NIHAL SINGH & OTHERS
v.
STATE OF PUNJAB & OTHERS
(Civil Appeal No. 1059 of 2005)

AUGUST 7, 2013

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

Service Law – Regularisation – Appointment of appellants ex-servicemen as Special Police Officers (SPOs) in term s of the procedure u/s.17 of the Act – Claim of appellants for regularisation – Rejected – Legality – Held: Recruitment of appellants was made in the background of terrorism prevailing in the State of Punjab at that time – Decision to resort to procedure u/s.17 was taken at the highest level of the State by conscious choice to provide necessary security to the public sector banks – Process of selection adopted in identifying the appellants was not unreasonable or arbitrary – From the mere fact that payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks – Appointment of appellants was made by the State and disciplinary control vested with the State, the two factors which conclusively establish relationship of master and servant between the State and the appellants – No justification for the State to take defence, after permitting utilisation of the services of appellants for decades, that there were no sanctioned posts to absorb the appellants – Sanctioned posts do not fall from heaven – State has to create them by a conscious choice on the basis of rational assessment of the need – Failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants for decades together itself would be arbitrary action (inaction) on the part of the State – On facts, creation

of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of the appellants was made available had agreed to bear the burden – If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden – State Government directed to regularise the services of the appellants by creating necessary posts – Police Act, 1861 – ss.17 and 18.

Service Law – New posts – Creation of – Assessment of need – Examination by Constitutional Court not barred.

Service Law – New posts – Creation of – Considerations for – Discussed.

There was a large scale disturbance in the State of Punjab in 1980s and the State was not in a position to handle the prevailing law and order situation with the available police personnel. Therefore, the State of Punjab resorted to recruitment under section 17 of the Police Act, 1861 which enabled appointment of Special Police Officers (SPOs). The appellants, who were ex-servicemen, were recruited as SPOs.

Subsequently, the appellants approached the High Court praying that their services be regularized. The writ petition was dismissed directing consideration of the cases of the appellants in accordance with the law. Pursuant to the directions, the Senior Superintendent of Police (SSP) purported to consider the cases of the appellants and passed order rejecting their claim on the ground that the appellants were working as guards with various banks and their wages were being paid by such banks and, therefore, their claim for regularization, if any,

lay only to the concerned bank but not to the police department.

Challenging the said order, the appellants once again approached the High Court in a Writ Petition which was dismissed on the basis of an earlier judgment of the High Court in Letter Patent Appeal No.209 of 1992 filed by persons similarly situated as the appellants, wherein the High Court had rejected the claim of the SPOs for regularization. Hence the present appeals.

Allowing the appeals, the Court

HELD:1.1. The appointment of all the appellants was made by the SSP in exercise of the statutory power under section 17 of the Police Act, 1861. The powers, privileges and obligations of the SPOs appointed in exercise of the powers under section 17 of the Act are specified in section 18. It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power under section 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages. [Paras 16, 17] [14-B-C, E-F]

1.2. From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment was made by the State and the disciplinary control vested with the State, the two factors which conclusively establish that the relationship of master and servant exists between the State and the appellants. Under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment

of wages to the appellants was being made by the concerned banks rendering them disentitled to seek regularization of their services from the State, is clearly untenable. [Para 18] [14-G-H; 15-A-C]

2.1. In the judgment of the division bench of the High Court of Punjab & Haryana in LPA No.209 of 1992 where the claims for regularization of the similarly situated persons were rejected on the ground that no regular cadre or sanctioned posts are available for regularization of their services, the High Court may be factually right in recording that there is no regularly constituted cadre and sanctioned posts against which recruitments of persons like the appellants were made. However, that does not conclusively decide the issue on hand. The creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State. That the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship only demonstrates the arbitrary nature of the exercise of the power available under section 17 of the Act. [Para 19] [15-C-F]

2.2. No doubt that the powers under section 17 are meant for meeting the exigencies contemplated under it, such as, riot or disturbance which are normally expected to be of a short duration. Therefore, the State might not have initially thought of creating either a cadre or permanent posts. But there is no justification for the State to take a defence after permitting the utilisation of the services of large number of people like the appellants for decades that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need. [Paras 20, 21] [15-G-H; 16-A-B]

3.1. The initial appointment of s

made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. [Paras 25, 26] [18-C-D, E-F]

3.2. Pursuant to the requisition by the police department, options were called upon from ex-servicemen who were willing to be enrolled as Special Police Officer (SPOs) under section 17 of the Police Act, 1861. Such a procedure making recruitments through the employment exchanges is consistent with the requirement of Articles 14 and 16 of the Constitution. It is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates. [Paras 27, 29] [20-B-E]

3.3. The recruitment of the appellants and other similarly situated persons was made in the background of terrorism prevailing in the State of Punjab at that time. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process of selection cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants. Preference

was given to persons who are in possession of licensed weapons. The procedure which is followed during the normal times of making recruitment by inviting applications and scrutinising the same to identify the suitable candidates would itself take considerable time. Even after such a selection, the selected candidates are required to be provided with necessary arms and also be trained in the use of such arms. All this process is certainly time consuming. The requirement of the State was to take swift action in an extra-ordinary situation. Therefore, the process of selection adopted in identifying the appellants cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. [Paras 30, 31, 32] [21-A-F]

Union of India and Ors. v. N. Hargopal and Ors. **(1987) 3 SCC 308: 1987 (2) SCR 911 – relied on.**

4.1. No doubt the assessment of the need to employ a certain number of people for discharging a particular responsibility of the State under the Constitution is always with the executive Government of the day subject to the overall control of the Legislature. That does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need is barred. [Para 34] [22-C-D]

4.2. The existence of the need for creation of the posts is a relevant factor reference to which the executive government is required to take rational decision based on relevant consideration. When the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants for decades together itself would be arbitrary action (inaction) on the part of the State. [Para 35] [23-C-D]

4.3. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the Legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is – the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. These banks are public sector banks. Neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. [Para 36] [23-E-F; 24-A-C]

S. S. Dhanoa v. Union of India **(1991) 3 SCC 567: 1991 (3) SCR 159 – relied on.**

Secretary, State of Karnataka and Ors v. Umadevi (3) and Ors **(2006) 4 SCC 1: 2006 (3) SCR 953 – referred to.**

5. The appellants are entitled to be absorbed in the services of the State. The State of Punjab is directed to regularise the services of the appellants by creating necessary posts. Upon such regularisation, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already

in the cadre of the police services of the State. [Para 37 and 38] [24-D-F]

Case Law Reference:

2006 (3) SCR 953	**referred to**	**Para 15**
1987 (2) SCR 911	**relied on**	**Para 28**
1991 (3) SCR 159	**relied on**	**Para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1059 of 2005.

From the Judgment & Order dated 21.08.2006 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 1024 of 2005.

WITH

C.A. No. 6315 of 2013

R.K. Kapoor, Shivani Mahipal, Sheweta Kapoor, Rajat Kapoor, Prikshit Mahipal, Anis Ahmed Khan for the Appellants.

Kuldip Singh, Mohit Mudgal, Jagjit Singh Chhabra, Ajay Pal for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted in SLP (Civil) No.12448 of 2009.

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 Civil Appeal No.1059 of 2005.

3. This appeal arises out of a judgment in CWP No. 13915 of 2002 of the High Court of Punjab and Haryana dated 23rd January, 2003. 20 unsuccessful petitioners in the above writ-petition are the appellants herein. The High Court dismissed the writ petition following an earlier judgment of a Division Bench in LPA 209 of 1992 dated 6th S[illegible]h

in turn arose out of Civil Writ Petition No. 5280 of 1988. The facts leading to all these writ petitions as could be culled out from the material on record are as follows:-

4. There was a large scale disturbance in the State of Punjab in 1980s. State was not in a position to handle the prevailing law and order situation with the available police personnel. Therefore, the State of Punjab resorted to recruitment under section 17[1] of the Police Act, 1861 (hereinafter referred to as 'the Act') which enabled the State (police officers not below the rank of Inspector) to appoint Special Police Officers.

5. The factual background in which persons such as the appellants herein came to be appointed is recorded in the judgment in LPA No. 209 of 1992 as follows:-

> "I was at the meeting held on March 24, 1984 between the Advisor to the Governor of Punjab and Senior officers of the banks in the public Sector Operating in Punjab that, after reviewing the security arrangements for banks in Punjab, it was decided that SPOs be appointed for the said purpose in terms of section 17 of the Police Act, 1861 (hereinafter referred to as the Act). This step was taken as it was felt that it would not be possible for the State Govt. to provide the requisite police guards to banks and that, thereafter, this additional force be raised, in order to do so, the banks undertook to take over the financial burden of the SPOs to be appointed, but it was clearly understood that as per the provisions of the Act, such Police Officers would be under the discipline and control of the Senior Superintendent of Police of the district concerned. As regards their remuneration it was decided that SPOs would be paid an honorarium of Rs. 15/- per day. This was, however, later enhanced to Rs. 30/- per day. Relevant in the context of the SPOs to be appointed, was the further decision"

6. The appellants herein assert that all the appellants are ex-servicemen and registered with the employment exchange. They were recruited as Special Police Officers[2].

7. The appointment order of the first appellant reads as follows:

> "Nihal Singh s/o Shri Nidhan Singh r/o Kallah PS Sadar 7-7 is hereby appointed as a Special Police Officer under section 17 of the Police Act, 1961, in the rank of SPO and is assigned special constabulary number 277. He shall be entitled to all privileges under Police Act 1861 and shall be under the administrative control of the undersigned in the matter of discipline etc.
>
> He shall be paid Rs.35/- per day by the concerned bank of posting as honorarium from the date he actually takes over charge of his duty."

8. In the background of such appointments, various persons who were appointed, including the appellants herein,

1. Section 17, Police Act, 1861—When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that police force ordinarly employed for preserving the peace is not sufficient for its preservation and for the protection of the inhabitants and the security of property in the place where such unlawful assembly or riot or disturbances of the peace has ocurred, or is apprehended, it shall be lawful for any police officer not blew the rank of Inspector to apply to the nearest Magistrate to appoint so many of the residents of the neighourbhood as such police officers may require to act as SPOs for such time and within such limits as he shall deem necessary and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application.

2. Ground IV of SLP.....It was the Police Department which sent the intimation to the employment exchange and thereafter all the ex-serviceman who enrolled as Special Police Officer (SPOs) under Section 17 of the Police Act, 1861. Those persons who were having armed licence were enrolled as SPOs and this enrolment was made by the Superintendent of Police, Amritsar. Similar orders were passed by the Superintendent of Police regarding all the petitioners between 1986 to

approached the High Court of Punjab & Haryana from time to time seeking appropriate directions for regularisation of their services. It appears that the petitioners herein also had approached the High Court earlier in CWP No.19390 of 2001 praying that their services be regularized in the light of notification No.11/34/2000-4PP-III/1301 dated 23.1.2001. The said writ petition was dismissed by order dated 12.12.2001 directing consideration of the cases of the petitioners therein (appellants herein) in accordance with the law and pass a speaking order.

9. Pursuant to the said directions, the Senior Superintendent of Police, Amritsar (hereinafter referred to as 'the SSP') purported to consider the cases of the appellants herein and passed an order dated 23.4.2002 rejecting the claim of the appellants. The relevant portion of the order reads as follows:

> "In compliance with the aforesaid order dated 12.12.2001 passed by the Hon'ble High Court of Punjab and Haryana, the joint legal notice dated 3.4.2001 (Annexure P-4) submitted by the petitioners, has been examined by the undersigned and it has been found that the petitioner is not entitled to claim the relief of regularization of his services as he was appointed as SPOs (Bank Guards) on daily wages basis @ Rs.30/- per day by the SSP/Amritsar vide No.14477-80/B dated 27.4.87 S.P.O. (Bank Guard), on the request of the Bank Authorities which were increased later on from time to time as per Govt. instructions. They were appointed as SPO (Bank Guards) in order to provide them power, privileges and protection of ordinary police official as provided under section 18 of the Police Act 1861 due to terrorism in the State at that time. The petitioners are still working as guards with the Gramin Banks and daily wages is being given by the Bank Authorities. No seniority of the S.P.O. (Bank Guard) has been maintained in Amritsar District. SPO (Bank Guard) is still working with the Gramin banks in Amritsar district and he can lay his claim, if any, to the bank authorities instead of the Police Department.
>
> Keeping in view the above legal notice dated 3.4.2001 (annexure P.4) has been considered. The notification No.11/34/2000-4PP-III/1301 dated 23.1.2001 is not applicable in the case bank guard as their daily wages are being paid by the bank. As such, the claim of the petitioner (Bank Guards) SPO Ajit Singh No.247/ASR is not maintainable against the State of Punjab or this Office. Legal notice Annexure P-4 is devoid of any legal force and is being rejected. The petitioner be informed personally."

10. Challenging the said order, the appellants herein once again approached the High Court of Punjab & Haryana in Civil Writ Petition No.13915 of 2002 which came to be dismissed by the judgment under appeal.

11. As already noticed, the appellants' writ petition was dismissed on the basis of an earlier judgment of the High Court of Punjab & Haryana passed in Letter Patent Appeal No.209 of 1992. In the said Letter Patent Appeal filed by the persons similarly situated as the appellants herein, the High Court of Punjab & Haryana recorded a categoric finding that there is a relationship of master and servant between the State of Punjab and the SPOs:

> "Such being the situation, there can be no escape from the conclusion that the relationship of master and servant of SPOs is with the State govt. and not with the banks."

However, the claim of the SPOs for regularization was refused holding:

> "As regards regularization of the services of Special Police Officers, by the very nature and purpose of their appointment as such, no occasion [illegible] h

regularization. As mentioned earlier, there is no regular cadre for such posts, nor have any particular number of posts been created for this purpose. These factors clearly mitigate against such services being regularized."

12. Relying on the said conclusion, the writ petition of the appellants herein also came to be dismissed. Hence the present appeal.

13. We are required to examine the correctness of the decision dated 23.4.2002 of the SSP as approved by the judgment under appeal. The reason assigned by the SSP for rejecting the claim of the appellants (the relevant portion of which order is already extracted above) is that the appellants are working as guards with various banks and their wages are being paid by such banks and, therefore, their claim for regularization, if any, lay only to the concerned bank but not to the police department.

