificate Ex.P.W.23/A, sufficiently demonstrate the nature of injuries sustained by the deceased viz. the multiple contusions below the knee, as well as serious injuries on the head of the deceased. Therefore, the said circumstance of the accused causing the injury on the body of the deceased and the ultimate death of the deceased due to the said injury is a circumstance, which has been proved without any iota of doubt. [Para 27] [681-H; 682-A-B]

1.4 The other circumstance viz., that the accused themselves reported to the police about the missing of the accused, the said circumstance has to be necessarily considered along with the circumstances described by P.W.17 and P.W.19, viz., their proceeding to the rivulet where the dead body was found by P.W.1, which was reported to the very same police station and that P.W.19 had gone to the said spot for making necessary enquiries. There is no reason to discard the evidence of P.W.17, as well as that of P.W.19 simply because they were official witnesses. The inquest report viz., Ex.P.W.19/A, postmortem report Ex.P.W.23/A, the evidence of P.W.1 and P.W.23, as well as P.W.2, sufficiently establish that the dead body, which was found at the rivulet was the body of the deceased. In the said background it will have to be held that the accused did visit the rivulet and failed to identify the body of the deceased as stated by P.W.19. Except mere denial, nothing was brought in evidence to disbelieve the said view of P.W.19. [Paras 28 and 31] [682-C-D; 683-C-E]

1.5. Such a deliberate stand of the accused in not identifying the dead body of the deceased only goes to show that the accused wanted to suppress the truth, for reasons best known to them. Therefore, the last of the circumstances viz., factum of missing of the deceased, as from 31.03.2002, were proved by the reporting of the

same by the accused themselves to the police and also to P.W.2 on 01.04.2002. When once the said circumstance of the missing of the deceased was established beyond reasonable doubt, the conduct of the accused in their deliberate failure to identify the deceased when his body was shown to them at the rivulet by P.W.19, was a serious circumstance, which has to be considered and held against the accused. [Para 33] [683-G-H; 684-A-B]

1.6. The failure of the accused in not having come forward with any acceptable explanation for not taking any steps by them to trace the missing of the deceased, except stating that they reported him missing to the police is yet another circumstance creating serious doubts about the credibility in their stand. [Para 34] [684-C-D]

1.7. The last of the circumstances viz., the version of P.W.2 and P.W.12 that after reporting about the missing of the deceased to them by A2 and A3 on 01.04.2002, on 04.04.2002, they came and reported that the deceased was no more and that they were prepared to pay a sum of Rs.1,00,000/- by way of compensation, if accepted to be true, would be a clinching piece of circumstance, that would complete the other chain of circumstances to fasten the alleged offence against the accused persons. [Para 36] [685-B-D]

1.8. According to P.W.2, as the incident occurred in the State of Himachal Pradesh and she was living in a village in the State of Punjab, it took some time for her to arrange for her trip to Himachal Pradesh to lodge the complaint and in that process she could go to the Police Station only on 14.04.2002, where she identified the photographs of the dead body of the deceased along with his other belongings. [Para 22] [680-D-E]

2. From the nature of injuries fo of

the deceased, it cannot safely be said that the accused assaulted the deceased with intention to cause such injury so as to cause death. The accused persons were upset by the poor quality of food cooked by the deceased and, therefore, assaulted him. The nature of injury or the weapon used do not suggest that the accused assaulted him with the intention of causing death. However, the accused knew that the injury inflicted by them is likely to cause death. Hence, the accused shall be liable to be convicted for offence under Section 304 (Part II) IPC. In the facts and circumstances of the case, sentence of 7 years' rigorous imprisonment each and fine of Rs.50,000/- each shall meet the ends of justice. Out of the fine amount, the appellants shall be paid a sum of Rs.2 lakhs. [Para 39] [686-E-H]

Case Law Reference:

2010 (15) SCR 1	**referred to**	**Para 18**
1975 (0) Suppl. SCR 84	**referred to**	**Para 18**
1980 Suppl. SCC 567	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1624 of 2008.

From the Judgment & Order dated 18.06.2008 of the High Court of Himachal Pradesh in Criminal Appeal No. 280 of 2005.

Vineet Dhanda, Puneet Dhanda, J.P. Dhanda, Raj Rani Dhanda, Amrendra Kumar Singh for the Appellant.

Neeraj Kumar Jain, Manish Mohan, Aditya Kr. Chaudhary, Dharmendra Kumar Sinha, Sumeet Sharma (for Prashant Bhushan) for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This

appeal is directed against the judgment of the Division Bench of the High Court of Himachal Pradesh, dated 18.06.2008, in Crl.A.No.280 of 2005. The *de facto* complainant is the appellant. The respondents 1 to 5 were arrayed as accused 1 to 5 along with Gurnam Singh and Jagtar Singh, two other accused in Sessions Trial No.13/7 of 2001/2002.

2. The case of the prosecution was that on 30.03.2002, a group of pilgrims were led by the second accused to Shah Talai for worshiping Baba Balak Nath. The deceased Jeet Singh, was taken by the second accused along with the team for the purpose of cooking. The pilgrims reached Shah Talai on 30.03.2002. On reaching Shah Talai and after paying obeisance at the temple, the pilgrims stayed at Dana Mandi in Shah Talai. The accused party appeared to have been not satisfied with the food prepared by Jeet Singh and being annoyed by the said factor, it was alleged that the accused beat the deceased Jeet Singh, after tying his hands with Parna (a piece of cloth used both as head-gear and towel by the villagers). The deceased was taken towards a khud in a jeep-taxi belonging to P.W.6, Milap Chand. The accused stated to have given fist blows and kicks to the deceased and on the next day morning the body of Jeet Singh was found in the bed of a rivulet known as 'Saryali Khud', near Dana Mandi.

3. Some other pilgrims, not connected with the group led by the second accused, after noticing the body of the deceased, stated to have brought it out and placed it on the dry portion of the rivulet bed and the information was passed on to P.W.1. P.W.1 is a village Up-pradhan of Gram Panchayat Naghiar. P.W.1 in turn gave the information to the police station Thalai on 31.03.2002, at about 10.45 a.m. by telephone informing that a dead body of some Punjabi male was lying in the bank of Saryali Khud. Based on the said information P.W.19 A.S.I., along with other police officials reached the spot and prepared the inquest report. In the meantime, A2, A4 and A5 along with A7 (acquitted accused) appeared to h

Shah Talai police station and reported to P.W.17, M.H.C. about the missing of one of their companion. P.W.17 directed the four of them to go to Saryali Khud and find out whether, the dead body was that of their missing companion. They went to the place where the body was found by P.W.19 and after inspecting the body A2, A4, A5 and A7 told P.W.19 that he was not the person who was missing viz., Jeet Singh. P.W.19 after conducting the inquest, sent the body for post-mortem and the post-mortem was carried out by P.W.23, Dr. A.K. Sarma. Exhibit P.W.23/A is the post-mortem report, wherein the post-mortem doctor has noted two injuries. The injuries were :

"(a) Multiple contusions on both knee and below the knee, reddish brownish scab formed, underline bones are normal.

(b) Contusion over the xiphisternum 2 cm x 1 cm reddish brown scab formed, under lying bone normal."

P.W.23 gave the opinion in exhibit P.W.23/A that the cause of death was the head injury leading to shock.

4. Be that as it may, on the early morning of 01.04.2002, the pilgrims led by the second accused, reached Ferozpur District of Punjab. The second accused met the appellant and informed her that her husband had gone missing at the place of Baba Balak Nath; that three of their team members have stayed back in search of her husband and they are likely to get the information in the evening by 6.00 p.m.

5. According to the appellant while no information about her missing husband was forthcoming from the accused, on 04.04.2002, A2 and A5 again met her, as well as her son P.W.12, Angrej Singh and negotiated for a settlement by way of payment of a sum of Rs.1,00,000/- as compensation, by stating that her husband Jeet Singh was no more. Thereafter, the appellant accompanied by her brother-in-law Ajit Singh and Gurbanch Singh, stated to have gone to Shah Talai police

station on 14.04.2002 and lodged an F.I.R. (Ex.P.W.2/A) at the police station. The appellant identified her husband from the photo of the dead body shown to her, besides identifying the clothes and purse of the deceased. Thereafter, the investigation commenced.

6. On 15.04.2002, A2, A6 and A5 were arrested at village Baltoha and were remanded to police custody by the Court. On 17.04.2002, based on the disclosure statement of A2, the turban, parna, bag, shirt, blanket and cooking utensils of the deceased, Jeet Singh, were recovered from the house of A2 at village Baltoha. The first and the third accused were arrested on 19.04.2002, and they stated to have identified the place of occurrence. A4 and A7 were arrested on 06.05.2002, and based on the admissible portion of the disclosure statement of A4, a stone which was thrown below the bus stand of Deothsidh, was recovered. The prosecution *in toto* examined 23 witnesses and in the Section 313 questioning, the accused denied the case of the prosecution and no defence evidence was let in on behalf of the accused.

7. One relevant statement in the Section 313 questioning of A4 when it was put to him that the prosecution evidence against him that all the pilgrims except Jeet Singh, returned to the native place on 01.04.2002 and what he had to say about it, A4 in his answer stated as under:

"It is correct. We all retuned except Jeet Singh, but he was missing from Shah Talai and we have lodged report with the police at P.S.Talai about missing of Jeet Singh."

8. Again in Question No.20, it was put to A4, that in the prosecution evidence against him it had come to light that on 01.04.2002, at about 9.00 A.M., accused Joginder Singh @ Kala, went to the house of Smt.Swarn Kaur and told her that her husband Jeet Singh had been missing from Shah Talai and that he had retained three persons in S ut

Jeet Singh and further told Smt.Swarn Kaur that Jeet Singh would return in the evening, A4 answered as follows:

> *"We all persons had went to the house of Smt. Swarn Kaur and told that Jeet Singh was missing from Shah Talai and that we told that we have lodged a report about his missing with the police."*

9. With the above evidence on record and the stand of the accused, the Trial Court found accused 1 to 5 guilty of the charges falling under Section 302 r/w Section 34 and Section 201 r/w Section 34 of I.P.C. The Trial Court, however acquitted A6 and A7 of all the charges. Ultimately, after finding accused 1 to 5 guilty of the above charges, the Trial Court imposed the punishment of imprisonment for life for the offence under Section 302 r/w Section 34, besides imposing a fine of Rs.10,000/- each and in default of payment of fine, further sentence of imprisonment for six months each. For the offence proved under Section 201, all the five accused were sentenced to rigorous imprisonment for one year, apart from a fine of Rs.2,000/- each and in default, imprisonment for one month each. The sentence were directed to run concurrently.

10. All the five accused preferred an appeal before the High Court of Himachal Pradesh in Crl.A.No.280 of 2005 and the High Court having reversed the judgment of the Sessions Court and set aside the conviction and sentence imposed on them and there being no further appeal at the instance of the State, the *de facto* complainant has come forward with this appeal.

11. We heard Mr. Vineet Dhanda, learned counsel for the appellant and Mr. Neeraj Kumar Jain learned senior counsel for the respondent accused.

12. The learned counsel for the appellant contended that the deceased was taken by the second accused along with the other accused and the pilgrims for cooking purposes, on

27.03.2002 and that on 31.03.2002, the dead body of the deceased was seen by P.W.1, the village Up-pradhan, who preferred a complaint to the police. According to the learned counsel, the accused 1 to 5 were last seen along with the deceased when they travelled in the jeep-taxi belonging to P.W.6; that in the evidence of P.W.6 it has come to light that the accused hit the deceased by fist, apart from giving him indiscriminating kicks; that his hands were tied with a parna and that they got themselves dropped at Saryali Khud, near Dana Mandi. The dead body of Jeet Singh was found in the bed of the rivulet Saryali Khud and that the accused who stated to have reported about the missing of Jeet Singh to Shah Talai Police on 31.03.2002, were directed to see the dead body near the rivulet, and though the accused went there and saw the dead body, for reasons best known to them, did not identify the same, though it was the dead body of Jeet Singh.

13. The learned counsel contended that it has come out in evidence that on 01.04.2002, after returning from the pilgrimage, A2 and A4 went to the home of the appellant and informed that the deceased went missing at Shah Talai and that a report has been lodged with the police. The learned counsel contended that the said fact was admitted by A4 in the Section 313 questioning and therefore, it was the responsibility of the accused to have satisfactorily explained as to how the deceased was missing. The learned counsel further contended that though on behalf of the accused it was claimed that they preferred a complaint with the police on 31.03.2002, nothing was brought on record to show that any serious complaint was lodged with the police to trace the deceased. Per contra, when they stated to have gone to the police station of Shah Talai on 31.03.2002, P.W.17 advised them to go and see whether the dead body lying at the rivulet was the body of deceased and that the accused who had gone there and met P.W.19 deliberately did not identify the body of the deceased Jeet Singh. The learned counsel submitted th[illegible]e

rivulet for the purpose of identification was duly noted as per the statements recorded by P.W.19, which were marked as Ex.P.W.19/G,H & J. The learned counsel, therefore, contended that the chain of circumstances leading to the involvement of the accused in the killing of the accused, were duly brought out in evidence by the prosecution and that the conviction and sentence imposed by the learned Sessions Judge was perfectly justified. The learned counsel contended that the interference with the same by the High Court, therefore, was liable to be set aside.

14. As against the above submissions, Mr. Neeraj Kumar Jain learned senior counsel appearing for the respondent accused, submitted that there were very many missing links in the chain of circumstances and that if really the accused persons had gone to the place where the dead body of Jeet Singh was lying as claimed by the prosecution, there was no reason why the said fact was not recorded in the inquest report and their signatures were not obtained in that report. According to the learned senior counsel, at the police station when they went to report about the missing of Jeet Singh, their signatures were obtained in blank papers, which were fabricated to the advantage of the prosecution for foisting a false case against the accused Nos.1 to 5.

15. The learned senior counsel also contended that there was long delay in the filing of the F.I.R. and that by itself would vitiate the case of the prosecution. The alleged killing of the deceased was on 31.03.2002. The appellant lodged the F.I.R. with Shah Talai Police Station only on 14.04.2002. The learned senior counsel contended that there was no valid explanation for the enormous delay in the filing of the complaint by the appellant.

16. The learned senior counsel by referring to the injuries noted on the body of the deceased contended that there were only multiple contusions and if really the deceased was beaten

by several persons, there would have been apparent swelling on the body, which was not present and, therefore, the story of the prosecution cannot be believed.

17. The learned senior counsel, therefore, contended that the various circumstances, which were listed out by the High Court and the lack of proper evidence to support the said circumstances, weighed with the High Court in interfering with the conviction and sentence imposed by the learned Sessions Judge and the same does not call for interference.

18. The learned counsel appearing for the appellant relied upon the decisions in *Brahm Swaroop and another vs. State of Uttar Pradesh - (2011) 6 SCC 288* and *Podda Narayana and others vs. State of Andhra Pradesh - AIR 1975 SC 1252,* as well as *Gurnam Kaur vs. Bakshish Singh and others - AIR 1981 SC 631*.

19. Having heard the learned counsel for the appellant, as well as the respondent accused and having perused the judgment of the Trial Court, as well as that of the High Court, we find that this was a case based on circumstantial evidence. Having noted the facts and the evidence led before the Trial Court, the following facts are not in dispute viz.,

(a) There was a pilgrimage tour organised at the instance of the second accused, which consisted of about 100 pilgrims including other accused viz., A1, A3, A4 and A5, as well as A6 and A7.

(b) The deceased Jeet Singh was taken by the second accused along with the pilgrims for the purpose of cooking.

(c) The evidence of P.W.6 was to the effect that the deceased was carried in his jeep taxi bearing Registration No.PB-10D-0507 on 31.03.2002 and that his hands were tied wit

(d) According to P.W.6, while they were travelling, the deceased was mercilessly beaten by all the accused persons.

(e) It is the stand of the respondent accused that the deceased was missing on and from 31.03.2002 and that they reported the same to the Shah Talai Police Station.

(f) While according to P.Ws.17 and 19 when the accused persons went and reported to P.W.17 about the missing of the deceased Jeet Singh, they were directed to report to P.W.19 to find out whether the dead body lying at the rivulet was the body of the deceased. According to the accused they were not asked to go to the said riverbed for identification. On the other hand, it was claimed that their signatures were obtained in blank papers, which was fabricated later on by the prosecution.

(g) Admittedly on 01.04.2002, A2 and A4 went to the house of the deceased Jeet Singh and informed the appellant about the missing of the deceased from the pilgrims group.

(h) According to P.W.17 and P.W.19 after the appellant filed the F.I.R. on 14.04.2002, the photograph of the dead body of Jeet Singh was shown to her, which was duly identified and that she also identified the clothes worn by the deceased, as well as the purse belonging to the deceased.

(i) According to the appellant, after informing her about the missing of the deceased by A2 and A5, on 01.04.2002 and subsequently on 04.04.2002, they came and informed her that her husband was no more and that they were prepared to pay a sum of Rs.1,00,000/- by way of compensation and that she

should not go to the police and that her son P.W.12 was also present at that time.

(j) The postmortem report Ex.P.W.23/A revealed that there were multiple contusions on the knee and below the knee of the deceased, apart from contusions in the head of the deceased, which according to the postmortem doctor P.W.23 was fatal to the deceased.

(k) The evidences of P.W.1, P.W.2, P.W.6 and P.W.12, read together discloses that the deceased went along with the accused who were part of the pilgrims group of about 100 persons on 27.03.2002 and that while all others returned back on 31.03.2002, the deceased alone did not return and for which there was no valid explanation offered at the instance of the accused, except stating that they made a report at Shah Talai police station about the missing of the deceased.

20. By referring to the above factors, when we note the circumstances, which were put against the accused by the prosecution, we find that the following circumstances have to be noted. In our considered opinion, the Hon'ble High Court failed to analyze all the circumstances which were existing, while only a few of them were noted by the High Court while examining the correctness of the judgment of the Trial Court. The circumstances which were existing as against the accused can be stated as under:

(i) At the instance of A2, the deceased Jeet Singh was engaged as a cook to come along with the pilgrims to Shah Talai to worship Baba Balak Nath on 27.03.2002.

(ii) P.W.6 in whose jeep taxi the accused stated to have travelled along with the dec s

totally an independent witness, who had no axe to grind against the accused.

(iii) The version of P.W.6, read along with the postmortem report Ex.P.W.23/A and oral evidence of P.W.23, the postmortem doctor, it has come to light that the deceased Jeet Singh, suffered injuries viz., multiple contusions below his knee and also severe head injury.

(iv) The factum of 'missing of the deceased' Jeet Singh, was admittedly said to have been reported by the accused themselves, first to the police station at Shah Talai and then on 01.04.2002, to the appellant.

(v) There was no document produced on behalf of the accused to show that any earnest effort was taken by the accused to trace the deceased after he was reported to be missing from 31.03.2002. According to P.W.17 and P.W.19, the accused were advised to go and see a dead body lying at the rivulet bank and that after checking the body in the presence of P.W.1 and P.W.19, the accused stated that the said dead body was not that of the deceased.

(vi) As far as the identification of the dead body of the deceased, the same was established by the identification made by P.W.2, the appellant, by looking to the photograph of the deceased and also the clothes worn by him, as well as the purse belonged to the deceased. The said statement of the appellant as regards the identification based on the photographs shown to her, as well as the belongings of the deceased was not disputed at the instance of the accused.

(vii) The recovery of the stone at the instance of A4, which was alleged to have been used in the offence was also duly established.

21.Keeping the above circumstances in mind, when we test the submissions made on behalf of the appellant, as well as that of the respondent accused in so far as the circumstances are concerned, it has come in evidence through P.W.2 and P.W.12 that A2 and A4 informed the appellant after 01.04.2002 i.e., on 04.04.2002 that the deceased was reported to be missing earlier and was stated to be dead and according to P.W.2 and P.W.12 the said accused offered to pay a sum of Rs.1,00,000/- by way of compensation, so that the appellant did not report the matter to the police.

22. According to P.W.2, as the incident occurred in the State of Himachal Pradesh and she was living in a village in the State of Punjab, it took some time for her to arrange for her trip to Himachal Pradesh to lodge the complaint and in that process she could go to the Police Station at Shah Talai only on 14.04.2002, where she identified the photographs of the dead body of the deceased along with his other belongings.

23. According to P.W.19, based on Exhibits P.W.19/G, J and I, the statements of the accused that the dead body found in the rivulet was not that of the deceased Jeet Singh. When P.W.19 was confronted as to why the statement of the accused about the identification of the dead body was not noted in the inquest report, P.W.19 came forward with an answer that since the accused made it clear that the dead body was not that of the deceased Jeet Singh, he felt that there was no necessity to make a note of it in the inquest report.

24. Keeping the above circumstances which exist in the case on hand, when we consider the submissions of the learned counsel, as far as the first circumstance is concerned, there is no dispute about the engagement of the services of the deceased Jeet Singh as a cook to go al[illegible]e

tour organised by the second accused on 27.03.2002. Therefore, the said circumstance was fully established.

25. As far as the second circumstance viz., that the deceased Jeet Singh was found in the company of the accused when they were travelling together in the jeep taxi bearing Reg.No.PB-10D-0507 is concerned, the evidence of P.W.6 was unassailable. It has been found by the Trial Court that the evidence of P.W.6 was categoric in that respect and that nothing contra was elicited from him to take a different view.

26. When once that factum of the travel of the deceased along with the accused is found to be true, then the next circumstance to be examined is the alleged violent assault made by the accused on the body of the deceased as stated by P.W.6, when they were travelling together in his jeep taxi. When once the travel undertaken by the accused along with the deceased in the jeep taxi belonging to P.W.6 was found to be true, the point for consideration is as to why the version of P.W.6, as regards the brutal assault and the injuries inflicted upon the deceased at the instance of the accused, should not be believed. In the course of the cross examination of P.W.6, it was not brought forth as to why he was enemically disposed of towards them or as to why the P.W.6 was harbouring any other grudge against the accused in order to unnecessarily implicate the accused to the alleged assault on the deceased. The vehicle was a jeep, therefore, when five of them were sitting together along with the deceased in the jeep and when a brutal assault was inflicted upon the deceased, there is every possibility of P.W.6 noticing the assault inflicted upon the deceased. If that be so, his version that the deceased was beaten repeatedly and mercilessly below the knees and other parts of the body as stated by him, have to be accepted *in toto*, without any scope for contradiction.

27. When once the said factum of the assault cannot be doubted, the further evidence of P.W.23 viz., the postmortem

doctor, read along with the postmortem certificate Ex.P.W.23/A, sufficiently demonstrate the nature of injuries sustained by the deceased viz. the multiple contusions below the knee, as well as serious injuries on the head of the deceased. Therefore, the said circumstance of the accused causing the injury on the body of the deceased and the ultimate death of the deceased due to the said injury is a circumstance, which has been proved without any iota of doubt.

28. When we come to the other circumstance viz., that the accused themselves reported to the Shah Talai police about the missing of the accused, the said circumstance has to be necessarily considered along with the following circumstances described by P.W.17 and P.W.19, viz., their proceeding to the rivulet where the dead body was found by P.W.1, which was reported to the very same police station and that P.W.19 had gone to the said spot for making necessary enquiries.

29. The question for consideration is whether the accused had gone to report the incident to the police and what were the subsequent events after the said reporting. In this context, the evidence of P.W.17, to some extent support the version of the accused about their reporting to the police about the missing of the deceased on 31.03.2002. Though the accused took the stand that after reporting at Shah Talai police station, they did not go to the rivulet as claimed by the prosecution, according to the prosecution, P.W.17 directed them to go to the rivulet and find out as to whether or not the dead body lying there was the dead body of the deceased. In so far as the report of the missing of the deceased is concerned, since there were no two contradicting views, we do not wish to dilate further on that issue.

30. When we examined the disputed question about the visiting of the accused to the place viz., the rivulet where the dead body was found, the prosecution relied upon the evidence of P.W.17 and P.W.19 and the statements of the accused in Ex.P.W.19/G,J and K.

31. On behalf of the accused, it was contended that their signatures were obtained in blank papers, which were subsequently fabricated by the police to suit their convenience. As far as the said statement is concerned, except the *ipse dixit* there was no other evidence to support the said stand. It is quite possible that when the accused reported to the police station about the missing of the deceased, as the S.H.O., P.W.17 would have directed them to go to the spot where the dead body was reported to be lying in order to ensure whether the said body either belonged to the deceased or not. There is no reason to discard the evidence of P.W.17, as well as that of P.W.19 on that score, simply because they were official witnesses. The inquest report viz., Ex.P.W.19/A, postmortem report Ex.P.W.23/A, the evidence of P.W.1 and P.W.23, as well as P.W.2, sufficiently establish that the dead body, which was found at the rivulet was the body of the deceased Jeet Singh. In the said background it will have to be held that the accused did visit the rivulet and failed to identify the body of the deceased as stated by P.W.19. Except mere denial, nothing was brought in evidence to disbelieve the said view of P.W.19.

32. In such circumstances, it is not known as to why the accused should have merely stated that the body was not that of the deceased Jeet Singh. The statements in Ex.P.W.19/G, J and K were rightly relied upon by the Trial Court to affirm the position that the accused came forward with the stand that the body found on the rivulet was not that of the deceased.

33. Therefore, a conspectus consideration of all the above proved facts, only disclosed that the accused deliberately failed to identify the body of the deceased, when the same was shown to them at the spot by P.W.19, pursuant to the direction of P.W.17. Such a deliberate stand of the accused in not identifying the dead body of the deceased only goes to show that the accused wanted to suppress the truth, for reasons best known to them. Therefore, the last of the above circumstances viz., factum of missing of the deceased Jeet Singh, as from

31.03.2002, were proved by the reporting of the same by the accused themselves to the police and also to P.W.2 on 01.04.2002. When once the said circumstance of the missing of the deceased Jeet Singh was established beyond reasonable doubt, the conduct of the accused in their deliberate failure to identify the deceased Jeet Singh, when his body was shown to them at the rivulet by P.W.19, was a serious circumstance, which has to be considered and held against the accused.

34. With that when we come to the next question as to the failure of the accused in not having come forward with any acceptable explanation for not taking any steps by them to trace the missing of the deceased, except stating that they reported him missing to the police is yet another circumstance creating serious doubts about the credibility in their stand. When admittedly, the deceased was engaged at the instance of A2 for the purpose of cooking food for the pilgrims and subsequently he was found missing when the tour programme was on going, we fail to understand as to how by taking a mere stand that such missing of the person was simply reported to the police without any further action taken in that respect is one other circumstance to be considered against the accused. When the deceased was engaged and was taken along with the pilgrims, which was led by the second accused, it was the responsibility of the second accused to have shown what were the earnest efforts taken by him to trace the whereabouts of the deceased. Unfortunately, except the mere statement that along with A3 and A4, he went to Shah Talai police station and reported about the missing of the deceased, nothing else was shown as to what were the further steps taken by him to trace the deceased. Further, the evidence of P.W.2 that the accused offered to compensate the missing of the deceased was yet another circumstance to be taken into account while considering the guilt of the accused.

35. Therefore, the said conduct of the accused would only go to show that the said circumstance is also one other relevant circumstance, which has to be considered along with the other circumstances, which were all found proved and adverse against the accused.

36. With that when we come to the last of the circumstance viz., the version of P.W.2 and P.W.12 that after reporting about the missing of the deceased to them by A2 and A3 on 01.04.2002, on 04.04.2002, they came and reported that the deceased was no more and that they were prepared to pay a sum of Rs.1,00,000/- by way of compensation, was last of the circumstance which if accepted to be true would be a clinching piece of circumstance, that would complete the other chain of circumstances to fasten the alleged offence against the accused persons. The Trial Court which had the advantage of watching the demonour of P.W.2 and P.W.12, has noted that no serious answer was elicited from the mouth of the said witnesses, as regards the alleged offer of compensation made by A2 and A4. There is no valid reason to interfere with the said conclusion of the Trial Court in the absence of any other legally acceptable counter evidence to doubt the version of P.W.2 and P.W.12. Therefore, if A2 and A4, had made an attempt and offered the compensation of Rs.1,00,000/- after informing P.W.2 about the death of the deceased, the only conclusion which could be drawn based on the other chain of circumstances, which we have found to have been established without any scope of contradiction, was the culpability of the accused in having eliminated the deceased by inflicting the injuries upon him, as narrated by P.W.6 and as found to have existed by the expert witness viz., the postmortem doctor P.W.23 in Ex.P.W.23/A.

37. We are convinced that every one of the circumstances which were demonstrated to have been proved, sufficiently established the guilt of the accused and consequently, the conclusion of the Trial Court in having found the accused guilty

was perfectly justified and the interference with the same by the High Court without sufficient reasoning was therefore, liable to be set aside.

38. Now, we address as to the nature of the offence committed by the accused. PW-23, Dr. A.K. Sharma, who conducted the post-mortem examination, has found the cause of death to be the head injury. But, the question is whether that itself would be sufficient to hold the accused guilty of the offence under Section 302 of the Indian Penal Code. The injuries found on the person of the deceased, as quoted in the preceding paragraph of the judgment, shows presence of only a small contusion of the size of 2 cm x 1 cm on the xiphisternum and the underlying bone was also found to be normal.

39. It is well settled that intention is always lodged in the mind of the accused but, to gather the intention one of the relevant factors which the court looks into is the nature of injury inflicted on the deceased. In our opinion, from the nature of injuries found on the person of the deceased it cannot safely be said that the accused assaulted the deceased with intention to cause such injury so as to cause death. It appears to us that the accused persons were upset by the poor quality of food cooked by the deceased and, therefore, assaulted him. The nature of injury or the weapon used do not suggest that the accused assaulted him with the intention of causing death. However, we are of the opinion that the accused knew that the injury inflicted by them is likely to cause death. Hence, in our opinion, the accused shall be liable to be convicted for offence under Section 304 Part II of the Indian Penal Code. In the facts and circumstances of the case, we are of the opinion that sentence of 7 years' rigorous imprisonment each and fine of Rs.50,000/- each shall meet the ends of justice. Each of the accused shall deposit the fine amount within three months failing which they shall suffer imprisonment for a further period of one year. Out of the fine amount the appellants shall be paid a sum of Rs.2 lakhs.

40. The said accused 1 to 5 are directed to surrender forthwith before the Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, who shall hand them over to the concerned police for serving the remaining sentence. In the result, the appeal is allowed, the judgment and order of acquittal passed by the High Court is set aside and the accused are convicted and sentenced in the manner indicated above.

K.K.T. Appeal allowed.

CHARANJIT & ORS.
v.
STATE OF PUNJAB & ANR.
(Criminal Appeal No. 232 of 2007)

JULY 4, 2013

[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 - ss.323/34, 504/34, 376(2)(a) and 376(2)(g) - Appellant-police officials picked up PW3 for interrogation and detained her in the police station at night, and then tortured and raped her - PW3 was released only on the next day when the village panchayat intervened - Conviction of appellants by Courts below - Justification - Held: Justified - Testimony of PW-3 was corroborated by the evidence of her husband (PW-1) and neighbor (PW-2) - Appellants failed to produce relevant records in defence - Statement made by PW3 in inquiry conducted by Superintendent of Police cannot be used to contradict her evidence in the Court - No proof that PW3 made allegations against the appellants on the pressure of others - PW-3 took consistent stand in her petition to the Governor made within few days of her release from Police Station, in her complaint before the Magistrate and her evidence in Court - Both trial court and the High Court found that soon after PW3 was released from the Police Station, she stated before PWs-1 and 2 that she had been raped by the appellants and that she was bleeding profusely - Trial court and the High Court recorded concurrent findings of facts while holding the appellants guilty - Though powers of Supreme Court u/Article 136 of the Constitution are very wide, in criminal appeals the Supreme Court does not interfere with concurrent findings of facts, save in exceptional circumstances where there has been grave miscarriage of justice - In the case at hand, concurrent findings of facts recorded by the trial court and the

High Court are based on legal evidence and there is no miscarriage of justice as such by the two courts while arriving at said findings - Impugned judgment of the High Court therefore not interfered with, in exercise of discretion under Article 136 of the Constitution - Constitution of India, 1950 - Article 136 - Evidence Act, 1872 - s.145.

Thirty two persons of a village filed a petition before the SHO, Police Station, alleging that terrorists frequented the house of PW3. The appellants-police officials picked up PW3 and 'K' for interrogation and brought them to the Police Station on 09.02.1989 at 7.00 a.m. 'K' was released but PW3 was detained and on the night of 09.02.1989, the appellants allegedly tortured her with patta, made her senseless and had intercourse with her and released her only on 10.02.1989 when the Village Panchayat intervened.

On 13.02.1989, the complainant sent a petition to the Governor of the State making allegations against the appellants and requesting for enquiry. PW3 also filed a criminal complaint before the Judicial Magistrate on 25.07.1989. The Magistrate took cognizance of the offences alleged and summoned the appellants. The case was committed to the Sessions Court. At the trial, PW-3 reiterated her version in the complaint. The husband of PW-3 was examined as PW-1 and, a neighbour was examined as PW-2. Both PW-1 and PW-2 stated before the trial court that PW-3 was not released on the evening of 09.02.1989 and was released only at 4.30 p.m. on 10.02.1989 and when released, she was in a bad shape and told them about the torture and sexual intercourse that was forced upon her by the appellants on the night of 09.02.1989. The appellants, on the other hand, took the defence that PW-3 alongwith 'K' were actually released on 09.02.1989 at 6.00 p.m. and denied that they had any sexual intercourse with PW3.

The trial court rejected the defence of the appellants and held that the testimony of PW-3 was corroborated by the evidence of PW-1 and PW-2 and convicted the appellants under Sections 323/34, 504/34, 376(2)(a) and 376(2)(g) IPC and the appellant-'R' under Section 342 IPC also. The judgment was affirmed by the High Court, and, therefore, the present appeals.

Dismissing the appeals, the Court

HELD: 1. No evidence has been led on behalf of the defence to show that PW-3 implicated the appellants under the influence of the terrorists. Reliance was placed upon Ext.DW-1/B dated 09.02.1989 said to have been signed by 32 villagers in which it is stated that the villagers believe that terrorists were frequenting the house of PW-3 and staying in her house and taking their meals and, therefore, PW-3 should be brought and interrogated about those terrorists. But Ext.DW-1/B is no proof of the fact that PW-3 made the allegations of rape against the appellants on the pressure of the terrorists. [Para 11] [699-G-H; 700-A]

2. Though contention was raised that PW-3 had herself given a statement in the inquiry conducted by the Superintendent of Police, Mr. Harbhajan Singh Bajwa, that she had made the complaint against the appellants at someone's instigation and she does not want any action to be taken on her complaint, but this statement of PW-3 is not substantive evidence before the Court and at best can be treated as a previous statement to contradict the substantive evidence of PW-3 given in Court. Section 145 of the Indian Evidence Act states that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and if it is intended to contradict him by the writing, his attention must, before the writing [illegible] e

called to those parts of it which are to be used for the purpose of contradicting him. In the cross-examination of PW-3, a question was put whether S.P. Mr. Harbhajan Singh Bajwa conducted the inquiry and recorded her statement and she has stated that he did conduct an inquiry but she does not know what he had recorded. She has further stated that her signatures were obtained on the statement but she knew only how to write her name and cannot read or write Punjabi except appending her signatures. In view of the aforesaid statement made by PW-3 in her cross-examination, her statement recorded in the inquiry conducted by S.P. Mr. Harbhajan Singh Bajwa cannot be used to contradict the evidence of PW-3 given in Court. [Para 11] [700-A-F]

3. The statement of PW-3 in the petition dated 13.02.1989 to the Governor (Ex.PW-3/A), is not substantive evidence before the Court and can only be treated as a previous statement to contradict the substantive evidence of PW-3 given in Court by putting a question to PW-3 in course of her cross-examination under Section 145 of the Indian Evidence Act. If such a question was put in the cross-examination, PW-3 would have got an opportunity to explain why she had not specifically stated in the petition dated 13.02.1989 to the Governor (Ex.PW-3/A) that her husband (PW-1) and the neighbour (PW-2) were also present when she was released at the intervention of the Panchayat on 10.02.1989. In absence of any such question put to PW-3 in her cross-examination, the omission of the names of PW-1 and PW-2 in Ex.PW-3/A cannot be taken as contradictory to the evidence of PW-3. Hence, the evidence of PW-3 as well as that of PW-1 and PW-2 that on 10.02.1982, PW-1 and PW-2 were present when PW-3 was released at 4.30 p.m. could not have been disbelieved by the Court. [Para 12] [700-H; 701-A-D]

4.1. The depositions of PW-1, PW-2 and PW-3 support the findings of the trial court and the High Court that PW-3 was not released at 6.00 p.m. on 09.02.1989 but 4.30 p.m. on 10.02.1989. The most relevant evidence to establish the defence of the appellants would have been the records of the Police Station. However, except the document Ext.DW1/A, the relevant records of Police Station, Balachaur such as the Daily Diary Register were not produced to support the defence case. [Paras 13, 14] [701-E; 702-H; 703-D]

4.2. As has been provided in Section 35 of the Indian Evidence Act, an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, is itself a relevant fact. Even if PW-3 was not arrested, records were required to be maintained in Police Station, Balachaur with regard to both the arrivals of the appellants and PW-3 and their departure giving the exact hour of arrival and departure. Moreover, if Ex.DW1/A was to be treated as a genuine document, records of Police Station, Balachaur, containing relevant entries ought to have been produced by the appellants to show that Ex.DW1/A was contemporaneously created on 09.02.1989. Since the appellants did not produce the aforesaid records in their defence, the trial court and the High Court acted within their powers to reject the defence of the appellants and instead believed the evidence of PW-1, PW-2 and PW-3 that PW-3 was released only on 10.02.1989 at 4.30 p.m. [Para 14] [703-D; 704-B-E]

5. The trial court and the High Court recorded the findings of rape committed by the appellants on PW-3 because of her consistent version in her petition dated 13.02.1989 (Ext.P3/A) to the Governor made within a few days of her release from Police Stati[illegible]r

complaint dated 25.07.1989 and her evidence in Court. Both the trial court and the High Court found that soon after she was released from the Police Station on 10.02.1989, she stated before her husband (PW-1) and the neighbour (PW-2) that she had been raped by the appellants and that she was bleeding profusely. The trial court and the High Court, therefore, came to the finding of guilt of rape against the appellants relying on the evidence of PW-3 as corroborated by the evidence of PW-1, PW-2 under Section 157 of the Indian Evidence Act. [Para 15] [704-E-F; 705-B-D]

6. The trial court and the High Court recorded concurrent findings of facts while holding the appellants guilty. Even though the powers of this Court under Article 136 of the Constitution are very wide, in criminal appeals this Court does not interfere with the concurrent findings of facts, save in exceptional circumstances where there has been grave miscarriage of justice. As the concurrent findings of facts recorded by the trial court and the High Court in this case are based on legal evidence and there is no miscarriage of justice as such by the two courts while arriving at said findings, this Court is not inclined to disturb the impugned judgment of the High Court in exercise of discretion under Article 136 of the Constitution. [Para 16] [705-D-G]

Sri Sambhu Das and Anr. v. State of Assam **(2010) 10 SCC 374: 2010 (11) SCR 493 - relied on.**

Case Law Reference:

2010 (11) SCR 493	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 232 of 2007.

From the Judgment & Order dated 16.11.2005 of the High

Court of Punjab & Haryana at Chandigarh in Criminal Appeals no. 768 SB & 769 of 1997.

P.H. Parekh, Sanjay Jain, Sudhakar Kulwant, Afshan for the Appellants.

Kuldip Singh, Mohit Mudgil for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment of the Punjab & Haryana High Court in Criminal Appeal Nos. 768-SB of 1997 & 769-SB of 1997 arising out of a complaint case.

Facts of the case:

2. The facts very briefly are that on 09.02.1989 at about 5.00 a.m. Shankar Dass, who was the Principal of D.A.V. Higher Secondary School, Balachaur, was shot dead by terrorists and Ramesh Kumar, son of the deceased Shankar Dass lodged FIR No. 13 on 09.02.1989 in Police Station, Balachaur. Thirty two persons of village Paili filed a petition before the SHO, Police Station, Balachaur, alleging that terrorists frequent the house of the complainant in Village Paili. The appellants who were posted in Police Station, Balachaur went to the house of the complainant and picked up the complainant and one Kamaljit Kaur, who were working as '*dai*' and nurse respectively, and brought them to the Police Station. On 13.02.1989, the complainant sent a petition to the Governor of Punjab by a registered letter alleging that she along with Kamaljit Kaur were taken to the Police Station on 09.02.1989 at 7.00 a.m. and were asked whether the extremists were frequenting their house and when they replied in the negative they were tortured at the Police Station. On the intervention of Maha Singh, President of the Para Medical Union, Kamaljit Kaur, was released, but the complainant[illegible]e

complainant further alleged in her petition to the Governor of Punjab that in the night of 09.02.1989, the appellants tortured her with patta, made her senseless and had intercourse with her and released her on the morning of 10.02.1989 on the intervention of the Panchayats of Villages Paili, Otal Majarh and Unaramour. Soon after the release, the complainant disclosed to the members of Panchayat what had happened to her in the night of 09.02.1989. In this petition to the Governor of Punjab, the complainant made a request for an enquiry.

3. When no action was taken against the appellants, the complainant filed a criminal complaint before the Chief Judicial Magistrate, Hoshiarpur on 25.07.1989 making substantially the same allegations against the appellants. The Magistrate recorded the preliminary evidence of the complainant and took cognizance of the offences under Sections 323 and 504 read with Section 34 of the Indian Penal Code (for short 'IPC') and issued summons to the appellants. The complainant then filed a petition under Section 482 of the Criminal Procedure Code (for short "Cr.P.C.") contending that the appellants should be summoned for standing trial for the offences under Sections 366/342/376/506 read with Section 34 IPC. The appellants also filed a petition under Section 482 Cr.P.C. for quashing the complaint as well as the order of the Magistrate summoning the appellants. Both these petitions were disposed of by order dated 29.07.1991 with the direction to the Magistrate to hold an enquiry in respect of the offences described in the complaint. The complaint was thereafter transferred to the court of the Chief Judicial Magistrate, Chandigarh, by the High Court. Thereafter, the Magistrate took cognizance of offences under Sections 323/342/366/506 read with Section 34 IPC and summoned the appellants and Hussan Lal. The case was committed to the Sessions Court and the Additional Sessions Judge, Chandigarh, was entrusted with the case. The Additional Sessions Judge initially framed charges under Sections 366/504/342 and 323 IPC to which the appellants pleaded not guilty, but thereafter by order dated 16.02.1995 the High Court

directed the Additional Sessions Judge to reconsider the framing of charges against the appellants in the light of the allegations made in the complaint and the preliminary evidence recorded in respect of the complaint. The learned Additional Sessions Judge reframed the charges under Section 376 (2) (g) IPC to which the appellants pleaded not guilty and the appellants were tried.

4. At the trial, the complainant was examined as PW-3 and she reiterated in the witness box her version in the complaint. The husband of the complainant, Gurmail Singh, was examined as PW-1 and, the neighbour of Gurmail Singh, Harbans Singh was examined as PW-2 and both PW-1 and PW-2 stated before the trial court that the complainant (PW-3) was not released on the evening of 09.02.1989 and was released only at 4.30 p.m. on 10.02.1989 and when she was released on 10.02.1989, she was in a bad shape and she told them about the torture and sexual intercourse that was forced upon her by the appellants on the night of 09.02.1989. The appellants in their statements under Section 313 Cr.P.C. before the trial court, on the other hand, took the defence that the complainant (PW-3) along with Kamaljit Kaur were actually released on 09.02.1989 at 6.00 p.m. and they were handed over to the people of Panchayat to ensure that the complainant would not do anything wrong in future and they denied that they had any sexual intercourse with the complainant and also stated that she was not detained in the evening or the night of 09.02.1989 at the Police Station as alleged by her. In support of their defence, the appellants examined witnesses and produced two documents Ex. DW-1A and Ex. DW-1B.

5. The trial court, however, rejected the defence of the appellants and instead held that the testimony of PW-3 as corroborated by the evidence of PW-1 and PW-2 who were present at the gathering immediately after the release of PW-3 clearly establishes that PW-3 was released on 10.02.1989 and at the time of her release she was [illegible]n

torn clothes and was bleeding and that she had told her tale of sufferings before PW-1 and PW-2 by giving details of the incident of rape at the hands of the appellants. The trial court accordingly convicted the appellants under Sections 323/34, 504/34, 376(2)(a) and 376(2)(g) IPC and sentenced them to rigorous imprisonment for various periods which were to run concurrently, the maximum being 10 years for the offences under Sections 376(2)(a) and 376(2)(g) IPC. Aggrieved, the appellants, Charanjit and Kashmiri Lal filed Criminal Appeal No. 768-SB of 1997 and Radha Krishan filed Criminal Appeal No. 769-SB of 1997, but by the impugned common judgment, the High Court has dismissed their appeals.

Contentions of the learned Counsel for the parties:

6. Mr. P. H. Parekh, learned counsel for the appellants, submitted that the finding of the trial court as well as the High Court that PW-3 was not released on 09.02.1989 at 6 p.m. and was detained in the Police Station on the night of 09.02.1989 and raped by the police is not at all correct. He submitted that this finding is based on the evidence of PW-3 but PW-3 ought not to have been believed because she had close links with the terrorists who had pressurized her to implicate the appellants falsely in the case and therefore it was unsafe to rely on her evidence. In this connection, he submitted that one of the terrorists Hazura Singh was a relative of PW-3 and PW-3 used to give shelter to him and this would be clear from the letter dated 09.02.1989 of the villagers marked as Ex.DW1/B. He submitted that PW-3 had herself given an earlier statement in an enquiry conducted by the Superintendent of Police Mr. Harbhajan Singh Bajwa that she had made the complaint against the appellants on someone's instigation and she does not want any action to be taken on her complaint.

7. Mr. Parekh next submitted that the trial court and the High Court have held that the evidence of PW-3 has been corroborated by the evidence of PW-1 and PW-2 who claimed

to have gone to the Police Station on 10.02.1989 at 5.30 p.m. when PW-3 was released but in her petition dated 13.02.1989 to the Governor (Ex.PW-3/A) she has not mentioned that PW-1 and PW-2 were present when she was released at the intervention of the Panchayat of village Paili, Otal Majarh and Unaramour on 10.02.1989. He submitted that the trial court and the High Court, therefore, should not have relied on the corroboration of PW-1 and PW-2.

8. Mr. Parekh next submitted that the trial court and the High Court ought to have considered the evidence led on behalf of the defence. He referred to the evidence of DW-2 as well as Ex.DW1/A to submit that PW-3 was released on 09.02.1989 itself. He also referred to the evidence of DW-10, who has stated that PW-3 had returned home on 09.02.1989 at about 9.00 p.m. He submitted that the case of the prosecution is that PW-3 went to the civil hospital at Balachaur for her medical examination and thereafter to the hospital at Saroa but the doctors of the two hospitals did not conduct the medical examination to avoid a conflict with the police, and therefore the appellants examined the doctors of the two hospitals DW-11 and DW-12, and both DW-11 and DW-12 have denied that PW-3 approached them for her medical examination. Mr. Parekh vehemently submitted that there is thus no medical evidence to support the allegation of rape and the trial court and the High Court could not have held the appellants guilty of the offence of rape.

9. Mr. Parekh submitted that the main reason why the trial court and the High Court disbelieved the defence version was that the records of the Police Station relating to the arrest of PW-3 were not produced by the appellants before the Court. He submitted that in the present case there was no arrest of PW-3 at all and she was picked up only for interrogation and for this reason no records were maintained by the Police Station. He vehemently argued that the prosecution has not

been able to establish the guilt of the appellants beyond reasonable doubt and hence they are entitled to acquittal.

10. Learned counsel for the State Mr. Kuldip Singh submitted that it is not believable that PW-1, husband of PW-3 did not accompany the Panchayat to the Police Station for release of PW-3 on 10.02.1989. He submitted that Ex. DW-1/A dated 09.02.1989 on which the appellants relied on for their case that PW-3 was released on 09.02.1989 itself has not been signed by PW-1, the husband of PW-3. He referred to the evidence of PW-3 to show how she was tortured and raped by the appellants one after the other and submitted that the evidence of PW-3 is believable. He submitted that PW-1, the husband of PW-3 as well as PW-2, the neighbour of PW-1 who had accompanied PW-1 to the Police Station on 10.02.1989, have also deposed that soon after PW-3 was released from the Police Station she told them how she was humiliated and raped by the appellants against her consent after taking liquor. He submitted that the evidence of PW-3 as corroborated by the evidence of PW-1 and PW-2 was sufficient for the trial court and the High Court to hold the appellants guilty of the offences under Sections 323/34, 504/34 and 376 2(a) and 2(g), IPC and to hold the appellant Radha Krishan guilty also of the offence under Section 342, IPC.

Findings of the Court

11. We have considered the contention of Mr. Parekh on behalf of the appellants that PW-3 has sought to falsely implicate the appellants on account of her close links with the terrorists and on account of the pressure from the terrorists, but no evidence as such has been led on behalf of the defence to show that PW-3 has implicated the appellants under the influence of the terrorists. Mr. Parekh relied on Ext.DW-1/B dated 09.02.1989 said to have been signed by 32 villagers in which it is stated that the villagers believe that terrorists were frequenting the house of PW-3 and staying in her house and

taking their meals and, therefore, PW-3 should be brought and interrogated about those terrorists, but Ext.DW-1/B is no proof of the fact that PW-3 has made the allegations of rape against the appellants on the pressure of the terrorists. We have also considered the submission of Mr. Parekh that PW-3 had herself given a statement in the inquiry conducted by the Superintendent of Police, Mr. Harbhajan Singh Bajwa, that she had made the complaint against the appellants at someone's instigation and she does not want any action to be taken on her complaint. This statement of PW-3 is not substantive evidence before the Court and at best can be treated as a previous statement to contradict the substantive evidence of PW-3 given in Court. Section 145 of the Indian Evidence Act states that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. In the cross-examination of PW-3, a question was put whether S.P. Mr. Harbhajan Singh Bajwa conducted the inquiry and recorded her statement and she has stated that he did conduct an inquiry but she does not know what he had recorded. She has further stated that her signatures were obtained on the statement but she knew only how to write her name and cannot read or write Punjabi except appending her signatures. In view of the aforesaid statement made by PW-3 in her cross-examination, her statement recorded in the inquiry conducted by S.P. Mr. Harbhajan Singh Bajwa cannot be used to contradict the evidence of PW-3 given in Court.

12. We have also considered the submission of Mr. Parekh that in the petition dated 13.02.1989 to the Governor (Ex.PW-3/A), PW-3 had not mentioned that PW-1 and PW-2 were present when she was released at the intervention of the Panchayat of village Paili, Otal Majarh and Unaramour on 10.02.1989. This statement of PW-3 [illegible] d

13.02.1989 is not substantive evidence before the Court and can only be treated as a previous statement to contradict the substantive evidence of PW-3 given in Court by putting a question to PW-3 in course of her cross-examination under Section 145 of the Indian Evidence Act. If such a question was put in the cross-examination, PW-3 would have got an opportunity to explain why she had not specifically stated in the petition dated 13.02.1989 to the Governor (Ex.PW-3/A) that her husband (PW-1) and the neighbour (PW-2) were also present when she was released at the intervention of the Panchayat of village Paili, Otal Majarh and Unaramour on 10.02.1989. In absence of any such question put to PW-3 in her cross-examination, the omission of the names of PW-1 and PW-2 in the petition dated 13.02.1989 to the Governor (Ex.PW-3/A) cannot be taken as contradictory to the evidence of PW-3. Hence, the evidence of PW-3 as well as that of PW-1 and PW-2 that on 10.02.1982, PW-1 and PW-2 were present when PW-3 was released at 4.30 p.m. could not have been disbelieved by the Court.

13. We have perused the depositions of PW-1, PW-2 and PW-3 and we find that the depositions of these three witnesses support the findings of the trial court and the High Court that PW-3 was not released at 6.00 p.m. on 09.02.1989 but 4.30 p.m. on 10.02.1989. As against the evidence of PW-1, PW-2 and PW-3, the appellants examined DW-1, the Head Constable, who produced the record of Police Station, Balachaur relating to FIR No.13 dated 09.02.1989 and he has stated that the investigation of the case was conducted by the appellant-Radha Krishan, the then SHO of Police Station, Balachaur, and PW-3 was interrogated by him and PW-3 was handed over to Shanker Singh, Maha Singh, Dhanpat, Sarpanch of village Pillai and others as per the document Ext.DW1/A dated 09.02.1989, but he has admitted in his cross-examination that he has no personal knowledge of the investigation and he did not know PW-3 and had just produced the record. The

appellants have also examined DW-2 and he has stated in his examination-in-chief that he along with others who had been to the Police Station requested the appellant-Radha Krishan to release the two ladies in case they were no longer required for interrogation and the two ladies, PW-3 and Kamaljit Kaur, were released at 6.00 p.m. on 09.02.1989 after getting a writing from them (Ext.DW1/A) to the effect that they will produce them before the police if need be at a future date. In cross-examination, however, DW-2 admitted that he did not know whether any entry was recorded at the Police Station for calling the two ladies to the Police Station, Balachaur and whether any entry was recorded regarding their release and he was also not aware whether Ext.DW1/A was recorded in the Daily Diary Register of the Police Station, Balachaur. Additional M.H.C. Harminder Singh of Police Station, Balachaur was examined as DW-4 and he produced the FIR Register containing the FIR No.13 dated 09.02.1989 of Police Station, Balachaur under Section 302/34, IPC and others and has admitted that there was no *jimni* specifically incorporating the facts of execution of Ext.DW1/A. The Head Constable Gurdev Dass of Police Station, Balachaur was examined as DW-9 and he has stated that he was posted in Police Station, Balachaur from 20.11.1988 to April, 1991 and his duty hours on 09.02.1989 and 10.02.1989 were from 8.00 p.m. to 8.00 a.m. and no lady by the name of PW-3 was confined in the police lock up, but he has stated that he has not brought any record of Police Station, Balachaur and he has made the statement from his memory only. He has, however, admitted that entries were to be made in Daily Diary Register kept in the Police Station as and when any police official leaves the Police Station or returns to the Police Station and similarly, if anybody other than police officials enters or departs from the Police Station. Thus, except the document Ext.DW1/A, the relevant records of Police Station, Balachaur such as the Daily Diary Register were not produced to support the defence case that PW-3 was picked up for interrogation on the morning of s

released at 6.00 p.m. on 09.02.1989 and for this reason both the trial court and the High Court rejected the defence case and instead believed the evidence of PW-1, PW-2 and PW-3 that PW-3 was not released at 6.00 p.m. on 09.02.1989, but was detained during the night of 09.02.1989 and was released only on the next day in the evening on 10.02.1989.

14. The aforesaid discussion would show that the prosecution adduced evidence through PW-1, PW-2 and PW-3 that PW-3 was not released from the Police Station on 09.02.1989 at 6.00 p.m., but was actually released on 10.02.1989 at 4.30 p.m. This evidence could be discarded by the Court only if reliable evidence was produced by the defence to establish that PW-3 was actually released from the Police Station at 6.00 p.m. on 09.02.1989. The most relevant evidence to establish this defence of the appellants would have been the records of the Police Station. As has been provided in Section 35 of the Indian Evidence Act, an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, is itself a relevant fact. The Punjab Police Rules provides that Register No. II shall be maintained in the Police Station and Rule 22.49 in Chapter 22 enumerates the matters to be entered in Register No. II. These include the following matters in clauses (c) and (h) of Rule 22.49, which are extracted hereinbelow:

> "(c) The hour of arrival and departure on duty at or from a police station of all enrolled police officers of whatever rank, whether posted at the police station or elsewhere, with a statement of the nature of their duty. This entry shall be made immediately on arrival or prior to the departure of the officer concerned and shall be attested by the latter personally by signature or seal.
>
> ***Note***. - The term Police Station will include all places such as Police Lines and Police Posts where Register No. II is maintained."

> "(h) All arrivals at, and dispatches from, the police station of persons in custody, and all admissions to, and removals from, the police station lock-ups, whether temporary or otherwise, the exact hour being given in every case."

That the aforesaid matters are required to be maintained in the Daily Diary Register kept in the Police Station has been admitted by DW-9 in his evidence. Thus, even if PW-3 was not arrested as contended by Mr. Parekh, records were required to be maintained in Police Station, Balachaur with regard to both the arrivals of the appellants and PW-3 and their departure giving the exact hour of arrival and departure. Moreover, if Ex.DW1/A was to be treated as a genuine document, records of Police Station, Balachaur, containing relevant entries ought to have been produced by the appellants to show that Ex.DW1/A was contemporaneously created on 09.02.1989. Since the appellants did not produce the aforesaid records in their defence, the trial court and the High Court acted within their powers to reject the defence of the appellants and instead believe the evidence of PW-1, PW-2 and PW-3 that PW-3 was released only on 10.02.1989 at 4.30 p.m.

15. We further find that the trial court and the High Court have recorded the findings of rape committed by the appellants on PW-3 because of her consistent version in her petition dated 13.02.1989 (Ext.P3/A) to the Governor made within a few days of her release from Police Station on 09.02.1989, her complaint dated 25.07.1989 and her evidence in Court. PW-1, PW-2 and PW-3 have deposed that an attempt was made for a medical examination in the Civil Hospital, Balachaur, and the hospital at Saroa but the doctors refused to conduct the medical examination on account of the pressure from the appellant-Radha Krishan, but DW-11 and DW-12, the doctors in the hospital, have denied that they had refused to conduct the medical examination. The result is that there is no medical evidence to support the allegation of rape made by PW-3 against the appellants. The High Court, at

as PW-3 was not a young woman, medical examination was not significant and absence of medical examination may not be sufficient to disbelieve PW-3 if her story stands on its own. The High Court has found that she has consistently stated in her petition dated 13.02.1989 to the Governor of Punjab, in her complaint dated 25.07.1989 before the Magistrate and in her deposition in Court that she was detained in the night and raped by the appellants and both the trial court and the High Court have found that soon after she was released from the Police Station on 10.02.1989, she stated before her husband (PW-1) and the neighbour (PW-2) that she had been raped by the appellants and that she was bleeding profusely. The trial court and the High Court, therefore, have come to the finding of guilt of rape against the appellants relying on the evidence of PW-3 as corroborated by the evidence of PW-1, PW-2 under Section 157 of the Indian Evidence Act.

16. Thus, the trial court and the High Court have recorded concurrent findings of facts holding the appellants guilty of the offences under Sections 323/34, 504/34, 376(2)(a) and 376(2)(g) IPC and the appellant-Radha Krishan guilty of the offence under Section 342 IPC also. It has been repeatedly held by this Court that even though the powers of this Court under Article 136 of the Constitution are very wide, in criminal appeals this Court does not interfere with the concurrent findings of facts, save in exceptional circumstances where there has been grave miscarriage of justice (*Sri Sambhu Das and Another v. State of Assam* [(2010) 10 SCC 374]. As we have found that the concurrent findings of facts recorded by the trial court and the High Court in this case are based on legal evidence and there is no miscarriage of justice as such by the two courts while arriving at said findings, we are not inclined to disturb the impugned judgment of the High Court in exercise of our discretion under Article 136 of the Constitution and we accordingly dismiss the appeal.

B.B.B. Appeal dismissed.

SONDUR GOPAL
v.
SONDUR RAJINI
(Civil Appeal No. 4629 of 2005)

JULY 15, 2013

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

Hindu Marriage Act, 1955 - ss.1(2), 2(1) and 10 - Extent and applicability of the Act - Extra-territorial operation - Wife's petition for judicial separation and custody of children - Maintainability of - Challenged by husband on ground that the parties had no domicile in India and, hence, were not governed by the Act - Held: The Act has extra-territorial operation and applies to Hindus domiciled in India even if they reside outside India - If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India - Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin - Unless proved, there is presumption against the change of domicile - Therefore, the person who alleges it has to prove that - Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person - On facts, no material to endorse the husband's claim of being domicile of Australia - The husband or for that matter, the wife and the children did not acquire Australian citizenship - The claim that the husband desired to permanently reside in Australia, in the face of the material available, can only be termed as a dream - It does not establish his intention to reside there permanently - Further, there is no whisper at all as to how and in what manner the husband had abandoned the domicile of origin - The

husband continued to have the domicile of origin i.e. India - Both the husband and wife being domicile of India, were covered by the provisions of the Act - Petition filed by wife, therefore, was maintainable - Constitution of India, 1950 - Art. 245(2).

Private International Law - Domicile - Kinds of - Domicile of origin and domicile of choice - Discussed.

The respondent-wife filed petition before the Family Court inter alia praying for decree of judicial separation from appellant-husband under Section 10 of the Hindu Marriage Act, 1955 and custody of their two minor children.

The appellant-husband filed interim application questioning the maintainability of the petition on ground that the parties had no domicile in India and, hence, were not governed by the Hindu Marriage Act. The husband pleaded that the parties were citizens of Sweden presently domiciled in Australia which was their domicile of choice and having abandoned the domicile of origin i.e. India, the jurisdiction of the Family Court, Mumbai was barred by the provisions of Section 1(2) of the Hindu Marriage Act.

The Family Court allowed the application of appellant-husband and held the petition of respondent-wife not maintainable. In appeal, the High Court set aside the order of the Family Court and held the petition filed by the respondent-wife to be maintainable. The High Court held that the husband had miserably failed to establish that he ever abandoned Indian domicile and/or intended to acquire domicile of his choice and even assuming that the husband had abandoned his domicile of origin and acquired domicile of Sweden along with citizenship, he abandoned the domicile of Sweden when he shifted to

Australia and in this way the domicile of India got revived. The order passed by the High Court was challenged before this Court.

Dismissing the appeal, the Court

HELD: 1. From a plain reading of Section 1(2) of the Hindu Marriage Act, 1955, it is evident that it has extra-territorial operation. A law which has extra territorial operation cannot directly be enforced in another State but such a law is not invalid and saved by Article 245 (2) of the Constitution of India. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. But this does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. Unless such contingency exists, the Parliament shall be incompetent to make a law having extra-territorial operation. [Para 13] [719-F-H; 720-A-B]

M/s.Electronics Corporation of India Ltd. v. Commissioner of Income Tax & Anr. **1989 Supp (2) SCC 642: 1989 (2) SCR 994 - relied on.**

2. From Section 1(2) of the Act, it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. This extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India. [Para 14] [720-E-G]

3. To say that the Act applies to Hindus irrespective of their domicile extends the extra-territorial operation of the Act all over the world without any nexus, which interpretation if approved, would make such provision invalid. Further, this will render the words "domiciled" in Section 1(2) of the Act redundant. Legislature ordinarily does not waste its words is an accepted principle of interpretation. Any other interpretation would render the word 'domicile' redundant. [Para 16] [721-F-H; 722-A]

Prem Singh v. Sm.Dulari Bai & Anr. **AIR 1973 Cal. 425;** *Varindra Singh & Anr. v. State of Rajasthan* **RLW 2005(3) Raj. 1791 and** *Vinaya Nair & Anr. v. Corporation of Kochi* **AIR 2006 Ker. 275 - overruled.**

Nitaben v. Dhirendra Chandrakant Shukla & Anr. **I (1984) D.M.C.252 - referred to.**

4. Section 2(1) of the Hindu Marriage Act, 1955 provides for application of the Act. This section contemplates application of the Act to Hindu by religion in any of its forms or Hindu within the extended meaning i.e. Buddhist, Jaina or Sikh and, in fact, applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, Section 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act. Therefore, the Act will apply to Hindu outside the territory of India only if such a Hindu is domiciled in the territory of India. [Paras 19, 20] [722-G; 723-C-E]

5. It is specific case of the appellant that he is a Swedish citizen domiciled in Australia and it is the Australian courts which shall have jurisdiction in the matter. In order to succeed, the appellant has to establish that he is a domicile of Australia and, he cannot be

allowed to make out a third case that in case it is not proved that he is a domicile of Australia, his earlier domicile of choice, that is Sweden, is revived. In certain contingency, law permits raising of alternative plea but the facts of the present case does not permit the husband to take this course. The husband in his evidence has stated that at the time of marriage in 1989, he was a domicile of Sweden, but it is not his case that he shall be governed by the Swedish law or Swedish courts will have jurisdiction. From the aforesaid, it is evident that the appellant does not claim to be the domicile of Sweden but claims to be the domicile of Australia and, therefore, the only question which requires consideration is as to whether Australia is the husband's domicile of choice. [Paras 22, 24, 25] [724-D-F; 725-C, E]

6. Domicile are of three kinds, viz. domicile of origin, the domicile by operation of law and the domicile of choice. The present case concerns only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child. In domicile of choice one is abandoned and another domicile is acquired but for that, the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin. [Para 26] [725-F-G]

7.1. In order to establish that Australia is their domicile of choice, the husband has relied on their residential tenancy agreement dated 25.01.2003 for period of 18 months; enrollment of one child in Warrawee Public School in April,2003; commencement of proceedings for grant of permanent resident status in Australia during October-Nove d

submission of application by the husband and wife on 11.11.2003 for getting their permanent resident status in Australia. [Para 26] [725-H; 726-A-B]

7.2. The right to change the domicile of birth is available to any person not legally dependant and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality. [Para 27] [726-C-D]

7.3. In the aforesaid background, when one considers the husband's claim of being domicile of Australia, no material is found to endorse this plea. The residential tenancy agreement relied upon by the husband is only for 18 months which cannot be termed for a long period. Admittedly, the husband or for that matter, the wife and the children have not acquired the Australian citizenship. In the absence thereof, it is difficult to accept that they intended to reside permanently in Australia. The claim that the husband desired to permanently reside in Australia, in the face of the material available, can only be termed as a dream. It does not establish his intention to reside there permanently. Husband has admitted that his visa was nothing but a "long term permit" and "not a domicile document". Not only this, there is no whisper at all as to how and in what manner the husband had abandoned the domicile of origin. In the face of it, it is difficult to accept the case of the husband that he is domiciled in Australia and he shall

continue to be the domicile of origin i.e. India. Both the husband and wife are domicile of India and, hence, shall be covered by the provisions of the Hindu Marriage Act, 1955. [Para 28] [726-E-H; 727-B]

Case Law Reference:

AIR 1973 Cal. 425	**overruled**	**Para 8, 16**
(1984) D.M.C.252	**referred to**	**Para 9, 17**
2005(3) Raj. 1791	**overruled**	**Para 10, 18**
AIR 2006 Ker. 275	**overruled**	**Para 11**
1989 (2) SCR 994	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4629 of 2005.