14. Learned counsel for the appellants Shri R.K. Kapoor submitted that the conclusion of the SSP that appellants cannot have any claim against the State of Punjab to seek regularization of their services is clearly wrong in view of the fact that the master and servant relationship exists between the appellants and the State of Punjab. Coming to the conclusion of the High Court that in the absence of regularly constituted cadre or sanctioned posts, regularization of the services of the appellants cannot be guaranteed, Shri Kapoor argued that the authority to create posts vests exclusively with the State. The State cannot extract the work from the persons like the appellants for decades and turn back to tell the court that it cannot regularize the services of such persons in view of the fact that these appointments were not made against any sanctioned posts.

15. On the other hand, Shri Kuldip Singh, learned counsel appearing for the State submitted that in the light of the Constitution Bench decision of this Court in *Secretary, State*

of Karnataka and Ors v. Umadevi (3) and Ors (2006) 4 SCC 1, in absence of a sanctioned post the relief such as prayed by the appellants cannot be given.

16. As can be seen from the order of appointment of the 1st appellant - which we take to be representative of the orders of appointment of all the appellants (a fact which is not disputed by the respondent), the appointment was made by the SSP in exercise of the statutory power under section 17 of the Act. It is categorically mentioned in the said appointment order that the appellants are entitled to all the privileges under the Act. The powers, privileges and obligations of the SPOs appointed in exercise of the powers under section 17 of the Act are specified in section 18 which reads as follows:

> "Every special police officers so appointed shall have same powers, privileges and protection, and shall be liable to perform the same duties and shall be amenable to the same penalities and be subordinate to the same authorities, as the ordinary officers of police."

17. It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power under section 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages of Rs.35 (which came to be revised from time to time). Further, such payment was to be made by the bank to whom the services of each one of the appellants is made available.

18. From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment is made by the State. The disciplinary control vests with the State. The two factors which conclusively establish that the relationship of master and servant exists between the State and

which is clearly recognized by the division bench of the High Court in LPA No.209 of 1992. It may be worthwhile mentioning here that under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment of wages to the appellants herein was being made by the concerned banks rendering them disentitled to seek regularization of their services from the State is clearly untenable.

19. Coming to the judgment of the division bench of the High Court of Punjab & Haryana in LPA No.209 of 1992 where the claims for regularization of the similarly situated persons were rejected on the ground that no regular cadre or sanctioned posts are available for regularization of their services, the High Court may be factually right in recording that there is no regularly constituted cadre and sanctioned posts against which recruitments of persons like the appellants herein were made. However, that does not conclusively decide the issue on hand. The creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State. That the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship only demonstrates the arbitrary nature of the exercise of the power available under section 17 of the Act. The appointments made have never been terminated thereby enabling various banks to utilize the services of employees of the State for a long period on nominal wages and without making available any other service benefits which are available to the other employees of the State, who are discharging functions similar to the functions that are being discharged by the appellants.

20. No doubt that the powers under section 17 are meant for meeting the exigencies contemplated under it, such as, riot or disturbance which are normally expected to be of a short duration. Therefore, the State might not have initially thought of creating either a cadre or permanent posts.

21. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need.

22. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in *Umadevi's case*. To answer this question, the *ratio decidendi* of the *Umadevi's case* is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution.

> "4. … The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a **proper appointment procedure** through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, **keeping out those who are qualified to apply** for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion an[illegible]n

directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over."

(emphasis supplied)

23. It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment. It was further declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other

eligible candidates who were similarly situated to compete for such employment.

24. Even going by the principles laid down in *Umadevi's* case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

25. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us. The High Court in its decision in LPA No.209 of 1992 recorded that the decision to resort to the procedure under section 17 of the Act was taken in a meeting dated 24.3.1984 between the Advisor to the Government of Punjab and senior officers of the various Banks in the public sector. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. In this regard, the written statement filed before the High Court in the instant case by respondent nos.1 to 3 through the Assistant Inspector General of Police (Welfare & Litigation) is necessary to be noticed. It is stated in the said affidavit:

"2. That in meeting of higher officers held on 27.3.1984 in Governor House Chandigarh with Shri Surinder Nath, IPS, Advisor to Governor of Punjab, in which following decisions were taken:-

(i) That it will not be possible to provide police guard to banks unless the Banks were willing to pay for the same and additional force could be arranged on that basis, it was decided that police guards should be requisitioned by the Banks for their biggest branches located at the Distt. and Sub Divisional towns. They should place the requisition with the Distt. SSPs endorsing a copy of IG CID. In the requisition, they should clearly state that the costs of guard would be met by them. It will then be for the police department to get additional force sanctioned. This task should be done on a top priority. In the meantime depending upon the urgency of the need of any particular branch, police Deptt. may provide from police strength for its protection.

(ii) For all other branches guards will be provided by Distt. SSP after selecting suitable ex-servicemen or other able bodied persons who will be appointed as Special Police Officer in terms of Section 17 of the Police Act. Preference may be given to persons who may already be in possession of licence weapons. All persons appointed as SPO for this purpose will be given a brief training for about 7 days in the Police Lines in the handling of weapons taking suitable position for protection of branches. These SPOs will work under the discipline and control and as per Police Act, they will have the same powers, privileges and protection and shall be amenable to same penalty as an ordinary police personnel."

26. It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to **choose suitable ex-servicemen or other able bodied persons** for being appointed as Special

Police Officers in terms of section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority.

27. It is also asserted by the appellants that pursuant to the requisition by the police department options were called upon from ex-servicemen who were willing to be enrolled as Special Police Officer (SPOs) under section 17 of the Police Act, 1861[3].

28. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in *Union of India and Ors. v. N. Hargopal and Ors.* (1987) 3 SCC 308.[4]

29. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

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3. Paragraph 4 of the Writ petition and at page 34 of the SLP Paperbook:

"That the Government made a policy to enrol the ex-serviceman to guard the life and property of the Government employees as well as Government employees. All the petitioners being ex-servicemen enrolled themselves in the employment exchange. The police department sent the intimation to the employment exchange and thereafter all the ex-servicemen who were enrolled with the Employment Exchange were called upon and got their option to be enrolled in as Special Police Officer (SPOs) under section 17 of the Police, Act 1861 (hereinafter called as the SPos). Those persons who were having armed licence were enrolled as SPOs and this enrolment was made by the Superintendent of Police, Amritsar."

4. 9.....We, therefore, consider that insistence on recruitment through Employment Exchanges advances rather than restricts the rights guaranteed by Article 14 and 16 of the Constitution. The submission that Employment Exchanges do not reach everywhere applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily press, for example, is also equally ineffective as it does not reach everyone desiring employment.

30. Such a process of selection is sanctioned by law under section 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants.

31. It can also be noticed from the written statement of the Assistant Inspector General of Police (Welfare & Litigation) that preference was given to persons who are in possession of licensed weapons. The recruitment of the appellants and other similarly situated persons was made in the background of terrorism prevailing in the State of Punjab at that time as acknowledged in the order dated 23.4.2002 of the SSP. The procedure which is followed during the normal times of making recruitment by inviting applications and scrutinising the same to identify the suitable candidates would itself take considerable time. Even after such a selection the selected candidates are required to be provided with necessary arms and also be trained in the use of such arms. All this process is certainly time consuming. The requirement of the State was to take swift action in an extra-ordinary situation.

32. Therefore, we are of the opinion that the process of selection adopted in identifying the appellants herein cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. It may be worthwhile to note that in *Umadevi's case*, this Court was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States.

33. Coming to the other aspect of the matter pointed out by the High Court - that in the absence of sanctioned posts the State cannot be compelled to absorb the persons like the appellants into the services of the State, we can only say that posts are to be created by the State depending upon the need

to employ people having regard to various functions the State undertakes to discharge.

> "Every sovereign Government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration."[5]

34. It is no doubt that the assessment of the need to employ a certain number of people for discharging a particular responsibility of the State under the Constitution is always with the executive Government of the day subject to the overall control of the Legislature. That does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need is barred. This Court in *S.S. Dhanoa v. Union of India* (1991) 3 SCC 567 did examine the correctness of the assessment made by the executive government. It was a case where Union of India appointed two Election Commissioners in addition to the Chief Election Commissioner just before the general elections to the Lok Sabha. Subsequent to the elections, the new government abolished those posts. While examining the legality of such abolition, this Court had to deal with an argument[6] whether the

5. 42 American Jurisprudence 902 Para 31.

6. "21. In the first instance, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by respondent 1 (Union of India), that on account of the Constitution (61st Amendment) Act reducing the voting age and the voting age and the Constitution (64th Amendment) and (65th Amendment) and (65th Amendment) Bills relating to election to the Panchayats and Nagar Palikas, the work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts no ice. As has been pointed out by respondent 2, the work relating to revision of electroal rolls on account of the reduction of voting age was completed in all the States expect Assam by the end of July 1989 itself, and at the Conference of the Chief Elecoral Officers at Tirupati, respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sabha would be completed by August in the whole of the co[illegible]r, the Constitution (64th and 65th Amendment)

need to have additional commissioners ceased subsequent to the election. It was the case of the Union of India that on the date posts were created there was a need to have additional commissioners in view of certain factors such as the reduction of the lower age limit of the voters etc. This Court categorically held that "The truth of the matter as is apparent from the record is that …….there was no need for the said appointments…..".

35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the Legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the

Parliament, before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on October 16, 1989. Admittedly, further the views of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day, i.e., October 16, 1989.

services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is – the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. *Umadevi's* judgment cannot become a licence for exploitation by the State and its instrumentalities.

37. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside.

38. We direct the State of Punjab to regularise the services of the appellants by creating necessary posts within a period of three months from today. Upon such regularisation, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already in the cadre of the police services of the State. We are of the opinion that the appellants are entitled to the costs throughout. In the circumstances, we quantify the costs to Rs.10,000/- to be paid to each of the appellants.

B.B.B. Appeals allowed.

KAMLESH VERMA

v.

MAYAWATI AND ORS.

REVIEW PETITION (CRL.) NO. 453 OF 2012

IN

WRIT PETITION (CRL.) 135 OF 2008

AUGUST 8, 2013

[P. SATHASIVAM, CJI. AND DIPAK MISRA, J.]

Constitution of India, 1950 – Art.137 – Review jurisdiction – Exercise of –Scope – Review, when maintainable and when not maintainable – Principles summarised and discussed – Code of Civil Procedure, 1908 – Or. XLVII, r.1 – Supreme Court Rules, 1966 – Part VIII, Or. XL.

Constitution of India, 1950 – Art.137 – Review petition – Maintainability – Vide order dated 18.09.2003 in M.C. Mehta case, the Supreme Court had directed the CBI to conduct inquiry with respect to execution of Taj Heritage Corridor Project under Taj Trapezium Zone (TTZ) Area at Agra which culminated into registration of an FIR under provisions of IPC and the PC Act against several persons including respondent no.1 – CBI thereupon lodged another FIR under provisions of the PC Act only against respondent no.1 with regard to alleged acquisition of disproportionate movable and immovable assets by her and her relatives – Respondent no.1 filed writ petition before Supreme Court against the second FIR – Supreme Court by order dated 06.07.2012, quashed the second FIR holding that the order dated 18.09.2003 did not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against respondent no.1 and that the CBI exceeded its jurisdiction in lodging the same – Review petition challenging order dated 06.07.2012 passed in the Writ Petition – Held:

Review petitioner herein was intervener in the earlier writ Petition – Contentions raised by him were dealt with and duly considered at length in the order dated 06.07.2012 and it was clarified that anything beyond the Taj Corridor matter was not the subject matter of reference – Inasmuch as the very same point was urged once again, the same was impermissible – In the writ petition, the Supreme Court had not gone into any other aspect relating to the claim of the CBI, intervener (review petitioner herein) or the stand of the respondent except the directions relating to Taj Heritage Corridor Project which was the only lis – No material within the parameters of review jurisdiction to go into order dated 06.07.2012 passed in the Writ Petition – Code of Civil Procedure, 1908 – Or. XLVII, r.1 – Supreme Court Rules, 1966 – Part VIII, Order XL – Penal Code, 1860 – s.120-B r/w ss.420, 467, 468 and 471 – Prevention of Corruption Act, 1988 – s.13(2) r/w s.13(1)(d) and s.13(2) r/w s.13(1)(e).

Vide order dated 18.09.2003 in *M.C. Mehta* vs. *Union of India and Others*, the Supreme Court had directed the CBI to conduct an inquiry with respect to the execution of the Taj Heritage Corridor Project under Taj Trapezium Zone (TTZ) Area at Agra which culminated into the registration of an FIR being No. 0062003A0018 of 2003 dated 05.10.2003 under Section 120-B read with Sections 420, 467, 468 and 471 of IPC and under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against several persons including Respondent No.1.

On the very same date, i.e., on 05.10.2003, the Superintendent of Police, CBI/ACP lodged another FIR being RC No. 0062003A0019 of 2003 under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 only against respondent no.1 with regard to the alleged acquisition of disproportionate movable and immovable assets by respondent no.1 and her relatives.

Aggrieved by the filing of the

0062003A0019 of 2003, respondent no.1 preferred Writ Petition (Crl.) No. 135 of 2008 before this Court, wherein the review petitioner herein also moved an application for intervention. This Court allowed the application for intervention and then by order dated 06.07.2012, quashed the FIR being No. 0062003A0019 of 2003 dated 05.10.2003 holding that the order dated 18.09.2003 did not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against respondent no.1 and that the CBI exceeded its jurisdiction in lodging the same.

The order dated 06.07.2012 passed in Writ Petition (Crl.) No. 135 of 2008 was challenged in the present review petition.

The question which arose for consideration before this Court was whether the review petitioner had made out a case for reviewing the judgment and order dated 06.07.2012 passed in Writ Petition (Crl.) No. 135 of 2008 and satisfied the criteria for entertaining the same in review jurisdiction.

Disposing of the review petition, the Court

HELD: 1.1. Article 137 of the Constitution provides for review of judgments or orders by the Supreme Court. Order XLVII, Rule 1(1) of the Code of Civil Procedure, 1908, provides for an application for review. Further, Part VIII Order XL of the Supreme Court Rules, 1966 deals with the review. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise

that an alternative view is possible under the review jurisdiction. [Paras 5, 6, 7 and 15] [34-D, E; 35-C; 45-C-D]

1.2. The following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him; (ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason. The words "any other sufficient reason" has been interpreted to mean "a reason sufficient on grounds at least analogous to those specified in the rule".

(B) When the review will not be maintainable:- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications. (ii) Minor mistakes of inconsequential import. (iii) Review proceedings cannot be equated with the original hearing of the case. (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. (v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error. (vi) The mere possibility of two views on the subject cannot be a ground for review. (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched. (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition. (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived. [Para 16] [45-E-H; 46-A, B-G]

Sow Chandra Kante and Anr. vs. **1**

SCC 674; *M/s Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi* **(1980) 2 SCC 167: 1980 (2) SCR 650;** *Col. Avtar Singh Sekhon vs. Union of India and Ors.* **1980 (Supp) SCC 562: 1981 SCR 168;** *Parsion Devi and Ors. vs. Sumitri Devi and Ors.* **(1997) 8 SCC 715: 1997 (4) Suppl. SCR 470;** *Lily Thomas and Ors. vs. Union of India and Ors.* **(2000) 6 SCC 224: 2000 (3) SCR 1081;** *Kerala State Electricity Board vs. Hitech Electrothermics and Hydropower Ltd. and Ors.* **(2005) 6 SCC 651: 2005 (2) Suppl. SCR 517;** *Jain Studios Ltd. vs. Shin Satellite Public Co. Ltd.* **(2006) 5 SCC 501: 2006 (3) Suppl. SCR 409;** *Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius and Ors.* **(1955) 1 SCR 520 and** *Union of India vs. Sandur Manganese and Iron Ores Ltd. and Ors.* **JT 2013 (8) SCC 275: 2013 SCR 1045 – relied on.**

Mayawati vs. Union of India and Ors. **(2012) 8 SCC 106: 2012 (7) SCR 33;** *M.C. Mehta vs. Union of India and Ors.* **(2003) 8 SCC 706;** *M.C. Mehta vs. Union of India* **(2003) 8 SCC 711 and** *M.C. Mehta vs. Union of India and Ors.* **(2003) 8 SCC 696: 2003 (3) Suppl. SCR 925 – referred to.**

Chhajju Ram vs. Neki **AIR 1922 PC 112 – referred to.**

2.1. In order to substantiate the argument that FIR being RC No. 0062003A0019 of 2003 was lodged under the orders and directions of this Court, the petitioner referred to the earlier orders passed at the time of original hearing. In fact, the very same orders and arguments were advanced by the then Additional Solicitor General for CBI as well as the then counsel on behalf of the intervener/petitioner herein. In paragraph Nos. 18 to 23 of the order dated 06.07.2012, the very same contentions were made, dealt with and duly considered at length and it was clarified that anything beyond the Taj Corridor matter was not the subject matter of reference before the Taj Corridor Bench and the CBI was not justifying in proceeding with FIR being RC No. 0062003A0019 of 2003

dated 05.10.2003 since the order dated 18.09.2003 did not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against respondent No.1. After dealing with all those orders exhaustively, the contents of the FIR dated 05.10.2003 and taking note of the principles laid down by the Constitution Bench of this Court in the case of Committee for Protection of Democratic Rights, West Bengal & Ors., conclusion was arrived at by this Court in Writ Petition (Crl.) No. 135 of 2008. Inasmuch as the very same point has been urged once again, the same is impermissible. [Paras 20, 21] [47-H; 48-A-E]

2.2. The earlier writ petition filed by the respondent was disposed off based on the relief sought for, contents of the FIR dated 05.10.2003, and earlier directions relating to the Taj Heritage Corridor Project. This Court had not gone into any other aspect relating to the claim of the CBI, intervener or the stand of the respondent except the directions relating to Taj Heritage Corridor Project which was the only *lis* before this Court in Writ Petition being No. 135 of 2008. In such circumstances, there is no material within the parameters of review jurisdiction to go into the earlier order dated 06.07.2012. [Para 22 and 23] [50-C-E]

H.N. Rishbud and Inder Singh vs. The State of Delhi **1955 (1) SCR 1150;** *Vineet Narain and Ors. vs. Union of India and Anr.* **(1998) 1 SCC 226: 1997 (6) Suppl. SCR 595;** *State of West Bengal and Ors. vs. Committee for Protection of Democratic Rights, West Bengal and Ors.* **(2010) 3 SCC 571: 2010 (2) SCR 979 and** *Mayawati vs. Union of India* **(2012) 8 SCC 106: 2012 (7) SCR 33 – referred to.**

Case Law Reference:

2012 (7) SCR 33	**referred to**	**Para 1**
(2003) 8 SCC 706	**referr**	**)**

(2003) 8 SCC 711	**referred to**	**Para 2(b)**
2003 (3) Suppl. SCR 925	**referred to**	**Para 7**
(1975) 1 SCC 674	**relied on**	**Para 8**
1980 (2) SCR 650	**relied on**	**Para 9**
1981 SCR 168	**relied on**	**Para 10**
1997 (4) Suppl. SCR 470	**relied on**	**Para 11**
2000 (3) SCR 1081	**relied on**	**Para 12**
2005 (2) Suppl. SCR 517	**relied on**	**Para 13**
2006 (3) Suppl. SCR 409	**relied on**	**Para 14**
AIR 1922 PC 112	**referred to**	**Para 16A**
(1955) 1 SCR 520	**relied on**	**Para 16A**
2013 SCR 1045	**relied on**	**Para 16A**
1955 (1) SCR 1150	**referred to**	**Para 18**
1997 (6) Suppl. SCR 595	**referred to**	**Para 18**
2010 (2) SCR 979	**referred to**	**Para 21**

CRIMINAL ORIGINAL JURISDICTION : Review Petition (Crl.) No. 453 of 2012.

In

W.P. (Crl) No. 135 of 2008.

Under Article 32 of the Constitution of India.

Mohan Parasaran, ASG, Harish Salve, S.C. Mishra, Shail Kumar Dwivedi, Kapil Mishra, Abhinav Shrivastava, D.L. Chidananda, T.A. Khan, Arvind Kumar Sharma, B. Krishna Prasad, Kamini Jaiswal, Prashant Bhushan, Anupam Bharti,

Shashnak Singh, Pyoil Swatija, Akhilesh Karla, Rohit Kr. Singh, P. Narasimhan for the appearing parties.

The Judgment of the Court was delivered by

P.SATHASIVAM, CJI. 1. This petition has been filed by the petitioner herein-Kamlesh Verma seeking review of the judgment and order dated 06.07.2012 passed in *Mayawati vs. Union of India & Ors.* (2012) 8 SCC 106 (Writ Petition (Crl.) No. 135 of 2008).

2. **Brief Facts:**

(a) This Court, by order dated 16.07.2003 in I.A. No. 387 of 2003 in Writ Petition (C) No. 13381 of 1984 titled *M.C. Mehta vs. Union of India & Ors.,* (2003) 8 SCC 706, directed the CBI to conduct an inquiry on the basis of the I.A. filed in the aforesaid writ petition alleging various irregularities committed by the officers/persons concerned in the Taj Heritage Corridor Project and to submit a Preliminary Report. By means of an order dated 21.08.2003 in *M.C. Mehta vs. Union of India* (2003) 8 SCC 711, this Court issued certain directions to the CBI to interrogate and verify the assets of the persons concerned with regard to outflow of Rs. 17 crores which was alleged to have been released without proper sanction for the said Project.

(b) The CBI-Respondent No. 2 therein submitted a report on 11.09.2003 before this Court which formed the basis of order dated 18.09.2003 titled *M.C. Mehta vs. Union of India and Others,* (2003) 8 SCC 696 wherein the CBI was directed to conduct an inquiry with respect to the execution of the Taj Heritage Corridor Project under Taj Trapezium Zone (TTZ) Area at Agra which culminated into the registration of an FIR being No. 0062003A0018 of 2003 dated 05.10.2003 under Section 120-B read with Sections 420, 467, 468 and 471 of the Indian Penal Code, 1860 (in short 'the IPC') and under Section 13(2) read with Section 13(1)(d) of the Prever t,

1988 (in short 'the PC Act') against several persons including Ms. Mayawati-Respondent No. 1 herein.

(c) On the very same date, i.e., on 05.10.2003, Shri K.N. Tewari, Superintendent of Police, CBI/ACP, Lucknow lodged another FIR being RC No. 0062003A0019 of 2003 under Section 13(2) read with Section 13(1)(e) of the PC Act only against Ms. Mayawati (petitioner therein) alleging that in pursuance of the orders dated 21.08.2003, 11.09.2003 and 18.09.2003 passed by this Court, the CBI conducted an inquiry with regard to the acquisition of disproportionate movable and immovable assets of Ms. Mayawati and her close relatives on the basis of which, the CBI has lodged the said FIR. Pursuant to the same, the CBI conducted raids, search and seizure operations at all the premises of the petitioner therein and her relatives and seized all the bank accounts.

(d) Aggrieved by the filing of the FIR being RC No. 0062003A0019 of 2003, Ms. Mayawati-the petitioner therein and Respondent No. 1 herein preferred Writ Petition (Crl.) No. 135 of 2008 before this Court. In the said petition, one Shri Kamlesh Verma (the petitioner herein) also moved an application for intervention being I.A. No. 8 of 2010.

(e) This Court, by order dated 06.07.2012, quashed the FIR being No. 0062003A0019 of 2003 dated 05.10.2003 holding that the order dated 18.09.2003 does not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against Ms. Mayawati (the petitioner therein) and the CBI exceeded its jurisdiction in lodging the same and also allowed the application for intervention.

(f) Aggrieved by the order of quashing of the FIR being No. 0062003A0019 of 2003 dated 05.10.2003, Shri Kamlesh Verma-the petitioner herein/the intervenor therein has filed the above review petition.

3. Heard Mr. Shanti Bhushan, learned senior counsel for the petitioner, Mr. Satish Chandra Mishra, learned senior counsel for Respondent No. 1 herein and Mr. Mohan Parasaran, learned Solicitor General for the CBI.

Discussion:

4. The only point for consideration in this petition is whether the review petitioner has made out a case for reviewing the judgment and order dated 06.07.2012 and satisfies the criteria for entertaining the same in review jurisdiction?

Review Jurisdiction:

5. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court which reads as under:

> "Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

6. Order XLVII, Rule 1(1) of the Code of Civil Procedure, 1908, provides for an application for review which reads as under:

> "Any person considering himself aggrieved-
>
> a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> b) by a decree or order from which no appeal is allowed, or
>
> c) by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new

or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

7. Further, Part VIII Order XL of the Supreme Court Rules, 1966 deals with the review and consists of four rules. Rule 1 is important for our purpose which reads as under:

"The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII Rule 1 of the Code and in a criminal proceeding except on the ground of an error apparent on the face of the record."

8. This Court has repeatedly held in various judgments that the jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is an error apparent on the face of the record. A mere repetition through different counsel, of old and overruled arguments, a second trip over ineffectually covered grounds or minor mistakes of inconsequential import are obviously insufficient. This Court, in *Sow Chandra Kante & Anr. vs. Sheikh Habib* (1975) 1 SCC 674, held as under:

"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be, we were not right is refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious step and reluctant resort to it is

proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

9. In a criminal proceeding, review is permissible on the ground of an error apparent on the face of the record. A review proceeding cannot be equated with the original hearing of the case. *In M/s Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi,* (1980) 2 SCC 167, this Court, in paragraph Nos. 8 & 9 held as under:

"8. It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgm e

Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so: Sajjan Singh v. State of Rajasthan. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: G.L. Gupta v. D.N. Mehta. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi. Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order 40 Rule 1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility": *Sow Chandra Kante v. Sheikh Habib.*

9. Now, besides the fact that most of the legal material so assiduously collected and placed before us by the learned Additional Solicitor General, who has now been entrusted to appear for the respondent, was never brought to our attention when the appeals were heard, we may also examine whether the judgment suffers from an error apparent on the face of the record. Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original

judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record."

10. Review of the earlier order cannot be done unless the court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. This Court, in Col. *Avtar Singh Sekhon vs. Union of India & Ors.* 1980 (Supp) SCC 562, held as under:

> **"12.** A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In *Sow Chandra Kante v. Sheikh Habib* this Court observed :
>
> > "A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

11. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for patent error. This Court, in *Parsion Devi & Ors. vs. Sumitri Devi & Ors.,* (1997) 8 SCC 715, held as under:

> "7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In *Thungabhadra Industries Ltd. v. Govt. of A.P.* this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."(emphasis ours)

8. Again, in *Meera Bhanja v. Nirmala Kumari Choudhury* while quoting with approval a passage from *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma* this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

12. Error contemplated under the rule must be such which

is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. This Court, in *Lily Thomas & Ors. vs. Union of India & Ors.,* (2000) 6 SCC 224, held as under:

> "54. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure which provides:
>
> "1. *Application for review of judgment*.—(1) Any person considering himself aggrieved—
>
> *(a)* by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> *(b)* by a decree or order from which no appeal is allowed, or
>
> *(c)* by a decision on a reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree

Under Order XL Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order XL Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.

56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

58. Otherwise also no ground as envisaged under Order XL of the Supreme Court Rules read with Order 47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us during the arguments for the purposes of reviewing the judgment in *Sarla Mudgal* case, (1995) 3 SCC 635 It is not the case of the petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to the notice of the Court at the time of passing of the judgment. All pleas raised before us were in fact

addressed for and on behalf of the petitioners before the Bench which, after considering those pleas, passed the judgment in Sarla Mudgal case. We have also not found any mistake or error apparent on the face of the record requiring a review. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. No such error has been pointed out by the learned counsel appearing for the parties seeking review of the judgment. The only arguments advanced were that the judgment interpreting Section 494 amounted to violation of some of the fundamental rights. No other sufficient cause has been shown for reviewing the judgment. The words "any other sufficient reason appearing in Order 47 Rule 1 CPC" must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in *Chhajju Ram v. Neki,* AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius,* AIR 1954 SC 526 Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. In *T.C. Basappa v. T. Nagappa,* AIR 1954 SC 440 this Court held that such error is an error which is a patent error and not a mere wrong decision. In *Hari Vishnu Kamath v. Ahmad Ishaque,* AIR 1955 SC 233, it was held:

"[I]t is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarc

Mr Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in — *'Batuk K. Vyas v. Surat Borough Municipality,* AIR 1953 Bom 133' that no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

Therefore, it can safely be held that the petitioners have not made out any case within the meaning of Article 137 read with Order XL of the Supreme Court Rules and Order 47 Rule 1 CPC for reviewing the judgment in Sarla Mudgal case. The petition is misconceived and bereft of any substance."