From the Judgment & Order dated 11.04.2005 of the High Cour of Judicature at Bombay in Family Court Appeal No. 11 of 2005.

WITH

C.A. No. 487 of 2007.

V. Giri, Y.H. Muchhala, Huzefa Ahmadi, Liz Mathew, M.F. Philip, Ejaz Maqbool, Shalini Prasad, Mrigank Prabhakar, Tanima Kishore, Rohan Sharma for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J.

CIVIL APPEAL NO.4629 OF 2005

1. Appellant-husband, aggrieved by the judgment and order dated 11th of April, 2005 passed by the Division Bench of the Bombay High Court in Family Court Appeal No. 11 of 2005 reversing the judgment and order

2005 passed by the Family Court, Mumbai at Bandra in Interim Application No. 235 of 2004 in Petition No. A-531 of 2004, is before us with the leave of the Court.

2. Shorn of unnecessary details, facts giving rise to the present appeal are that the marriage between the appellant-husband and the respondent-wife took place on 25th of June, 1989 according to the Hindu rites at Bangalore. It was registered under the provision of the Hindu Marriage Act also. After the marriage the husband left for Sweden in the first week of July, 1989 followed by the wife in November, 1989. They were blessed with two children namely, Natasha and Smyan. Natasha was born on 19th of September, 1993 in Sweden. She is a down syndrome child. The couple purchased a house in Stockholm, Sweden in December, 1993. Thereafter, the couple applied for Swedish citizenship which was granted to them in 1997. In June, 1997, the couple moved to Mumbai as, according to the wife, the employer of the husband was setting up his business in India. The couple along with child Natasha lived in India between June, 1997 and mid 1999. In mid 1999, the husband's employer offered him a job in Sydney, Australia which he accepted and accordingly moved to Sydney, Australia. The couple and the child Natasha went to Sydney on sponsorship visa which allowed them to stay in Australia for a period of 4 years. While they were in Australia, in the year 2000, the husband disposed of the house which they purchased in Stockholm, Sweden. The second child, Smyan was born on 9th February, 2001 at Sydney. The husband lost his job on 7th July, 2001 and since he no longer had any sponsorship, he had to leave Australia in the second week of January, 2002. The couple and the children shifted to Stockholm and lived in a leased accommodation till October, 2002 during which period the husband had no job. On 2nd of October, 2002, the husband got another job at Sydney and to join the assignment he went there on 18th of December, 2002. But before that on 14th of December, 2002, the wife along with children left for Mumbai.

Later, on 31st of January, 2003, the wife and the children went to Australia to join the appellant-husband. However, the wife and the children came back to India on 17th of December, 2003 on a tourist visa whereas the husband stayed back in Sydney. According to the husband, in January, 2004 he was informed by his wife that she did not wish to return to Sydney at all and, according to him, he came back to India and tried to persuade his wife to accompany him back to Sydney. According to the husband, he did not succeed and ultimately the wife filed petition before the Family Court, Bandra inter alia praying for a decree of judicial separation under Section 10 of the Hindu Marriage Act and for custody of the minor children Natasha and Smyan.

3. After being served with the notice, the husband appeared before the Family Court and filed an interim application questioning the maintainability of the petition itself. According to the husband, they were original citizens of India but have "acquired citizenship of Sweden in the year 1996-1999 and as citizens of Sweden domiciled in Australia". According to the husband, the wife along with the children "arrived in India on 17th of December, 2003 on a non-extendable tourist visa for a period of six months and they had confirmed air tickets to return to Sydney on 27th of January, 2004" and therefore, "the parties have no domicile in India and, hence, the parties would not be governed by the Hindu Marriage Act". According to the husband, "the parties by accepting the citizenship of Sweden shall be deemed to have given up their domicile of origin, that is, India" and acquired a domicile of choice by the combination of residence and intention of permanent or indefinite residence. The husband has also averred that the domicile of the wife shall be that of the husband and since they have abandoned their domicile of origin and acquired a domicile of choice outside the territories of India, the provisions of the Hindu Marriage Act shall not apply to them. Consequently, the petition by the wife [illegible] under Section 10 of the Hindu Marriage [illegible]

children is not maintainable. According to the husband, he did not have any intention to "give up the domicile of choice namely the Australian domicile nor have the parties acquired a third domicile of choice or resumed the domicile of origin" and, therefore, provisions of the Hindu Marriage Act would not be applicable to them. In sum and substance, the plea of the husband is that they are citizens of Sweden presently domiciled in Australia which is their domicile of choice and having abandoned the domicile of origin i.e. India, the jurisdiction of the Family Court, Mumbai is barred by the provisions of Section 1(2) of the Hindu Marriage Act.

4. As against this, the case set up by the wife is that their domicile of origin is India and that was never given up or abandoned though they acquired the citizenship of Sweden and then moved to Australia. According to the wife, even if it is assumed that the husband had acquired domicile in Sweden, she never changed her domicile and continued to be domiciled in India. The wife has set up another alternative plea. According to her, even if it is assumed that she also had acquired domicile of Sweden, that was abandoned by both of them when they shifted to Australia and, therefore, their domicile of origin, that is, India got revived. In short, the case of the wife is that both she and her husband are domiciled in India and, therefore, the Family Court in Mumbai has jurisdiction to entertain the petition filed by her seeking a decree for judicial separation and custody of the children.

5. The husband in support of his case filed affidavit of evidence and he has also been cross-examined by the wife. According to the husband "even before the marriage he visited Stockholm, Sweden in Spring, 1985" and "immediately taken in by the extraordinary beauty of the place and warmth and friendliness of the people". According to the husband, the first thought which occurred to him was that "Stockholm is the place where" he "wanted to live and die". According to his evidence, at the time of marriage in 1989, he was a domicile of Sweden.

From this the husband perhaps wants to convey that he abandoned the domicile of his birth, that is, India and acquired Sweden as the domicile of choice. He went on to say that "keeping in mind wife's express desire to be in English speaking country" he "accepted the offer to move to Sydney, Australia". His specific evidence is that "parties herein are Swedish citizens, domiciled in Australia", hence, according to the husband, "only the courts in Australia will have the jurisdiction to entertain the petition of this nature". The husband has further claimed that "on 5th of April, 2004, the day wife had filed the petition" he "had acquired domicile status of Sydney, Australia". As regards domicile status on the date of cross-examination, that is, 17.11.2004, he insisted to be the domicile of Australia. It is an admitted position that the day on which husband claimed to be the domicile of Australia, that is, 05.04.2004, he was not citizen of that country or had ever its citizen but had 457 visa which, according to his own evidence "is a long term business permit and it is not a domicile document".

6. The family court, after taking into consideration the facts and circumstances of the case, allowed the application filed by the husband and held the petition to be not maintainable. While doing so, the family court observed that "it cannot be held" that "the husband has never given up his domicile of origin, i.e., India." However, in appeal, the High Court by the impugned order has set aside the order of the family court and held the petition filed by the wife to be maintainable. While doing so, the High Court held that "the husband has miserably failed to establish that he ever abandoned Indian domicile and/or intended to acquire domicile of his choice". Even assuming that the husband had abandoned his domicile of origin and acquired domicile of Sweden along with citizenship, according to the High Court, he abandoned the domicile of Sweden when he shifted to Australia and in this way the domicile of India got revived. Relevant portion of the judgme[illegible]n this regard reads as follows:

"15.4……It is against this factual matrix, we are satisfied that the respondent has miserably failed to establish that he ever abandon Indian domicile and/or intended to acquire domicile of his choice.

16. Even if it is assumed that the respondent had abandoned his domicile of origin and acquired domicile of Sweden alongwith citizenship in 1997, on his own showing the respondent abandoned the domicile of Sweden when he shifted to Sydney, Australia. Therefore, keeping the case made out by the respondent in view and our findings in so far as acquisition of Australian domicile is concerned, it is clear that the domicile of India got revived immediately on his abandoning Swedish domicile……."

7. It is against this order that the husband is before us with the leave of the court.

8. We have heard Mr. V.Giri, learned Senior Counsel for the appellant and Mr. Y.H. Muchhala and Mr.Huzefa Ahmadi, learned Senior Counsel on behalf of respondent. Mr. Giri draws our attention to Section 1 of the Hindu Marriage Act (hereinafter to be referred to as 'the Act') and submits that the Act would apply only to Hindu domiciled in India. He submits that the parties having ceased to be the domicile of India, they shall not be governed by the Act. Mr. Muchhala joins issue and contends that the benefit of the Act can be availed of by Hindus in India irrespective of their domicile. He submits that there is no direct precedent of this Court on this issue but points out that a large number of decisions of different High Courts support his contention. In this connection, he draws our attention to a judgment of Calcutta High Court in *Prem Singh v. Sm.Dulari Bai & Anr.* AIR 1973 Cal. 425, relevant portion whereof reads as follows:

"On a fair reading of the above provisions, it seems clear from the first section that the Act is in operation in

the whole of India except in the State of Jammu and Kashmir and applies also to Hindus, domiciled in the territories to which this Act extends, who are outside the said territories. This section read with Section 2(1)(a)(b) makes it equally clear that as regards the intra-territorial operation of the Act it applies to all Hindus, Buddhists, Jains or Sikhs irrespective of the question whether they are domiciled in India or not."

9. Reference has also been made to decision of Gujarat High Court in *Nitaben v. Dhirendra Chandrakant Shukla & Anr. I* (1984) D.M.C.252 and our attention has been drawn to the following:

"Apparently looking, this argument of Mr. Nanavati is attractive. But it would not be forgotten that section 1 of the Act refers to the extension of the Act to the whole of India except the State of Jammu and Kashmir and also to the territories to which the Act is applicable, and further to all those persons who are domiciles of those territories but who are outside the said territories."

10. Yet another decision to which reference has been made is the judgment of the Rajasthan High Court in *Varindra Singh & Anr. v. State of Rajasthan RLW* 2005(3) Raj. 1791. Paragraphs 13 and 17 which are relevant read as follows:

"13. Clause (a) of Sub-section (1) of Section 2 of the Act of 1955 makes the Act of 1955 applicable to all persons who are Hindu by religion irrespective of the fact where they reside.

xxx xxx xxx

17. Therefore, Section 2 of the Act of 1955 is very wide enough to cover all persons who are Hindu by religion irrespective of the fact where they are residing and whether they are domiciled in Indian territo

11. Lastly, learned Senior Counsel has placed reliance on a judgment of the Kerala High Court in *Vinaya Nair & Anr. v. Corporation of Kochi* AIR 2006 Ker. 275 and our attention has been drawn to the following passage from Paragraph 6 of the judgment which reads as follows:

> "A conjoint reading of Ss. 1 and 2 of the Act would indicate that so far as the second limb of S. 1(2) of the Act is concerned its intra territorial operation of the Act applied to those who reside outside the territories. First limb of sub-section (2) of S. 1 and Cls. (a) and (b) of S.2(1) would make it clear that the Act would apply to Hindus reside in India whether they reside outside the territories or not."

12. Rival submission necessitates examination of extent and applicability of the Act. Section 1(2) of the Act provides for extent of the Act. The same reads as follows:

> **"1. Short title and extent.-**
>
> (1) xxx xxx xx
>
> (2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories."

13. From a plain reading of Section 1(2) of the Act, it is evident that it has extra-territorial operation. The general principle underlying the sovereignty of States is that laws made by one State cannot have operation in another State. A law which has extra territorial operation cannot directly be enforced in another State but such a law is not invalid and saved by Article 245 (2) of the Constitution of India. Article 245(2) provides that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial

operation. But this does not mean that law having extra-territorial operation can be enacted which has no nexus at all with India. In our opinion, unless such contingency exists, the Parliament shall be incompetent to make a law having extra-territorial operation. Reference in this connection can be made to a decision of this Court in *M/s.Electronics Corporation of India Ltd. v. Commissioner of Income Tax & Anr.* 1989 Supp (2) SCC 642 in which it has been held as follows:

> "9.But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to sub-serve the object, and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India."

14. Bearing in mind the principle aforesaid, when we consider Section 1(2) of the Act, it is evident that the Act extends to the Hindus of whole of India except the State of Jammu and Kashmir and also applies to Hindus domiciled in India who are outside the said territory. In short, the Act, in our opinion, will apply to Hindus domiciled in India even if they reside outside India. If the requirement of domicile in India is omitted altogether, the Act shall have no nexus with India which shall render the Act vulnerable on the ground that extra-territorial operation has no nexus with India. In our opinion, this extra-territorial operation of law is saved not because of nexus with Hindus but Hindus domiciled in India.

15. At this stage, it shall be useful to refer to the observation made by the High Court in the impugned order which is quoted hereunder.

"It is, thus, clear that a condition of a domicile in India, as contemplated in Section 1(2) of H.M.Act, is necessary ingredient to maintain a petition seeking reliefs under the H.M.Act. In other words, a wife, who is domiciled and residing in India when she presents a petition, seeking reliefs under H.M.Act, her petition would be maintainable in the territories of India and in the Court within the local limits of whose ordinary civil jurisdiction she resides."

16. Now, we revert to the various decisions of the High Courts relied on by the Senior Counsel for the respondent-wife; the first in sequence is the decision of Calcutta High Court in the case of *Prem Singh* (supra). In this case, the husband submitted an application for restitution of conjugal rights inter alia pleading that he had married his wife according to Hindu rites in India. After the marriage, they continued to live as husband and wife and a daughter was born. The grievance of the husband was that the wife had failed to return to the matrimonial home which made him to file an application for restitution of conjugal rights. The trial court noticed that the husband was a Nepali and he was not a domicile in India and therefore, he could not have invoked the provisions of the Act. While interpreting Sections 1(1) and 2(1) of the Act, the Court held that as regards the intra-territorial operation of the Act, it is clear that it applies to Hindus, Buddhists, Jaina and Sikhs irrespective of the question as to whether they are domiciled in India or not. Having given our most anxious consideration, we are unable to endorse the view of the Calcutta High Court in such a wide term. If this view is accepted, a Hindu living anywhere in the world, can invoke the jurisdiction of the Courts in India in regard to the matters covered under the Act. To say that it applies to Hindus irrespective of their domicile extends the extra-territorial operation of the Act all over the world without any nexus which interpretation if approved, would make such provision invalid. Further, this will render the words "domiciled" in Section 1(2) of the Act redundant. Legislature ordinarily does not waste its words is an accepted principle of interpretation.

Any other interpretation would render the word 'domicile' redundant. We do not find any compelling reason to charter this course. Therefore, in our opinion, the decision of the Calcutta High Court taking a view that the provisions of the Act would apply to a Hindu whether domiciled in the territory of India or not does not lay down the law correctly. One may concede to the applicability of the Act if one of the parties is Hindu of Indian domicile and the other party a Hindu volunteering to be governed by the Act.

17. As regards the passage from the judgment of the Gujarat High Court in *Nitaben* (Supra) relied on by the wife, it does not lay down that the Act applies to all Hindus, whether they are domiciled in India or not. In fact, the High Court has held that it extends to all those persons who are domiciles of India, excluding Jammu and Kashmir.

18. So far as the decision of the Rajasthan High Court in *Varindra Singh* (supra) is concerned, it is true that under Section 1(2) of the Act, residence in India is not necessary and Section 2 also does not talk about requirement of domicile for its application. This is what precisely has been said by the Rajasthan High Court in this judgment but, in our opinion, what the learned Judge failed to notice is that the application of the Act shall come into picture only when the Act extends to that area. Hence, in our opinion, the Rajasthan High Court's judgment does not lay down the law correctly. For the same reason, in our opinion the judgment of the Kerala High Court is erroneous.

19. Section 2(1) provides for the application of the Act. The same reads as follows:

2. Application of Act.- (1) This Act applies –

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarth

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."

20. This section contemplates application of the Act to Hindu by religion in any of its forms or Hindu within the extended meaning i.e. Buddhist, Jaina or Sikh and, in fact, applies to all such persons domiciled in the country who are not Muslims, Christians, Parsi or Jew, unless it is proved that such persons are not governed by the Act under any custom or usage. Therefore, we are of the opinion that Section 2 will apply to Hindus when the Act extends to that area in terms of Section 1 of the Act. Therefore, in our considered opinion, the Act will apply to Hindu outside the territory of India only if such a Hindu is domiciled in the territory of India.

21. There is not much dispute that the wife at the time of presentation of the petition was resident of India. In order to defeat the petition on the ground of maintainability, Mr. Giri submits that the wife will follow the domicile of the husband and when Sweden has become the domicile of choice, the domicile of origin i.e. India has come to an end. According to the husband, the parties had India as the domicile of origin, but in 1987 the husband moved to Sweden with an intention to reside there permanently and acquired the Swedish domicile as his domicile of choice. After the marriage, the wife also moved to Sweden to reside permanently there and both of them acquired Swedish citizenship in 1996-97 thereby giving up their domicile of origin and embracing Sweden as their domicile of choice. Further, on account of express desire of the wife to move to

an English speaking country, the family moved to Australia in June, 1999 with an intention to reside there permanently and initiated the process to acquire the permanent resident status in Australia. On these facts, the husband intends to contend that they have acquired Swedish domicile as domicile of choice. Mr. Muchhala, however, submits that the specific case of the husband is that he is a Swedish citizen domiciled in Australia and, therefore, the appellant cannot be allowed to contend that he is domiciled in Sweden. He points out that the husband is making this attempt knowing very well that his claim of being the domicile of Australia is not worthy of acceptance and in that contingency to contend that the earlier domicile of choice, i.e. Sweden has revived.

22. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Muchhala. In certain contingency, law permits raising of alternative plea but the facts of the present case does not permit the husband to take this course. It is specific case of the appellant that he is a Swedish citizen domiciled in Australia and it is the Australian courts which shall have jurisdiction in the matter. In order to succeed, the appellant has to establish that he is a domicile of Australia and, in our opinion, he cannot be allowed to make out a third case that in case it is not proved that he is a domicile of Australia, his earlier domicile of choice, that is Sweden, is revived. In this connection, we deem it expedient to reproduce the averment made by him in this regard:

"22……..In the instant case, it is submitted that in the year 1996 the applicant acquired citizenship as well as domicile of Sweden and is presently domiciled in Australia. Thus, the Hindu Marriage Act is not applicable to the parties herein and the Family Court Mumbai has no jurisdiction to proceed in the matter and the petition is not maintainable under Section 10 of the Hindu Marriage Act, 1955."

23. The appellant has further averred that the parties never acquired a third domicile of choice, the same reads as follows:

> "19…..In the instant case, there is no intention to give up the domicile of choice namely the Australia domicile and nor have the parties acquired a third domicile of choice or resume the domicile of origin……."

24. Further, the husband in his evidence has stated that at the time of marriage in 1989, he was a domicile of Sweden, but it is not his case that he shall be governed by the Swedish law or Swedish courts will have jurisdiction. His specific evidence in this regard reads as follows:

> "7……as the parties herein are Swedish citizens, domiciled in Australia, and hence it is only the Courts in Australia that have the jurisdiction to entertain a petition of this nature……."

25. From the aforesaid, it is evident that the appellant does not claim to be the domicile of Sweden but claims to be the domicile of Australia and, therefore, the only question which requires our consideration is as to whether Australia is the husband's domicile of choice.

26. Domicile are of three kinds, viz. domicile of origin, the domicile by operation of law and the domicile of choice. In the present case, we are concerned only with the domicile of origin and domicile of choice. Domicile of origin is not necessarily the place of birth. The birth of a child at a place during temporary absence of the parents from their domicile will not make the place of birth as the domicile of the child. In domicile of choice one is abandoned and another domicile is acquired but for that, the acquisition of another domicile is not sufficient. Domicile of origin prevails until not only another domicile is acquired but it must manifest intention of abandoning the domicile of origin. In order to establish that Australia is their domicile of choice, the husband has relied on their residential tenancy agreement

dated 25.01.2003 for period of 18 months; enrollment of Natasha in Warrawee Public School in April,2003; commencement of proceedings for grant of permanent resident status in Australia during October-November, 2003; and submission of application by the husband and wife on 11.11.2003 for getting their permanent resident status in Australia.

27. The right to change the domicile of birth is available to any person not legally dependant and such a person can acquire domicile of choice. It is done by residing in the country of choice with intention of continuing to reside there indefinitely. Unless proved, there is presumption against the change of domicile. Therefore, the person who alleges it has to prove that. Intention is always lodged in the mind, which can be inferred from any act, event or circumstance in the life of such person. Residence, for a long period, is an evidence of such an intention so also the change of nationality.

28. In the aforesaid background, when we consider the husband's claim of being domicile of Australia we find no material to endorse this plea. The residential tenancy agreement is only for 18 months which cannot be termed for a long period. Admittedly, the husband or for that matter, the wife and the children have not acquired the Australian citizenship. In the absence thereof, it is difficult to accept that they intended to reside permanently in Australia. The claim that the husband desired to permanently reside in Australia, in the face of the material available, can only be termed as a dream. It does not establish his intention to reside there permanently. Husband has admitted that his visa was nothing but a "long term permit" and "not a domicile document". Not only this, there is no whisper at all as to how and in what manner the husband had abandoned the domicile of origin. In the face of it, we find it difficult to accept the case of the husband that he is domiciled in Australia and he shall continue to be the domicile of origin i.e. India. In view

of our answer that the husband is a domicile of India, the question that the wife shall follow the domicile of husband is rendered academic. For all these reasons, we are of the opinion that both the husband and wife are domicile of India and, hence, shall be covered by the provisions of the Hindu Marriage Act, 1955. As on fact, we have found that both the husband and wife are domicile of India, and the Act will apply to them, other contentions raised on behalf of the parties, are rendered academic and we refrain ourselves to answer those.

29. In the result, we do not find any merit in the appeal and it is dismissed accordingly but without any order as to costs.

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30. In view of our decision in Civil Appeal No. 4629 of 2005 (Sondur Gopal vs. Sondur Rajini) holding that the petition filed by the appellant for judicial separation and custody of the children is maintainable, we are of the opinion that the writ petition filed by the respondent for somewhat similar relief is rendered infructuous. On this ground alone, we allow this appeal and dismiss the writ petition filed by the respondent.

B.B.B. Appeals disposed of.

GIAN CHAND & ORS.
v.
STATE OF HARYANA
(Criminal Appeal No. 2302 of 2010)

JULY 23, 2013

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

Narcotic Drugs and Psychotropic Substances Act, 1985 - ss.15, 20, 35 & 54 - Accused-appellants found carrying ten bags of contraband in a vehicle - Convicted by Courts below u/s.15 - Justification - Held: Justified - Overwhelming evidence on record to prove that the seizure of ten bags had actually been made from the appellants - Since appellants were found in possession of contraband article, they were presumed to have committed the offence until the contrary was proved - Burden was on the appellants to establish that they had no knowledge of the same - Appellants miserably failed to rebut the statutory presumption - They could not point out what prejudice was caused to them if the fact of "conscious possession" was not put to them while recording their statements u/s.313 CrPC - Mere non-joining of independent witness did not cast doubt on the version forwarded by the prosecution since no reason on record to falsely implicate the appellants - On facts, at the time of the incident some villagers had gathered there - The Investigating Officer in his cross-examination made it clear that in spite of his best persuasion, none of them were willing to become witness and therefore, he could not examine any independent witness - Further, every official act by the police is presumed to have been regularly performed - Evidence Act, 1872 - ss.106 and 114 - Maxims - "omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta".

The accused-appellants were allegedly found travelling in a jeep at odd hours in the night and carrying

contraband material i.e. 10 bags containing 41 kg poppy husk each. The trial court convicted the appellants under Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced them to undergo RI for a period of 10 years each. The conviction and sentenced was affirmed by the High Court.

The appellants challenged their conviction before this Court on grounds: 1) that the prosecution failed to prove that the appellants were in "conscious possession" of the contraband and this incriminating circumstance was not put to the appellants while recording their statements under Section 313 CrPC and 2) that no independent witness was examined or involved in preparation of the panchnama of the recovered substances.

Dismissing the appeal, the Court

HELD: 1.1. The appellants abandoned the vehicle (jeep) just after it dashed against the wall and made a desperate attempt to escape but were apprehended by the police party. The Trial Court examined the matter elaborately and after appreciating the evidence of the witnesses, came to the conclusion that there were no discrepancies in the statements of the three officials, i.e. prosecution witnesses. Their statements inspired tremendous confidence and thus, there was no reason for the court to discard the testimony of the official witnesses. Grievance had also been raised before the Trial Court that the chit carrying contents of case property was not available on the bags. However, this did not give any benefit to the accused as there was overwhelming evidence on record to prove that the seizure of ten bags had actually been made from the accused. Further the contents of the samples sent for chemical analysis gave positive results on analysis in the laboratory. Moreover,

the defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/ contraband articles. Thus, no grievance could be raised by the appellants in this regard. [Paras 7, 12] [737-H; 738-A-D; 741-G]

1.2. From the conjoint reading of the provisions of Section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise. Thus, once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same. In the instant case, in their statement under Section 313 CrPC, the appellants took the plea of false implication only and the appellants miserably failed to rebut the statutory presumption. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts,

explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. [Paras 9, 14, 15 & 16] [739-E; 742-H; 743-A-D, F-H]

1.3. In the instant case, the issue relating to non-compliance of Section 313 Cr.P.C. had not been raised before the High Court, and it was raised for the first time before this Court. The appellants could not point out what prejudice has been caused to them if the fact of "conscious possession" was not put to them. Even otherwise such an issue cannot be raised in the existing facts and circumstances of the case wherein the burden was on the accused to show how the contraband material came to be found in the vehicle which was driven by one of them and the other two were travelling in that vehicle. [Para 20] [746-E-G]

1.4. Mere non-joining of an independent witness where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. In the instant case, at the time of incident some villagers had gathered there. The Investigating Officer in his cross-examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness. Section 114 of the Evidence Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim omnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta i.e., all the acts are

presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed. [Paras 28, 29] [748-H; 749-A-D]

Avtar Singh & Ors. v. State of Punjab **AIR 2002 SC 3343: 2002 (2) Suppl. SCR 482 - distinguished.**

Madan Lal & Anr. v. State of Himachal Pradesh **AIR 2003 SC 3642: 2003 (2) Suppl. SCR 716;** *State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc.* **AIR 2000 SC 2988: 2000 (2) Suppl. SCR 712;** *Shambhu Nath Mehra v. The State of Ajmer* **AIR 1956 SC 404; 1956 SCR 199;** *Gunwantlal v. The State of Madhya Pradesh* **AIR 1972 SC 1756: 1973 (1) SCR 508;** *Sucha Singh v. State of Punjab* **AIR 2001 SC 1436: 2001 (2) SCR 644;** *Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai* **AIR 2003 SC 215: 2003 (1) SCC 534;** *Durga Prasad Gupta v. The State of Rajasthan thr. CBI* **(2003) 12 SCC 257: 2003 (4) Suppl. SCR 1;** *Santosh Kumar Singh v. State thr. CBI,* **(2010) 9 SCC 747: 2010 (13) SCR 901;** *Manu Sao v. State of Bihar* **(2010) 12 SCC 310: 2010 (8) SCR 811;** *Neel Kumar alias Anil Kumar v. State of Haryana* **(2012) 5 SCC 766: 2012 (5) SCR 696;** *Megh Singh v. State of Punjab* **AIR 2003 SC 3184: 2003 (3) Suppl. SCR 720;** *Wasim Khan v. The State of Uttar Pradesh,* **AIR 1956 SC 400: 1956 SCR 191; and** *Bhoor Singh & Anr. v. State of Punjab,* **AIR 1974 SC 1256: 1974 (4) SCC 754** *Asraf Ali v. State of Assam* **(2008) 16 SCC 328: 2008 (10) SCR 1115;** *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra* **AIR 1973 SC 2622: 1974 (1) SCR 489;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064;** *Rohtash v. State of Haryana* **JT 2013 (8) SC 181;** *Paras Ram v. State of Haryana,* **AIR 1993 SC 1212: 1992 (2) Suppl. SCR 55;** *Balbir Singh v. State* **(1996) 11 SCC 139;** *Akmal Ahmad v. State of Delhi,* **AIR 1999 SC 1315: 199** *1.*

Prabhulal v. Assistant Director, **1996 (7) Suppl. SCR 50;** *Directorate of Revenue Intelligence* **AIR 2003 SC 4311: 2003 (3) Suppl. SCR 958;** *Ravinderan @ John v. Superintendent of Customs* **AIR 2007 SC 2040: 2007 (6) SCC 410;** *State, Govt. of NCT of Delhi v. Sunil & Anr.* **(2001) 1 SCC 652: 2000 (5) Suppl. SCR 144 and** *Appabhai & Anr. v. State of Gujarat* **AIR 1988 SC 696: 1988 Suppl. SCC 241 - relied on.**

Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors. **AIR 2013 SC 1204: 2013 (1) SCR 632;** *Ravinder Kumar Sharma v. State of Assam & Ors.,* **AIR 1999 SC 3571: 1999 (2) Suppl. SCR 339;** *Ghasita Sahu v. State of Madhya Pradesh,* **AIR 2008 SC 1425: 2008 (2) SCR 95;** *Rohtash Kumar v. State of Haryana,* **JT 2013 (8) SC 181 and** *State of Punjab v. Hari Singh and Ors.* **AIR (2009) SC 1966: 2009 (2) SCR 470 - referred to.**

Case Law Reference:

2013 (1) SCR 632	**referred to**	**Para 11**
1999 (2) Suppl. SCR 339	**referred to**	**Para 11**
2008 (2) SCR 95	**referred to**	**Para 11**
JT 2013 (8) SC 181	**referred to**	**Para 11**
2003 (2) Suppl. SCR 716	**relied on**	**Para 13**
2000 (2) Suppl. SCR 712	**relied on**	**Para 16**
1956 SCR 199	**relied on**	**Para 16**
1973 (1) SCR 508	**relied on**	**Para 16**
2001 (2) SCR 644	**relied on**	**Para 16**
2003 (1) SCC 534	**relied on**	**Para 16**
2003 (4) Suppl. SCR 1	**relied on**	**Para 16**
2010 (13) SCR 901	**relied on**	**Para 16**

2010 (8) SCR 811	**relied on**	**Para 16**
2012 (5) SCR 696	**relied on**	**Para 16**
2009 (2) SCR 470	**referred to**	**Para 17**
2002 (2) Suppl. SCR 482	**distinguished**	**Para 17**
2003 (3) Suppl. SCR 720	**relied on**	**Para 18**
1956 SCR 191	**relied on**	**Para 20**
1974 (4) SCC 754	**relied on**	**Para 20**
2008 (10) SCR 1115	**relied on**	**Para 21**
1974 (1) SCR 489	**relied on**	**Para 22**
2010 (11) SCR 1064	**relied on**	**Para 23**
JT 2013 (8) SC 181	**relied on**	**Para 25**
1992 (2) Suppl. SCR 55	**relied on**	**Para 25**
(1996) 11 SCC 139	**relied on**	**Para 25**
1999 (2) SCR 160	**relied on**	**Para 25**
1996 (7) Suppl. SCR 50	**relied on**	**Para 25**
2003 (3) Suppl. SCR 958	**relied on**	**Para 25**
2007 (6) SCC 410	**relied on**	**Para 25**
2000 (5) Suppl. SCR 144	**relied on**	**Para 26**
1988 Suppl. SCC 241	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2302 of 2010.