13. In a review petition, it is not open to the Court to re-appreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court, in *Kerala State Electricity Board vs. Hitech Electrothermics & Hydropower Ltd. & Ors.,* (2005) 6 SCC 651, held as under:

"10. .....In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Learned counsel for the Board at best sought to impress us that the

correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

14. Review is not re-hearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to re-open concluded adjudications. This Court, in *Jain Studios Ltd. vs. Shin Satellite Public Co. Ltd.,* (2006) 5 SCC 501, held as under:

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review

extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of "second innings" which is impermissible and unwarranted and cannot be granted."

15. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in *Chhajju Ram vs. Neki,* AIR 1922 PC 112 and approved by this Court in Moran *Mar Basselios Catholicos vs.*

Most Rev. Mar Poulose Athanasius & Ors., (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors.,* JT 2013 (8) SC 275.

(B) When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

17. Keeping the above principles in mind, let us consider the claim of the petitioner and find out whether a case has been made out for interference exercising re

18. Mr. Shanti Bhushan, learned senior counsel for the petitioner, once again took us through various earlier orders passed by this Court in respect of Taj Corridor Project and submitted that even if there is any invalidity of investigation and breach of mandatory provision, it is the duty of the Court exercising jurisdiction under Article 32 of the Constitution of India to take necessary steps by ordering the investigating agency to proceed further and take action in accordance with law. For the same, he relied on the judgments of this Court in *H.N. Rishbud & Inder Singh vs. The State of Delhi,* 1955 (1) SCR 1150 at page 1164 and *Vineet Narain & Ors. vs. Union of India & Anr.,,* (1998) 1 SCC 226. In *H.N. Rishbud* (supra), the following observation/conclusion is pressed into service:

> "…..It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for."

19. In *Vineet Narain* (supra), by drawing our attention to paragraph 55, it was argued that the CBI must be allowed to investigate and the offender against whom a prima facie case is made out should be prosecuted expeditiously. In other words, according to him, it is the duty of the judiciary to enforce the rule of law and to guard against erosion of the rule of law. We make it clear that there is no second opinion on the above direction and we also reiterate the same.

20. Based on the above, at the foremost, it is submitted by Mr. Shanti Bhushan, learned senior counsel for the petitioner that on a reading of various orders of this Court, it is clear that FIR being RC No. 0062003A0019 of 2003 was lodged under the orders and directions of this Court. In order to substantiate

the above argument, Mr. Shanti Bhushan, once again, took us through earlier orders which were passed at the time of original hearing. In fact, the very same orders and arguments were advanced by the then Additional Solicitor General for CBI as well as Ms. Kamini Jaiswal, learned counsel on behalf of the intervener. In paragraph Nos. 18 to 23 of the order dated 06.07.2012, the very same contentions have been made, dealt with and duly considered at length and it was clarified that anything beyond the Taj Corridor matter was not the subject matter of reference before the Taj Corridor Bench and the CBI is not justifying in proceeding with FIR being RC No. 0062003A0019 of 2003 dated 05.10.2003 since the order dated 18.09.2003 does not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against Ms. Mayawati-Respondent No. 1 herein.

21. After dealing with all those orders exhaustively, the contents of the FIR dated 05.10.2003 and taking note of the principles laid down by the Constitution Bench in *State of West Bengal & Ors. vs. Committee for Protection of Democratic Rights, West Bengal & Ors.,* (2010) 3 SCC 571, this Court, in *Mayawati vs. Union of India* (2012) 8 SCC 106 arrived at the following conclusion:

> "39. As discussed above and after reading all the orders of this Court which are available in the "compilation", we are satisfied that this Court being the ultimate custodian of the fundamental rights did not issue any direction to CBI to conduct a roving inquiry against the assets of the petitioner commencing from 1995 to 2003 even though the Taj Heritage Corridor Project was conceived only in July 2002 and an amount of Rs 17 crores was released in August/September 2002. The method adopted by CBI is unwarranted and without jurisdiction. We are also satisfied that CBI has proceeded without proper understanding of various orders dated 16-7-2003, 21-8-2003, 18-9-2003, 25-

passed by this Court. We are also satisfied that there was no such direction relating to second FIR, namely, FIR No. RC 0062003A0019 dated 5-10-2003.

40. We have already referred to the Constitution Bench decision of this Court in Committee for Protection of Democratic Rights wherein this Court observed that only when this Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for investigation by CBI for the alleged offence, an order directing inquiry by CBI could be passed and that too after giving opportunity of hearing to the affected person. We are satisfied that there was no such finding or satisfaction recorded by this Court in the matter of disproportionate assets of the petitioner on the basis of the status report dated 11-9-2003 and, in fact, the petitioner was not a party before this Court in the case in question. From the perusal of those orders, we are also satisfied that there could not have been any material before this Court about the disproportionate assets case of the petitioner beyond the Taj Corridor Project case and there was no such question or issue about disproportionate assets of the petitioner. In view of the same, giving any direction to lodge FIR relating to disproportionate assets case did not arise.

41. We finally conclude that anything beyond the Taj Corridor matter was not the subject-matter of reference before the Taj Corridor Bench,. Since the order dated 18-9-2003 does not contain any specific direction regarding lodging of FIR in the matter of disproportionate assets case against the petitioner, CBI is not justified in proceeding with FIR No. RC 0062003A0019 dated 5-10-2003. In view of the above discussion, we are satisfied that CBI exceeded its jurisdiction in lodging FIR No. RC 0062003A0019 dated 5-10-2003 in the absence of any direction from this Court in the order dated 18-9-2003 or in any subsequent orders."

Inasmuch as the very same point has been urged once again, in the light of the principles noted above, we are of the view that the same are impermissible.

22. We have also noted the principles enunciated in *H.N. Rishbud* (supra) as well as in *Vineet Narain* (supra). For the sake of repetition, we are pointing out that we have disposed of the earlier writ petition filed by the petitioner therein (respondent herein) based on the relief sought for, contents of the FIR dated 05.10.2003, earlier directions relating to Taj Heritage Corridor Project and arrived at such conclusion.

23. It is also made clear that we have not gone into any other aspect relating to the claim of the CBI, intervener or the stand of the writ petitioner therein (respondent herein) except the directions relating to Taj Heritage Corridor Project which was the only lis before us in Writ Petition being No. 135 of 2008. In such circumstances and in the light of enormous decisions, we find that there is no material within the parameters of review jurisdiction to go into the earlier order dated 06.07.2012.

24. In the light of the above discussion, we once again reiterate that our decision is based on earlier directions relating to Taj Heritage Corridor Project, particularly, the order dated 18.09.2003, the contents of FIR being RC No. 0062003A0019 dated 05.10.2003, the relief prayed in the writ petition filed before this Court and we have not said or expressed anything beyond the subject matter of the dispute.

25. In the light of the above discussion, the review petition is disposed of with the above observation.

B.B.B. Review Petition disposed of.

SHAHID BALWA
v.
UNION OF INDIA AND OTHERS
(Writ Petition (C) No. 548 of 2012)

SEPTEMBER 3, 2013

[G.S. SINGHVI AND K.S. RADHAKRISHNAN, JJ.]

Constitution of India, 1950 – Articles 136 and 142 – 2G Spectrum Scam Case –Day-to-day trial – Orders passed by Supreme Court in exercise of powers conferred u/Arts. 136 and 142 of the Constitution, while monitoring the investigation of 2G related cases – If liable to be recalled – Held: The purpose and object of passing the impugned orders was for larger public interest and for speedy trial, that too on day-to-day basis which is reflected not only in the various provisions of the Prevention of Corruption Act, but also falls within the realm of judicial accountability – No reason to lay down any guidelines in a Court monitored investigation – A superior court exercising the appellate power or constitutional power, if gives a direction to conduct the trial on day-to-day basis or complete the trial in a specific time by giving direction is not interfering with the trial proceedings but only facilitating the speedy trial, which is a facet of Article 21 of the Constitution – In the case at hand, charge-sheet was filed only in one among the various 2G related cases – The Supreme Court, while passing the impugned order, only directed speedy trial and, that too, on a day-to-day basis which cannot be termed as interference with the trial proceedings – Prevention of Corruption Act, 1988 – s.13(1)(d) – Penal Code, 1860 – s.120-B.

The CBI lodged FIR alleging that during the years 2000-2008 certain officials of the Department of Telecommunications (DoT) entered into a criminal conspiracy with certain private companies and misused

their official position in the grant of Unified Access Licenses causing wrongful loss to the nation, to the tune of more than Rs.22,000 crores. Following that, the CBI registered what was described as the 2G Spectrum Scam Case under Section 120B IPC, 13(1)(d) of the PC Act.

Civil Appeal No.10660 of 2010 was filed under Article 136 of the Constitution, *inter alia* praying for a Court monitored investigation by the Central Bureau of Investigation (CBI) or by a Special Investigating Team into the 2G Spectrum Scam. This Court agreed for a Court monitored investigation; and, on 10-02-2011, passed an order stating that since this Court is monitoring the investigation of 2G Spectrum Scam, no Court shall pass any order which may, in any manner, impede the investigation being carried out by the CBI and the Directorate of Enforcement. Meanwhile, two separate notifications dated 28-03-2011 were issued in terms of Section 3(1) the PC Act, 1988 and Section 43(1) of the Prevention of Money Laundering Act, 2002 for establishment of the Special Court to exclusively try offences relating to the 2G Scam and other related offences.

On 11-4-2011, this Court *inter alia* ordered that any objection about appointment of Special Public Prosecutor or his Assistant Advocates or any prayer for staying or impeding the progress of the trial can be made only before this Court and no other Court shall entertain the same and that the trial must proceed on a day-to-day basis. However, large number of writ petitions were filed before the Delhi High Court praying for stay of the trial proceedings on one or the other ground. The CBI filed application before this Court for summoning the records of the cases pending before the Delhi High Court and also prayed for stay of all the proceedings of these cases. This Court passed order dated 09-

proceedings pending before the Delhi High Court.

The question which arose for consideration in the present writ petition was whether the two orders passed by this Court on 11-04-2011 and 09-11-2012 in Civil Appeal No.10660 of 2010, in exercise of powers conferred on this Court under Articles 136 and 142 of the Constitution of India, while monitoring the investigation of 2G related cases, were liable to be recalled, *de hors* the rights guaranteed to the Petitioners to invoke the jurisdiction of this Court under Articles 32 and 136 of the Constitution, if aggrieved by the orders passed by the Special Court dealing with 2G Spectrum case.

Dismissing all the matters, the Court

HELD:1.1. The CBI as well as the Enforcement Directorate is yet to complete the investigation of the cases relating to 2G Scam and the case which is being tried by the Special Judge is only one among them, wherein the charge-sheet has been filed and the trial is in progress. This Court, taking into consideration the width and ambit of the investigation which even spreads overseas and the larger public interest involved, passed the orders impugned, reserving the right of all, including the accused persons, to move this Court if their prayer would amount to staying or impeding the progress of the trial. In case they have any grievance against the orders passed by the Special Judge during trial, they are free to approach this Court so that the progress of the trial would not be hampered by indulging in cumbersome and time consuming proceedings in the other Forums, thereby stultifying the pre-emptory direction given by this Court for day-to-day trial. [Para 21] [68-B-E]

1.2. Article 136 read with Article 142 of the Constitution of India enables this Court to pass such orders, which are necessary for doing complete justice

in any cause or matter pending before it and, any order so made, shall be enforceable throughout the territory of India. Parties, in such a case, cannot invoke the jurisdiction under Articles 226 or 227 of the Constitution of India or under Section 482 Cr.P.C. so as to interfere with those orders passed by this Court, in exercise of its constitutional powers conferred under Article 136 read with Article 142 of the Constitution of India. Or, else, the parties will move Courts inferior to this Court under Article 226 or Article 227 of the Constitution of India or Section 482 Cr.P.C., so as to defeat the very purpose and object of the various orders passed by this Court in exercise of its powers conferred under Article 136 read with Article 142 of the Constitution of India. [Para 22] [68-F-H; 69-A]

PUBLIC INTEREST:

1.3. Public Interest compelled this Court to take up the investigation in 2G related cases in exercise of its powers under Article 136 read with Article 142, that too, on a request made by the Central Government. When larger public interest is involved, it is the responsibility of the Constitutional Court to assure judicial legitimacy and accountability. Public interest demands timely resolution of cases relating to 2G Scam. Prolonged litigation undermines the public confidence and weakens the democracy and rule of law. [Paras 23, 24] [69-B-C, H; 70-A]

3.2. The Parliament, in its wisdom, has also noticed the necessity of early disposal of cases relating to bribery and corruption. Section 4(4) of the Prevention of Corruption Act, 1988 reflects the will of the Parliament that a Special Judge shall hold the trial of an offence on day-to-day basis, notwithstanding anything contained in the Code of Criminal Procedure. Section 19(3)(c) also states that, notwithstanding anything cont[illegible]f

Criminal Procedure, no Court shall stay the proceedings under the Prevention of Corruption Act on any other ground and no Court shall exercise the powers of the revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings. Statutory provisions highlight the imperative need to eradicate the evils of bribery and corruption. Larger public interest should have precedence over the prayers of the petitioners, especially when this Court has safeguarded their rights and given freedom to them to move this Court, either under Article 136 or Article 32 of the Constitution of India. Article 139A also reflects the larger public interest, which enables this Court to transfer certain cases which involve substantial questions of law, from one High Court to another or to this Court, in such an event, it cannot be contended that the parties are deprived of their rights to adjudicate their grievances under Articles 226, 227 or Section 482 Cr.P.C., before the High Court. [Para 25] [70-B-F]

COURT MONITORED INVESTIGATION

1.4. Monitoring of criminal investigation is the function of investigating agency and not that of the Court – either of the superior Court or of the trial Court. However, proper and uninfluenced investigation is necessary to bring about the truth. Truth will be a casualty if investigation is derailed due to external pressure and guilty gets away from the clutches of law. This Court has taken the consistent view that once charge-sheet is submitted in the proper Court, the process of Court monitoring investigation comes to an end and it is for that Court to take cognizance of the offence and deal with the matter. But, so far as the present case is concerned, charge-sheet has been filed only in one among the various 2G related cases. This Court, while passing the impugned order, only directed speedy trial and, that too,

on a day-to-day basis which cannot be termed as interference with the trial proceedings. Order dated 11.4.2011 only facilitates the progress of the trial by ordering that the trial must proceed on a day-to-day basis. Large backlog of cases in the Courts is often an incentive to the litigants to misuse Court's system by indulging in unnecessary and fraudulent litigation, thereby delaying the entire trial process. Criminal justice system's procedure guarantees and elaborateness sometimes give, create openings for abusive, dilatory tactics and confer unfair advantage on better heeled litigants to cause delay to their advantage. Longer the trial, witnesses will be unavailable, memories will fade and evidence will be stale. Taking into consideration all those aspects, this Court felt that it is in the larger public interest that the trial of 2G Scam be not hampered. Further, when larger public interest is involved, it is the bounden duty of all, including the accused persons, who are presumed to be innocent, until proven guilty, to co-operate with the progress of the trial. Early disposal of the trial is also to their advantage, so that their innocence could be proved, rather than remain enmeshed in criminal trial for years and unable to get on with their lives and business. [Paras 26, 27 and 28] [70-G; 71-B-C, E-F-H; 72-A-D]

1.5. The purpose and object of passing the impugned orders was for a larger public interest and for speedy trial, that too on day-to-day basis which has been reflected not only in the various provisions of the PC Act, 1988 but also falls within the realm of judicial accountability. Also, there is no reason to lay down any guidelines as prayed for by the petitioners in a Court monitored investigation. In a Court monitored investigation, the Court is not expected to interfere with the trial proceedings. The conduct of the trial is the business of the trial judge and not the court monitoring the investigation. A superior court exercising the appellate power or constitution[illegible]a

direction to conduct the trial on day-to-day basis or complete the trial in a specific time by giving direction is not interfering with the trial proceedings but only facilitating the speedy trial, which is a facet of Article 21 of the Constitution of India. [Paras 29, 30] [72-F-H; 73-A-B]

A.R. Antulay vs. R.S. Nayak and Anr. **(1988) 2 SCC 602: 1988 (1) Suppl. SCR 1;** *Rajiv Ranjan Singh "Lalan" VI and Anr. vs. Union of India and Ors.* **(2006) 1 SCC 356;** *Brij Narain Singh vs. Adya Prasad* **(2008) 11 SCC 558: 2008 (2) SCR 1114 and** *Ankul Chandra Pradhan vs. Union of India and Ors.* **(1996) 6 SCC 354: 1996 (7) Suppl. SCR 212 – held inapplicable.**

Rajiv Ranjan Singh 'Lalan' (VIII) and Anr. vs. Union of India and Ors. **(2006) 6 SCC 613: 2006 (4) Suppl. SCR 742;** *Vineet Narain and Ors. vs. Union of India and Anr.* **(1996) 2 SCC 199: 1996 (1) SCR 1053;** *L. Chandra Kumar vs. Union of India and Ors.* **(1997) 3 SCC 261: 1997 (2) SCR 1186;** *Shalini Shyam Shetty and Anr. vs. Rajendra Shankar Patil* **(2010) 8 SCC 600 and** *Jakia Nasim Ahesan and Anr. vs. State of Gujarat and Ors.* **(2011) 12 SCC 302: 2011 (11) SCR 365 – cited.**

Case Law Reference:

2006 (4) Suppl. SCR 742	**Cited**	**Para 16**
1996 (1) SCR 1053	**Cited**	**Para 16**
1988 (1) Suppl. SCR 1	**held inapplicable**	**Para 17**
1997 (2) SCR 1186	**Cited**	**Para 17**
(2010) 8 SCC 600	**Cited**	**Para 17**
2011 (11) SCR 365	**Cited**	**Para 17**
1996 (7) Suppl. SCR 212	**held inapplicable**	**Para 18**
(2006) 1 SCC 356	**held inapplicable**	**Para 30**
2008 (2) SCR 1114	**held inapplicable**	**Para 30**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 548 of 2012.

Under Article 32 of the Constitution of India.

WITH

W.P.(C) Nos. 550, 551 & 552 of 2012, W.P. (C) No. 17 of 2013 & I.A. Nos. 59, 61, 63 & 68 in C.A. No. 10660 of 2010.

Rakesh Kumar Khanna, ASG, Ram Jethmalani, K.K. Venugopal, U.U. Lalit, Harish N. Salve, F.S. Nariman, Amit Desai, Mukul Rohatgi, Rudreshwar Singh, Kumar Ranjan, Karan Kalia, P. Diesh, Gopal Jha, Kaushik Poddar, Vijay Aggarwal, Mudit Jain, Entesham Hashmi, Shelly B. Maheshwari, Prashant Bhushan, Pranav Sachdeva, Gopal Sankaranarayanan, Sonia Mathur, Harsh Prabhakar, Anirudh Tanwar, Rohit Bhatt, Vikramaditya, Rajiv Nanda, R.V. Dass, Sidharth Agarwal, Mahesh Agarwal, Neeha Nagpal for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in these cases, called upon to examine the question whether two orders passed by this Court on 11.04.2011 and 09.11.2012 in Civil Appeal No.10660 of 2010, in exercise of powers conferred on this Court under Articles 136 and 142 of the Constitution of India, while monitoring the investigation of 2G related cases, are liable to be recalled, *de hors* the rights guaranteed to the Petitioners to invoke the jurisdiction of this Court under Articles 32 and 136 of the Constitution of India, if aggrieved by the orders passed by the Special Court dealing with 2G Spectrum case.

2. Civil Appeal No.10660 of 2010, in which the above-mentioned orders have been passed, [illegible]e

136 of the Constitution of India by special leave, praying for a Court monitored investigation by the Central Bureau of Investigation (CBI) or by a Special Investigating Team into what was described as the 2G Spectrum Scam and also for a direction to investigate the role played by A. Raja, the then Union Minister for Department of Telecommunications (DoT), senior officers of DoT, middlemen, businessmen and others. Before this Court, it was pointed out that the CBI had lodged a first information report on 21.10.2009 alleging that during the years 2000-2008 certain officials of the DoT entered into a criminal conspiracy with certain private companies and misused their official position in the grant of Unified Access Licenses causing wrongful loss to the nation, which was estimated to be more than Rs.22,000 crores. CBI, following that, registered a case No.RC-DAI-2009-A-0045(2G Spectrum Case) on 21.10.2009 under Section 120B IPC, 13(1)(d) of the PC Act against a former Cabinet Minister and others.

3. Before this Court parties produced large number of documents, including the Performance Audit Report (Draft and Final) prepared by the Comptroller and Auditor General of India (CAG) on the issue of licence and allocation of 2G Spectrum by DoT, Ministry of Communications and Information and Technology for the period from 2003-2004 to 2009-2010. Report of the CAG, was submitted to the President of India, as per Article 151 of the Constitution of India. The Central Vigilance Commission (CVC) also conducted an inquiry under Section 8(d) of the Central Vigilance Commission Act, 2003 and noticed grave irregularities in the grant of licences. The CVC on 12.10.2009 had forwarded the enquiry report to the Director, CBI to investigate into the matter to establish the criminal conspiracy in the allocation of 2G Spectrum under UASL policy of DoT and to bring to book all wrongdoers.

4. After taking into consideration of all those factors, including the report of the CVC as well as the findings recorded

by the CAG, this Court agreed for a Court monitored investigation and held as follows:

> "We are, prima facie, satisfied that the allegations contained in the writ petition and the affidavits filed before this Court, which are supported not only by the documents produced by them, but also the report of the Central Vigilance Commission, which was forwarded to the Director, CBI on 12.10.2009 and the findings recorded by the CAG in the Performance Audit Report, need a thorough and impartial investigation. However, at this stage, we do not consider it necessary to appoint a Special Team to investigate what the appellants have described as 2G Spectrum Scam because the Government of India has, keeping in view the law laid down in Vineet Narain's case and others passed in other cases, agreed for a Court monitored investigation."

5. This Court, with a view to ensure a comprehensive and co-ordinated investigation by the CBI and the Enforcement Directorate, gave the following directions vide its order dated 16.12.2010:

> (i) The CBI shall conduct thorough investigation into various issues high-lighted in the report of the Central Vigilance Commission, which was forwarded to the director, CBI vide letter dated 12.10.2009 and the report of the CAG, who have prima facie found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. The CBI should also probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why the TRAI and the DoT did not take action against those licensees w[illegible]/

equities for many thousand crores and also against those who failed to fulfill rollout obligations and comply with other conditions of licence.

(ii) The CBI shall conduct the investigation without being influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated/probed.

(iii) The CBI shall, if it has already not registered first information report in the context of the alleged irregularities committed in the grant of licences from 2001 to 2006-2007, now register a case and conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/ service providers and also on the issue of allowing use of dual/alternate technology by some service providers even before the decision was made public vide press release dated 19.10.2007.

(iv) The CBI shall also make investigation into the allegation of grant of huge loans by the public sector and other banks to some of the companies which have succeeded in obtaining licences in 2008 and find out whether the officers of the DoT were signatories to the loan agreement executed by the private companies and if so, why and with whose permission they did so.

(v) The Directorate of Enforcement/ concerned agencies of the Income Tax Department shall continue their investigation without any hindrance or interference by any one.

(vi) Both the agencies, i.e. the CBI and the Directorate of Enforcement shall share information with each

other and ensure that the investigation is not hampered in any manner whatsoever.

(vii) The Director General, Income Tax (Investigation) shall, after completion of analysis of the transcripts of the recording made pursuant to the approval accorded by the Home Secretary, Government of India, hand over the same to CBI to facilitate further investigation into the FIR already registered or which may be registered hereinafter."

6. CBI and the Enforcement Directorate then used to apprise this Court of the various stages of investigation and this Court, on 10.02.2011, passed an order stating that since this Court is monitoring the investigation of 2G Spectrum Scam no court shall pass any order which may, in any manner, impede the investigation being carried out by the CBI and the Directorate of Enforcement.

7. Learned Attorney General of India, it was pointed out, had written to the Law Minister on the issue of creation of separate Special Court for dealing with the cases relating to 2G Scam and, for the said purpose, the Law Minister, in turn, had written to the Chief Justice of the Delhi High Court seeking nomination of a Special Court for the said purpose. Learned Attorney General submitted before this Court on 16.03.2011 that the Registrar General of the High Court of Delhi had conveyed its decision to nominate Shri O.P. Saini, an officer of the Delhi Higher Judicial Service, as the Special Judge to take up the trial of cases relating to what has been described as 2G Scam. The Court was also informed that two separate notifications would be issued by the Central Government in terms of Section 3(1) the PC Act, 1988 and Section 43(1) of the Prevention of Money Laundering Act, 2002 for establishment of the Special Court to exclusively try the offences relating to 2G Scam and other related offences. Following that, two notifications dated 28.03.2011 were published in the Gazette of India Extraordinary on Monday, the 28th March, 2011.

8. The CBI submitted before this Court on 01.04.2011 that a notification had been issued under Section 6 of the Delhi Police Establishment Act by the State Government for entrusting the case relating to death of Sadiq Batcha to the CBI and the CBI had indicated that it had no objection to take up the investigation. The CBI also submitted before this Court that a Special Public Prosecutor had to be appointed to lead and supervise the prosecution of the case relating to the 2G Scam for which the CBI had suggested the name of Shri U.U. Lalit, senior advocate of this Court.

9. The CBI, after completion of the investigation in the main case, noticed the commission of various other offences during 2007-09 punishable under Sections 120-B, 420, 468, 471 of IPC against the accused persons, namely, Shri A. Raja and others and the following substantive offences were stated to have been made out against the following accused persons:

"(a) Sh. A. Raja, then MOC&IT – the offence punishable u/s 420, 468, 471 IPC & 13(2) r/w 13(1)(d) PC Act, 1988.

(b) Sh. Siddartha Behura, then Secretary, Department of Telecom- the offence punishable u/w 420 IPC & 13(2) r/w 13(1)(d) PC Act, 1988.

(c) Sh. R.K. Chandolia, then PS to MOC&IT- the offence punishable u/s 420 IPC & 13(2) r/w 13(1)(d) PC Act.

(d) Sh. Shahid Usman Balwa, Director, M/s Swan Telecom Pvt. Ltd.; Sh. Vinod Goenka, Director, M/s Swan Telecom Pvt. Ltd. and M/s Swan Telecom Pvt. Ltd. (now M/s Etisalat DB Telecom Pvt. Ltd) through its Director – offences punishable u/s 420/468/471 IPC.

(e) Sh. Sanjay Chandra, Managing Director, M/s Unitech Ltd. and M/s Unitech Wireless (Tamil Nadu) Pvt. Ltd. through its Director –offences punishable u/s 420 IPC.

(f) Sh. Gautam Doshi, Group Managing Director, Reliance

ADA Group, Sh. Hari Nair, Senior Vice President of Reliance ADA Group & Sh. Surendra Pipara, Senior Vice President of Reliance ADA Group & M/s Reliance Telecom Ltd. through its Director – offences punishable under section 109 r/w 420 IPC."

10. The CBI, on the basis of the investigation conducted, submitted a charge-sheet against the above-mentioned persons/companies before a Special Judge on 02.04.2011 and Special Judge took cognizance of the aforesaid offences on the same day.

11. This Court undertook the monitoring of the investigation in view of the prayers made by the appellants and the request made by the prosecution agency and the Government of India, having regard to the larger public interest involved and the necessity of a proper investigation and also with the ultimate object of unearthing the crime.

12. Counsel appearing for the CBI suggested to this Court, on 11.4.2011, the name of Shri U.U. Lalit, senior advocate, for the conduct of the criminal prosecution in the case on behalf of the CBI as well as the Directorate of Enforcement and the Court on that date *inter alia* ordered as follows:

"We also make it clear that any objection about appointment of Special Public Prosecutor or his assistant advocates or any prayer for staying or impeding the progress of the Trial can be made only before this Court and no other Court shall entertain the same. The trial must proceed on a day-to-day basis.

All these directions are given by this Court in exercise of its power under Article 136 read with Article 142 of the Constitution and in the interest of holding a fair prosecution of the case."