From the Judgment & Order dated 04.11.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 392-SB of 2001.

J.P. Dhanda, N.A. Usmani for the Appellants

Brijender Chahar, R.K. Shokeen, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been filed against the judgment and order dated 4.11.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 392-SB of 2001, by which it has affirmed the judgment and order dated 2.2.2001 passed by the trial court, Sirsa by which the appellants were convicted under the provisions of Section 15 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act'). By that order, they were sentenced to undergo RI for a period of 10 years each and to pay a fine of rupees 1 lakh each, and in default of payment of fine, to undergo further RI for a period of one year.

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

A. On 5.9.1996, at about 2.15 a.m., Bhan Singh, ASI of Police Station, Rania alongwith other police officials was present in the village Chakka Bhuna in an official jeep. The police party saw a jeep coming at high speed from the opposite direction and asked the said jeep to stop. However, instead of stopping, the driver accelerated the speed of the jeep. This created suspicion in the minds of the police officials. Thus, they chased the jeep. The occupants of the jeep took a U-turn and in that process the jeep struck the wall of a house in the village. The three occupants of the jeep tried to run away but they were caught by the police. The said three occupants were later identified as the appellants. They were asked whether they would like to be searched before a Gazetted officer or a Magistrate, however, they chose the former. The Deputy Superintendent of Police was called and a search was conducted in his presence. The vehicle had 10 bags containing

41 kg poppy husk each. The police party took samples of 200 grams of poppy husk from each bag and the same was sealed by the Dy.S.P.

B. On the basis of same, an FIR was lodged on 5.9.1996 itself at 3.15 a.m. at the Rania Police Station against the appellants-accused. After investigation, a chargesheet was filed against them and the appellants claimed trial. Hence, the trial commenced.

C. The prosecution led the evidence in support of its case and also produced the case property in the court alongwith the damaged jeep in which the appellants were carrying 410 kg. poppy husk. In the FSL report all positive results were shown. Appellants did not lead any evidence in defence and pleaded that they had falsely been implicated in the crime.

D. After conclusion of the trial, the appellants were convicted and sentenced as referred to hereinbefore vide judgment and order dated 2.2.2001, and the said judgment and order has been affirmed by the High Court vide its judgment and order dated 4.11.2008.

Hence, this appeal.

3. Mr. J.P. Dhanda, learned counsel appearing for the appellants has submitted that no independent witness was examined by the prosecution in the case, though a large number of people had gathered at the place of the alleged incident which led to the appellants-accused being apprehended. No independent witness was involved in preparation of the panchnama of the recovered substances. Further, the prosecution failed to prove that the appellants-accused were in conscious possession of the contraband material. This incriminating circumstance had not even been put to the appellants-accused while recording their statements under Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'). The

already served about 8 years of sentence. Thus, the appeal deserves to be allowed.

4. Per contra, Mr. Brijender Chahar, learned senior counsel appearing for the State has opposed the appeal contending that even if some persons had gathered at the place of occurrence when the appellants were apprehended, nobody was willing to become a witness. Therefore, the prosecution could not examine any independent witness. The case of the prosecution does not deserve to get disbelieved simply because police officials themselves are the witnesses, nor there is any requirement in law that in every case an independent witness should be examined. Further all incriminating material was put to the appellants-accused while recording their statements under Section 313 Cr.P.C. Once it is established that an accused is in possession of contraband substance, the burden to prove that he had no knowledge of the same, shifts to the accused to prove the same. More so, the accused is supposed to explain his conduct while making his statement under Section 313 Cr.P.C. particularly where there are certain presumptions against him under Section 35 of the Act. There are concurrent findings of fact recorded by the courts below. Thus, no interference is called for and the appeal is liable to be dismissed.

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

6. No dispute has been raised regarding the poppy husk recovered from the jeep or the damaged jeep. Further, the appellants did not challenge the result shown in the FSL report wherein the qualitative tests in respect of Meconic Acid, Morphine, Codeine, Thebaine, Papaverine and Narcotine had all been shown as positive.

7. All three occupants, i.e. the appellants abandoned the vehicle just after it dashed against the wall and made a

desperate attempt to escape but were apprehended by the police party. The Trial Court examined the matter elaborately and after appreciating the evidence of the witnesses, came to the conclusion that there were no discrepancies in the statements of the three officials, i.e. prosecution witnesses. Their statements inspired tremendous confidence and thus, there was no reason for the court to discard the testimony of the official witnesses. The grievance had also been raised before the Trial Court that the chit carrying contents of case property was not available on the bags. However, this did not give any benefit to the accused as there was overwhelming evidence on record to prove that the seizure of ten bags had actually been made from the accused. Further the contents of the samples sent for chemical analysis gave positive results on analysis in the laboratory.

8. The High Court dealt with the issue elaborately regarding knowledge i.e. conscious possession, and held as under:

> "There were only three occupants in the jeep, at the relevant time. As many as 10 bags, each containing 41 kgs. Poppy husk, were lying in the jeep. It was not a small quantity of poppy husk,.....and could escape the notice of the accused. It was a big haul of poppy husk, ……The accused were having special means of knowledge, with regard to the bags, containing poppy husk, lying in the jeep. **It was for the accused to explain, as to how the bags, containing poppy husk, were being transported.** Not only this, the conduct of the accused, is also relevant, in this case. They instead of stopping the jeep, when the signal was given, by the policy party, accelerated the speed thereof and sped away towards Village Keharwala. It was only after hot chase, given by the members of the police party, in their jeep, that the driver of the jeep got nervous, could not properly negotiate the turn and lost control, as a result whereof, the sa[illegible]st

the wall and stopped. In case, there was no contraband, in the jeep, and the accused were not in the knowledge of the same then what was the necessity of speeding away the jeep, was for them to explain. This material circumstance goes against them. Under these circumstances, it could be said that they were in possession of, and in control over the bags, lying in the jeep.

Once the possession of the accused, and their control over the contraband, was proved, then statutory presumption under Section 54 and 35 of the Act, operated against them, that they were in conscious possession thereof. Thereafter, it was for them, to rebut the statutory presumption, by leading cogent and convincing evidence. However, **the appellants, failed to rebut the said presumption** either during the course of cross-examination of the prosecution witnesses, or by leading defence evidence."

(Emphasis added)

9. Further, in their statement under Section 313 Cr.P.C., the appellants took the plea of false implication only and the appellants miserably failed to rebut the statutory presumption, referred to above. The High Court further held as under:-

"In the instant case, no plea was taken up by the accused, during the course of trial or in their statements, under Section 313 Cr.P.C. that they were not the occupants of the jeep. No plea was taken by the accused that they were not aware of the contents of the bags, lying in the jeep. No plea was taken up by the driver of the jeep that he was taking the bags, containing poppy husk, as per the directions of the owner thereof, and did not know, as to what was contained in the bags. No plea was taken up, by the other occupants, of the jeep, that they were merely labourers engaged for loading and unloading the bags,

containing poppy husk, at the destination. No plea was taken up by the accused, other than the driver, sitting in the jeep, that they only took lift therein, and as such were passengers. They did not take up the plea, that the driver of the jeep knew them earlier and since they could not find any public transport, for going to their villages, he gave them lift therein on friendly basis. The facts of the cases, relied upon by the Counsel for the appellants, and referred to, in this paragraph, being distinguishable, from the facts of the instant case, no help can be drawn by the counsel for the appellants therefrom. In this view of the matter, the submission of the counsel for the appellants, being without merit, must fail, and the same stands rejected."

10. So far as the condition of the property is concerned, the court observed that "as the witnesses have been examined after four years from the date of recovery. The case property remained lying in the malkhana. On account of shortage of space, in the malkhanas, the case properties cannot be stacked properly and the bags, containing poppy husk, underwent the process of decay, however, did not mean that the case property produced in the court, did not relate to the instant case." There was nothing on record to show that the said case property had been tampered with.

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors.,* AIR 2013 SC 1204 observing as under:

"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which ha

the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses."

(Emphasis supplied)

(See also: *Ravinder Kumar Sharma v. State of Assam & Ors.,* AIR 1999 SC 3571; *Ghasita Sahu v. State of Madhya Pradesh,* AIR 2008 SC 1425; and *Rohtash Kumar v. State of Haryana,* JT 2013 (8) SC 181)

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/ contraband articles. Thus, no grievance could be raised by the appellants in this regard.

13. The appellants were found travelling in a jeep at odd hours in the night and the contraband material was found.

Therefore, the question arises whether they can be held to have conscious possession of the contraband substances.

This Court dealt with this issue in *Madan Lal & Anr. v. State of Himachal Pradesh* AIR 2003 SC 3642, observing that Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences and penalties for possession of such articles. Undoubtedly, in order to bring home the charge of illicit possession, there must be conscious possession. The expression 'possession' has been held to be a polymorphous term having different meanings in contextually different backgrounds. Therefore, its definition cannot be put in a straitjacket formula. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be actual physical possession and may be constructive i.e. having power and control over the article in case in question, while the person to whom physical possession is given holds it subject to that power or control. The Court further held as under:

*"**Once possession is established the person who claims that it was not a conscious possession has to establish it**, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles….It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."* (Emphasis added)

14. From the conjoint reading of the provisions of Section 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the contraband article, he is presumed to have committed the offen nt

provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.

Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.

15. Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872 (hereinafter referred to as 'the Act 1872').

16. In *State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc.,* AIR 2000 SC 2988, this Court held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. **Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.**

(See also: *Shambhu Nath Mehra v. The State of Ajmer* AIR 1956 SC 404; *Gunwantlal v. The State of Madhya Pradesh* AIR 1972 SC 1756; *Sucha Singh v. State of Punjab* AIR 2001 SC 1436; *Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai* AIR 2003 SC 215; *Durga Prasad Gupta v. The State of Rajasthan thr. CBI,* (2003) 12 SCC 257; *Santosh Kumar Singh v. State thr. CBI,* (2010) 9 SCC 747; *Manu Sao v. State of Bihar* (2010) 12 SCC 310; *Neel Kumar alias Anil Kumar v. State of Haryana* (2012) 5 SCC 766).

17. Learned counsel for the appellants has placed much reliance upon the judgment of this Court in *State of Punjab v. Hari Singh & Ors.,* AIR 2009 SC 1966, wherein placing reliance upon the earlier judgment in *Avtar Singh & Ors. v. State of Punjab,* AIR 2002 SC 3343, it was held that if the incriminating material i.e., the issue relating to possession had not been put to the accused under Section 313 Cr.P.C. the principles of natural justice stand violated and the judgment stands vitiated.

18. So far as the judgment in *Avtar Singh* (supra) is concerned, it has been considered by this Court in *Megh Singh v. State of Punjab* AIR 2003 SC 3184. The Court held that the circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact based. In *Avtar Singh* (supra), the contraband articles were being carried in a truck. There were several persons in the truck. Some of them fled and it could not be established by evidence that anyone of them had conscious possession. While the accused was examined under Section 313 Cr.P.C. the essence of accusations was not brought to his notice, particularly with respect to the *aspect of possession*. It was also noticed that the possibility of the ac[illegible]g

labourers of the truck was not ruled out by evidence. Since the decision was rendered on special consideration of several peculiar factual aspects specially noticed in that case, it cannot be of any assistance in all the cases.

19. Therefore, it is evident that *Avtar Singh* (supra) does not lay down the law of universal application as it had been decided on its own facts.

20. So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan v. The State of Uttar Pradesh,* AIR 1956 SC 400; and *Bhoor Singh & Anr. v. State of Punjab,* AIR 1974 SC 1256 held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

21. In *Asraf Ali v. State of Assam,* (2008) 16 SCC 328, a similar view has been reiterated by this Court observing that all material circumstances appearing in the evidence against the accused are required to be put to him specifically and failure to do so amounts to serious irregularity vitiating trial, **if it is shown that the accused was prejudiced**.

22. In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra,* AIR 1973 SC 2622, a three-Judge Bench of this Court held that "basic fairness of a criminal trial may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed." However, where such an omission has occurred it does not *ipso facto* vitiate the proceedings and prejudice occasioned **by such defect, must be established by the accused.**

23. In *Paramjeet Singh @ Pamma v. State of*

Uttarakhand, AIR 2011 SC 200, after considering large number of cases on the issue, this Court held as under:-

> *"Thus, it is evident from the above that the provisions of Section 313 Cr. P.C make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same.* ***But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice.*** *In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial* ***unless it is shown that some material prejudice was caused to the accused by the omission of the court****"*
>
> (Emphasis added)

24. In the instant case the issue relating to non-compliance of the provisions of Section 313 Cr.P.C. has not been raised before the High Court, and it is raised for the first time before this Court. Learned counsel for the appellants could not point out what prejudice has been caused to them if the fact of "conscious possession" has not been put to them. Even otherwise such an issue cannot be raised in the existing facts and circumstances of the case wherein the burden was on the accused to show how the contraband material came to be found in the vehicle which was driven by one of them and the other two were travelling in that vehicle.

25. The next question for consideration does arise as to whether it is necessary to examine an independent witness and further as to whether a case can be seen with doubt where all the witnesses are from the police depart

In *Rohtash v. State of Haryana* JT 2013 (8) SC 181, this court considered the issue at length and after placing reliance upon its earlier judgments came to the conclusion that where all witnesses are from the police department, their depositions must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars should be sought. The Court held as under:

> *"Thus, a witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause, to bear such enmity against the accused, so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon."*

(See also: *Paras Ram v. State of Haryana,* AIR 1993 SC 1212; *Balbir Singh v. State,* (1996) 11 SCC 139; *Akmal Ahmad v. State of Delhi,* AIR 1999 SC 1315; *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* AIR 2003 SC 4311; and *Ravinderan @ John v. Superintendent of Customs,* AIR 2007 SC 2040).

26. In *State, Govt. of NCT of Delhi v. Sunil & Anr.* (2001) 1 SCC 652, this Court examined a similar issue in a case where no person had agreed to affix his signature on the document. The Court observed that it is an archaic notion that actions of the police officer should be viewed with initial distrust. At any rate, the court cannot begin with the presumption that police records are untrustworthy. As a proposition of law the presumption should be the other way around. The wise principle of presumption, which is also recognised by the legislature, is that judicial and official acts are regularly performed. Hence,

when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe that version to be correct if it is not otherwise shown to be unreliable. The burden is on the accused, through cross-examination of witnesses or through other materials, to show that the evidence of the police officer is unreliable. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume that police action is unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

27. In *Appabhai & Anr. v. State of Gujarat* AIR 1988 SC 696, this court dealt with the issue of non-examining the independent witnesses and held as under:

> *"The prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties."*

28. The principle of law laid down hereinabove is fully applicable to the facts of the present case. Therefore, mere non-joining of an independent witness whe e

prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants.

29. In the instant case at the time of incident some villagers had gathered there. The Investigating Officer in his cross-examination has made it clear that in spite of his best persuasion, none of them were willing to become a witness. Therefore, he could not examine any independent witness.

Section 114 of the Act 1872 gives rise to the presumption that every official act done by the police was regularly performed and such presumption requires rebuttal. The legal maxim o*mnia praesumuntur rite it dowee probetur in contrarium solenniter esse acta* i.e., all the acts are presumed to have been done rightly and regularly, applies. When acts are of official nature and went through the process of scrutiny by official persons, a presumption arises that the said acts have regularly been performed.

In view of the above, the submissions of the learned counsel for the appellants in this regard, are held to be without any substance.

30. In view of the above, the appeal does not present special features warranting any interference by this court. Appeal is devoid of any merit and is, accordingly, dismissed.

B.B.B. Appeal dismissed.

REKHA JAIN & ANR.
v.
NATIONAL INSURANCE CO. LTD.
(Civil Appeal Nos. 5373-5375 of 2013)

AUGUST 1, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Motor Vehicles Act, 1988 - 149(2) and 170(b) - Fatal accident - Claim for compensation - Claims Tribunal awarded compensation of Rs.10,62,000/- after deducting 1/3rd of the income of the deceased towards her personal expenses and by applying multiplier of 11 - Appeal by the claimant as well as the insurer - High Court reduced the compensation to Rs.8,00,000/- - Held: High Court wrongly interfered with the quantum of compensation awarded by the Tribunal - Moreover, the insurance company had no right to challenge the quantum of compensation in absence of permission from the Tribunal - Hence, judgment of Tribunal is restored.

A renowned doctor lost her life in a motor accident. The appellants (her daughter and husband respectively) filed petition claiming compensation. Claims Tribunal granted compensation at Rs.10,62,000/- with interest @ 6% P.A. taking her income as Rs. 12,000/- p.m. by deducting 1/3rd out of the monthly salary towards her personal expenses and using multiplier of 11. The claimants went in appeal seeking enhancement of compensation amount, while insurer also filed appeal. High Court reduced the compensation amount to Rs.8,00,000/-. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The Tribunal and the High Court have erred in not awarding just and reasonable compensation in

favour of the appellants keeping in view the principles laid down by this Court in various judgments in the matters of motor accidents claims keeping in view the object of compensation which will be the source of the maintenance for them particularly, in respect of the claimant, appellant no.1. The High Court instead of enhancing the compensation, though the case is made out in the appeal filed by the appellants for enhancement, has erroneously exercised its jurisdiction and has reduced the compensation from Rs.10,62,000/- to Rs.8,00,000/- without taking into consideration the facts of the case that the deceased was a renowned doctor serving in College of Homeopathy and Research, and she also had private practice and had earned good reputation in the area. [Para 11] [757-C-E]

2. It should have been taken into consideration that the employment of the deceased was a public employment. Therefore, it was a stable employment for a period of another seven years and there could have been revision of wages and promotional benefits accrued in her favour if she was alive. 30% should have been added to the monthly salary of the deceased at Rs. 12,000/-, as future prospects of income and that amount could have been taken as monthly income of the deceased for the purpose of determining the compensation towards the loss of dependency of the appellants. [Para 15] [758-E-G; 759-A]

Sarla Verma and Ors. vs. Delhi Transport Corp. and Anr. **2009 (6)SCC 121: 2009 (5) SCR 1098 - relied on.**

3. The compensation awarded by the Tribunal has been interfered with by the High Court in the Appeal filed by the Insurance Company, though it has no right to challenge the quantum of compensation as it has got limited defence as provided under Section 149(2) of the

Motor Vehicles Act in the absence of permission from the Tribunal to avail the defence on behalf of the insurer as required under Section 170(b) of the Act. [Para 15] [759-G-H; 760-A]

National Insurance Co. Ltd. vs. Nicolletta Rohtagi and Ors. **(2002) 7SCC 456: 2002 (2) Suppl. SCR 456 - relied on.**

4. The Tribunal in exercise of its original jurisdiction has taken Rs.12,000/- as monthly income of the deceased and has deducted 1/3rd out of the monthly salary towards her personal expenses and computed the compensation both on the loss of dependency as well as the conventional heads and has awarded Rs.10,62,000/-. The same should not have been interfered with by the High Court in exercise of its appellate jurisdiction. Thus, in view of the facts, circumstances and the finding recorded by the Tribunal, its judgment is restored. [Paras 16 and 17] [761-A-B, E]

United India Insurance Co. Ltd. and Ors. vs. Patricia Jean Mahajanand Ors. **2002 (6) SCC 281: 2002 (3) SCR 1176 - referred to.**

Case Law Reference:

2002 (3) SCR 1176	**referred to**	**Para 10**
2009 (5) SCR 1098	**relied on**	**Para 15**
2002 (2) Suppl. SCR 456	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5373-5375 of 2013.

From the Judgment & Order dated 24.02.2011 of the High Court of Orissa, Cuttack in M.A.C.A. No. 579 of 2007 and Order dated 10.3.2011 in Misc. Case No. 385 of 2011 in M.A.C.A. No. 579 of 2007 and final judgment and order dated 24.02.2011 in M.A.C.A. No. 844 of 200

Sukumar Pattjoshi, S.K. Dubey, Sibo Sankar Mishra for the Appellants.

S.L. Gupta, Ram Ashray, Shyam Gupta for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted by this Court vide order dated 02.07.2013 after condoning the delay in filing the special leave petitions.

2. These appeals are filed by the claimants namely Rekha Jain and T.A. Sebastian. They have questioned the correctness of the judgment and award and order dated 24.2.2011 passed by the High Court of Orissa, Cuttack in MACA No. 579 of 2007 and order dated 10/03/2011 in MC No. 385 of 2011 in MACA No. 579 of 2007 in the aforesaid appeal and final order dated 24.11.2011 in M.A.C.A. No.844 of 2007 urging rival facts and legal contentions.

3. The daughter and the husband of the deceased have filed these appeals seeking just and reasonable compensation on account of the death of the deceased in a motor vehicle accident, which took place on 17.08.2001. The deceased was traveling alongwith her daughter, the first appellant in her Maruti Car bearing Regn. No. OR 15 D-9005. The accident took place on account of rash and negligent driving of the offending truck bearing Regn. No. MP 23 D-0096. The deceased Dr. Grace Jain died on the spot, as she had sustained grievous injuries on account of the said accident. It is stated by the appellants that the deceased was a renowned doctor serving as a lecturer in Odisha College of Homeopathy and Research, Sambalpur and had private practice as well.

4. It is stated in the claim petition and in the evidence that the salary of the deceased was Rs.12,000/- per month. The appellants herein filed claim petition i.e. Misc.(A) Case No.118

of 2002 claiming compensation of Rs.27,00,000/- before the Second Motor Accidents Claims Tribunal, Northern Division, Sambalpur (hereinafter referred to as 'the Tribunal').

5. The owner of the truck (since deleted from the array of parties) appeared and filed identical written statement in the claim petition as that of the written statement filed in Rekha Jain's claim petition. According to him, the driver of the truck had valid driving licence and the same was insured with Respondent - National Insurance Company Limited (hereinafter referred to as the 'Insurance Company'). The owner of the offending vehicle has further stated that his driver was not negligent. A motor cyclist suddenly came in front of the truck overtaking him from its left side and hence the driver had to move to the right side in order to avoid accident with the motor cyclist. In that process the truck hit the Maruti car causing death of the deceased.

6. The respondent-Insurance Company had also filed similar written statement in both the claim petitions denying its liability on the ground that the driver of the offending truck was not negligent and that the accident occurred due to the negligence of the driver of the Maruti Car. On behalf of Rekha Jain, the first appellant herself was examined as a witness PW 3 and two other eye witnesses were examined as PW 1 and PW 2 to prove the occurrence of the accident. On the basis of documentary and oral evidence particularly eye witnesses' evidence, the finding of fact was recorded on issue Nos. 2 and 3 that the accident took place on account of rash and negligent driving of the offending truck driver and it was also answered that the claim petition filed by the appellants is maintainable. The Tribunal held that the appellant's mother died and the first appellant was grievously injured due to the accident involving offending vehicle. The Tribunal also recorded the finding of fact holding that the accident took place on account of rash and negligent driving by the driver of the offending vehicle. Consequently, issue No.4 was ans

compensation at Rs.10,62,000/- with 6% interest per annum by accepting the pleading of the appellants that the deceased was a renowned doctor practicing in Government Hospital.

7. The claim petition Misc.(A) Case No. 118/2002 was allowed with interest @ 6% per annum from the date on which the claim petition was filed and the respondents were directed by the Tribunal to deposit Rs.5,00,000/- each for both the appellants for a period of five years with quarterly interest payable to them. The Tribunal also directed the payment of balance amount and interest on the compensation in equal proportion to both the appellants in cash.

8. Aggrieved by the above said judgment and award both the Insurance Company as well as the appellants filed appeals before the High Court of Orissa, which were numbered as M.A.C.A. No. 579 of 2007 and M.A.C.A. No.844 of 2007. as the Insurance Company is aggrieved by fastening of liability and quantum of compensation and the appellants have prayed for just and reasonable compensation. The High Court after examining the appeal of the Insurance Company, found fault with the compensation awarded by the Tribunal at Rs.10,62,000/- in favour of the appellants taking monthly earnings of the deceased at Rs. 12,000/-, in the absence of material evidence produced on record regarding the proof of her monthly salary. The Tribunal calculated the compensation by deducting 1/3rd out of the monthly salary towards her personal expenses and her contribution to the appellants' family. The same is taken as Rs.8,000/- per month. Hence, her annual income was assessed at Rs.96,000/-. The age of the deceased is recorded at about 51 years. Hence, a multiplier of 11 was used for calculating the loss of dependency of the appellants and Rs.10,62,000/- was awarded by the Tribunal, which included Rs.6,000/- towards general damages. The High Court however, arrived at the conclusion and recorded the finding of fact stating that a compensation of Rs.10,62,000/- is on the higher side and hence, the same was reduced by the

High Court to Rs.8,00,000/-.

9. Aggrieved by the same, the appeal was filed by the appellants for modification of the impugned judgment for grant of just and reasonable compensation to them. It is urged that the appeal of the appellants was dismissed by the High Court without examining the case independently and appreciating the pleadings, legal evidence on record and law on the question and without following the criteria for awarding just and reasonable compensation. The correctness of the judgment, awards and order passed on 10.3.2011 in Misc. Case No.385 of 2011 modifying the order dated 24.2.2011 is challenged wherein the modification was only to the extent of the direction given by the High Court that out of the awarded amount, an amount equivalent to 60% shall be kept in fixed deposit in the name of appellants in any nationalized bank for a period of five years and the balance amount should be disbursed to the appellants.

10. However, the High Court has taken Rs.12,000/- per month as the monthly income of the deceased for the purpose of determining the compensation in favour of the appellants. It is urged that this approach of the High Court in reducing the compensation awarded by the Tribunal is erroneous in law. Further, the multiplier applied by both the Tribunal as well as the High Court is contrary to the multiplier mentioned in the schedule which is applicable for special reasons having regard to the facts and circumstances of the case placing reliance upon the judgment of this Court in the case of *United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors.*[1] The relevant paragraph of the judgment reads as under:

> **"13.** We may refer to the decision in *G.M., Kerala SRTC v. Susamma Thomas*. In this case while considering the law on the subject, it was observed in para 13 of the Report as follows: (SCC p. 183)

1. 2002 (6) SCC 281.

"The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last."

11. The Tribunal and the High Court have erred in not awarding just and reasonable compensation in favour of the appellants keeping in view the principles laid down by this Court in various judgments in the matters of motor accidents claims keeping in view the object of compensation which will be the source of the maintenance for them particularly, in respect of the claimant, appellant no.1. The High Court instead of enhancing the compensation though the case is made out in the appeal filed by the appellants for enhancement, has erroneously exercised its jurisdiction and has reduced the compensation from Rs.10,62,000/- to Rs.8,00,000/- without taking into consideration the facts of the case that the deceased was a renowned doctor serving in Odisha College of Homeopathy and Research, Sambalpur, and she also had private practice and had earned good reputation in the area.

12. The above said important aspect of the matter had been ignored both by the Tribunal as well as the High Court in not awarding just and reasonable compensation in favour of the appellants. Therefore, Mr. Sukumar Pattjoshi, the learned Senior Counsel for the appellants has sought for enhancement of compensation as claimed in the claim petition by the appellants.

13. On the other hand, Mr. S.L. Gupta, the learned counsel for the Insurance Company sought to justify the impugned judgment passed by the High Court in its appeal and the appeal filed by the appellants contending that the High Court has rightly

considered the facts and legal evidence on record and has modified the impugned judgment of the Tribunal and awarded compensation of Rs.8,00,000/- with 6% interest per annum and giving direction as contained in the impugned judgment passed in the appeal of the Insurance Company and modifying the same vide order dated 10.3.2011 in the instant appeal regarding 60% of deposit of the awarded amount including the interests. Therefore, he has prayed for dismissal of the appeals as there is no merit.

14. In view of the aforesaid rival factual and legal contentions, the following points would fall for our consideration:

1. Whether the High Court is justified in reducing the compensation from Rs.10,62,000/- to Rs.8,00,000/- with 6% interest per annum?

2. Whether the appellants are entitled for enhanced compensation?

3. What award?

15. We have perused the impugned judgment and evidence on record particularly the evidence of PW 3, the first appellant who is the daughter of deceased. It should have been taken into consideration that the employment of the deceased was a public employment. Therefore, it was a stable employment for a period of another seven years and there could have been revision of wages and promotional benefits accrued in her favour if she was alive. Therefore, for determining the annual income of the deceased, the principles laid down in *Sarla Verma & Ors. v. Delhi Transport Corp. & Anr*[2] should have been applied to the case of the appellants by taking into consideration the monthly salary of the deceased at Rs. 12,000/- to which 30% should have been added as future prospects of income as mentioned above and that much amount could have been taken as monthly income of the

2. 2009 (6) SCC 121.

deceased for the purpose of determining the compensation towards the loss of dependency of the appellants. The relevant paragraph of the case reads as under:

> **"24.** In *Susamma Thomas* this Court increased the income by nearly 100%, in *Sarla Dixit* the income was increased only by 50% and in *Abati Bezbaruah* the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

This aspect of the matter is not taken into consideration by the Tribunal while awarding compensation. Nonetheless, it has accepted the claim made by the appellants that the salary of the deceased was Rs.12,000/- per month and the multiplier 11 was applied and awarded compensation of Rs. 10,62,000/-. The same has been interfered with by the High Court in the Appeal filed by the Insurance Company though it has no right to challenge the quantum of compensation as it has got limited defence as provided under Section 149(2) of

the Motor Vehicles Act in the absence of permission from the Tribunal to avail the defence on behalf of the insurer as required under Section 170(b) of the Act. This principle has been laid down by three judge Bench decision of this Court in *National Insurance Co. Ltd. vs. Nicolletta Rohtagi & Ors.*[3] The relevant paragraphs of the judgment read as under:

> **"15.** It is relevant to note that Parliament, while enacting sub-section (2) of Section 149 only specified some of the defences which are based on conditions of the policy and, therefore, any other breach of conditions of the policy by the insured which does not find place in sub-section (2) of Section 149 cannot be taken as a defence by the insurer. If Parliament had intended to include the breach of other conditions of the policy as a defence, it could have easily provided any breach of conditions of insurance policy in sub-section (2) of Section 149. If we permit the insurer to take any other defence other than those specified in sub-section (2) of Section 149, it would mean we are adding more defences to the insurer in the statute which is neither found in the Act nor was intended to be included.
>
> **16.** For the aforesaid reasons, we are of the view that the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section 149 of the 1988 Act and not more and for that reason if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds."

16. In our considered view the Tribunal and the High Court have erred in not following the principles laid down in *Sarla Verma' case* (supra) in fixing the monthly income at Rs. 12,000/- in the absence of documentary evidence having regard to the fact that the deceased was employed as Lecturer in Odisha College of Homeopathy and Research, Sambalpur and

3. (2002) 7 SCC 456.

she also had private practice. The Tribunal in exercise of its original jurisdiction has taken Rs.12,000/- as her monthly income and has deducted 1/3rd out of the monthly salary towards her personal expenses and computed the compensation both on the loss of dependency as well as the conventional heads and has awarded Rs.10,62,000/-. The same should not have been interfered with by the High Court in exercise of its appellate jurisdiction. Hence, the impugned judgment, award and order passed in the Misc. Case no. 385/2011 in M.A.C.A No. 579/2007 is required to be interfered with. So also the order dated 10.3.2011 in Misc. Case No.385 of 2011 modifying the earlier direction issued by the High Court to deposit 60% of the awarded amount in any of the Nationalized Bank, is required to be interfered with. Accordingly, both the impugned judgment, award and orders dated 24.2.2011 and 10.03.2011 are hereby set aside by allowing the civil appeals.

17. Having regard to the facts, circumstances and the finding recorded by the Tribunal in its judgment, we restore the same in awarding compensation in favour of the appellants at Rs.10,62,000/- with interest at the rate of 6% per annum. The appeal of the appellants for enhancement is disposed of in the above terms. We further keep the order of the Tribunal dated 20.3.2007 in so far as the directions issued by it for deposit of awarded amount in M.A.C. No. 118 of 2002 are concerned.

18. The appeals are disposed of accordingly. There will be no order as to costs.

K.K.T. Appeals allowed.