13. We found, in spite of the orde[illegible]rt on 11.04.2011 that no Court should e[illegible]r

staying or impeding the progress of the trial, large number of writ petitions were seen filed before the Delhi High Court praying for stay of the trial proceedings on one or the other ground. The CBI noticing that entertaining of those cases would violate the order passed by this Court on 11.04.2011, filed an application before this Court for summoning the records of Writ Petition (Criminal) No.1587 of 2012, Writ Petition (Criminal) No.1588 of 2012, Writ Petition (Criminal) No.913 of 2012, Writ Petition (Criminal) No.111 of 2012, Writ Petition (Criminal) No.207 of 2012, Writ Petition (Criminal) No.1478 of 2012, Writ Petition (Criminal) No.1751 of 2012, Writ Petition (Criminal) No. 1752 of 2012, Writ Petition (Criminal) No. 1754 of 2012, Writ Petition (Criminal) No.206 of 2012, Writ Petition (Criminal) No. 159 of 2012, Writ Petition (Criminal) No. 208 of 2012, Criminal M.C. No. 4197 of 2011, Criminal M.C. No.67 of 2012, Writ Petition (Criminal) No.129 of 2012, Writ Petition (Criminal) No.656 of 2012, Criminal M.C. No.4199 of 2011, Writ Petition (Criminal) No.467 of 2012 and Criminal M.C. No.1060 of 2012 pending before the Delhi High Court and also prayed for stay of all the proceedings of these cases.

14. This Court felt entertaining those cases by the Delhi High Court, at this stage, would violate the order passed by this Court on 11.4.2011, passed an order on 09.11.2012 staying those proceedings pending before the Delhi High Court.

15. Shri Ram Jethmalani, learned senior counsel, appearing for the petitioner in Writ Petition (C) No.548 of 2012, prayed for recalling orders dated 11.04.2011 and 09.11.2012 on the ground that those orders would violate the rights guaranteed to the petitioners under Section 482 of the Cr.P.C. and Articles 226 and 227 of the Constitution of India for moving the High Court. Learned senior counsel also submitted that remedy, if at all, available under Article 32 is limited to safeguarding the rights guaranteed under Part III of the Constitution while the remedies available under Articles 226 and 227 of the Constitution have a wider scope, which cannot

be taken away by the impugned orders passed by this Court while monitoring the 2G Scam.

16. Learned senior counsel also submitted that the impugned orders have the effect of taking away the power of the Court in granting reasonable adjournments under Section 309 of the Cr.P.C. and submitted neither sub-section (4) of Section 4 nor Section 19(3) of the PC Act can take away that right of the petitioners, but has been effectively curtailed by the impugned orders passed by this Court. Learned senior counsel also submitted that this Court exercising powers under Articles 136 and 142 of the Constitution, has the power to only monitor the investigation and once the investigation is over and charge-sheet has been filed, this Court should leave the matter to the trial court safeguarding the rights of parties in questioning the correctness or otherwise of the orders passed by the trial Court in appropriate Forums. Reference was made to the decision of this Court in *Rajiv Ranjan Singh 'Lalan' (VIII) and Another v. Union of India and others* (2006) 6 SCC 613 and *Vineet Narain and Others v. Union of India and Another* (1996) 2 SCC 199.

17. Shri Mukul Rohtagi, learned senior counsel, submitted that right to fair trial is a right guaranteed to the parties under Articles 14 and 21 of the Constitution of India and the impugned order has the effect of negating those rights by shutting out all remedies available to the parties under Articles 226 and 227 of the Constitution of India to move the High Court. Learned senior counsel placed reliance on the Judgment of this Court in *A.R. Antulay* v. *R.S. Nayak and another* (1988) 2 SCC 602 and submitted that in appropriate cases this Court has got the power to recall its earlier order in the interest of justice, if it is satisfied that its directions will result in the deprivation of fundamental rights guaranteed to the citizens or any other legal rights. Placing reliance on the Judgment of this Court in *L. Chandra Kumar v. Union of India and others* (1997) 3 SCC 261 and *Shalini Shyam Shetty and*

Shankar Patil (2010) 8 SCC 600, learned senior counsel submitted that the rights conferred under Articles 226 and 227 of the Constitution of India are the basic structure of the Constitution and the same cannot be taken away by exercising powers under Article 136 and 142 of the Constitution of India.

18. Shri Harish Salve, learned senior counsel, submitted that the power of the Court to monitor the criminal investigation should stop once the charge-sheet has been filed, leaving the trial court to proceed with trial in accordance with the law. In support of his contention reliance was placed on the Judgment of this Court in *Jakia Nasim Ahesan and another v. State of Gujarat and others* (2011) 12 SCC 302 and the Judgment in *Ankul Chandra Pradhan v. Union of India and others* (1996) 6 SCC 354.

19. Shri K.K. Venugopal, learned senior counsel appearing for the CBI, submitted that there are no justifiable reasons for recalling the impugned orders since those orders had been passed in the larger public interest and that too based on the request made by the Government of India virtually inviting this Court's intervention for monitoring the investigation relating to 2G Scam. Learned senior counsel referred to the CAG report as well as the report sent by the CVC to the CBI and submitted that those reports would highlight the magnitude of loss suffered by the public exchequer, which has been revealed by the investigation conducted by the CBI. Learned senior counsel also submitted that this Court has undertaken monitoring of the investigation due to the involvement of highly placed officers of DoT and the then Union Minister for Telecommunications, Members of Parliament, bureaucrats and businessmen.

20. Learned senior counsel also submitted that this Court, while issuing the orders dated 11.04.2011 or 09.11.2012, has neither interfered with the proceedings pending before the Special Court, nor attempted to supervise or investigate the trial proceedings. On the other hand, this Court only ensured that the progress of the trial be not impeded and the trial should go

on day-to-day basis. Learned senior counsel also submitted that this Court has reserved its powers to entertain any challenge against the orders passed by the Special Judge under Articles 136, 32 as well as Article 142 of the Constitution and hence, no prejudice is caused to the petitioners.

21. We may, at the very outset, point out that CBI as well as the Enforcement Directorate is yet to complete the investigation of the cases relating to 2G Scam and the case which is being tried by the Special Judge is only one among them, wherein the charge-sheet has been filed and the trial is in progress. This Court, taking into consideration the width and ambit of the investigation which even spreads overseas and the larger public interest involved, passed the orders impugned, reserving the right of all, including the accused persons, to move this Court if their prayer would amount to staying or impeding the progress of the trial. In case they have any grievance against the orders passed by the Special Judge during trial, they are free to approach this Court so that the progress of the trial would not be hampered by indulging in cumbersome and time consuming proceedings in the other Forums, thereby stultifying the preemptory direction given by this Court for day-to-day trial.

22. Article 136 read with Article 142 of the Constitution of India enables this Court to pass such orders, which are necessary for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable throughout the territory of India. Parties, in such a case, cannot invoke the jurisdiction under Articles 226 or 227 of the Constitution of India or under Section 482 Cr.P.C. so as to interfere with those orders passed by this Court, in exercise of its constitutional powers conferred under Article 136 read with Article 142 of the Constitution of India. Or, else, the parties will move Courts inferior to this Court under Article 226 or Article 227 of the Constitution of India or Section 482 Cr.P.C., so as to defeat the very purpose and object

passed by this Court in exercise of its powers conferred under Article 136 read with Article 142 of the Constitution of India.

PUBLIC INTEREST:

23. Public Interest compelled this Court to take up the investigation in 2G related cases in exercise of its powers under Article 136 read with Article 142, that too, on a request made by the Central Government. CAG is stated to be the most important Officer under the Constitution of India and his duty, being the guardian of the public Purse, is to see that not a farthing of it is spent without the authority of the Parliament. Article 149 of the Constitution of India empowers the CAG to perform such duties and exercise such powers in relation to the accounts of the Union and the State and Audit plays an important role in the scheme of Parliamentary Financial Control and it is also directed towards discovering waste, extravagance and disallow any expenditure violating the Constitution, or any Law. CAG, in its report submitted to the President of India under Article 151 of the Constitution of India, has commented upon the manner in which the Unified Access Licences were granted and projected that it caused wrongful loss to the Government to the tune of Rs.1.76 lac crore. Of course, some acrimony had erupted between the Central Government and the CAG's estimate of loss, but it is reported to be substantial. CVC also conducted an enquiry under Section 8(d) of the Central Vigilance Act, 2003 and noticed grave irregularities in the grant of licences. CVC, on 12.10.2009, had forwarded the enquiry report to that effect to the Directorate of CBI.

24. The nation and the people of this country are seriously concerned with the outcome of cases involving larger public interest, like one concerning 2G and this Court, as the guardian of the Constitution, has got the duty and obligation to see that the larger public interest and the interest of the nation is preserved and protected. When larger public interest is involved, it is the responsibility of the Constitutional Court to assure judicial legitimacy and accountability. Public interest

demands timely resolution of cases relating to 2G Scam. Prolonged litigation undermines the public confidence and weakens the democracy and rule of law.

25. The Parliament, in its wisdom, has also noticed the necessity of early disposal of cases relating to bribery and corruption. Section 4(4) of the Prevention of Corruption Act, 1988 reflects the will of the Parliament that a Special Judge shall hold the trial of an offence on day-to-day basis, notwithstanding anything contained in the Code of Criminal Procedure. Section 19(3)(c) also states that, notwithstanding anything contained in the Code of Criminal Procedure, no Court shall stay the proceedings under the Prevention of Corruption Act on any other ground and no Court shall exercise the powers of the revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings. Statutory provisions highlight the imperative need to eradicate the evils of bribery and corruption. Larger public interest should have precedence over the prayers of the petitioners, especially when this Court has safeguarded their rights and given freedom to them to move this Court, either under Article 136 or Article 32 of the Constitution of India. Article 139A also reflects the larger public interest, which enables this Court to transfer certain cases which involve substantial questions of law, from one High Court to another or to this Court, in such an event, it cannot be contended that the parties are deprived of their rights to adjudicate their grievances under Articles 226, 227 or Section 482 Cr.P.C., before the High Court.

COURT MONITORED INVESTIGATION

26. Monitoring of criminal investigation is the function of investigating agency and not that of the Court – either of the superior Court or of the trial Court. But unsolved crimes, unsuccessful prosecution, unpunished offenders and wrongful convictions bring our criminal justice system in disrepute. Crores and crores of tax payers' money is being spent for investigating crimes in our country since

a crime against the society. When the persons involved in the crime wield political power and influence, the possibility of putting pressure on the investigating agency, which is no more independent in our country, is much more. Common people will be left with the feeling that they can get away with any crime which tarnish the image not only of the investigating agency but judicial system as well. Once investigation fails, Court will face with a *fait accompli*. Proper and uninfluenced investigation is necessary to bring about the truth. Truth will be a casualty if investigation is derailed due to external pressure and guilty gets away from the clutches of law.

27. More and more demands are now coming before the Courts for its monitoring of investigation relating to crimes committed by influential persons and persons who have political influence, with the apprehension that they could derail the investigation. Courts in public interest sometime have to take such a course in the larger public interest. That burden this Court has discharged in various cases like Vineet Narayan's case and Gujarat Communal Riot's case, etc. This Court has taken the consistent view that once charge-sheet is submitted in the proper Court, the process of Court monitoring investigation comes to an end and it is for that Court to take cognizance of the offence and deal with the matter. But, so far as the present case is concerned, we have already indicated that charge-sheet has been filed only in one among the various 2G related cases. This Court, while passing the impugned order, only directed speedy trial and, that too, on a day-to-day basis which cannot be termed as interference with the trial proceedings.

28. We also, therefore, find no basis in the contention of the petitioners that the orders dated 11.4.2011 and 9.11.2012 have the effect of monitoring the trial proceedings. No Court, other than the Court seized with the trial, has the power to monitor the proceedings pending before it. Order dated 11.4.2011 only facilitates the progress of the trial by ordering

that the trial must proceed on a day-to-day basis. Large backlog of cases in the Courts is often an incentive to the litigants to misuse of Court's system by indulging in unnecessary and fraudulent litigation, thereby delaying the entire trial process. Criminal justice system's procedure guarantees and elaborateness sometimes give, create openings for abusive, dilatory tactics and confer unfair advantage on better heeled litigants to cause delay to their advantage. Longer the trial, witnesses will be unavailable, memories will fade and evidence will be stale. Taking into consideration all those aspects, this Court felt that it is in the larger public interest that the trial of 2G Scam be not hampered. Further, when larger public interest is involved, it is the bounden duty of all, including the accused persons, who are presumed to be innocent, until proven guilty, to co-operate with the progress of the trial. Early disposal of the trial is also to their advantage, so that their innocence could be proved, rather than remain enmeshed in criminal trial for years and unable to get on with their lives and business.

29. We fail to see how the principle laid down by this Court in *A.R. Antulay's* case (supra) would apply to the facts of these cases. We have found no error in the orders passed by this Court on 11.04.2011 or on 09.04.2012. Therefore, the question of rectifying any error does not arise. On the other hand, as we have already indicated, the purpose and object of passing those orders was for a larger public interest and for speedy trial, that too on day-to-day basis which has been reflected not only in the various provisions of the PC Act, 1988 but also falls within the realm of judicial accountability.

30. We also find no reason to lay down any guidelines as prayed for by the petitioners in a Court monitored investigation. In a Court monitored investigation, as already pointed out the Court is not expected to interfere with the trial proceedings. The conduct of the trial is the business of the trial judge and not the court monitoring the investigation. A su[illegible]g

the appellate power or constitutional power, if gives a direction to conduct the trial on day-to-day basis or complete the trial in a specific time by giving direction is not interfering with the trial proceedings but only facilitating the speedy trial, which is a facet of Article 21 of the Constitution of India. That being the factual situation in these cases, the principle laid down by this Court in *Rajiv Ranjan Singh "Lalan" VI and another v. Union of India and others* (2006) 1 SCC 356, *Brij Narain Singh v. Adya Prasad* (2008) 11 SCC 558 and *Ankul Chandra Pradhan* (supra), are not applicable.

31. We, therefore, find no good reason either to frame guidelines to be followed by a constitutional court in relation to monitoring of criminal investigation or any legal infirmity in the orders passed by this Court on 11.04.2011 or 09.04.2012. Writ Petitions lack merits and they are accordingly dismissed, so also IA Nos.59, 61, 63 and 68 in Civil Appeal No.10660 of 2010.