STANDARD CHARTERED BANK

v.

V. NOBLE KUMAR & OTHERS

(Criminal Appeal No. 1218 of 2013)

AUGUST 22, 2013

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

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:

ss. 13(4) and 14 - Possession of secured assets - Method and manner of - Invocation of s. 14 - Without invoking provisions of s. 13(4) - And without following procedure contemplated u/r. 8 of Security Interest (Enforcement) Rules, 2002 - Permissibility - Held: It is not mandatory for the secured creditor to obtain possession on its own resorting to provision u/s. 13(4), before approaching the Magistrate u/s. 14 - The secured creditor is also not required to follow the procedure laid down u/r. 8 of 2002 Rules before invoking provisions u/s. 14 - Functioning of the Magistrate is structured by the provisions under Cr.P.C. - r.8 provides procedure to be followed when possession of the secured asset is taken without intervention of the Court - Security Interest (Enforcement) Rules, 2002 - r. 8 - Code of Criminal Procedure, 1973.

s. 17 - Appeal under - Scope and nature of - Held: A borrower is always entitled to prefer an 'appeal' under s.17 after losing possession of the property - It is immaterial whether such possession is obtained either directly u/s. 13(4) or through the Magistrate u/s. 14 - The remedy u/s. 17 is essentially like filing a suit.

The questions for consideration in the present appeals were whether the secured creditor/Bank can by pass the provisions u/s. 13(4) of Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and invoke the provisions of s.14; whether the resort to s. 14 by bypassing the provisions u/s. 13(4) would make the provisions of appeal u/s. 17 illusory, because the proceeding u/s. 14 cannot be questioned in appeal; and whether not following the procedures contemplated u/r. 8 of the Security Interest (Enforcement) Rules, 2002 before invoking provisions u/s. 14 would make the order passed u/s. 14 liable to be set aside, being contrary to the Rules.

Allowing the appeals, the Court

HELD: 1.1. In every case where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. Such action - having regard to the object and scheme of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - could be taken directly by the secured creditor u/s. 13(4) of the Act. However, visualising the possibility of resistance for such action, Parliament under section 14 also provided for seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it. [Para 23] [778-F-G, 779-A]

1.2. The scheme of sections 13 and 14 and the object of the enactment, do not warrant the High Court to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under section 13(4) and on facing resistance, he may still approach the Magistrate under section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under section 14. The

submission that such a construction would deprive the borrower of a remedy under section 17 is rooted in a misconception of the scope of section 17. [Para 29] [782-C-E]

1.3. The "appeal" under section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower. Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. By whatever manner, the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available. [Para 30] [782-F; 783-A-D]

1.4. It can be noticed from the language of the proviso to section 13(3A) and the language of section 17 that an "appeal" under section 17 [illegible]e

borrower only after losing possession of the secured asset. The employment of the words "aggrieved by…….taken by the secured creditor" in section 17(1) clearly indicates the appeal under section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of section 17, the proviso to sub-section (3A) of section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under section 17. The same principle is re-emphasised with the newly added explanation in section 17(1) which came to be inserted by Act No.30 of 2004. [Paras 31 and 32] [783-E-F; 784-A-C]

1.5. Remedy under Section 17 of the Act is essentially like filing a suit in a Civil Court though it was called an Appeal. It would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13 (4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate. [Para 39] [789-H; 790-A, C-D]

Mardia Chemials Limited vs. Union of India **(2004) 4 SCC 311: 2004 (3) SCR 982 - relied on.**

2.1. The High Court clearly erred in recording a conclusion that in the absence of the rule, the strict compliance of the provisions of section 13(4) and rule 8, even in case of possession taken by virtue of an order under section 14, assumes importance. The language of Rule 8 does not demand such a construction. On the other hand, a Magistrate whose functioning is structured by the Code of Criminal Procedure is required to act in accordance with the provisions of the said code unless

expressly ordained otherwise by any other law. It is not a case that Cr.P.C. never prescribed for the procedure to be followed by the Magistrate in a case where the Magistrate is required to take possession of property. [Paras 34 and 35] [785-F-H; 786-A]

2.2. There is also no justification for the conclusion that the receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by secured creditor taking possession of the secured asset without the intervention of Court. Such a process was unknown prior to the Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. There is no conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court, therefore, is unsustainable. [Para 36] [788-D-F]

3. Thus, there will be three methods for the secured creditor to take possession of the secured assets:- (i) The first method would be where the secured creditor gives the requisite notice under rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor. (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under rule 8(1) is given. In that case he will take recourse to the mechanism provided under section 14 of the Act viz. making application to the Magistrate and (iii) The third situation will be one where the secured creditor approaches the Magistrate conce

section 14 of the Act. In any of the three situations, after the possession is handed over to the secured creditor, the subsequent specified provisions of rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply. [Paras 37 and 38] [788-G-H; 789-A-F]

4.1. In the present case, a notice under section 13(2) was served on the respondent for which the respondent did not choose to respond. Therefore, there was no occasion for the appellant to consider the objections as there was none of the respondent against the demand made in the said notice. Even while making application under section 14, the appellant filed an affidavit substantially providing for the necessary information contemplated under the newly introduced proviso to section 14 (1), though there was no statutory requirement as on the date when the application under section 14 was made in the instant case either to give such an affidavit or regarding the content of the affidavit. In view of the contents of the affidavit, that all the basic requirements necessary for granting the request of the appellant of delivery of the possession of the secured asset are asserted to have existed on the date of application. [Paras 40 and 41] [790-E-H; 791-C-D]

4.2. In view of the scope of section 17, it would normally have been open to the respondent to prefer an appeal under section 17 raising objections regarding legality of the decision of the Magistrate to deprive the respondent of the possession of the secured asset. But in view of the fact that the respondent chose to challenge the decision of the Magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution and in view of the fact that the respondent does not have any

substantive objection, it is clarified that the respondent in the instant case would not be entitled to avail the remedy under section 17 as the respondent stalled the proceedings for a period of almost 4 years. The respondent did not even choose to raise any objections to the demand issued under section 13(2) of the Act. However, it is always open to the respondent to seek restoration of his property by complying with sub-section 8 of section 13 of the Act. [Para 42] [791-E-H; 792-A]

Trade Well vs. Indian Bank **2007 CriLJ 2544 - referred to.**

Case Law Reference:

2004 (3) SCR 982	**referred to**	**Para 20**
2007 CriLJ 2544	**referred to**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1218 of 2013.

From the Judgment & Order dated 27.07.2010 of the High Court of Judicature at Madras in Writ Petition being W.P. No. 4600 of 2010.

WITH

Crl. A.No. 1217 of 2013.

Siddharth Luthra, ASG, Sanjay Jain, Sanjeev Sagar, Ruchi Jain, Mohd. Irshad Hanif, Ajay Vir Singh J., Sanjay Kapur, Anmol Chadan, Shubhra Kapur for the Appellant.

P.B. Suresh, Vipin Nair, U. Banerjee (for Temple Law Firm), Venkita Subramonium T.R., for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. Since both the appeals raise a common question of law, the same are being disposed of by this common judgment. For the sake of convenience, we shall refer to the facts in Criminal Appeal arising out of Special Leave Petition (Criminal) No.2038 of 2011.

3. This appeal arises out of judgment and order of the High Court of Judicature at Madras in Writ Petition No.4600 of 2010 dated 23rd January, 2003.

4. The first respondent is a guarantor of the borrower to loan transaction whereby the second respondent borrowed money from the appellant herein. The undisputed facts are that the first respondent created a mortgage on certain property (Land and building comprised in Re-survey No.493/2 lying within the sub-registration district of Saidapet hereinafter referred to as the "secured asset") owned by him to secure the abovementioned loan.[1]

5. On 15.11.2007, a notice under section 13(2)[2] of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") demanding the repayment of the loan amount along with interest within a period of sixty days was issued *inter alia* to the borrower as well as the guarantor (respondent nos.2 and 1 herein). The said notice also advised the respondents to comply with the demand in order to avoid

1. Section 2 (zc) - "secured asset" means the property on which security interest is created;

2. Section 13(2) - Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

further action under the Act. The first respondent neither made the payment nor raised any objection to the said demand.

6. Consequent upon the failure of the respondents to make the payments the appellant herein made an application under section 14[3] of the SARFAESI Act in the Court of Chief Judicial Magistrate, Chengalpattu requesting him to take possession of the secured asset and to handover the same to the appellant.

7. Pursuant to the abovementioned application, the Chief Judicial Magistrate, Chengalpattu by his proceeding dated 14.12.2009 appointed an Advocate commissioner to take possession of the secured asset and to handover the same to the appellant herein.

8. Challenging the legality of the proceedings dated 14.12.2009 the first respondent approached the High Court. By the judgment under appeal, the first respondent's writ petition came to be allowed by a Division Bench setting aside the order impugned therein.

9. The High Court recorded the submissions made before it as follows:

"3. The learned counsel appearing for the petitioner raised two contentions, viz.:

3. 14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and document

(i) The bank cannot bypass section 13(4) of the SARFAESI Act and invoke the provisions of section 14. He would submit, before invoking section 14, that notice under section 13(4) is necessary, otherwise the provisions of appeal under section 17 will become illusory, particularly when the proceedings under section 14 cannot be questioned by filing appeal before the Tribunal or before a Court.

(ii) In the event the procedures contemplated under Rule 8 of the Security Interest (Enforcement) Rules, 2002, are not followed before section 14 is invoked, the order passed by the Chief Judicial Magistrate would be contrary to the said Rules and consequently, the order passed under section 14 is liable to be set aside."

10. It is argued before the High Court as well as before us by the respondent that a secured creditor before invoking the authority of the Magistrate under section 14 must necessarily make an attempt to take possession of the secured asset. Only when the creditor faces resistance to such an attempt the creditor could resort to the procedure under section 14 of the Act. According to the first respondent, section 17[4] of the Act

4. 17. Right to Appeal.- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

....

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section 1 of section 17.

provides an "appeal" only against the measures taken by the creditor under section 13(4)[5] of the Act and no such appeal is available against an action taken by the Judicial Magistrate under section 14 of the Act. Therefore, permitting the creditor to invoke section 14 without first resorting to the procedure under section 13(4) would deprive the owner of the secured asset an opportunity to prefer an "appeal" to have his grievances adjudicated. It is further argued that Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "the Rules") contemplates a procedure to be followed which includes a certain mode of publicity of taking possession to be made, and therefore, even a Magistrate exercising power under section 14 of the Act is also required to follow the

5. 13(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the

procedure contemplated under Rule 8 though the Rule does not expressly say so. Failure to comply with the requirement of Rule 8 in the instant case vitiated the order of the Magistrate.

11. The abovementioned submissions found favour with the High Court.

12. The learned counsel appearing for the appellant argued before us that the Act provided for two alternative procedures for taking possession of the secured assets under sections 13(4) and 14 respectively. While section 13(4) authorises the creditor himself to take possession of the secured assets without the aid of the State's coercive power, section 14 enables the secured creditor to seek the assistance of the State's coercive power for securing the possession of the secured assets. It is submitted that it is always open to the secured creditor to choose one of the abovementioned two procedures in a given case to obtain possession of the secured asset depending upon his own assessment of the situation regarding the possibility of resistance (by the debtor or guarantor as the case may be) for taking possession of the secured assets. It is also submitted that the fact that an "appeal" under section 17 is available against the measures taken under section 13(4) and such an "appeal" is not available against the measures taken by the Magistrate under section 14 does not necessarily mean that the procedure under section 14 cannot be resorted to without first exhausting the measures contemplated under section 13(4). Lastly, it is submitted on behalf of the appellant that the High Court completely erred in recording a conclusion:

> "3. In the event the secured creditor bypassing the provision of section 13(4) and the rule 8 and files an application under section 14, a situation may arise that the advocate commissioner may straight away take possession without there being compliance of any of the provisions of section 13(4) or rule 8. When both the

> provisions are read together, we could only come to the conclusion that the legislature had not intended to create such a situation. The objection of section 14 is only to be invoked in case the secured creditor faces obstruction and not as a routine, bypassing the provisions of section 13(4).

13. On the other hand, the learned counsel appearing for the first respondent reiterated the submissions made by him before the High Court.

14. To decide the correctness of the judgment under appeal, it is essential that we examine the purpose and the scheme of the Act. One of the professed purposes sought to be achieved by the enactment as evidenced by the Objects and Reasons appended to the Bill is as follows:-

> "….Further, unlike international banks, the banks and financial institutions in India **do not have power to take possession of securities and sell them.** Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. **This has resulted in slow place of recovery of defaulting loans** and mounting levels of non-performing assets of banks and financial institutions."

15. In order to achieve the said purpose, sections 13, 14 and 15 are enacted. Only sections 13 and 14 are relevant for the present appeal. Section 13(1)[6] enables the secured creditor to enforce a security interest which such creditor has in a secured asset without intervention of the Court or Tribunal. The expression "security interest" is defined under section 2 (zf) as follows:-

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6. Section 13(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such cre… provisions of this Act.

"security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;

16. Sub-section (2) authorises the secured creditor to exercise any of the rights under sub-section (4). Sub-section (2) reads as follows:-

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

18. It can be seen from the said sub-section that for the secured creditor to take possession of the secured assets, the following conditions must be satisfied: (i) That there must be a security agreement[7] which creates the liability of the borrower to make repayment to the secured creditor of the secured debt, (ii) The secured creditor is required to demand the borrower by notice in writing to discharge the full liability within a period of 60 days from the date of the notice.

19. Sub-section (3)[8] stipulate that such notice shall give the

7. Section 2(zb) "security agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor;

8. Sub-Section (3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

details of (i) the amount payable by the borrower (ii) the interest in the secured asset intended to be enforced by the secured creditor. Sub-section (4)[9] provides for various measures which can be resorted to by the secured creditor in order to recover his debt. Such measures are (1) taking possession of the secured asset or (2) taking over the management of the business of the borrower.[10] The secured creditor is also given the right either to make a further assignment of his interest or lease out the secured assets or sell the same in order to realise

9. Section 13(4) - In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

10. Section 2(f) - "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;

his debt. Such right of the secured creditor is hedged with limitations/safeguards designed to protect interest of the borrower so that the secured creditor may not abuse his rights i.e. except to take a possession of the property and alienate the same only to the extent necessary to realise the actual amount due to him. Details of which may not be necessary for the purpose of this case. We are only concerned in this case with the method and manner in which possession of the secured assets could be obtained and the conditions precedents that are required to be satisfied for taking possession of the secured assets.

20. Section 13, as originally enacted, did not contain any provision for consideration of objections (if any) the borrower may have to the demand made under sub-section (2). However, this Court in *Mardia Chemials Limited v. Union of India* [(2004) 4 SCC 311], where the constitutionality of the Act fell for the consideration of this Court, noticed that section 13(2) is a very stringent provision and opined:-

> **"77.** It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated so as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons, howsoever brief they may be, for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such

> legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery."

21. Consequent upon the said decision, Parliament introduced sub-section 3A[11] by Act 30 of 2004, which now provides for consideration of the objections, if any raised by the borrower. By definition under section 2(f) of the Act a borrower includes the guarantor of the debt.

22. Section 3A further provides that if the secured creditor reaches a conclusion that the objections raised by the borrower are not acceptable or tenable, the creditor shall communicate the reasons for non-acceptance of the objections within a period of 15 days. The proviso to the said sub-section declares that the rejection of the objections does not confer any right on the borrower to resort to the proceedings, contemplated either under section 17 or 17A. We may indicate here both sections 17 and 17A afford an opportunity to the borrower to approach the Debts Recovery Tribunal or (in the cases of Jammu & Kashmir) the concerned District Court against any measure taken under section 13(4).

23. In every case where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. In our opinion, such action – having regard to the object and scheme of the Act – could be taken directly by the secured creditor. However, visualising the possibility of resistance for such action, Parliament under section 14 also provided for

11. Section 3A - (3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it.

24. Under the scheme of section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of section 14 originally enacted purportedly obliged the Magistrate receiving a request under section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter.

25. However, the Bombay High Court in the case of *Trade Well v. Indian Bank* [2007 CriLJ 2544] opined;

> "2 …CMM/DM acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd party.
>
> 3. He has to only verify from the bank or financial institution whether notice under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. **There is no adjudication of any kind at this stage.**
>
> 4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14."

The said judgment was followed by the Madras High Court in the case of *Indian Overseas Bank v. M/s. Sri Aravindh Steels Ltd.* [AIR 2009 Mad. 10]. Subsequently, Parliament

inserted a proviso to section 14(1)[12] and also sub-section 1A[13] by Act 1 of 2013.

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12. 14(1) …….. x x x x

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) Affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) The objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) The borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 red with section 14 of the principal Act;

(ix) That the provisions of this Act and the rules made thereunder had been complied with:

Provided further on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

13. 14 (1A). The District Magistrate or the Chief M authorise any officer subordinate to him,-

26. We must make it clear that these provisions were not in existence on the date of the order impugned in the instant proceedings. These amendments are made to provide safeguards to the interest of borrower. These provisions stipulate that a secured creditor who is seeking the intervention of the Magistrate under section 14 is required to file an affidavit furnishing the information contemplated under various sub-clauses (i) to (ix) of the proviso and obligates the Magistrate to pass suitable orders regarding taking of the possession of the secured assets only after being satisfied with the contents of the affidavits.

27. An analysis of the 9 sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that **(i)** there was a loan transaction under which a borrower is liable to repay the loan amount with interest, **(ii)** there is a security interest created in a secured asset belonging to the borrower, **(iii)** that the borrower committed default in the repayment, **(iv)** that a notice contemplated under section 13(2) was in fact issued, **(v)** in spite of such a notice, the borrower did not make the repayment, **(vi)** the objections of the borrower had in fact been considered and rejected, **(vii)** the reasons for such rejection had been communicated to the borrower etc.

28. The satisfaction of the Magistrate contemplated under the second proviso to section 14(1) necessarily requires the

(i) to take possession of such assets and documents relating thereof; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

29. It is in the above-mentioned background of the legal frame of sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under section 13(4) and on facing resistance, he may still approach the Magistrate under section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under section 14. The submission that such a construction would deprive the borrower of a remedy under section 17 is rooted in a misconception of the scope of section 17.

30. The "appeal" under section 17[14] is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than

14. 17. **Right to Appeal.-** (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than th

taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower. Therefore, the borrower is always entitled to prefer an "appeal"[15] under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available.

31. It can be noticed from the language of the proviso to section 13(3A) and the language of section 17 that an "appeal" under section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words "aggrieved by…….**taken by the** secured creditor" in section 17(1) clearly indicates the appeal under section 17 is

15. *Mardia Chemials Limited v. Union of India* [(2004) 4 SCC 311], The expression appeal as originally existed in Section 17 is substituted by the word representation in view of the judgment of this Court in Mardia Chemicals Case.

We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case.

available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of section 17, the proviso[16] to sub-section (3A) of section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the **likely action** of the secured creditor shall not confer any right under section 17.

32. The same principle is re-emphasised with the newly added explanation in section 17(1) which came to be inserted by Act No.30 of 2004:

> "Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section 1 of section 17."

33. The High Court opined that Rule 8[17] of the Security Interest (Enforcement) Rules, 2002 provides for certain (i) procedure to be followed by the secured creditor taking

16. Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

17. Rule 8. Sale of immovable secured assets.-(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality by the authorised officer.

possession of the secured asset. The High Court opined that even in a case where procedure contemplated under section 14 is resorted to for obtaining possession of the secured assets, compliance with Rule 8 is mandatory. Such a requirement according to the High Court arises because in view of the High Court:

> "The object of Section 14 is only to be invoked in case the secured creditor faces obstruction and not as a routine bypassing the provisions of Section 13(4)."

Under Rule 8, the secured creditor is required to deliver to the borrower a notice prepared as nearly as possible in Appendix IV to the Rules and by affixing such notice to the property. Further sub-rule (2) which came to be substituted in 2007 in original provides that the notice contemplated under sub-rule (1) is required to be published in two leading newspapers having sufficient circulation in the locality of which at least one should be in vernacular language. Prior to 2007 the requirement of publication in vernacular newspaper was not there.

34. The High Court recognized that the language of Rule 8 does not expressly warrant the compliance with the procedure contemplated therein when section 14 is resorted to for obtaining possession of the secured asset:

> "In the absence of the rule, the strict compliance of the provisions of section 13(4) and rule 8, even in case of possession taken by virtue of an order under section 14, assumes importance."

35. We are of the opinion that the High Court clearly erred in recording such a conclusion. The language of Rule 8 does not demand such a construction. On the other hand, a Magistrate whose functioning is structured by the Code of Criminal Procedure is required to act in accordance with the provisions of the said code unless expressly ordained otherwise by any other law. It is not a case that Cr.P.C. never

prescribed for the procedure to be followed by the Magistrate in a case where the Magistrate is required to take possession of property. For example, under section 83[18] of the Code, a

18. 83. Attachment of property of person absconding.- (1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise that the person in relation to whom the proclamation is to be issued, -

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; on

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases-

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent on delivery of property to

the proclaimed person or to any one on his behalf

(d) by all or any two of such methods, as the Co

criminal Court is authorized to attach the movable or immovable property or both belonging to a proclaimed offender. Sub-sections (3) and (4) to section 83 specifically provide that once an order of attachment under sub-section (1) is made by the criminal Court, the property which is the subject matter of such attachment shall either be seized or taken possession of as the case may be depending upon the fact whether the property is movable or immovable. Both the sub-sections contemplate the appointment of receiver. It is declared under sub-section (6) that the powers, duties and liabilities of a receiver appointed under section 83 are the same as those of a receiver appointed under the Code of Civil Procedure, 1908. Order XL of the Code of Civil Procedure deals with the appointment of the receiver. Rule 1 authorizes the Court to appoint a receiver:

> "1. Appointment of Receivers.—(1) Where it appears to the Court to be just and convenient, the Court may by order—
>
> (a) appoint a receiver of any property, whether before or after decree;
>
> (b) remove any person from the possession or custody of the property;
>
> (c) commit the same to the possession, custody or management of the receiver, and
>
> (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.
>
> (2) Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure, 1908(5 of 1908).

It can also be noticed from Rule (1) that the power of the Civil Court to appoint a receiver could be exercised either before or after passing of the decree.

36. Therefore, there is no justification for the conclusion that the receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by secured creditor taking possession of the secured asset without the intervention of Court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

37. Thus, there will be three methods for the secured creditor to take possession of the secured assets:-

(i) The first method would be where the secured creditor gives the requisite notice under rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under rule 8(2) onwards to take possession and thereafter

for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

(ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under rule 8(1) is given. In that case he will take recourse to the mechanism provided under section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinize the application as provided in section 14, and then if satisfied, appoint an officer subordinate to him as provided under section 14 (1)(A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

(iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under clause (ii) above.

38. In any of the three situations, after the possession is handed over to the secured creditor, the subsequent specified provisions of rule 8 concerning the preservation, valuation and sale of the secured assets,, and other subsequent rules from the Security Interest (Enforcement) rules, 2002, shall apply.

39. In this connection, it is material to refer to the judgment in *Mardia Chemicals (supra)* wherein the Court was concerned with the legality and validity of the SARFAESI Act. The Court held the Act to be valid except Section 17(2) thereof as it then stood. In paragraphs 59, 62 and 76 of the judgment the Court in terms held that in remedy under Section 17 of the Act was essentially like filing a suit in a Civil Court though it was called

an Appeal. It is also relevant to note that in the ultimate conclusions in paragraph 80 of the judgment this Court held in sub-para 2 thereof as follows:-

> "2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal."

The grievance of the respondent that it will be left with no remedy is, therefore, misplaced. As held by a bench of three Judges in *Mardia Chemicals (supra)*, it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13 (4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate.

40. Coming to the facts of this case, a notice under section 13(2) was in fact served on the respondent for which the respondent did not choose to respond. Therefore, there was no occasion for the appellant to consider the objections **as there was none** of the respondent against the demand made in the said notice. It is brought to our notice that even while making application under section 14 the appellant filed an affidavit substantially providing for the necessary information contemplated under the newly introduced proviso to section 14 (1). We have already noticed that there was no statutory requirement as on the date when the application under section 14 was made in the instant case either to give such an affidavit or regarding the content of the affidavit. Nonetheless the appellant chose to give such an affidavit. A copy of which is placed before us. We have perused the affidavit and it substantially complies with the conditions stipulated in the newly

introduced proviso. May be the appellant did it by way of abundant caution to avoid any litigation.

41. However, the respondent submitted before us that there is nothing in the impugned order of the Magistrate which indicates that the Magistrate applied his mind to such an affidavit and satisfied that it is necessary to deliver possession of the secured asset to the appellant. No doubt that there is no material on record to show that the Magistrate applied his mind to the facts stated in the affidavit filed by the appellant. On the date of the impugned order the law did not oblige the Magistrate to undertake any such exercise. Apart from that we are satisfied on examination of the content of the affidavit that all the basic requirements necessary for granting the request of the appellant of delivery of the possession of the secured asset are asserted to have existed on the date of application. Therefore, we do not see any illegality in the impugned order. The appeal is allowed. The order of the High Court is set aside.

42. In view of our conclusion on the scope of section 17 recorded earlier it would normally have been open to the respondent to prefer an appeal under section 17 raising objections regarding legality of the decision of the Magistrate to deprive the respondent of the possession of the secured asset. But in view of the fact that the respondent chose to challenge the decision of the magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution and in view of the fact that the respondent does not have any substantive objection as can be discerned from the record, we make it clear that the respondent in the instant case would not be entitled to avail the remedy under section 17 as the respondent stalled the proceedings for a period of almost 4 years. It is worthwhile remembering that the respondent did not even choose to raise any objections to the demand issued under section 13(2) of the Act. However, we make it clear that it is always open to the respondent to seek restoration

of his property by complying with sub-section 8 of section 13 of the Act.

Criminal Appeal arising out of SLP (Crl) No. 6560 of 2011

43. The first respondent in this appeal is the borrower in a transaction to which V. Noble Kumar, the first respondent in Criminal Appeal arising out of SLP(Crl) No. 2038 of 2011 was the surety. The issue in the appeal is identical. Therefore, for the reasons stated above, this appeal is also allowed.

K.K.T. Appeals allowed.

KISHAN GOPAL & ANR.

v.

LALA & ORS.

(Civil Appeal No. 7137 of 2013)

AUGUST 26, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Motor Vehicles Act, 1988 - ss. 140, 166 and 163A - Fatal accident - Claim for compensation - By the parents of the deceased (a 10 year old boy) - Courts below denied compensation - On appeal, held: The claimants are entitled to award of just and reasonable compensation - Compensation of Rs. 5 lakhs awarded with interest at the rate of 9% p.a. from the date of filing of claim petition.

Appellants' 10 years old son died in an accident, while he was travelling in a trolley of a tractor, driven by respondent No.1. Criminal proceedings were initiated in this regard against the driver and the owner (respondent No.2) of the offending vehicle. The appellants filed claim petition u/s. 140 r/w. s.166 of the Motor Vehicles Act, 1988, claiming compensation of Rs.15,63,000/-. In the claims proceedings, the driver and owner of the offending vehicle were placed ex-parte, while the insurance company (respondent No.3) contested the petition. Claims Tribunal held that the appellants did not succeed in proving that the deceased boy died because of falling from the tractor-trolley driven rashly and negligently by the driver and hence the appellants were not entitled to any compensation. High Court concurred with the order of the Tribunal and dismissed the appeal. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The Tribunal should have considered both oral and documentary evidence and appreciated the same in the proper perspective and recorded the finding on the contentious issues in the affirmative. But it has recorded the finding in the negative on the issues by adverting to certain statements of evidence of AW-1 and referring to certain alleged discrepancies in the FIR without appreciating entire evidence of AW-1 and AW-2 on record properly and also not assigned valid reasons in not accepting their testimony. The registration of FIR and filing of the charge-sheet against the driver and owner of the offending vehicle are not in dispute, therefore, the Tribunal had no option but to accept the entire evidence on record and to record the finding on the contentious issues in favour of the appellants. [Para 16] [806-G-H; 807-A-B, C-D]

1.2. Though the High Court has got power to re-appreciate the pleadings and evidence on record, it has declined to do so and mechanically endorsed the findings of fact on contentious issues after referring to certain stray sentences from the evidence of AW-1 and the FIR and it has erroneously held that there is a contradiction between the FIR, the claim petition and the evidence of the appellants. The approach of the High Court to the claim of the appellants is very casual as it did not advert to the oral and documentary evidence placed on record on behalf of the appellants, particularly, in the absence of rebuttal evidence adduced by the Insurance Company, hence the same is liable to be set aside. [Para 17] [808-D-G]

1.3. The appellants are entitled to award of just and reasonable compensation, as they have lost their affectionate 10 year old son. The deceased was assisting the appellants in their agricultural occupation which is an undisputed fact. Had th[illegible]n

alive, would have contributed substantially to the family of the appellants by working hard. Therefore, it would be just and reasonable to take his notional income at Rs.30,000/- and further taking the young age of the parents, namely the mother who was about 36 years old, at the time of accident, the multiplier of 15 can be applied to the multiplicand. Thus, 30,000 x 15 = 4,50,000 and 50,000/- under conventional heads towards loss of love and affection, funeral expenses, last rites. Thus, the said amount would be fair, just and reasonable compensation to be awarded in favour of the appellants. The said amount will carry interest at the rate of 9% p.a., for the reason that the Insurance Company has been contesting the claim of the appellants from 1992-2013 without settling their legitimate claim for nearly about 21 years. If the Insurance Company had awarded and paid just and reasonable compensation to the appellants, the same could have been either invested or kept in the fixed deposit, then the amount could have earned five times more than what is awarded in this appeal. Therefore, awarding 9% interest on the compensation awarded in favour of the appellants is legally justified. The awarded amount of Rs.5,00,000/- with interest at the rate of 9% per annum should be paid to the appellants from the date of filing of the application till the date of payment. [Paras 18 and 19] [809-D; 810-G; 811-A-C, D-G; 812-B]

Lata Wadhwa and Ors. vs. State of Bihar and Ors. **(2001) 8 SCC 197: 2001 (1) Suppl. SCR 578;** *Sarla Verma vs. Delhi Transport Corporation* **(2009) 6 SCC 121: 2009 (5) SCR 1098;** *Kerala SRTC vs. Susamma Thomas* **(1994) 2 SCC 176;** *Municipal Council of Delhi vs. Association of Victims of Uphaar Tragedy* **(2011) 14 SCC 481: 2011 (16) SCR 1 - relied on.**

National Insurance Co.Ltd. vs. Baljit Kaur **(2004) 2 SCC 1: 2004 (1) SCR 274 - referred to.**

2. The counter affidavit of the driver-respondent No.1 filed in the proceedings, cannot be relied upon by this Court at this stage as he did not choose to appear before the Tribunal, though he had filed statement of counter and neither he nor the Insurance Company adduced rebuttal evidence by obtaining permission from the Tribunal under Section 170(b) of the Act to avail the defence of the insured respondent No.2, as the Insurance Company has limited defence as provided under Section 149(2) of the Act. But on the other hand, the driver would support the case of the appellants. [Para 16] [808-A-C]

National Insurance Company vs. Nicolletta Rohtagi **2002 (7) SCC 456: 2002 (2) Suppl. SCR 456 - relied on.**

Case Law Reference:

2004 (1) SCR 274	**referred to**	**Para 11**
2002 (2) Suppl. SCR 456	**relied on**	**Para15**
2001 (1) Suppl. SCR 578	**relied on**	**Para 18**
2009 (5) SCR 1098	**relied on**	**Para 18**
(1994) 2 SCC 176	**relied on**	**Para 18**
2011 (16) SCR 1	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7137 of 2013.

From the Judgment & Order dated 15.03.2011 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in S.B. Civil Misc. Appeal No. 1283 of 2000.

Praveen Kumar Jain (for Rameshwar Prasad Goyal) for the Appellants.

The Judgment of the Court was delivered by

V.GOPALA GOWDA, J. 1. This appeal has been filed by the appellants questioning the correctness of the judgment dated 15th March, 2011 passed in SBCMA No.1283 of 2000 by the High Court of Judicature at Rajasthan, Jaipur Bench, affirming the judgment and award dated 25.5.2000 of the Motor Accident Claims Tribunal, Tonk (for short 'the Tribunal') in MAC case No.7/93, urging various relevant facts and legal contentions in support of their claim made in this appeal.

2. Necessary relevant facts are stated hereunder to appreciate the case of the appellants and also to find out whether the appellants are entitled for the reliefs as prayed in this appeal.

The appellants are the parents of the deceased Tikaram, who died in a road accident on 19.07.1992 on account of rash and negligent driving of the motor vehicle tractor bearing registration No. RJX 5532 by the driver, as he was traveling in the trolley which was turned upside down and he fell down from the trolley and sustained grievous injuries and succumbed to the same. The FIR was registered with the Police Station Uniara, Tonk being case No.121/92. After investigation in the case, charge-sheet No.81/92 (Ex.2) was filed on 30.07.1992 against the first respondent, the driver of the offending vehicle and its owner the respondent No.2. A site map (Ex.3) was drawn up, post-mortem of the deceased was conducted and post-mortem Report was marked as Ex.7. The claimants, being the appellants-parents, who have lost their son at the age of 10 years in the motor vehicle accident and the vehicle was insured with respondent No.3 - the Insurance Company, preferred claim petition under Section 140 read with Section 166 of the Motor Vehicles Act, 1988 (in short the 'M.V. Act') claiming compensation for Rs.15,63,000/- under the headings of loss of dependency, mental agony, loss of love and affection, expenses incurred for carrying dead body and performing last rites of the deceased son as per Hindu customs. Further, they have, inter alia, pleaded that the son would have earned a sum

of Rs.2000/- p.m. after the age of 18 years and he would have lived upto 70 years, therefore, multiplied by 52 for claiming the financial assistance that he could have rendered to the parents, the same is worked out to Rs.12,48,000/-.

3. Notices were served upon respondent Nos.1 and 2, the driver and the owner of the offending vehicle. Despite service of notice upon them they did not choose to appear and contest the proceedings and therefore, they were placed ex-parte in the claim proceedings before the Tribunal.

4. The Insurance Company appeared and filed its statement of counter denying the various averments of the claim petition and pleaded that the deceased son of the appellants was not studying and further disputed that there was possibility of earning Rs.2000/- p.m. by the deceased. It was further pleaded that in the FIR, it is mentioned that deceased boy was going in the tractor-trolley, fell down from it on account of rash and negligent driving of the offending vehicle by the first respondent, the deceased son sustained grievous injuries and succumbed to the same. It is further stated that the driver of the offending vehicle had no right to carry passenger in a tractor as it is exclusively required to be used for the agricultural operation and therefore, there is contravention of the terms and conditions of the insurance policy issued in favour of the owner of the offending vehicle. It is further stated by the Insurance Company that the trolley was not registered and the driver of the offending vehicle did not have the valid licence and hence, it is not liable to pay compensation as claimed by the appellants. On the basis of the pleadings, five issues were framed by the Tribunal for its determination.

5. On behalf of the appellants, Kishan Gopal the father of the deceased was examined as AW-1. He has deposed in his evidence narrating the manner in which the accident took place and marked the documents produced by him viz. FIR, charge-sheet, Site Map, Notice under Section

note, Mechanical Inspection, post-mortem Report, Notice under Section 133 and the Registration Certificate as Exhs. 1 to 9 respectively. AW-2, who was cultivating in the adjoining field situated near the place of accident was examined on behalf of the appellants and he has spoken about the incident and deposed that the deceased boy was going in the tractor-trolley and the first respondent-driver was driving the tractor and the trolley turned down and he fell down as the driver drove the tractor with high speed negligently and he had sustained grievous injuries and succumbed to the same. The respondent Insurance Company have not adduced the rebuttal evidence in support of its pleaded case in its counter statement. In the counter statement of the Insurance Company, it is pleaded that the claim petition filed by the appellants is a fabricated one in collusion with the driver and the owner of the offending vehicle. It is not forthcoming from the judgment of Tribunal that the Insurance Company has filed the application under Section 170(b) of the M.V. Act seeking permission from the Tribunal in the proceedings to avail the defence available for the insured of the offending vehicle to contest the proceedings on merits. As could be seen from the record, the lawyer of the Insurance Company has cross-examined the appellants' witnesses before the Tribunal.

6. The Tribunal, on appreciation of pleadings and legal evidence on record, has answered the issue No.1, after adverting to the averments of the claim petition and evidence on record, and held that the appellants have not succeeded in proving that Tikaram died because of falling from the tractor-trolley which was driven rashly and negligently by the driver. Issue No.2 was also answered holding that the appellants are not entitled for the compensation as claimed by them for the reason that the finding recorded on the issue No.1 is in the negative.

7. Aggrieved by the judgment and award of the Tribunal, the appellants filed an appeal before the High Court questioning

the correctness of the findings recorded on the contentious issue Nos.1 & 2 contending that rejection of the claim petition by it is not only erroneous in fact but also suffers from error in law. Therefore, they have approached the High Court by filing an appeal for grant of just and reasonable compensation to them setting aside the judgment and award of the Tribunal.

8. The learned Judge of the High Court has not exercised his appellate jurisdiction by reappreciating the pleadings and evidence on record and he had mechanically concurred with the findings and reasons recorded by the Tribunal on the contentious issues in its judgment and dismissed the appeal by passing a cryptic order without adverting to the pleadings, legal evidence and legal contentions urged on behalf of the parties.

9. The appellants are aggrieved by the impugned judgment and award passed by the High Court and they have filed this appeal urging various tenable grounds.

As per the Office Report dated 13th December, 2012, Notice was issued to all the respondents. M/s M.M. Kashyap and Aftab Ali Khan, Advocates have filed vakalatnama and memo of appearance on behalf of respondent Nos. 1 and 3 respectively and also filed counter affidavits on their behalf. Acknowledgement card duly signed by respondent No.2 has been received back in proof of the service of notice upon him but no one has entered appearance and filed vakalatnama or memo of appearance on his behalf, therefore, it is reported that the service of notice on him is complete.

10. This appeal was listed before this Court on 14.12.2012, when the Court was pleased to pass the following order:-

"Send for the record of award dated 25.05.2000 passed by Motor Accident Claims Tribunal, Tonk, Rajasthan in MACT Case No.7/1993

The Registry is directed to send requisition to the Presiding Officer of the Tribunal. It is expected that the Presiding Officer will remit the record of the case without any delay.

Put up after the receipt of the record."

11. This appeal was listed before the Court on 12th August, 2013. On behalf of the appellants we have heard Mr.Praveen Kumar Jain, Advocate. None appeared on behalf of the respondents and this Court granted leave. Though respondent Nos.1 & 3 have filed their counter affidavits reiterating the averments made in the counter statement filed by the Insurance Company before the Tribunal extracting certain portion from the FIR and Statements of Evidence of AW-1 – the father of the deceased and AW-2 - the brother of the deceased and placed strong reliance upon the definition of 'trailer' as defined under Section 2(46) of the M.V. Act, and that the trolley of the tractor is not registered with the registering Authority. The tractor with trolley can be used only for agricultural purposes but not for carrying passengers which would be in contravention of the provisions of the M.V. Act and terms and conditions of the policy issued covering the Motor Vehicle Tracter. Therefore, it is stated by the Insurance Company that by allowing the deceased boy to travel in the trolley of the tractor, the driver has violated the terms & conditions of the insurance policy and law and it has also placed reliance upon the decision of this Court in *National Insurance Co.Ltd. v. Baljit Kaur,*[1] in support of its defence wherein this Court has held that the passengers, who travel in the goods carriage and die in the accident are not entitled to get any compensation from the Insurance Company under the policy.

12. Respondent No.1 has filed counter affidavit, stating the following averments, the relevant paragraphs are extracted hereunder for our perusal:-

1. (2004) 2 SCC 1.

"2...That there is contradiction in statement of Kishan Gopal AW1 and Babu AW2 as Babu stated that Tikaram deceased fell down due to rash and negligent driving of tractor by Lala the Deponent herewith. Whereas Kishan Gopal stated that Tikaram fell down due to rash and negligent driving of tractor by which tractor got turned.

3. That deceased Tikaram was not studying in School and there is no possibility of earning Rs.2000/- per month.

4. That as passenger cannot travel in tractor and death was caused sitting in trolly which is not allowed. The petitioner cannot claim any compensation for the negligence of Tikaram sitting in trolly. Tractor can only be used for agricultural purposes.

5. That driver had no valid licence.

6. That learned Tribunal in its award rightly gave finding that there is contradiction in statement of Kishan Gopal AW1 and Babu AW2 as Kishan Gopal stated that his son died as his son was hit by Lala driving the tractor fast and negligently. Whereas Babu stated that Lala was driving tractor rashly and negligently because of which the tractor got turned down and in the accident Tikaram died. As per the contradictions the case was not proved by the petitioner before the Tribunal. Further, there are contradictions in the statement of witnesses and FIR.

7. That the Insurance Company did not appear to prove the fact that Lala was not having valid licence to drive tractor.

8. That Insurance Company has to prove that driver has not got valid licence. The finding to this effect given by learned Tribunal is right.

9. That petitioner is not entitled for any compensation

10. That the above special leave petition may kindly be dismissed."

13. The ground urged by the appellants in this appeal is that the High Court has erred in concurring with the finding of fact recorded by the Tribunal in its judgment on the contentious issue Nos.1 & 2. It is erroneous for the reason that the same is contrary to substantive evidence on record in favour of the appellants and no rebuttal evidence is adduced by the Insurance Company in the case to accept its defence pleas and record the finding on the contentious issue Nos.1 and 2 in its favour. Further, it is urged that both the Tribunal and the High Court have not taken into consideration the relevant indisputed fact that the criminal case is registered against respondent No.1-the driver and respondent no.2-the owner of the vehicle and the charge-sheet is filed against them. Both AW-1 and AW-2 adduced evidence before the Tribunal stating that the deceased son of the appellants was traveling in the trolley of the tractor, it was turned down on account of rash and negligent driving of the offending vehicle by respondent No.1 and he fell down from the trolley and the tractor tyre ran over the body and he sustained grievous injuries and succumbed to the same. Further, it is urged that in the absence of evidence of either the driver or the owner of the tractor and also in the absence of rebuttal evidence on behalf of the Insurance Company in support of its pleadings, the finding of fact recorded by the Tribunal stating that the accident did not take place on account of rash and negligent driving of the offending vehicle by the driver is erroneous, as it has failed to consider the evidence on record in a proper perspective in favour of the appellants. The finding recorded by the Tribunal without appreciating the entire evidence of AW-1 and AW-2 on record, by picking bits and piece of certain sentences from evidence of the witnesses and FIR Exh.1 and answered the contentious issue No.1 against the appellants which approach of it is erroneous, which finding is erroneously affirmed by the High Court, mechanically

without re-appreciating the evidence and assigning valid and cogent reasons in support of its conclusion in concurring with the Tribunal. Further, it is contended that the Tribunal has since answered the contentious issue No.1 holding that the death of Tikaram is not due to rash and negligent driving of the tractor by its driver is not proved, it has answered the contentious issue No.2 stating that the question of awarding compensation as claimed by the appellants does not arise and consequently, it has rejected the claim petition, which decision of it is not only erroneouos, but, also suffers from error in law. Therefore, the learned counsel for the appellants has requested this Court to award just and reasonable compensation in favour of the appellants by allowing this appeal.

14. On behalf of respondent Nos.1 and 3 counter affidavits have been filed but none appeared at the time of hearing. After hearing the learned counsel for the appellants, this appeal was reserved for judgment. On the basis of the factual and rival legal contentions urged on behalf of the appellants, the following points are framed for consideration of this Court:-

(I) Whether the findings of fact recorded on issue Nos.1 & 2 framed by the Tribunal, which finding is affirmed by the High Court in the impugned judgment is vitiated on account of erroneous reasoning?

(II) Whether the appellants are entitled for compensation, if so to what amount?

(III) What award?

15. The first point is required to be answered in favour of the appellants by assigning the following reasons:-

The deceased son of the appellants died in an accident, while he was traveling in a trolley of the tractor bearing No.RJX-5532 on 19.07.1992, the trolley turned down on account of rash and negligent driving of the tractor by

No.1. In this regard, the FIR was registered being FIR No.121/92 with the Uniara Police Station, Tonk. On the basis of the said FIR, the investigation was made by the Investigation Officer and charge-sheet No.81/92 was filed on 30.07.1992 against the driver and the owner of the offending vehicle for the offences punishable under Sections 279 and 304-A IPC read with certain provisions of the M.V.Act. The FIR and the charge-sheet were produced in the evidence of the first appellant-the father of the deceased, who was examined as AW-1. He has also produced and marked the site map (Ex.3), action taken under Section 174 (Ex.4), Insurance cover note Ex.5, Mechanical inspection Ex.6 and post-mortem report Ex.7 as exhibits in the evidence to substantiate the case of the appellants to show that accident took place on account of rash and negligent driving of driver of the tractor. AW-2 - Babu s/o Kishan Gopal, r/o Bhat-Ka Nada, Tehsil Uniara, Dist. Tonk, who is an agriculturist by occupation, is examined on behalf of the appellants, who has deposed before the Tribunal and he has stated that the deceased Tikaram was traveling in the trolley of the tractor, which was driven by the first respondent in a high speed, rashly and negligently on account of which the vehicle got turned down and the tyre of tractor ran over Tikaram on account of which, he sustained grievous injuries and succumbed to the same. The following evidence is elicited from AW-2 in his cross-examination by the lawyer of the Insurance Company to the following effect;

> "that at the time of accident he was carrying paddy and he was one field away from the place of accident and he reached there by running. Before him, several other persons also reached the site of the accident and he was examined by the Investigating Officer and the same is accepted as true after understanding the same".

AW-1, the father of the deceased boy has also spoken about the manner in which accident took place and his son Tikaram died and had produced the documentary evidence

referred to supra in justification of the case pleaded by the appellants. In his evidence, he has stated that Tikaram was sitting in the trolley of the tractor and the tractor was driven by its driver rashly and negligently on account of which the trolley turned down and his son sustained grievous injuries and died. The suggestion put to AW-1 in his cross-examination by the lawyer of the Insurance Company to the following effect

> "this is correct that when accident took place I was at home. It is the incident of 5 p.m. when my son had gone to graze cattle. My son was made to sit in the trolley by the tractor wala."

The lawyer of the Insurance Company has not challenged the evidence of AW-2 that the deceased was traveling in the trolley of the tractor and accident took place on account of rash and negligent driving of the driver. Therefore, the fact of accident that took place on 19.07.1992 at 5.00 p.m. is not challenged by the lawyer of the Insurance Company at all. Apart from the said fact, no rebuttal evidence adduced by the Insurance Company before the Tribunal in the claim proceedings. It has also not obtained permission from the Tribunal under Section 170(b) of the M.V. Act to contest the case on the defence of the insured as the driver and the insured both remained ex-parte in the proceedings before the Tribunal and therefore, it could not have contested the case on merits as held by this Court in the case of *National Insurance Company vs. Nicolletta Rohtagi* reported in 2002(7) SCC 456. It is also not clear in the counter statement filed by the Insurance Company before the Tribunal that the claim petition was filed by the appellants on account of collusion between them and respondent Nos.1 and 2, the driver and the owner of the vehicle respectively.

16. In view of the aforesaid facts, the Tribunal should have considered both oral and documentary evidence referred to supra and appreciated the same in the proper perspective and recorded the finding on the contentious issue No. 1 & 2 in the affirmative. But it has recorded the find n

the above issues by adverting to certain statements of evidence of AW-1 and referring to certain alleged discrepancies in the FIR without appreciating entire evidence of AW-1 and AW-2 on record properly and also not assigned valid reasons in not accepting their testimony. The Tribunal should have taken into consideration the pleadings of the parties and legal evidence on record in its entirety and held that the accident took place on 19.07.1992, due to which Tikaram sustained grievous injuries and succumbed to the same and the case was registered by the Uniara Police Station under Sections 279 and 304-A, IPC read with Sections 133 and 181 of the M.V. Act against the first and second respondents. The registration of FIR and filing of the charge-sheet against respondent Nos.1 & 2 are not in dispute, therefore, the Tribunal should have no option but to accept the entire evidence on record and recorded the finding on the contentious issue Nos.1 and 2 in favour of the appellants. Further, it should have held that the deceased son died in the tractor accident, driven by first respondent rashly and negligently, but it has answered the above contentious issue Nos. 1 & 2 in the negative and therefore, we have to set aside the said erroneous findings as the Tribunal has failed to appreciate the entire evidence both oral and documentary properly to answer the issue Nos.1 & 2 in the affirmative. From the perusal of the evidence elicited in the cross-examination of AW-1 – the father and AW-2 who reached the spot immediately after the accident, he had seen the accident and narrated that the deceased boy had sustained grievous injuries in the accident and succumbed to the same. The evidence on record proved that the deceased sustained grievous injuries in the accident on account of which he died. The Insurance Company by cross-examining the witness No. AW-2 has categorically admitted the accident, as its counsel had put the suggestion to him the relevant portion of which is extracted above, which portion of evidence clearly go to show that in the accident the deceased died, but the Tribunal has failed to appreciate the evidence of AW-2 and also the documentary

evidence referred to supra, while recording the finding of fact on the contentious issue No.1. The counter affidavit of respondent No.1 filed in these proceedings cannot be relied upon by this Court at this stage as he did not choose to appear before the Tribunal, though he had filed statement of counter and neither he nor the Insurance Company adduced rebuttal evidence by obtaining permission from the Tribunal under Section 170(b) of M.V. Act to avail the defence of the insured respondent No.2, as the Insurance Company has limited defence as provided under Section 149(2) of the M.V. Act. But on the other hand, by reading the averments from the paragraphs extracted from the affidavit of respondent No.1, the driver would support the case of the appellants.

17. In our considered view, the Tribunal has ignored certain relevant facts and evidence on record while considering the case of the appellants. The High Court though it has got power to re-appreciate the pleadings and evidence on record, has declined to do so and mechanically endorsed the findings of fact on contentious issue Nos.1 & 2 after referring to certain stray sentences from the evidence of AW-1 and the FIR and it has erroneously held that there is a contradiction between the FIR, the claim petition and the evidence of the appellants. It has concurred with the finding of fact recorded on the contentious issues and accepted dismissal of the petition. The concurrent findings of fact are erroneous and invalid and therefore, the same call for our interference in this appeal. The approach of the High Court to the claim of the appellants is very casual as it did not advert to the oral and documentary evidence placed on record on behalf of the appellants, particularly, in the absence of rebuttal evidence adduced by the Insurance Company, hence the same is liable to set aside and accordingly we set aside the same.

18. Point Nos.2 and 3 are answered together in favour of the appellants for the following reasons:

The Tribunal having answered the contentious issue No.1, against the appellants in its judgment the same is concurred with by the High Court by assigning erroneous reasons and it has affirmed dismissal of the claim petition of the appellants holding that the accident did not take place on account of the rash and negligent driving of the offending vehicle by the first respondent and therefore the contentious issue Nos.1 and 2 are answered in the negative against the appellants and it has not awarded compensation in favour of the appellants.

Since we have set aside the findings and reasons recorded by both the Tribunal and the High Court on the contentious issue Nos.1 & 2 by recording our reasons in the preceding paragraphs of this judgment and we have answered the point in favour of the appellants and also examined the claim of the appellants to award just and reasonable compensation in favour of the appellants as they have lost their affectionate 10 year old son. For this purpose, it would be necessary for us to refer to Second Schedule under Section 163-A of the M.V. Act, at clause No.6 which refers to notional income for compensation to those persons who had no income prior to accident. The relevant portion of clause No.6 states as under:

> "6. Notional income for compensation to those who had no income prior to accident:
>
> .....
>
> (a) Non-earning persons – Rs.15,000/- p.a."

The aforesaid clause of the Second Schedule to Section 163-A of the M.V. Act, is considered by this Court in the case of *Lata Wadhwa & Ors. v. State of Bihar & Ors.,*[2] while examining the tortuous liability of the tort-feasor has examined the criteria for awarding compensation for death of children in

2. (2001) 8 SCC 197.

accident between age group of 10 to 15 years and held in the above case that the compensation shall be awarded taking the contribution of the children to the family at Rs.12,000/- p.a. and multiplier 11 has been applied taking the age of the father and then under the conventional heads the compensation of Rs.25,000/- was awarded. Thus, a total sum of Rs.1,57,000/- was awarded in that case. After noting the submission made on behalf of TISCO in the said case that the compensation determined for the children of all age groups could be double as in its view the determination made was grossly inadequate and the observation was further made that loss of children is irrecoupable and no amount of money could compensate the parents. Having regard to the environment from which the children referred to in that case were brought up, their parents being reasonably well-placed officials of TISCO, it was directed that the compensation amount for the children between the age group of 5 to 10 years should be three times. In other words, it should be Rs.1.5 lakhs to which under the conventional heads a sum of Rs.50,000/- should be added and thus total amount in each case would be Rs.2 lakhs. Further, in the case referred to supra it has observed that in so far as the children of age group between 10 to 15 years are concerned, they are all students of Class VI to Class X and are children of employees of TISCO and one of the children was employed in the Company in the said case having regard to the fact the contribution of the deceased child was taken Rs.12,000/- p.a. appears to be on the lower side and held that the contribution of such children should be Rs.24,000/- p.a. In our considered view, the aforesaid legal principle laid down in *Lata Wadhwa's* case with all fours is applicable to the facts and circumstances of the case in hand having regard to the fact that the deceased was 10 years' old, who was assisting the appellants in their agricultural occupation which is an undisputed fact. We have also considered the fact that the rupee value has come down drastically from the year 1994, when the notional income of the non-earning member prior to the date o at

Rs.15,000/-. Further, the deceased boy, had he been alive would have certainly contributed substantially to the family of the appellants by working hard. In view of the aforesaid reasons, it would be just and reasonable for us to take his notional income at Rs.30,000/- and further taking the young age of the parents, namely the mother who was about 36 years old, at the time of accident, by applying the legal principles laid down in the case of *Sarla Verma v. Delhi Transport Corporation,*[3] the multiplier of 15 can be applied to the multiplicand. Thus, 30,000 x 15 = 4,50,000 and 50,000/- under conventional heads towards loss of love and affection, funeral expenses, last rites as held in *Kerala SRTC v. Susamma Thomas,*[4] which is referred to in *Lata Wadhwa's* case and the said amount under the conventional heads is awarded even in relation to the death of children between 10 to 15 years old. In this case also we award Rs.50,000/- under conventional heads. In our view, for the aforesaid reasons the said amount would be fair, just and reasonable compensation to be awarded in favour of the appellants. The said amount will carry interest at the rate of 9% p.a. by applying the law laid down in the case of *Municipal Council of Delhi v. Association of Victims of Uphaar Tragedy,*[5] for the reason that the Insurance Company has been contesting the claim of the appellants from 1992-2013 without settling their legitimate claim for nearly about 21 years, if the Insurance Company had awarded and paid just and reasonable compensation to the appellants the same could have been either invested or kept in the fixed deposit, then the amount could have earned five times more than what is awarded today in this appeal. Therefore, awarding 9% interest on the compensation awarded in favour of the appellants is legally justified.

19. Accordingly, we pass the following order:

3. (2009) 6 SCC 121.
4. (1994) 2 SCC 176.
5. (2011) 14 SCC 481.

(I) The appeal is allowed and the impugned judgments and awards of both the Tribunal and High Court are set aside.

(II) The awarded amount of Rs.5,00,000/- with interest at the rate of 9% per annum should be paid to the appellants from the date of filing of the application till the date of payment.

(III) We direct the Insurance Company to issue the demand draft drawn on any Nationalized Bank by apportioning the compensation amount equally with proportionate interest and send it to the appellants within six weeks from the date of receipt of a copy of this judgment.

K.K.T. Appeal allowed.

ADVOCATES ASSOCIATION, BANGALORE
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 7159 of 2013)

AUGUST 27, 2013

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

Constitution of India, 1950 - Article 136 - CBI investigation - Entrusting of -Prayer for - Tenability - Scuffle between advocates, police and media persons and simultaneous violence in the City Civil Court Complex - Lathi charge by police - Several persons injured - Number of vehicles also damaged and destroyed due to stone pelting and arson - Over 191 cases registered - Writ petitions before High Court - Special Investigation Team (SIT) constituted by High Court to investigate into the incident - Direction of Supreme Court modifying the composition of SIT - Inspite of the modified order of Supreme Court, investigation did not commence due to non-formation of SIT - Held: Principles laid down in a Constitution Bench decision of Supreme Court in regard to entrusting of investigation to CBI, and the series of incidents in the instant case, make it clear that CBI inquiry is necessitated in the matter in issue - CBI directed to carry out the investigation and submit a report before the appropriate Court within six months - State/SIT to immediately hand over all the records pertaining to the investigation to the CBI.

On 02.03.2012, when a former Minister in the Government of Karnataka was sought to be produced by the CBI, Bangalore Branch, in the City Civil Court Complex, a large crowd gathered in the court premises which caused a great deal of inconvenience, as a result of which, scuffle ensued between advocates, police and

media persons and simultaneously violence broke out and the police resorted to lathi charge in which several persons got injured. A number of vehicles were also damaged and destroyed due to stone pelting and arson. Over 191 cases were registered in regard to the above said incident against the police, advocates, media persons, public etc. under various categories in various police stations of the City.

Several writ petitions came to be filed before the High Court seeking various reliefs inter alia including direction to the State Government to entrust the investigation of the incident to the CBI. Vide order dated 16-5-2012, the High Court constituted a Special Investigation Team (SIT) to investigate into the incident and to conclude the same within 3 months from the date of the Government Notification.

It is the grievance of the appellant-Association before this Court that inspite of the said order of the High Court dated 16-5-2012 and subsequent direction of this Court dated 19-10-2012 modifying the composition of SIT, investigation had still not commenced even after a lapse of one year and five months from the date of the incident. It was submitted that it was a fit case which the Central Bureau of Investigation (CBI) should investigate and an outer limit ought to be fixed for the same.

Allowing the appeal and accordingly disposing off the connected I.A., the Court

HELD: 1. It is unfortunate that even after the order of this Court dated 19.10.2012 nothing has happened. The constitution of the so-called SIT has not completed till date. Inspite of the modified order of this Court, the investigation is yet to commence due to non-formation of SIT. [Para 10] [822-B, C]

2.1. As regards entrusting the investigation to the CBI, a Constitution Bench of this Court in Committee for Protection of Democratic Rights, West Bengal has laid down certain principles. It was held therein that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. It was further held that insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations. [Para 11] [822-D-G; 823-B-E]

2.2. Keeping the above principles in mind, considering the series of unfortunate incidents which occurred within the City Civil Court Complex, Bangalore on 02.03.2012 involving members of the bar, police personnel, journalists and media persons and in spite of the specific direction by the High Court as early as on 16.05.2012, subsequent order of this Court dated 19.10.2012, and also of the fact that the composition of SIT itself has not been finalized, it is clear that the present case falls within the principles enunciated by the Constitution Bench and this Court is satisfied that CBI inquiry is necessitated in the matter in issue. [Para 11] [823-F-G]

State of West Bengal and Others vs. Committee for Protection of Democratic Rights, West Bengal and Others **(2010) 3 SCC 571: 2010 (2) SCR 979 - followed.**

3. The CBI is directed to carry out the investigation and submit a report before the appropriate Court having jurisdiction at Bangalore within a period of six months from the date of receipt of copy of this judgment. Further the State/SIT is directed to immediately hand over all the records pertaining to the said investigation to the CBI. [Para 12] [824-B]

Case Law Reference:

2010 (2) SCR 979 followed Para

CIVIL APPELLATE JURISDICTION :Civil Appeal No. 7159 of 2013.

From the Judgment & Order dated 16.05.2012 of the High Court of Karnataka at Bangalore in Writ Petition No. 7623 of 2012 (GM-RES).

WITH

I.A. No. 8 in C.A. No. 7159 of 2013.

Amarjit Singh Chandhiok, ASG, K.K. Venugopal, P. Viswanath Shetty, K. V. Vishwanathan, Bharadwaj J. Iyengar, Rohit Bhat, B. Subrahmanya Prasad, Rajiv Nanda, Vidit Gupta, Harleen Singh, Syed Tanweer Ahmad, B.V. Balram Dass, Arvind Kumar Sharma, V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1.Leave granted.

2. This appeal is filed against the final judgment and order dated 16.05.2012 passed by the High Court of Karnataka at Bangalore in Writ Petition No. 7623 of 2012 whereby the Division Bench of the High Court constituted a Special Investigation Team (SIT) to investigate into the broadcasting of certain news items by certain television channels on 02.03.2012 regarding scuffle between advocates, police and media persons in the premises of the City Civil Court Complex, Bangalore.

3. **Brief Facts:**

(a) On 02.03.2012, Shri Janardhana Reddy, former Minister in the Government of Karnataka was sought to be produced by the CBI, Bangalore Branch, in the Court of 46th Additional City Civil and Special Judge, CBI at Bangalore City Civil Court Complex in a case which invited considerable public attention. The electronic as well as the print media were in the precincts of the Court so as to film and make video coverage and publish the news regarding the production of the former Minister.

(b) A large crowd gathered in the court premises caused a great deal of inconvenience, as a result of which, scuffle ensued between advocates, police and media persons and simultaneously violence broke out and the police resorted to lathi charge in which several persons got injured. A number of vehicles were also damaged and destroyed due to stone pelting

and arson. Over 191 cases were registered in regard to the above said incident against the police, advocates, media persons, public etc. under various categories in various police stations of the City.

(c) On 06.03.2012, Advocates Association, Bangalore-the appellant herein, registered under the Karnataka Societies Registration Act, 1959, submitted a representation to the Chief Minister of Karnataka to take suitable action against the police atrocities committed on the advocates on 02.03.2012. Subsequently, on 07.03.2012, the General Secretary of the appellant-Association filed a detailed complaint in the jurisdictional police station wherein the names of the police officers who were involved in the said incident were given.

(d) On the very same day, i.e., on 07.03.2012, the Government of Karnataka issued a Government Order (GO) and appointed the Director General of Police, CID, Special Units & Economic Offences as the Inquiry Officer to conduct an in-house inquiry into the matter. On 10.03.2012, the Registrar, City Civil Court, Bangalore, lodged a complaint with the Ulsoorgate Police Station for causing damage to the property of City Civil Court, Bangalore which came to be registered as FIR No. 206/2012 under Sections 143, 147, 323, 324, 427, 435 read with Section 149 of the Indian Penal Code, 1860 (in short 'the IPC') and Section 3(1) of the Prevention of Damage to Public Property Act, 1984 against unknown persons. On 19.03.2012, the Director General of Police submitted his report stating that the officers on bandobust failed to exercise adequate and proper supervisory control on the policemen while controlling the situation, which resulted in excesses committed by some of the policemen, and the police personnel responsible for excesses could not be easily identified.

(e) Several writ petitions came to be filed before the High Court seeking various reliefs inter alia including direction to the State Government to entrust the inves n

26.03.2012, the President of the appellant-Association filed an affidavit in the writ petitions, viz., 7623 and 8328 of 2012 appraising the court about the dismal progress in the investigation carried out by the police. In view of the same, on 29.03.2012 and 02.04.2012, Assistant Commissioner of Police filed an affidavit and counter affidavit respectively stating the status of the investigation. It was further stated that the State Government has accepted the report of the Director General of Police and he has been directed to conduct further inquiry. Several documents, records and other details were produced before the High Court during the course of the proceedings.

(f) The High Court, by order dated 16.05.2012, constituted a Special Investigation Team (SIT) headed by Dr. R.K. Raghavan, a retired Director of the CBI as Chairman and Mr. R.K. Dutta, Director General of Police, CID, Bangalore as Convenor along with other police officials to investigate into the incident with reference to the complaints lodged by the police, advocates as well as media against each other and to conclude the same within 3 months from the date of the Government Notification. In pursuance of the same, the State Government issued a series of Notifications constituting and reconstituting SIT for reasons of non-availability of officers to be its members.

(g) Being aggrieved of the impugned order, this appeal has been filed by way of special leave before this Court. On 19.10.2012, this Court rejected the prayer of alteration of the investigating agency and directed the SIT to commence the investigation forthwith and submit a report within 3 months from the date of the order. Pursuant to the same, the State Government issued notifications dated 03.11.2012, 13.11.2012 and 17.11.2012 for appointing and substituting various officers in the SIT. On 12.12.2012, the State Government filed an application seeking extension of 6 months' time to investigate the case. In January, 2013, the State

Government filed a similar application for an extension of 6 months to submit a report.

(h) Being aggrieved of the fact that in spite of a lapse of over 1 year from the date of incident, the investigation has not even commenced even after the orders of the High Court dated 16.05.2012 and this Court dated 19.10.2012, the appellant-Association filed a contempt petition.