B.B.B. Matters dismissed.

LAFARGE AGGREGATES & CONCRETE INDIA P. LTD
v.
SUKARSH AZAD & ANR
(Criminal Appeal No. 1941 of 2013)

SEPTEMBER 10, 2013

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

Negotiable Instruments Act, 1881 – s.138 – Code of Civil Procedure, 1908 – Order IX r.13 – Dishonour of cheque of amount Rs.2,50,000/- – On the ground of 'stop payment' instruction – Complaint u/s. 138 of Negotiable Instruments Act – Petition u/s.482 – High Court quashed the complaint and the consequential proceedings, by ex-parte order – Application for recall of the ex-parte order dismissed – Present appeals against the order dismissing the application for recalling the ex-parte order and also against the ex-parte order – Held: Appeal against the order in application for recalling the ex-parte order is devoid of merit as the applicant failed to offer sufficient cause for his non-appearance on the date when the complaint was quashed – The appeal against the ex-parte order is liable to be dismissed on the ground of delay as well as on merit – However, in the interest of equity, justice and fair play, direction to make payment to the complainant for a sum of Rs.5 lakhs, which would be treated as an overall amount including interest and compensation towards the cheque for which 'stop payment 'instruction was issued.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1941 of 2013.

From the Judgment & Order dated 09.11.2010 of the High Court of Punjab & Haryana at Chandigarh in CRM No. 55019 of 2010 in Crl. Misc. No. 20203 of 2010.

WITH

Crl. A. No. 1942 of 2013.

Ajay Bhargava, Vanita Bhargava, Nitin Mishra, Abhijeet Swaroop, Khaitan & Co. for the Appellant.

Sudhir Walia, Abhishek Atrey for the Respondents.

The following Order of the Court was delivered by

O R D E R

1. Leave granted.

2. The appellant herein has challenged the order passed by the High Court whereby it has allowed the petition filed by the respondents herein, who are the Directors in a company known as M/s. Ria Constructions Ltd. and was pleased to quash the complaint lodged by the appellant as also all consequential proceedings pending before the Magistrate in regard to the complaint lodged by the appellant for an offence under Section 138 of the Negotiable Instruments Act, 1881.

3. Admittedly, the accused no. 2 in the complaint had issued the cheque in favour of the appellant for a sum of Rs.2,50,000/-, which was dishonoured as there was instruction of 'stop payment' by the Managing Director. This led to the lodgment of a complaint at the instance of the petitioner in which proceedings started.

4. At this stage, the respondents herein filed a petition under Section 482 of the Code of Criminal Procedure, 1973 ("Cr.P.C." for short) praying for quashing of the complaint and all consequential proceeding wherein the respondents had offered to tender the cheque amount of Rs.2,50,000/- to the appellant who had lodged the complaint alleging that the stop payment instructions by the respondents was illegal which made the offence triable in a summary procedure before the Magistrate. As already stated, the respondents offered to pay

the cheque amount of Rs.2,50,000/- which had been dishonoured due to instructions of stop payment.

5. The High Court allowed the petition filed by the respondents herein for quashing of the proceeding but the said order was passed ex-parte. The appellant, therefore, filed an application for recall of the said order but the High Court dismissed the application for recall on the ground that the averments in the complaint did not meet the test laid down by this Court in the matter of *N.K. Wahi Vs. Shekhar Singh and others,* 2007 (9) SCC 481. It is this order which is under challenge in this special leave petition at the instance of the appellant-complainant.

6. We have heard counsel for the appellant as also the respondents and taking an overall view of the matter, we are of the opinion that this appeal is not fit to be entertained against rejection of the application for recall of the order by which the proceedings against the respondents herein had been quashed by the High Court. Nevertheless, we are conscious of the fact that the appellant should not be deprived of the amount for which the respondents had stopped payment which led to the lodgment of the complaint. We, therefore, suggested to the respondents that they should honour the cheque which had been issued by them by making the payment along with the interest, which would be in the nature of compensation for stop payment instructions at their instance and that amount by way of lump sum amount including interest and compensation would be around Rs.5 lakhs.

7. The respondents have agreed to pay the said amount but the appellant has refused to accept the payment and insisted that the appeal against rejection of the recall application should be allowed by this Court. Counsel for the appellant submitted that merely because the accused has offered to make the payment at a later stage, the same cannot compel the complainant-appellant to accept it and the complainant-appellant would be just[illegible]e

complaint which was lodged under the Negotiable Instruments Act, 1881. In support of his submission, counsel for the Appellant also relied on a citation of *Rajneesh Aggarwal Vs. Amit J. Bhalla* (2001) 1 SCC 631.

8. However, we do not feel persuaded to accept this submission as the appellant has to apprise himself that the primary object and reason of the Negotiable Instruments Act, 1881, is not merely penal in nature but is to maintain the efficiency and value of a negotiable instrument by making the accused honour the negotiable instrument and paying the amount for which the instrument had been executed.

9. The object of bringing Sections 138 to 142 of the Negotiable Instruments Act on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business of negotiable instruments. Despite several remedy, Section 138 of the Act is intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induces the payee or holder in due course to act upon it. Therefore, once a cheque is drawn by a person of an account maintained by him for payment of any amount or discharge of liability or debt or is returned by a bank with endorsement like (I) refer to drawer (ii) exceeds arrangements and (iii) instruction for stop payment and like other usual endorsement, it amounts to dishonour within the meaning of Section 138 of the Act. Therefore, even after issuance of notice if the payee or holder does not make the payment within the stipulated period, the statutory presumption would be of dishonest intention exposing to criminal liability.

10. But in the instant case, the negotiable instrument which admittedly is a cheque was issued by respondent no. 2 who is the managing director and the contesting respondents herein against whom the proceedings have been quashed are not the director of the company in a statutory capacity and, therefore, the payments towards cheque in any case could not have been

made by them and it was respondent no. 2 who was liable to honour the cheque. Nevertheless, the respondents offered to make the payment to the appellant/complainant, yet the appellant refused to accept the payment and pursued the complaint which was quashed by the High Court on which date the appellant had failed to appear without sufficient cause. Thereafter, if the High Court refused to recall that order, we do not consider that there were sufficient grounds necessarily to recall the order quashing the complaint.

11. However, in the interest of equity, justice and fairplay, we deem it appropriate to direct the respondents to make the payment to the appellant by issuing a demand draft in their favour for a sum of Rs.5 lakhs, which would be treated as an overall amount including interest and compensation towards the cheque for which stop payment instructions had been issued. If the same is not acceptable to the appellant, it is their choice but that would not allow them to prosecute the respondents herein in pursuance to the complaint which they have lodged implicating these two respondents.

12. Besides this, the appellant also ought to take note of the fact that these appeals are not directed against the order by which the complaint had been quashed insofar as these two respondents are concerned but it is directed against the order of the High Court by which it refused to recall the order by which the complaint had been quashed. The appellant had failed to offer any sufficient cause for their non-appearance on the date when the complaint had been quashed and if we were to be driven to merely taking a technical view of the matter, these appeals could have been rejected even on the ground of non-sufficiency of material furnished by the appellant in the High Court against refusal to recall the order in which case the petitioner cannot realise even the amount towards the cheque issued in their favour. But considering the fact that the appellant would be deprived of their due amount of Rs.2,50,000/-, we delved into the factual details and

appropriate to direct the respondents to make the payment for the sake of substantial justice to the complainant-appellant as also in view of the analogous appeal, arising out of SLP(Crl)No. 1145/ 2012 directed against the order dated 10th September, 2010 passed in Crl.Misc.No.20203 of 2010 whereby the High Court had allowed the petition filed by the respondents herein under Section 482 of the Code of Criminal Procedure, 1973 and was pleased to quash the proceedings against them. It was in this context that we thought it appropriate to direct the respondents to make the payment towards the cheque in which stop payment instructions had been issued. Besides this, the appeal is time barred by 359 days for which also we see no justification. On the one hand, the appellant has sought to impress upon this Court to take a technical view of the matter by urging that the respondents had not made the payment during the 15 days notice period, even though that had been offered at a later stage, but ignoring his own conduct he expects this Court to condone the huge delay of 359 days in filing the appeal, which is fit to be rejected outright.

13. Hence, appeal arising out SLP(Crl) No. 1327 of 2011 is dismissed on merit and appeal arising out of SLP(Crl) No. 1145 of 2012 is dismissed on the ground of delay as also on merits subject to the direction of payment to the appellant by the respondents.

K.K.T. Appeals dismissed.

A.C. NARAYANAN

v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal No. 73 of 2007)

SEPTEMBER 13, 2013

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

Negotiable Instruments Act, 1881 – ss. 138, 142 and 145 – Filing of complaint petition by Power of Attorney holder – Validity – Whether a Power of Attorney holder can be verified on oath – Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint – Effect of s.145 – Held: Filing of complaint petition u/s.138 through power of attorney is perfectly legal and competent – The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint – However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the transaction – It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint – Power of attorney holder who has no knowledge regarding the transaction cannot be examined as a witness in the case – In the light of s.145, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint u/s.138 and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant upon oath for taking the decision whether or not to issue process on the complaint u/s.138 – The functions under the general power of attorney cannot be delegated to another

person without specific clause permitting the same in the power of attorney – Nevertheless, the general power of attorney itself can be cancelled and be given to another person – Code of Criminal Procedure, 1973 – s.200.

In terms of a reference order, the following questions arose for consideration before this Court:

(i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/ Whether the eligibility criteria prescribed by Section 142(a) of the Negotiable Instruments Act, 1881 would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?

(ii) Whether a Power of Attorney holder can be verified on oath under Section 200 CrPC?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated under Section 200 CrPC can be dispensed with in the light of Section 145 of the Negotiable Instruments Act which was introduced by an amendment in the year 2002?

Answering the Reference, the Court

HELD: 1.1. There is no dispute that complaint has to be filed by the complainant as contemplated by Section

200 CrPC, but the said Section does not create any embargo that the attorney holder or legal representative(s) cannot be a complainant. [Para 20] [103-A-B]

1.2. The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. However, the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal. [Para 21] [103-B-C, E]

1.3. From a conjoint reading of Sections 138, 142 and 145 of the Negotiable Instruments Act, 1881 as well as Section 200 CrPC, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 CrPC, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the com

138 of the N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. [Para 22] [103-F-H; 104-A-D]

1.4. The power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. [Para 23] [104-D-G]

1.5. The attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. Where the payee is a proprietary concern, the complaint can be filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary

concern represented by the attorney holder under a power of attorney executed by the sole proprietor. [Para 24] [104-G-H; 105-A-B]

1.6. The attorney holder can sign and file a complaint on behalf of the complainant-payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub-delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person. [Para 25] [105-D-F]

M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals and Pharma (P) Ltd. and Anr., **(2002) 1 SCC 234: 2001 (5) Suppl. SCR 265;** *Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors.* **(2005) 2 SCC 217: 2004 (6) Suppl. SCR 681;** *Vishwa Mitter of M/s Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vs. O.P. Poddar and Ors.* **(1983) 4 SCC 701: 1984 (1) SCR 176 and** *Ashwin Nanubhai Vyas vs. State of Maharashtra* **(1967) 1 SCR 807 – referred to.**

Nazir Ahmed vs. King Emperor, **AIR 1936 PC 253;** *Rao Bahasur Ravula Subba Rao & Ors. vs. Commissioner of Income Tax,* **AIR 1956 SC 604: 1956 SCR 577 and** *Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley (dead) by LRs,* **(2004) 12 SCC 509: 2004 (5) Suppl. SCR 955 – cited.**

2. In conclusion, the questions under reference are answered in the following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney hol d

verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person. [Para 26] [105-G-H; 106-A-E]

Case Law Reference:

2001 (5) Suppl. SCR 265	**referred to**	**Para 6**
2004 (6) Suppl. SCR 681	**referred to**	**Para 6**
AIR 1936 PC 253	**cited**	**Para 8**

1956 SCR 577	**cited**	**Para 8**
2004 (5) Suppl. SCR 955	**cited**	**Para 8**
1984 (1) SCR 176	**referred to**	**Para 13**
(1967) 1 SCR 807	**referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION :Criminal Appeal No. 73 of 2007.

From the Judgment & Order dated 12.08.2005 of the High Court of Judicature at Bombay in Criminal Applications No. 797, 798, 799, 801, 802 & 803 of 2002.

WITH

Crl. A.No. 1437 of 2013.

Indu Malhotra, Kush Chaturvedi, Vivek Jain, Nishtha Kumar, Namrata Sood, Vikas Mehta, Annam D.N. Rao. Shankar Chillarge, Asha Gopalan Nair, Saurabh Kumar Tuteja, Tarun Verma, Niraj Sharma, Mayur R. Shah, Dr. Kailash Chandra for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI.

Criminal Appeal No. 73 of 2007

1. This appeal is filed against the final common judgment and order dated 12.08.2005 passed by the High Court of Judicature at Bombay in Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002 whereby the High Court dismissed the applications filed by the appellant herein against the order of issuance of process against him for the offence punishable under Sections 138 and 142 of the Negotiable Instruments Act, 1881 (in short 'the N.I. Act) by the IXth Additional Chief Metropolitan Magistrate at Bandra, Mumbai

in Complaint Case Nos. 292/S/1998, 293/S/1998, 297/S/1998, 298/S/1998, 299/S/1998 and 300/S/1998.

2. **Brief facts :**

(a) The appellant is the Vice-Chairman and Managing Director of the Company by name M/s Harvest Financials Ltd. having its registered office at Bombay. Under a scheme of investment, the appellant collected various amounts from various persons in the form of loans and in consideration thereof issued post-dated cheques either in his personal capacity or as the signatory of the Company which got dishonoured.

(b) On 16.12.1997, Mrs. Doreen Shaikh, Respondent No.2 herein, the Power of Attorney Holder of six complainants, namely, Mr. Yunus A. Cementwalla, Smt. Fay Pinto, Mr. Mary Knoll Drego, Smt. Evelyn Drego, Mr. Shaikh Anwar Karim Bux and Smt. Gwen Piedade filed Complaint Case Nos. 292/S/1998, 293/S/1998, 297/S/1998, 298/S/1998, 299/S/1998 and 300/S/1998 respectively against the appellant herein under Sections 138 and 142 of the N.I. Act before the IXth Metropolitan Magistrate at Bandra, Mumbai. On 20.02.1998, Respondent No. 2 herein verified the complaint in each of these cases as Power of Attorney Holder of the complainants. Vide order dated 04.04.1998, the Additional Chief Metropolitan Magistrate, issued process against the appellant under Section 204 of the Code of Criminal Procedure, 1973 (in short 'the Code') for the offences punishable under Sections 138 and 142 of the N.I. Act.