(i) Interlocutory Application being No. 8 also came to be filed in the above said special leave petition to direct the SIT to hand over the investigation to the CBI in view of this Court's order dated 19.10.2012.

4. Heard Mr. K.K. Venugopal, learned senior counsel for the appellant-Association, Mr. K.V. Viswanathan, learned senior counsel for the respondent-State and Mr. Amarjit Singh Chandhiok, learned Additional Solicitor General for the Union of India.

Contentions:

5. Mr. K.K. Venugopal, learned senior counsel for the appellant-Association submitted that in spite of the fact that the incident occurred on 02.03.2012 and in view of the subsequent order of the High Court dated 16.05.2012 constituting a Special Investigation Team (SIT) and subsequent direction of this Court dated 19.10.2012 modifying the composition of SIT, the fact remains that till this moment, nothing has turned down, in fact, the investigation is yet to commence. Learned senior counsel for the appellant-Association further contended that in view of the fact that persons concerned in the issue are members of the bar, police personnel, persons from both print and electronic media, it is a fit case which the Central Bureau of Investigation (CBI) should investigate fixing an outer limit for the same.

6. On the other hand, Mr. K.V. Viswanathan, learned senior counsel appearing for the respondent-

attention to various orders of the High Court and this Court, submitted that owing to the clarifications sought for in respect of the composition of SIT, the matter got delayed in commencing the investigation and according to him, there is no need to entrust the investigation to an agency like CBI.

7. Mr. A.S. Chandhiok, learned ASG appearing for the Union of India submitted that though the CBI is to abide by the orders of this Court but due to various activities being handled by the CBI, let the SIT be allowed to continue and complete the investigation.

Discussion:

8. It is seen that on account of serious and unfortunate incident involving advocates, police personnel, journalists, media persons in the City Civil Court Complex at Bangalore on 02.03.2012, large number of persons were assaulted and injured. It is alleged by the appellant-Association that the same was caused due to the action of the police and the media. The appellant-Association also raised serious allegations against the print and electronic media in broadcasting false and provocative news thereby maligning and demeaning the advocate community.

9. Initially, the appellant–Association filed a Writ Petition No. 7623 of 2012 praying for a direction to the State Government to entrust the investigation to the CBI. Several other writ petitions were also filed. By impugned order dated 16.05.2012, the High Court disposed of the writ petition by constituting a SIT headed by Shri R.K. Raghavan, a retired Director of the CBI and other officers. It is further seen that on 19.10.2012, this Court reconstituted the SIT to investigate into the incident and also directed to submit a report within three months from the date of the order.

10. It is the grievance of the appellant-Association that in spite of the directions of this Court and a series of notifications

issued by the State Government constituting and re-constituting SIT for one reason or the other, the fact remains that even after a lapse of one year and five months from the date of the incident, the investigation has not yet been commenced. It is unfortunate that even after the order of this Court dated 19.10.2012 nothing has happened. It is relevant to mention that the constitution of the so-called SIT has not completed till date. Though Mr. K.V. Viswanathan, learned senior counsel for the respondent-State raised an objection as to the averments in para 9 in I.A. No. 8 filed by the appellant-Association, it is clear that in spite of the modified order of this Court, the investigation is yet to commence due to non-formation of SIT.

11. As regards entrusting the investigation to the CBI, a Constitution Bench of this Court in *State of West Bengal and Others vs. Committee for Protection of Democratic Rights, West Bengal and Others,* (2010) 3 SCC 571 has laid down certain principles. Though the CBI has issued various principles/ suggestions for endorsing the matter to CBI in para 68, it is worthwhile to refer the conclusion in paras 69 & 70.

> **"69.** In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.
>
> **70.** Before parting with the case, we deem it necessary to emphasise that despite wide y

Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

Keeping the above principles in mind, considering the series of unfortunate incidents which occurred within the City Civil Court Complex, Bangalore on 02.03.2012 involving members of the bar, police personnel, journalists and media persons and in spite of the specific direction by the High Court as early as on 16.05.2012, subsequent order of this Court dated 19.10.2012, and also of the fact that the composition of SIT itself has not been finalized, we feel that the present case falls within the principles enunciated by the Constitution Bench and we are satisfied that CBI inquiry is necessitated in the matter in issue.

12. In the light of what is stated above, while setting aside

the impugned order of the High Court dated 16.05.2012 and in modification of earlier order of this Court dated 19.10.2012, we entrust the entire investigation of the incident to the CBI. Accordingly, we direct the CBI to carry out the investigation and submit a report before the appropriate Court having jurisdiction at Bangalore within a period of six months from the date of receipt of copy of this judgment. We further direct the State/SIT to immediately hand over all the records pertaining to the said investigation to the CBI.

13. The appeal is allowed on the above terms. In view of the above direction, no separate order is required in I.A. No. 8 of 2013, accordingly, the same is also disposed of.

B.B.B. Appeal allowed & I.A. disposed of.

BHAJAN SINGH

v.

STATE OF UTTARAKHAND & ORS.

(Civil Appeal No. 7706 of 2013)

AUGUST 27, 2013

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

Service Law - Selection - Of respondent No.4 as Managing Director of respondent no.2-State Water Supply Department - Manner and merits of - Challenge to, on ground of non-disclosure of pending charge-sheets against respondent no.4 to the Selection Committee - Held: Respondent no.3 was Chairman of Respondent no.2-Nigam and also a Member of the Selection Committee - He was fully aware that three charge sheets were pending against respondent No. 4 and had in fact also approved the same and yet he did not bring the same to the notice of the Selection Committee - The Selection Committee was not apprised of the three charge sheets at all, which was in clear breach of the requirements of r.5 - Selection of respondent No.4 was clearly faulty and, therefore, set aside - Respondent no.4 relegated to the position he was occupying prior to his selection as Managing Director of Respondent no.2 - Serious doubt about the integrity of Respondent no.3 - Respondent No.1-State to hold appropriate inquiry as to why Respondent no.3 did not place the relevant material before the Selection Committee and take necessary corrective measure - Uttarakhand Peyjal Sanshadhan Vikas Avam Nirman Nigam (The Post of the Managing Director) Rules, 2011 - rr. 3, 4 and 5 - Uttar Pradesh Water Supply and Sewerage Act as applicable to the State of Uttarakhand - s.96 r/w s.4(2-A) - Public Corporation - Appointment in higher administrative positions.

Respondent no.4 was appointed to the post of

Managing Director of Respondent no.2-Nigam pursuant to a decision taken by the Departmental Promotion Committee. The appellant, who was officiating as the Managing Director at the relevant time and was amongst the officers who were considered for promotion, filed Writ petition challenging the appointment of respondent No.4 to the post of Managing Director.

The case of the appellant was that he deserved to be selected and not respondent No.4. He submitted that three charge-sheets were pending against respondent No.4, and the pendency of the charge-sheets was certainly a factor which had to be considered while deciding the merit of respondent No.4. The High Court, however, dismissed the writ petition filed by the appellant, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1. Whatever was the defence of respondent No.4, he ought to have replied to the charge-sheet, and he could not have decided it for himself that since according to him, the charge-sheet was not issued by the Disciplinary Authority, he was going to ignore the same. Nothing prevented him from placing on record his view point that the charge-sheets were motivated. That apart, as is seen from the record, the Chairman of the Nigam had signed on the charge-sheet approving the same and it is, therefore, that the Inquiry Officer had issued the charge-sheet. The Chairman of the Nigam is the Secretary of the Water Supply Department. He had taken some three months' time after the note was put up to him, to approve the charge-sheet. He was also a Member of the Selection Committee which consisted of 5 senior officers of the State. It was surely expected of him to bring it to the notice of the Selection Committee that charge-sheets were pending against

Respondent No.4 may have his defence on the merits of the charges. The fact of pending charge-sheets ought to have been placed before the Selection Committee. In the absence of such a very vital material being placed before the Selection Committee, the Committee went into the aspect of determining the merit without having the benefit of this vital material which was against respondent No.4. If these charge-sheets were made available to the Committee, it would have taken its decision after considering the same. His claim for promotion would have been kept in a sealed cover and he would have been asked to wait until the enquiry was complete. [Para 15] [840-F-H; 841-A-D]

Union of India v. K.V. Jankiraman & Ors, **(1991) 4 SCC 109 - held applicable.**

2. Respondent No. 4 was served with three charge sheets. The departmental proceedings will therefore have to be deemed to have been initiated against him. The Nigam cannot sit over the charge sheets or keep them in a wrapper, and not disclose to the selection committee until the charge sheets are either dropped or proceeded further. Once a departmental proceeding is pending, the claim of the employee concerned for promotion will have to be kept in a sealed cover. [Para 16] [842-C-E]

3. When any high officer is to be appointed to the position of Managing Director, obviously his integrity has to be gone into and the material whichever is there, either in his favour or against him, has to be placed before the Selection Committee. The Chairman of the Nigam has certainly not conducted himself appropriately in not placing these charge-sheets before the Selection Committee. In absence thereof, the merit (including absence of it) which was required to be assessed could not be assessed correctly. [Para 17] [842-F-H]

4. Rule 5(2) of the Uttarakhand Peyjal Sanshadhan Vikas Avam Nirman Nigam (The Post of the Managing Director) Rules, 2011 is sufficiently wide and requires that everything which is relevant for assessing the merit, has to be placed before the Selection Committee. The rule clearly states that all these facts are to be brought to the notice of the Departmental Promotion Committee and the Committee has to consider all the material before deciding whether the officer was suitable for promotion. The relevant rule No. 5 was brought to the notice of the High Court. Submissions were made thereon, and yet the High Court held that the law permitted the selectors to ignore altogether the charges inasmuch as according to it, the same bears only an accusation against him and that the integrity of a person cannot be questioned only on the basis of an allegation against him. The Selection Committee was not apprised of the three charge sheets at all. This was clearly in breach of Rule 5, and the High Court has erred in ignoring this aspect. [Para 18 and 20] [843-A, D-E; 844-B-D]

5. The Principal Secretary to the Water Supply Department is the Chairman of the Nigam and is respondent No. 3. He was fully aware of the charge sheets pending against the respondent No. 4. In fact he had signed the same. It was his duty and responsibility to place these charge sheets before the Selection Committee of which he was a member. If the Secretary of the department suppresses the relevant material, obviously the selection will not be on merit. This in fact raises a serious doubt about the integrity of the then Chairman of the Nigam. In the circumstances the respondent No. 1 State of Uttrakhand is expected to hold appropriate inquiry as to why the Chairman of the Nigam did not place the relevant material before the Selection Committee and take necessary corrective measure. [Para 19] [843-F-H; 844-A]

6. The selection of respondent No.4 was clearly faulted. The selection was in breach of the requirements of Rule 5 and, therefore, it will have to be set aside. Inasmuch as respondent No.4 has worked all this time as Managing Director, whatever salary and emoluments he has received, though on the basis of a faulty selection, will not be recovered from him. However, as a consequence of this order, he will now be immediately placed in the position which he was occupying prior to his selection as Managing Director of the Nigam. It will be for the Nigam to call for another Selection Committee and consider whosoever are the eligible officers. [Para 21] [844-E and G-H]

7. The manner in which the facts have unfolded in this matter is distressing and shocking. The public corporations like the Water Supply and Sewerage Board enter into the contracts of hundreds of crores of rupees. The persons occupying high positions therein such as that of Managing Director have a great responsibility to see to it that these schemes are implemented honestly and expeditiously. The officers at the high level have a good salary and perquisites. They have got to be above board. To qualify for promotion to such posts, the minimum that is expected is to have an unblemished record. If the high ranking officers come out with a devise to circumvent the law by suppressing the pending charge-sheets against favoured candidate, it is a serious matter. The Chairman is supposed to be an IAS Officer. These officers are given a protection under the Constitution itself. If such officers are to act in breach of the law laid down by this Court, it would result into officers of doubtful integrity getting into higher positions. [Para 22] [845-C-G]

Case Law Reference:

(1991) 4 SCC 109 held applicable Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7706 of 2013.

From the Judgment & Order dated 09.08.2012 of the High Court of Uttarakhand at Nainital in Writ Petition (S/B) No. 153 of 2012.

A. Subba Rao for the Appellant.

Ranjit Kumar, Manish Kumar, Rakesh K. Sharma, Rachana Srivastava, Utkarsh Sharma, Dinesh Kumar Garg, Abhishek Garg, Dhananjay Garg, S.K. Bandopadhyay for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. Leave granted.

2. This appeal by special leave seeks to challenge the judgment and order dated 9.8.2012 rendered by a Division Bench of the Uttarakhand High Court dismissing Writ Petition (S/B) No.153 of 2012. That writ petition was filed by the appellant herein seeking to challenge the appointment of respondent No.4 herein to the post of Managing Director of the Uttarakhand Peyjal Sanshadhan Vikas Avam Nirman Nigam ("Nigam" for short). There were various prayers in the writ petition. Prayer (A) was to call for the record of the selection proceedings and recommendations of the Selection Committee constituted on 2.5.2012 by the Government of Uttarakhand for selection to the post of Managing Director and after examining the legality and validity of selection process, recommendations to quash these recommendations. Prayer (B) challenged repatriation of the appellant to the post of Chief Engineer which was his substantive post from his officiating position of Managing Director. Prayer (C) essentially sought consideration of the appellant for the post of Managing Director, if found fit for the said post.

3. The facts leading to this appeal are this wise - The appellant as well as respondent No.4 both joined as Assistant Engineers in the Respondent No.2 Nigam. The appellant joined sometimes in 1984 whereas respondent No.4 joined in 1977. Over the years, they have risen in rank and the appellant, who belongs to a Scheduled Caste, became Superintending Engineer on 4.7.2002 whereas respondent No.4 came to that position on 2.7.2008. Subsequently the appellant became Chief Engineer on 8.2.2005 which post he is presently continuing to occupy. As far as respondent No.4 is concerned, he came in that position on 20.1.2011. He could become Managing Director on 3.5.2012 pursuant to the Departmental Promotion Committee's decision. The appellant was officiating as the Managing Director at the relevant time, he was amongst the officers who were considered for promotion and it is his case that he deserved to be selected and not the respondent No.4.

4. The challenge to the appointment of respondent No.4 is two-fold. Firstly that under the relevant rules regarding the consideration for promotion to the post of Managing Director, minimum 8 years of service as Chief Engineer is required, which respondent No.4 did not have. It is also pointed out that respondent No.4 came in the position of Superintending Engineer much after the appellant became Chief Engineer. This being the position, the submission is that respondent No.4 was not eligible for being considered for the post of Managing Director.

5. Be that as it may, the second challenge to the appointment of respondent No.4 was to the manner and merits of the selection of respondent No.4 for the post of Managing Director and in our view, this is a much more basic objection which we must look into. There are rules framed for the appointment to the post of Managing Director known as the Uttarakhand Peyjal Sanshadhan Vikas Avam Nirman Nigam (The Post of the Managing Director) Rules, 2011. They are framed under Section 96 read with sub-section (2-A) of Section

4 of the Uttar Pradesh Water Supply and Sewerage Act as applicable to the State of Uttarakhand. Rule 3 of these rules provides that the selection to the post of Managing Director shall be made through a Selection Committee which will comprise of 5 persons, namely:

(a) Chief Secretary to the State Government

(b) Principal Secretary/Secretary to the State Government in the Water Supply Department

(c) Principal Secretary to the State Government in the Public Enterprises Department

(d) Principal Secretary/Secretary to the State Government in the Personnel Department

(e) An expert nominated by the Chief Secretary to the State Government.

6. These Rules also provide for an officer belonging to the Scheduled Castes or other backward classes of citizens, nominated by the Chief Secretary to be on the Committee if the officers referred to in clauses (a) to (e) do not belong to any Scheduled Caste or other backward classes. Rule 4 of these Rules provides that only those Engineers of the Nigam shall be eligible for selection to the post of Managing Director who, amongst others, as per sub-clause (3) are holding the post of Chief Engineer Level-II in the Nigam and have completed at least 25 years of continuous service as Assistant Engineer, Executive Engineer, Superintending Engineer and Chief Engineer Level-II in the Nigam.

7. It is Rule 5 of these rules which is more relevant as far as this case is concerned. This Rule reads as follows:

"5(1) Selection for appointment to the post of the Managing Director of the Nigam shall be made on the basis of merit.

(2) The 'Merit' shall be assessed mainly on the basis of integrity of the officer, leadership qualities and capability to take quick decision, technical knowledge of the subject, special achievements/contribution and capacity to execute the work easily like qualities. Entries in the Annual Character Roll special entries, other records available in the personal file and other facts brought to the notice of the Departmental Promotion Committee shall be considered for the purpose.

(3) The Principal Secretary/Secretary to the State Government in the Drinking Water Department shall prepare a list of eligible person and place it before the selection committee referred to in Rule 3, along with their character rolls and other records pertaining to them.

(4) The Selection Committee shall consider the cases of eligible persons on the basis of the character rolls for ten years immediately preceding the year in which the selection is made and other records, referred to in sub-rule (2).

(5) Annual entries of at least 08 years out of the last ten years entries during the period of service on the post just below the promotional post must be available.

(6) For the purpose of assessment of the annual entries of the character rolls, the entries of the entire service period of the officers shall be taken into consideration, however, the entries of the last 10 years shall be given special consideration. The entries shall be categorized as 'Outstanding', 'Very Good', 'Good', Fair/Satisfactory and 'Adverse'. For entries of 12 months 10 marks for 'Outstanding', 08 marks for 'Very Good', 5 marks for

'Good', zero marks for 'satisfactory/fair' and 05 negative marks for 'adverse' entry shall be awarded. The marks obtained for the period less than 12 months shall be deducted from the total marks of months for which the entries are assessed, in the ratio of 12. The average monthly marks shall obtained by total number of months (the entries of which are assessed) and by multiplying the same by 12 average annual marks shall be obtained. The Officer securing more than 08 average annual marks shall be considered fit for selection on the basis of merit. Senior most in the cadre amongst the persons who are considered fit for selection shall be recommended for appointment against the post.

(7) The name of the candidate, whose even one out of he two entries immediately before the year of selection is adverse or whose integrity during the last five years preceding the year of selection is doubtful in the annual confidential entry or by special adverse entry, shall not be considered.

(8) If in selection on merit, any candidate has been pushed down, he/she shall be informed that he/she has been recommended on account of non-availability of post or being classified under 'Unfit' category for promotion, as the case may be."

8. It was submitted on behalf of the appellant before the High Court that three charge-sheets were pending against respondent No.4, and the pendency of the charge-sheets was certainly a factor which had to be considered while deciding the merit of respondent No.4. This was an aspect which was required to be placed before the concerned Selection Committee which was to decide the promotion to the post of Managing Director.

9. It was pointed out that the first charge-sheet was framed on 5.12.2011 which contained three

respect to the irregularities committed by the respondent No.4 as the Member Secretary of the Zonal Tender Committee when he was the Executive Engineer in the Construction Division, Pauri, during 1.6.1995 to 19.7.2007. Charge No.1 thereof alleged of not complying with the departmental procedure for deciding the tenders concerning the work of laying and jointing of pipelines and appurtenant works from Nanghat source to Molthaghat under Nanghat Potable Water Supply Scheme, resulting into avoidable delay in reaching the benefits of the scheme to the general public. Charge No.2 was regarding the procedure for inviting, opening and acceptance of the tenders and non-compliance thereof requiring re-tendering, concerning the same Nanghat Potable Water Supply Scheme, resulting into cost over-run and time over-run. Charge No.3 was regarding the manner in which the technical bids were decided concerning the said Scheme, ultimately resulting into loss of Rs.49.17 lacs to the Nigam and benefiting the contractors. These objections were raised in the Audit Report of 2008-2009 and accepted by the Accountant General. This charge-sheet called upon the respondent No.4 to inform the undersigning Inquiry Officer in writing whether he wanted to examine or cross-examine any witness. Evidences in support of the charges were mentioned along with the charges. The charge-sheet also required the respondent No.4 to submit written statement. The charge-sheet was signed by the Inquiry Officer for and on behalf of the Nigam, and was approved by the Chairman of the said Nigam, whose approval and signatures are also to be seen by the side of the signatures of the Inquiry Officer.

10. It is material to note that no reply was filed to this charge-sheet by respondent No.4. The Selection Committee met on 2.5.20012 and respondent No.4 was recommended for being appointed by its recommendation dated 3.5.2012. It was specifically mentioned in paragraph 4 of the writ petition that the second charge-sheet was dated 3.3.2012 concerning the working of respondent No.4 during the period 18.9.2000 to

19.7.2007 in respect of Birokhal Group of Villages Pumping Water Supply Scheme and the third charge-sheet dated 9.4.2012 was concerning the scheme of utilization of sewage for irrigation purpose for the Veer Chander Singh Garhwali Audyogik University during 18.11.2000 to 30.6.2007. The submission on behalf of the appellant was that this material, namely, that the charge-sheets were pending against respondent No.4, was not placed before the Selection Committee at all. There is no dispute, whatsoever, that respondent No.4 had not replied to the charge-sheets nor with respect to the fact that pendency of the charge-sheets against respondent No.4, was not brought to the notice of the Selection Committee. The Division Bench of the High Court has given importance only to the aspect of seniority of the engineers concerned, and although the issue with respect to the integrity of the officer, to be appointed to the high position of Managing Director, was raised in this writ petition the same has been decided against all canons of settled laws.

11. (i) Various affidavits were filed on behalf of the respondents in the High Court. One Shri S. Raju, S/o Shri S. Subbiah affirmed two affidavits on 26.6.2012. One affidavit he affirmed in his capacity as Principal Secretary, Department of Pey Jal, on behalf of Respondent No. 1 Government of Uttrakhand. In paragraph 17 thereof he stated as follows:-

> "*17. That perusal of the letter dated 5.12.2011, 3.3.2012 and 9.4.2012 do not mention that these letters have been issued, or the alleged charge sheets with these letters have been issued, under any disciplinary proceedings. These letters do not also mention that prior to issuance of these letters at any point of time an explanation from respondent No. 4 was called for or any order of initiating disciplinary proceeding was issued, as such the Principal Secretary or the Government on receiving the proposal came to the conclusion that the said letters/alleged charge sheets cannot be deemed* ...y

disciplinary proceeding against respondent No. 4 and accordingly the same was not mentioned in the note before the Selection Committee."

The officer has sought to contend that these charge sheets do not mention that they have been issued under any disciplinary proceedings. By stating so he has betrayed his ignorance of the legal position that the disciplinary proceedings begin with the issuance of the charge-sheet. He has further stated that prior to issuance of the charge sheets no explanation was called from respondent No. 4, nor any order of initiating disciplinary proceedings was issued. Now, this is a matter of the procedure to be followed by the concerned authority while initiating the disciplinary proceeding. In a given case a show cause notice may be issued, prior to the issuance of the charge sheets, but that is not the rule. In any case, it is the Principal Secretary of the Department who in his capacity as the Chairman of the Nigam was the Disciplinary Authority. He has counter signed on the charge sheet. The affidavit is a miserable attempt to explain as to why the charge sheets were not mentioned in the note placed before the Selection Committee by the then Secretary of the Department.

(ii) In another affidavit affirmed by him on the same day in his capacity as the Chairman of the Nigam, he stated in paragraph 4 thereof that he had joined the duties on the present post on 1.5.2012, and his predecessor in office at the relevant point of time, was one Mr. Utpal Kumar Singh, IAS. In paragraph 5 of this affidavit he stated that he had gone through the concerned file and upon perusal of the files it appeared to him that the three draft charge sheets were prepared. He has further stated that the three draft charge sheets were sent to the then Chairman for approval by the petitioner, and the then Chairman had approved the same and sent it with his covering letter to respondent No. 4 for calling his explanation before initiation of any disciplinary proceeding in the matter. In paragraph 9 he specifically stated amongst others as follows:-

"*9. .....The said charge sheets appear to have been approved and sent by the then Chairman to the respondent No. 4 for calling his explanation before commencing any disciplinary proceedings in the matters. No Enquiry Officer has been appointed in the matter till now.*

Thus, in so many words, while explaining his own position, he has contradicted the previous Secretary through this affidavit. On reading these two affidavits one thing is very clear that charge- sheets were approved by the then Chairman and thereafter sent to the respondent No. 4 calling for his explanation, though for the reasons best known to the Nigam the disciplinary proceedings have not proceeded thereafter.

(iii) As far as respondent No. 4 is concerned he affirmed an affidavit in reply and amongst others gave an explanation on the allegations contained in three charge sheets. He has however not denied having received these charge sheets. He has also not stated that he has filed any reply to these charge-sheets.

12. In paragraph 2 of the impugned judgment the High Court noted the contention that under Rule 5 of the Rules concerning appointment to the post of Managing Director, the Selection Committee has to look into the merit of the candidate concerned. It also noted the contention on behalf of the appellant that the Selection Committee was not in the know of the three charge sheets, and it did not have the appropriate opportunity to determine the integrity of the selected candidate. In paragraph 3 of its judgment however the Court observed that it is true that if the selectors had looked into those charge sheets, they may have reacted in some other manner. At the same time the Court held that mere issuance of a charge sheet does not affect integrity of an employee of a statutory authority. Thereafter, the court observed in paragraph 3:-

"*3.....c. Law requires selectors to ignore altogether a charge-sheet issued against a Government employee in as much as, the same bears only an accusation against him and integrity of a person cannot be questioned only on the basis of an allegation or insinuation against him. The Rules, it was not contended, debarred consideration of a candidate for promotion against whom a disciplinary proceeding is pending.*"

And then in paragraph 4 and 5 as follows:-

"*4. We think that integrity of the officer, to be looked at by the selectors, is such integrity, which is reflected in the records of the candidate appearing before the selectors. Issuance of a charge sheet may be reflected in the record, but the substance of the charge-sheet cannot be treated as part of the record. As aforesaid, mere issuance of a charge-sheet does not prevent the selectors from selecting a candidate against whom the charge-sheet has been issued.*"

"*5. We, accordingly, find no scope of interference with the selection under challenge merely on the basis that the charge-sheets, thus issued, were not placed before the selectors.*"

13. Mr. Subba Rao, learned counsel for the appellant submitted that these observations of the High court were totally contrary to the law laid down by this Court. If an employee is facing a charge-sheet, and is called upon to give an explanation, surely such an employee cannot be considered for promotion at that stage. His claim for promotion will have to be kept in sealed cover as held by a bench of three Judges of this Court in *Union of India Vs. K.V. Jankiraman & Ors.,* reported in (1991) 4 SCC 109. The present case is clearly one of suppression of the relevant material and not bringing it before the Selection Committee. This made the selection of the respondent No. 4 still more vulnerable. The view taken by the

High Court is totally untenable and the judgment had to be set aside.

14. On the other hand, it was submitted by Mr. Ranjit Kumar, learned senior counsel appearing for respondent No.4 that the submissions advanced in the High Court were mainly with respect to the issue of seniority. He contended that, in any case, the charge-sheet dated 5.12.2011 was not issued by the Disciplinary Authority and may not be taken cognizance of. Now, as can be seen, it is the Chairman who is the Disciplinary Authority, and the charge-sheet bears the signatures of the Chairman approving the charge-sheet. His signature is appended side by side with the signature of the Inquiry Officer, and therefore the submission has to be rejected. It was further submitted that the charge-sheet was a motivated document and it was an attempt by the appellant herein to see to it that respondent No.4's career is damaged. It was pointed out that the appellant himself was officiating as Managing Director at the relevant time and, therefore, he had chosen to rake up these controversies at that very time.

15. It is not possible to accept this submission. The charges in the charge-sheet are concerning the period starting from 2006 onwards. Whatever was the defence of respondent No.4, he ought to have replied to the charge-sheet, and he could not have decided it for himself that since according to him, the charge-sheet was not issued by the Disciplinary Authority, he was going to ignore the same. Nothing prevented him from placing on record his view point that the charge-sheets were motivated. That apart, as is seen from the record, the Chairman of the Nigam had signed on the charge-sheet approving the same and it is, therefore, that the Inquiry Officer had issued the charge-sheet. The Chairman of the Nigam is the Secretary of the Water Supply Department. He had taken some three months' time after the note was put up to him, to approve the charge-sheet. He was also a Member of the Selection Committee which consisted of 5 senior It

was surely expected of him to bring it to the notice of the Selection Committee that charge-sheets were pending against respondent No.4. Respondent No.4 may have his defence on the merits of the charges. All that we can say is that the fact of pending charge-sheets ought to have been placed before the Selection Committee. In the absence of such a very vital material being placed before the Selection Committee, the Committee went into the aspect of determining the merit without having the benefit of this vital material which was against respondent No.4. If these charge-sheets were made available to the Committee, it would have taken its decision after considering the same, and the principles laid down by this Court in *Union of India & Ors. Vs. K.V. Jankiraman & Ors.,* (supra) would have squarely applied to respondent No.4's case. His claim for promotion would have been kept in a sealed cover and he would have been asked to wait until the enquiry was complete.

16. (i) As held in paragraph 29 in Jankiraman's case (supra):

> *"An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interest."*

(ii) On the sealed cover procedure this Court observed in paragraph 16 of the said judgment as follows:-

> "*16. On the first question, viz. as to when for the purposes of the sealed cover procedure the disciplinary/ criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when*

> *a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/ criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point c.."*

In the present case the respondent No. 4 was served with three charge sheets. As per the above dicta, the departmental proceedings will therefore have to be deemed to have been initiated against him. The Nigam cannot sit over the charge sheets or keep them in a wrapper, and not disclose to the selection committee until the charge sheets are either dropped or proceeded further. Once a departmental proceeding is pending, the claim of the employee concerned for promotion will have to be kept in a sealed cover.

17. It was also submitted that the charge-sheet dated 5.12.2011 was in fact a show cause notice. We are not impressed at all by this submission which is in fact negated the second affidavit of Shri S. Raju. In any case, whether it was a charge-sheet or a show cause notice, it was a document imputing allegations against respondent No.4. When any high officer is to be appointed to the position of Managing Director, obviously his integrity has to be gone into and the material whichever is there, either in his favour or against him, has to be placed before the Selection Committee. The Chairman of the Nigam has certainly not conducted himself appropriately in not placing these charge-sheets before the Selection Committee. In absence thereof, the merit (including absence of it) which was required to be assessed could not be assessed correctly.

18. Rule 5(2) of the Rules noted above speaks of merit being assessed mainly on the basis of –

(i) integrity of the officer;

(ii) leadership qualities

(iii) capability to take quick decision

(iv) technical knowledge of the subject;

(v) special achievements/contribution and capacity to execute the work easily and like qualities.

Thereafter, it states in terms that the entries in the Annual Character Roll, special entries, other records available in the personal file, and other facts brought to the notice of the Departmental Promotion Committee shall be considered for the purpose of assessing the merit. The rule is sufficiently wide and requires that everything which is relevant for assessing the merit, has to be placed before the Selection Committee. The rule clearly states that all these facts are to be brought to the notice of the Departmental Promotion Committee and the Committee has to consider all the material before deciding whether the officer was suitable for promotion.

19. The Principal Secretary to the Water Supply Department is the Chairman of the Nigam. He was respondent No. 3 to the Writ Petition and is respondent No. 3 in this Civil Appeal. He was fully aware of the charge sheets pending against the respondent No. 4. In fact he had signed the same. It was his duty and responsibility to place these charge sheets before the Selection Committee of which he was a member. If the Secretary of the department suppresses the relevant material, obviously the selection will not be on merit. This in fact raises a serious doubt about the integrity of the then Chairman of the Nigam. In the circumstances we expect the respondent No. 1 State of Uttrakhand to hold appropriate inquiry as to why

the Chairman of the Nigam did not place the relevant material before the Selection Committee and take necessary corrective measure.

20. We are equally or more appalled at the manner in which the concerned division bench of the High Court has handled the matter. The High Court has totally ignored the law on this aspect. The relevant rule No. 5 was brought to the notice of the High Court. Submissions were made thereon, and yet the High Court held that the law permitted the selectors to ignore altogether the charges in as much as according to the Division Bench, the same bears only an accusation against him and that the integrity of a person cannot be questioned only on the basis of an allegation against him. As stated earlier we are not concerned with the merits of the allegations. The Selection Committee was not apprised of the three charge sheets at all. This was clearly in breach of Rule 5, and the High Court has erred in ignoring this aspect.

21. In view of these facts, the selection of respondent No.4 was clearly faulted. The selection was in breach of the requirements of Rule 5 and, therefore, it will have to be set aside. The High Court has also seriously erred in not allowing the writ petition of the appellant herein. In the circumstances, we allow this appeal, set aside the judgment rendered by the Division Bench of the Uttarakhand High Court. Prayer (A) made in the writ petition will stand granted, namely, that the selection and appointment of respondent No.4 will stand set aside. Inasmuch as respondent No.4 has worked all this time as Managing Director, whatever salary and emoluments he has received, though on the basis of a faulty selection, will not be recovered from him. However, as a consequence of this order, he will now be immediately placed in the position which he was occupying prior to his selection as Managing Director of the Nigam. It will be for the Nigam to call for another Selection Committee and consider whosoever are the eligible officers. Their full record will be placed before the

and thereafter it will be decided as to who should be selected as the Managing Director of the Nigam. The appeal is allowed in these terms, with costs. Respondent No.4 will pay cost of Rs.50,000/- and Respondent No.2 Nigam will pay cost of Rs.50,000/- to the appellant. Respondent No.2 will be at liberty to recover this amount of cost from the then Chairman of the Nigam.

22. Before we conclude, we must accord our distress and shock at the manner in which the facts have unfolded in this matter. The public corporations like the Water Supply and Sewerage Board enter into the contracts of hundreds of crores of rupees. The persons occupying high positions therein such as that of Managing Director have a great responsibility to see to it that these schemes are implemented honestly and expeditiously. After 67 years of independence, Indian cities and villages continue to have a serious problem of getting good potable water to drink. There is also a serious problem of having a proper sewerage system. The officers at the high level have a good salary and perquisites. They have got to be above board. To qualify for promotion to such posts, the minimum that is expected is to have an unblemished record. The law and procedure of selection to such posts when there are allegations against the candidates, was laid down in Jankiraman's case (supra), way back in the year 1991. If the high ranking officers come out with a devise to circumvent the law by suppressing the pending charge-sheets against favoured candidate, it is a serious matter. The Chairman is supposed to be an IAS Officer. These officers are given a protection under the Constitution itself. If such officers are to act in breach of the law laid down by this Court, it would result into officers of doubtful integrity getting into higher positions. Luckily, in this present matter, the petitioner who is an interested candidate contested the appointment of respondent No.4 and which is how the suppression of the material came into light.

23. Having decried the role of the then Chairman of the

Nigam, we cannot remain oblivious of the fact that a division bench presided over by the Chief Justice of the High Court has condoned such serious breaches in approving the suppression of the relevant material from the selection committee, which is most unfortunate and deplorable to say the least. Such judgments would lead to the approval of the appointment of persons of doubtful integrity in higher administrative positions. Apart from that, it will lead the people to doubt the integrity of the judges as well. Citizens have a faith in the judiciary because it is expected to render justice even-handedly. The members of higher judiciary are granted a constitutional protection so that they function without fear and favour and not mis-apply the law. It is such orders which bring the judiciary into disrepute. We rather refrain from saying anything more.

B.B.B. Appeal allowed.

MINU ROUT & ANR.

v.

SATYA PRADYUMNA MOHAPATRA & ORS.

(Civil Appeal No. 7368 of 2013)

SEPTEMBER 2, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Motor Vehicles Act, 1988 – s.166 – Compensation claim – Head-on collision between a car and a truck – Driver of the car died – Tribunal held that there was contributory negligence on the part of the deceased in causing the accident, therefore, his dependents i.e. the appellants were entitled to get dependency compensation only to the extent of 50% for the fault of the offending truck – Order affirmed by High Court – On appeal, held: 50% deduction out of the total loss of dependency compensation determined by the Tribunal was not correct – In absence of rebuttal evidence, the Tribunal erroneously placed reliance upon the charge-sheet filed against the driver of the offending truck and deceased to hold there was contributory negligence on the part of deceased ignoring the fact that the criminal case against him had abated – Finding of fact recorded by the Tribunal and affirmed by the High Court, was erroneous for want of proper consideration of pleadings and legal evidence by both of them.

Motor Vehicles Act, 1988 – s.166 – Compensation claim – Head-on collision between a car and a truck – Husband of the first appellant, who was working as driver of the car, died – Deceased was 35 years of age – Dependents of the deceased i.e. the appellants claimed compensation – Tribunal awarded Rs.1,92,000/- towards loss of dependency and further Rs.5000/- and Rs.3000/- towards funeral expenses and loss of estate, love and affection respectively and thus

in total, a compensation of Rs.2,00,000/- with interest @ 6% p.a – Compensation awarded by Tribunal approved by High Court – Justification – Held: Not justified – Appellants entitled to enhanced compensation – Judicial notice should have been taken of the fact that the post of a driver is a skilled job – Though the claim of appellants was Rs.5000/- as monthly salary of the deceased, for determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000/- per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the Appellate Court – Further, 30% of future prospects of the deceased should be added to the monthly income while 1/3rd should be deducted towards the personal expenses of the deceased – Multiplier of 16 to be applied as deceased was aged 35 years – Appellants accordingly entitled to amount of Rs.9,98,400/- towards loss of dependency – Further, taking into consideration all the expenses incurred for the funeral and sudhi ceremonies and towards loss of love and affection by the surviving child and the first appellant wife, award of Rs.50,000/- is just and reasonable under the conventional heads – Total compensation thus amounting to Rs.10,48,400/- – Insurance Company liable to pay the same as the offending vehicle was insured with it alongwith interest @ 9% p.a., from the date of application till the date of payment.

The husband of the first appellant was working as a car driver. He died on account of a head-on collision between his car and a truck. The second appellant is the son of the deceased, who was minor at the time of the accident.

The appellants filed compensation claim before the Motor Accident Claims Tribunal contending that the accident took place on account of rash and negligent driving of the offending truck by its driver and that at the time of the accident, the deceased was having good

health and earning a sum of Rs.5000/- per month which was mostly contributed to the appellants for their livelihood. The owner of the truck did not contest the proceedings. Respondent No. 1, driver of the truck, also did not file any counter statement. Respondent No.2, New India Assurance Company, however, opposed the claim of the appellants, contending that there was contributory negligence on the part of the deceased in causing the accident.

The Tribunal held that the accident occurred due to head on collision between the two vehicles and both the drivers were equally responsible for the occurrence of the accident, and, therefore, the appellants were entitled to get compensation to the extent of 50% for the fault of the offending truck. The Tribunal accepted the age of the deceased as 35 years and applied multiplier of 16 to quantify the loss of dependency by taking the monthly salary of the deceased at Rs.3,000/-. Deducting 1/3rd amount towards personal expenses of the deceased, the amount was thus quantified at Rs.3,84,000/-. Out of this amount, 50% was deducted towards alleged contributory negligence of the deceased husband of the first appellant and thus Rs.1,92,000/- was ultimately awarded by the Tribunal towards loss of dependency. To this amount, under the conventional heads, Rs.5000/- and Rs.3000/- was awarded towards funeral expenses and loss of estate, love and affection respectively and thus in total, a compensation of Rs.2,00,000/- with interest @ 6% per annum was awarded to the appellants.

The appellants were however not satisfied with the amount awarded by the Tribunal and filed appeal before the High Court which however, affirmed the judgment and award of the Tribunal, and therefore the instant appeal.

Allowing the appeal, the Court

HELD:1. The Tribunal committed error in law in coming to the conclusion in the absence of rebuttal

evidence that there was contributory negligence of 50% on the part of the deceased. The Tribunal recorded the erroneous finding by placing strong reliance upon the charge-sheet-Exh.1 without considering the fact that the criminal case was abated against the deceased and further making observation in the judgment that the appellants had not produced the FIR. The Tribunal ought to have seen that non production of FIR has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 302 of IPC read with the provisions of the Motor Vehicles Act, 1988. The Insurance Company, though claimed permission under Section 170(b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, it did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance on the charge-sheet-Exh.1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal also placed reliance on certain stray answers elicited from the evidence of P.W.2 and P.W.3 in their cross-examination. The findings and reasons recorded by the Tribunal while holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law. The Tribunal erroneously placed reliance upon the charge-sheet-Exh.1, which was filed against the driver of the offending truck and deceased to hold there was contributory negligence on his part by ignoring the fact that the criminal case against the dece[illegible]l.

Therefore, the said finding of fact recorded by the Tribunal and affirmed by the High Court in the impugned judgment, is erroneous for want of proper consideration of pleadings and legal evidence by both of them. [Paras 10, 12] [860-H; 861-G-H; 862-A-H; 863-A]

2. The appellants claimed compensation under the heading of loss of dependency as they were all dependents upon the earnings of the deceased who was working as a driver of the car which is a skilled job. The oral evidence of the first appellant, PW-1, is not accepted by the Tribunal, solely for the reason that the appellants did not produce documentary evidence to prove the monthly salary of the deceased as Rs.5,000/- per month as claimed by them. The compensation awarded by the Tribunal is approved by the High Court, which is not only erroneous in law but also suffers from error in law. The Tribunal ought to have taken the salary of the deceased driver at Rs.6,000/- by taking judicial notice of the fact that the post of a driver is a skilled job. Though the claim of the appellants is Rs.5000/- as monthly salary of the deceased, for the purpose of determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000/- per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the Appellate Court. 30% of future prospects of the deceased should be added to the monthly income. If 30% is added to the monthly income, it would amount to Rs.7,800/- p.m. From the same, 1/3rd should be deducted towards the personal expenses of the deceased, then the remaining amount would come to Rs.5,200/- per month. The same is multiplied by 12 amounting to Rs.62,400/- which would be the multiplicand. The same must be multiplied by 16 multiplier as the Tribunal has taken the age of the deceased at 35 as mentioned in the post mortem report, which is produced as Exh.5. If the 16

multiplier is applied to the multiplicand of Rs.62,400/-, it comes to Rs.9,98,400/- which amount is awarded towards the loss of dependency of the appellants. Further 50% deduction out of the total loss of dependency compensation determined by the Tribunal is not correct. The appellants are entitled to the full amount of Rs.9,98,400/-. Further, the Tribunal erroneously awarded a sum of Rs.5,000/- for funeral expenses without taking into consideration the actual amount required to be spent towards funeral expenses and obsequies ceremonies. The Tribunal also inadequately awarded Rs.3,000/- towards loss of love and affection. The Tribunal also erred both on facts and in law as it completely ignored the fact that the deceased died leaving behind him the first appellant-the widow, his mother and two minor children, who lost the love and affection of their father. Therefore, taking into consideration all the expenses incurred for the funeral and sudhi ceremonies and towards loss of love and affection by the surviving child and the first appellant wife, award of Rs.50,000/- is just and reasonable under the conventional heads. If Rs.50,000/- is added to the compensation awarded for the loss of dependency, the total compensation comes to Rs.10,48,400/-. The Insurance Company is liable to pay the same as the offending vehicle is insured with it and the same is an undisputed fact. The Insurance Company is also liable to pay interest at the rate of 9% per annum, from the date of application till the date of payment. The compensation awarded shall be apportioned between the appellant nos. 1and 2 equally as the remaining appellants died during the pendency of the proceedings and their names were deleted by the High Court. [Paras 13 and 14] [863-A-D, F-H; 864-A-G; 865-A-C, F]

Santosh Devi vs. National Insurance Company Ltd. and Ors. **2012 (6) SCC 421: 2012 (3) SCR 1178;** *Sarla Verma vs. Delhi Transport Corporation* **(2009)**

SCR 1098; *Kerala State Road Transport Corporation vs. Susamma Thomas* **(1994) 2 SCC 176 and** *Municipal Council of Delhi vs. Association of Victims of Uphaar Tragedy* **(2011) 4 SCC 481 – relied on.**

Case Law Reference:

2012 (3) SCR 1178	**relied on**	**Para 13**
2009 (5) SCR 1098	**relied on**	**Para 13**
(1994) 2 SCC 176	**relied on**	**Para 13**
(2011) 4 SCC 481	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7368 of 2013.

From the Judgment & Order dated 27.07.2011 of the High Court of Orissa at Cuttack in MACA No. 594 of 2010.

Chittaranjan Mishra, R.P. Singh Yadav, Debasis Misra for the Appellants.

Amit Kumar Singh for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. This appeal is filed by the appellants who were claimants before the Additional District Judge-cum-4th MACT, Jagatsinghpur, Odisha (in short 'the Tribunal') in MAC case No.6 of 2005, questioning the correctness of the judgment and award dated 27.07.2011 passed by the High Court of Orissa, Cuttack in MACA No. 594 of 2010, wherein it has affirmed the judgment and award of the Tribunal holding that the award of compensation of Rs.2,00,000/- in favour of the appellants along with interest at the rate of 6% per annum from the date of filing of the claim application till actual payment, is legal and valid and the same is not vitiated either on account of impropriety or illegality. The correctness of the same is challenged in this appeal urging certain relevant facts and grounds.

3. Brief facts of the case are mentioned hereunder for the purpose of appreciating the case and to examine whether the appellants are entitled for enhancement of compensation claimed by them in this civil appeal. The first appellant is the wife of the deceased Susil Kumar Rout and the second appellant is the son of the deceased (minor at the time of the accident). On account of a head on collision between the car of the deceased bearing registration No. OR 09 C 6463 and a truck bearing registration No. OR 09 C 7165 on National Highway 5 near Uraili Chhaka on 08.11.2004, the deceased sustained injuries and was declared brought dead at Jajpur Hospital. It is the case of the appellants that the road was wide and spacious and the accident was due to the rash and negligent driving of the driver of the offending truck. It is claimed by the appellants that at the time of the accident, the deceased was having good health and was earning a sum of Rs.5000/- per month which was mostly contributed to the appellants for their livelihood.

4. During the time of hearing, the owner of the truck was arrayed as a party and was served with notice but he remained absent and did not contest the proceedings. Respondent No. 1, the driver also did not file any counter statement despite notice being served on him and he was set ex-parte. Respondent No.2, the New India Assurance Company filed its statement of counter opposing the claim of the appellants taking the plea that the claim petition is not maintainable and the claim is barred by limitation. The averments regarding the age and income of the deceased were denied, and so also, the averments regarding the manner in which the accident occurred as described in the claim petition. It was pleaded by the Insurance Company that the averments made by the appellants in the claim petition regarding the manner in which the accident took place are false and fabricated. They have claimed that the accident was not due to sole negligence of the driver of the offending truck, by placing strong reliance upon the

charge-sheet filed by the Dharmasala police, who seized both the vehicles. Therefore, it is stated that both the drivers of the car and the truck were responsible for causing accident amounting to contributory negligence on the part of the deceased Susil Rout. The accident occurred on account of head on collision between the two vehicles. Due to the death of the deceased- husband of the first appellant, the charge-sheet submitted against him was deleted.

5. Four issues were framed by the Tribunal on the basis of the pleadings and the case went for trial on behalf of the appellants. The first appellant was examined as PW-1. In support of their claim, she produced and marked the documents namely, Exh.1 charge-sheet filed in GR 114 of 2004 before the S.D.J.M., Exh.2 three seizure lists, Exh.3 Zimanama, Exh. 4 inquest report, Exh.5 post mortem examination report and Exh.6 the copy of driving licence of the deceased. Apart from her, three other eye witnesses were examined, and they supported the claim of the appellants. None were examined on behalf of the Insurance Company to prove its case before the Tribunal. The Tribunal, on the basis of appreciation of pleadings and evidence on record, has answered the issue Nos. 1, 2 and 3 together and partly accepted the case of the appellants. The evidences of PW-2 and PW-4 are taken into consideration by the Tribunal and recorded the finding holding that the appellants did not produce FIR but on the other hand they have suppressed the same. The Tribunal placed reliance upon the charge-sheet-Exh. 1 and other documentary evidence referred to supra and held that due to negligence of both the drivers of the vehicles, there was a head on collision of both the vehicles and the accident occurred. The appellants have placed strong reliance on the documents Exhs.1 to 5 produced by them in their evidence after adverting to the fact that neither the owner of the car nor the driver of the truck came forward to adduce evidence to prove the plea taken by the Insurance Company that there was contributory negligence on the basis of the documentary

evidence on record and the so called admission of PW-4. The Tribunal has recorded the finding of fact on the contentious issue No. 1, and held that the accident occurred due to head on collision between the two vehicles and both the drivers are equally responsible for the occurrence of the accident. Therefore, the Tribunal recorded a finding of fact in this regard and held that appellants who are the legal heirs of the deceased are entitled to get compensation to the extent of 50% for the fault of the offending truck and held that the owner of the truck and the Insurance Company both are liable to pay 50% of the compensation to the appellants. Accordingly, issue Nos. 2 and 3 were also decided in favour of the appellants. The Tribunal quantified the compensation accepting the age of the deceased as 35 years on the basis of post mortem examination report - Exh.5 and applied multiplier of 16 to the multiplicand to quantify the loss of dependency by taking the monthly salary of the deceased at Rs.3,000/- in the absence of documentary evidence. Out of this amount, 1/3rd was deducted towards personal expenses of the deceased and the amount was quantified at Rs.3,84,000/-. Out of this amount again, 50% was deducted towards alleged contributory negligence of the deceased husband of the first appellant and the Tribunal awarded Rs.1,92,000/- towards the loss of dependency. To this amount, under the conventional heads, Rs.5000/- and Rs.3000/- was awarded towards funeral expenses and loss of estate, love and affection respectively and thereby in total, a compensation of Rs.2,00,000/- with interest at the rate of 6% per annum was awarded to the appellants. The appellants were aggrieved by the inadequate compensation awarded by the Tribunal in its judgment. The correctness of the same was questioned by them by filing an appeal before the High Court seeking enhancement of compensation. The High Court has passed a cryptic order without adverting to and appreciating the pleadings and evidence, and assigning any reason whatsoever to hold that the reasons assigned by the Tribunal on the contentious issue Nos. 1 and 2 do not suffer from

impropriety and illegality. The correctness of the same is challenged in this appeal urging the following grounds.

6. It is contended by the learned counsel for the appellants that the High Court has not considered the evidence produced on record to show that the accident took place on account of rash and negligent driving of the driver of the truck, which is proved by examining the three eye-witnesses PW-2 to PW-4. The Tribunal, without considering the testimony of the eye witnesses has erroneously placed reliance upon Exh.1 the charge-sheet which was filed against both the drivers of the car as well as the offending truck. Further, it has held that there is 50% contributory negligence on the part of the deceased. PW-3 was not examined by the police during the course of investigation and PW-2 had stated in his evidence that the car was also driven in high speed. It is urged by the learned counsel for the appellants that the Tribunal, without there being any rebuttal evidence adduced by either the owner of the truck or his driver or any other independent witness to prove the alleged fact of contributory negligence on the part of the deceased, has erroneously recorded the finding of fact on the contentious issue No. 1 and held that there is contributory negligence on the part of the deceased. Therefore, it is urged by the learned counsel that the approach of the Tribunal in appreciating the evidence on record without there being any evidence on record adduced by the Insurance Company about the negligence of the deceased is erroneous. The Tribunal has placed reliance on the charge-sheet filed against both the deceased and the driver of the offending vehicle and has held that there was contributory negligence of the deceased which resulted in head on collision between the two vehicles. This fact is not established by producing any evidence by the Insurance Company availing the defence of the insured. PW-1 who was traveling in the car has narrated how the accident occurred. The other eye witnesses who have witnessed the accident have also deposed in favour of the appellants. They have stated that on account of rash and negligent driving of the driver of the offending truck, the accident

took place. In fact, PW-2 has stated in his evidence that he was going to his village on his bicycle and the accident took place within a distance of 15 feet away from him. Two other persons who have witnessed the accident were examined in the case in support of the claim of the appellants. It is urged in their evidence that they had helped the injured persons by shifting them to the Jajpur Hospital. PW-3, who is a betel shop owner, whose shop is situated near the place of accident, has stated in his evidence that there were six persons in the car and that he was not examined by the police. PW-4 deposed that he had seen the accident from a little distance from market where 10 to 20 persons were present at that time. He has stated in his evidence that the truck was in a high speed and there were six persons inside the car who sustained injuries. The driver of the car sustained grievous injuries and was conscious when he was taken to Jajpur Hospital on a trekker and later succumbed to injuries. The evidence of this eye witness has not been properly considered both by the Tribunal and the High Court, while recording the finding on the relevant contentious issue No.1. Therefore, the findings recorded on the issue No.1 by the Tribunal is erroneous in law, and the same concurred with by the High court without re-appreciating evidence on record, and therefore, is liable to be set aside. The compensation awarded by the Tribunal towards the loss of dependency was at Rs.3,84,000/- for the reason that the appellants did not produce documentary evidence to prove the monthly income of the deceased at Rs.5000/- as claimed by them. Therefore, the Tribunal has taken Rs.3000/- per month as salary of the deceased, even though he was entitled for more than Rs.6000/- per month as the job of a driver is a skilled job. The aforesaid relevant fact should have been taken into consideration by the Tribunal in the absence of documentary evidence placed on record to quantify the reasonable compensation. The Tribunal was required to consider the claim of the appellants by taking reasonable amount towards the monthly salary for which the deceased was entitled to in law and on that basis the Tribunal should have quantified and awarded [illegible]e

compensation towards loss of dependency. That has not been done in the case in hand by the Tribunal. Therefore, it is urged by the learned counsel that the Tribunal has committed an error on fact by taking Rs.3000/- as monthly salary of the deceased for determination of multiplicand by ignoring the fact that the job of a driver is a skilled job. The Tribunal should have taken Rs.6000/- per month as the salary of the deceased and 1/3rd should have been deducted from his monthly salary towards his personal expenses.

7. Out of the total compensation of Rs.3,84,000/- under the head loss of dependency, 50% was deducted on the ground of equal contributory negligence on the part of the deceased and the Tribunal has erroneously awarded Rs.1,92,000/- towards the loss of dependency. It is further contended that the aforesaid legal contentions urged on behalf of the appellants are not examined by the High Court while exercising its appellate jurisdiction. It has passed a cryptic order without re-appreciating the facts, legal evidence on record and law on the question. Therefore, it is contended that the impugned judgment is vitiated both on facts and law and hence, the same is liable to be set aside.

8. The learned counsel on behalf of the Insurance Company has sought to justify the impugned judgments of both the Tribunal as well as the High Court contending that the Tribunal being a fact finding authority, on proper appreciation of both oral and documentary evidence, particularly, the evidence of PW-3 and PW-4 who were eye witnesses, and have deposed that there was contributory negligence, has rightly affirmed so. The PW-2, who has stated in his evidence that the car was coming in a speed and there was a head on collision between the two vehicles, on the basis of documentary evidence Exh.1 the charge-sheet, the finding of fact recorded by the Tribunal, regarding contributory negligence on the part of the deceased is based on proper appreciation of facts and legal evidence. Therefore, the same cannot be termed as erroneous and does not call for interference by this Court.

Further, it is urged that the quantum of compensation awarded by the Tribunal under the heading of loss of dependency at Rs.1,92,000/- in the absence of documentary evidence to prove the monthly income of the deceased, is legal.

9. On the basis of the rival factual and legal contentions urged by the learned counsel on behalf of the parties, the following points would arise for consideration of this Court:

1. Whether the finding of fact recorded by the Tribunal on the contentious issue No.1 holding that contributory negligence on the part of the deceased driver Susil Rout and award of compensation at Rs. 1,92,000/-, the same being affirmed by the High Court in its judgment, is erroneous in law and wrrant interference in this appeal?

2. Whether the appellants are entitled to enhanced compensation?

3. What award?

Answer to point No.1:

10. This point is required to be answered in favour of the appellants for the following reasons:-

It is an undisputed fact that the accident took place on 08.11.2004 at about 11.45 p.m on account of head on collision between truck bearing registration No. OR09-C-7165 and the car driven by the deceased bearing registration No. OR 09-C-6463. The Jajpur Police Station has registered FIR against both the drivers of the offending vehicle and the car. After investigation of the case, charge-sheet Exh.1 GR 114 of 2004 was filed before the S.D.J.M Jajpur against the first respondent and the deceased, and on account of his death the case was abated and therefore, the Tribunal has committed error in law in coming to the conclusion in the absence of rebuttal evidence that there was contributory negligence of 50% on the part of the deceased.

11. The case of the appellants is that the accident took place on account of rash and negligent driving of the offending truck by its driver. The offending truck was coming from opposite direction to the car. In the car, there were six persons traveling including the first appellant. The first appellant was examined as P.W.1 and other three eye witnesses were also examined as P.W.2 to P.W.4, who supported the version of P.W.1. They have narrated in their evidence that the accident occurred on 8.11.2004. P.W.2 has stated in his evidence that the accident took place within 15 feet away from the place, when he was going to his village in his bicycle. Two other eye witnesses were also examined as P.W.3 and P.W.4 who have also deposed before the Tribunal stating that Susil Rout got grievous injuries on account of the accident and was shifted to the Jajpur Hospital, where he was declared dead. They have also deposed that the occurrence of the accident was on account of rash and negligent driving of the truck. There was head on collision between the offending truck and the car.

12. P.W.3 was a betel shop owner, whose shop is situated near the spot of the accident. Though he was not examined by the Investigating Officer in the police case he is examined before the Tribunal whose evidence is required to be accepted for the reason that the same is not rebutted by the respondents. P.W.4 has stated in his cross examination that he saw the accident from a little distance from the market place, where about 10 to 20 persons were present. He has further deposed that the truck was in a high speed and the people traveling in the car sustained injuries and the driver of the car Susil Rout suffered grievous injuries and succumbed to the same. He was conscious when he was taken to the Jajpur Hospital on a trekker. The Tribunal, on appreciation of the oral and documentary evidence, has recorded the erroneous finding by placing strong reliance upon the charge-sheet-Exh.1 without considering the fact that the criminal case was abated against the deceased and further has made observation in the judgment that the appellants had not produced the FIR. Therefore, it has

held that there was 50% contributory negligence on the part of the deceased driver in causing accident. The Tribunal ought to have seen that non production of FIR has no consequence for the reason that charge sheet was filed against the truck driver for the offences punishable under Sections 279 read with Section 302 of IPC read with the provisions of the M.V. Act. The Insurance Company, though claimed permission under Section 170(b) of the Motor Vehicles Act, 1988 from the Tribunal to contest the proceedings by availing the defence of the owner of the offending vehicle, it did not choose to examine either the driver of the truck or any other independent eye witness to prove the allegation of contributory negligence on the part of the deceased Susil Rout on account of which the accident took place as he was driving the car in a rash and negligent manner. In the absence of rebuttal evidence adduced on record by the Tribunal, the Tribunal should not have placed reliance on the charge-sheet-Exh.1 in which the deceased driver was mentioned as an accused and on his death; his name was deleted from the charge sheet. The Tribunal has referred to certain stray answers elicited from the evidence of P.W.2 and P.W.3 in their cross-examination and placed reliance on them to record the finding on issue no.1. For the aforesaid reasons, the findings and reasons recorded by the Tribunal on the contentious issue No.1 holding that there is contributory negligence on the part of the deceased driver in the absence of legal evidence adduced by the Insurance Company to prove the plea taken by it that accident did not take place on account of rash and negligent driving of the truck driver is erroneous in law. The Tribunal has accepted the part of oral evidence of the eye witnesses regarding the scene of accident and it has erroneously placed reliance upon the charge-sheet-Exh.1, which was filed against the driver of the offending truck and deceased to hold there was contributory negligence on his part by ignoring the fact that the criminal case against the deceased was abated. Therefore, we have to hold that the finding of fact recorded on issue No.1 by the Tribunal and affirmed by the High Court in the i s

erroneous for want of proper consideration of pleadings and legal evidence by both of them. Accordingly, we have answered point No.1 in favour of the appellants in so far as the finding recorded by the Tribunal on the question of contributory negligence of 50% on the part of the deceased is concerned.

Answer to point Nos. 2 and 3:

13. The appellants claimed compensation under the heading of loss of dependency as they were all dependents upon the earnings of the deceased Susil Rout. It is an undisputed fact that Susil Rout was working as a driver of the car which is a skilled job. Appellants have stated in the claim petition and in the evidence of PW-1 that the deceased was earning Rs.5,000/- per month. The oral evidence of PW-1 is not accepted by the Tribunal, solely for the reason that the appellants did not produce documentary evidence to prove the monthly salary of the deceased as Rs.5,000/- per month as claimed by them. However, it had taken monthly income of the deceased at Rs.3,000/-, for the purpose of determining the multiplicand. Out of Rs.3,000/- p.m., 1/3rd amount was deducted towards personal expenses of the deceased and arrived at Rs.3,84,000/- towards loss of dependency. Out of that compensation, 50% was deducted towards contributory negligence on the part of the deceased and Rs.1,92,000/- was awarded under the above heading. The compensation awarded by the Tribunal is approved by the High Court, which is not only erroneous in law but also suffers from error in law. The Tribunal ought to have taken the salary of the deceased driver at Rs.6,000/- by taking judicial notice of the fact that the post of a driver is a skilled job. Though the claim of the appellants is Rs.5000/- as monthly salary of the deceased for the purpose of determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000/- per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the Appellate Court. In view of the law laid down

by this Court in *Santosh Devi vs. National Insurance Company Ltd. & Ors.*[1]; 30% of future prospects of the deceased should be added to the monthly income. If 30% is added to the monthly income, it would amount to Rs.7,800/- p.m. From the same, 1/3rd should be deducted towards the personal expenses of the deceased, then the remaining amount would come to Rs.5,200/- per month. The same is multiplied by 12 amounting to Rs.62,400/- which would be the multiplicand. The same must be multiplied by 16 multiplier as the Tribunal has taken the age of the deceased at 35 as mentioned in the post mortem report, which is produced as Exh.5. According to the decision of this Court in *Sarla Verma vs. Delhi Transport Corporation*[2], the multiplier of 16 taken by the Tribunal for computation of loss of dependency is correct. If the 16 multiplier is applied to the multiplicand of Rs.62,400/-, it comes to Rs.9,98,400/- which amount is awarded towards the loss of dependency of the appellants. We have answered point No.1 in favour of the appellants holding that the finding recorded by the Tribunal that there was 50% contributory negligence of both the drivers of the offending truck and the deceased, is erroneous and further 50% deduction out of the total loss of dependency compensation determined by the Tribunal is not correct. Therefore, we have to hold that the appellants are entitled to the full amount of Rs.9,98,400/-. Further, the Tribunal has erroneously awarded a sum of Rs.5,000/- for funeral expenses without taking into consideration the actual amount required to be spent towards funeral expenses and obsequies ceremonies. The Tribunal has also inadequately awarded Rs.3,000/- towards loss of love and affection. The Tribunal also erred both on facts and in law as it has completely ignored the fact that the deceased died leaving behind him the first appellant-the widow, his mother and two minor children, who have lost the love and affection of their father. Therefore, this Court, after taking into consideration all

1. 2012 (6) SCC 421.
2. (2009) 6 SCC 121.

the expenses incurred for the funeral and sudhi ceremonies and towards loss of love and affection by the surviving child and the first appellant wife, by applying the decision in the case of *Kerala State Road Transport Corporation vs. Susamma Thomas*[3], awards Rs.50,000/- which is just and reasonable under the conventional heads. If Rs.50,000/- is added to the compensation awarded for the loss of dependency, the total compensation comes to Rs.10,48,400/-. The Insurance Company is liable to pay the same as the offending vehicle is insured with it and the same is an undisputed fact. The Insurance Company is also liable to pay interest at the rate of 9% per annum, from the date of application till the date of payment in view of the decision of this Court in *Municipal Council of Delhi vs. Association of Victims of Uphaar Tragedy*[4].

14. Accordingly, we allow the appeal in the following terms:

(I) The impugned judgments and awards of the Tribunal and the High Court are set aside.

(II) We award Rs.10,48,400/ with 9% interest per annum payable from the date of filing the application till the date of payment.

(III) The compensation awarded shall be apportioned between the appellants - Minu Rout and Sumit Kumar Rout, equally as the remaining appellants Ratnamani Rout and Rohit Kumar Rout died during the pendency of the proceedings and their names have been deleted by the High Court of Orissa on 22.8.2011.

(IV) We direct the Insurance Company to deposit 50% of the awarded amount with proportionate interest in any of the Nationalized Bank of the choice of the appellants for a period of 3 years. During the said period, if they want to

3. (1994) 2 SCC 176.
4. (2011) 4 SCC 481.

withdraw a portion or entire deposited amount for their personal or any other expenses, including development of their asset, then they are at liberty to file application before the Tribunal for release of the deposited amount, which may be considered by it and pass appropriate order in this regard. The rest of 50% amount awarded with proportionate interest shall be paid to the appellants by way of a demand draft within six weeks from the date of receipt of a copy of this order after deducting the amount if already paid.

There will be no order as to costs.

B.B.B. Appeal allowed.