(c) Being aggrieved of the issuance of the process, on 13.01.2000, the appellant herein moved an application for discharge/recall of process in each of the complaints. Vide common order dated 29.11.2000, the Additional Chief Metropolitan Magistrate, IXth Court, Bandra, Mumbai dismissed the applications filed by the appellant herein.

(d) Being aggrieved of the said order, the appellant herein preferred applications being Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002 before the High Court for quashing of the complaints. By impugned order dated 12.08.2005, the said applications were dismissed by the High Court.

(e) Against the said order, the appellant has preferred this appeal by way of special leave before this Court.

Criminal Appeal 1473/2013 @ S.L.P.(Crl.) No. 2724 of 2008:

3. Leave granted.

4. This appeal is directed against the judgment and order dated 19.09.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 578 of 2002 whereby the High Court allowed the appeal filed by M/s Surana Securities Ltd.-Respondent No.1 herein (the complainant) against the judgment and order dated 30.10.2001 passed by the Court of XVIII Metropolitan Magistrate, Hyderabad in C.C. No. 18 of 2000 dismissing the complaint and acquitting the accused for the offence under Section 138 of the N.I. Act.

5. **Brief facts**

(a) Respondent No.1 herein-the complainant is a limited company carrying on the business of trading in shares. The appellant herein is a client of the respondent-Company and used to trade in shares. During the course of business, the appellant became liable to pay an amount of Rs. 7,21,174/- towards the respondent-Company. The appellant, in order to discharge the said liability, issued six cheques amounting to Rs.1,00,000/- each and another cheque for Rs.1,21,174/- drawn on Andhra Bank on different dates. When the first six cheques were presented for encashment on 18.09.1997, the

same got dishonoured with an endorsement 'funds insufficient'. Upon receiving the said information, the respondent-Company issued a legal notice to the appellant calling upon him to pay the amounts due but he did not pay the same.

(b) The Board of Directors of the respondent-Company, by a resolution, authorized its Managing Director to appoint an agent to represent the Company. Pursuant thereto, one Shri V. Shankar Prasad was appointed as an agent by executing a General Power of Attorney. Later, he was substituted by one Shri Ravinder Singh under another General Power of Attorney.

(c) Respondent-company filed a complaint under Section 138 of the N.I. Act being CC No. 1098 of 1997 in the Court of XIth Metropolitan Magistrate, Secunderabad. Subsequently, vide order dated 03.05.2000, the said complaint was transferred to the Court of XVIII Metropolitan Magistrate, Hyderabad and was registered as C.C. No. 18 of 2000. By order dated 30.10.2001, the Metropolitan Magistrate dismissed the complaint filed by the respondent-Company under Section 138 of the N.I. Act.

(d) Aggrieved by the said order, respondent-company filed an appeal being Criminal Appeal No. 578 of 2002 before the High Court of Judicature, Andhra Pradesh at Hyderabad. By impugned order dated 10.09.2007, learned single Judge of the High Court allowed the appeal and set aside the order dated 30.10.2001 passed by the XVIII Metropolitan Magistrate, Hyderabad and convicted the appellant herein under Section 138 of the N.I. Act.

(e) Being aggrieved by the order passed by the High Court, the appellant has filed this appeal by way of special leave.

(f) By order of this Court dated 07.04.2008, this appeal was tagged with the Criminal Appeal No. 73 of 2007 arising

out of S.L.P. (Crl.) Nos. 6703-6708 of 2005. Hence, we heard both the appeals together.

6. Heard Ms. Indu Malhotra, learned senior counsel and Mr. Annam D.N. Rao, learned counsel for the appellants and Mr. Shankar Chillarge, Mr. Saurabh Kumar Tuteja, and Mr. Mayur R. Shah, learned counsel for the respondents.

7. On 04.01.2007, a Division Bench of this Court, on 04.01.2007, while considering Criminal Appeal No. 73 of 2007 (arising out of Special Leave Petition (Crl.) Nos. 6703-6708 of 2005) with regard to the interpretation of Section 142(a) of the N.I. Act observed that in view of the difference of opinion among various High Courts as also the decisions of this Court in *M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals and Pharma (P) Ltd. and Anr.,* (2002) 1 SCC 234 and *Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors.,* (2005) 2 SCC 217, the matter should be considered by a larger Bench in order to render an authoritative pronouncement. In view of the same, it is desirable to extract the entire order of reference which reads as under:-

"Delay in filing counter affidavit is condoned.

Leave granted.

Interpretation and/or application of Section 142(a) of the Negotiable Instruments Act, 1881, ("NI Act") is in question in this appeal which arises out of a judgment and order dated 12.8.2005 passed by a learned Single Judge of the High Court of Judicature at Bombay.

The basic fact of the matter is not in dispute.

Several cheques on different dates were issued by the appellant herein which were dishonoured. The complainant executed a Special Power of Attorney on or about 28.11.1997, in favour of one Smt. Doreen Shaikh. She filed complaint petitions in th[illegible]al

Chief Metropolitan Magistrate, Bandra, Mumbai. The complaint petitions were filed in the name of the respective payees of the cheques. She also filed affidavits in support of the averments made in the said complaint petitions. Cognizance of offence under Section 138 of the NI Act was taken against the appellant. Summons were issued. Questioning the order issuing summons by the learned Magistrate in exercise of his power under Section 204 of the Code of Criminal Procedure, appellant herein filed criminal application before the High Court of Judicature at Bombay, inter alia contending that the complaint petitions filed by the Power of Attorney Holder was not maintainable and relying thereupon or on the basis thereof the learned Magistrate could not have issued summons. The said contention has been negatived by the High Court in its impugned judgment.

In the aforementioned premises interpretation of Section 142 (a) of the NI Act comes up for consideration before us. We may notice that in *M.M.T.C. and Anr. vs. Medchl Chemicals & Pharma (P) Ltd. and Anr.* [2002 (1) SCC 234], a Division Bench of this Court has opined:

"This Court has, as far back as, in the case of *Vishwa Mitter v. O.P. Poddar* (1983 4 SCC 701) held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due

course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant Company."

However, in a later judgment in *Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors.* [2005 (2) SCC 217], albeit in a different context, another Division Bench of this Court overruled the judgment of the Bombay High Court in *Pradeep Mohanbay vs. Minguel Carlos Dias* [2000 (1) Bom. L.R. 908], inter alia opining as follows:

"Order 3 Rules 1 and 2 CPC empowers the holder of power of attorney to 'act' on behalf of the principal. In our view the word 'acts' employed in Order 3 Rules 1 and 2 CPC confines only to in respect of 'acts' done by the power-of-attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal is entitled to be cross-examined."

"On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan (1986 2 WLN 713 (Raj.) it was held that a general power-or-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

"However, in the case of Humb

Armado Luis (2002 2 Bom. CR 754) on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word 'act' appearing in Order 3 Rule 2 CPC takes within its sweep 'depose'. We are unable to agree with this view taken by the Bombay High Court in Floriano Armando."

It is not in dispute that there is a conflict of opinion on this issue amongst various High Courts, including the decision of Bombay High Court in Mamatadevi Prafullakumar Bhansali vs. Pushpadevi Kailashkumar Agrawal & Anr. [2005 (2) Mah. L.J. 1003] on the one hand and a decision of the Andhra Pradesh High Court in S.P. Sampathy vs. Manju Gupta and Anr. (2002 Crl.L.J. 2621), on the other. One of the questions which would arise for consideration is as to whether the eligibility criteria prescribed by Section 142(a) of the NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque and/or whether a complaint petition has to be presented before the Court by the payee or the holder of the cheque himself.

Another issue which would arise for consideration is as to whether the payee must examine himself in support of the complaint petition keeping in view the insertion of Section 145 of the said Act (Act No.55 of 2002).

In our opinion, in view of difference of opinion amongst various High Courts as also the decisions of this Court in M.M.T.C. Ltd. (supra) and Janki *Vashdeo Bhojwani* (supra), particularly in view of the fact that in the later case the earlier one was not noticed, an authoritative pronouncement is necessary to be given in this regard.

We, therefore, are of the opinion that the matter should be considered by a larger Bench."

Before going into the factual details, rival contentions and the legal issues, it is useful to refer Sections 138 and 142(a) of the N.I. Act which read as under:

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

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment

of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

142. Cognizance of offences.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

Xxxx xxx xxx"

8. In terms of Section 142 of the N.I. Act, no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. Learned senior counsel appearing for the appellant pointed out that with a non obstante clause, Section 142 provides that only two categories of persons, namely, the payee or the holder in due course of the cheque is entitled to file a complaint under Section 138 of the N.I. Act. According to learned senior counsel for the appellant, in the first case, the verification statement of solemn affirmation has been made by the constituted attorney and not by the complainant. It is further pointed out that the verification affidavit made by the constituted attorney is not on the basis of her personal knowledge and hence, it would squarely fall within the ambit of hearsay evidence and cannot be read in evidence in a court of law. By pointing out the same, learned senior counsel for the appellant submitted that the constituted attorney is incompetent to depose on behalf of the complainants. In other words, according to the appellant, the

Power of Attorney holder is not competent to depose about the transaction that took place between the payee and the drawer of the cheque. Learned senior counsel also pointed out that Section 2 of the Power of Attorney Act, 1882 cannot override the specific provisions of the Statute which require that a particular act should be done in a particular manner (vide *Nazir Ahmed vs. King Emperor,* AIR 1936 PC 253, *Rao Bahasur Ravula Subba Rao & Ors. vs. Commissioner of Income Tax,* AIR 1956 SC 604 at 612-613). It was further pointed by learned senior counsel for the appellant that the decision in *Rao Bahasur Ravula Subba Rao (*supra) was followed in *Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley* (dead) by LRs, (2004) 12 SCC 509.

9. In view of the above, learned senior counsel for the appellant relied on a decision of this Court in *Janki Vashdeo Bhojwani* (supra) wherein this Court held that Power of Attorney cannot depose for the acts done by the principal. Likewise, it was further held that he cannot depose for principal in respect of matters of which only the principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. It was further held that the Power of Attorney can appear only as a witness in respect of facts, which are within his personal knowledge.

10. In the case on hand, it is pointed out by learned senior counsel for the appellant that the constituted attorney did not even file the Power of Attorney along with the complaint or with the verifying statement and in view of the same, the Magistrate could not have issued process on the basis of such a complaint. No doubt, it is true that the Power of Attorney was produced along with the reply to the application for discharge filed by the complainant after two years of the order passed by the Additional Chief Metropolitan Magistrate issuing summons. In other words, the Power of Attorney holder is at best a witness to the execution of the Power of Attorney and not to the contents of the complaint.

11. Learned senior counsel for the appellant also pointed out that the provision under Section 200 of the Code is mandatory and obligatory on the part of the Magistrate to examine the complainant. However, a perusal of the Section makes it clear that examination of witnesses present, if any, is optional.

12. Learned senior counsel for the appellant further contended that the object of such examination is to ascertain whether there is a prima facie case against the accused of the commission of an offence as mentioned in the complaint and also to prevent the issuance of a process on a complaint which is either false or vexatious or intended to harass a person.

13. Learned senior counsel for the appellant further contended, by drawing our attention to the language of Section 200 of the Code, that the Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant. She further pointed out that where the language of an Act is clear and explicit, it must be given effect to, whatever may be the consequences, as has been held by this Court in *Vishwa Mitter of M/s Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vs. O.P. Poddar and Ors.,* (1983) 4 SCC 701. In the said decision, this Court has held that if a special enactment provides for a specific procedure then that particular procedure has to be followed and hence, learned senior counsel for the appellant contended that the provisions of Section 142 of the N.I. Act regarding cognizance on the basis of a complaint filed by the payee or the holder in due course will prevail.

14. Learned counsel for the respondents met all the contentions which we will discuss hereunder.

15. In terms of the reference order, the following questions have to be decided by this Bench:

(i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/ Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?

(ii) Whether a Power of Attorney holder can be verified on oath under Section 200 of the Code?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?

16. In order to find out the answers to the above and also to ascertain whether there is any conflict between the two decisions as pointed out in the referral order, let us consider the factual details and the ultimate dictum laid down in both the decisions.

17. In *MMTC* (supra), the appellant is a Government of India company. Respondent No. 1 therein is also a company and Respondent Nos. 2 and 3 were the Directors of the respondent-Company. The appellant-Company and the respondent-Company entered into a Memorandum of Understanding (MoU) dated 01.06.1994 and the same was slightly altered on 19.09.1994. Pursuant to the MoU, two cheques were issued by the respondent-Company in favour of the appellant-Company. When both the cheques were presented for payment, the same got returned with an endorsement "payment stopped by drawer"

served by the appellant-Company on the respondent-Company. As the amounts under the cheques were not paid, the appellant-Company lodged two complaints through one Lakshman Goel, the Manager of the Regional Office (RO) of the appellant-Company. Respondents therein also filed two petitions for quashing of the complaints. By the impugned order, both the complaints were quashed. In the said case as well as in the cases filed subsequently, the respondents took identical contentions in their petitions in order to quash the complaints, viz., that the complaints filed by Mr Lakshman Goel were not maintainable and that the cheques were not given for any debt or liability. In the impugned judgment, it was held that the complaints filed by Mr Lakshman Goel were not maintainable. The High Court held that it is only an Executive Director of the Company who has the authority to institute legal proceedings. While holding that the reasoning given by the High Court cannot be sustained, this Court held that Section 142 of the N.I. Act provides that a complaint under Section 138 can be made by the payee or the holder in due course of the said cheque. This Court further held that the complaints in question were by the appellant-company who is the payee of the two cheques. After finding that the Court cannot quash a complaint as stated by the High Court, this Court set aside the same and directed the trial Court to proceed with the complaints against Respondent Nos. 1 and 3 therein in accordance with law.

18. Now, let us consider the later decision of this Court in *Janki Vashdeo Bhojwani* (supra). This case relates to powers of Power of Attorney under the Code of Civil Procedure, 1908 and it was concluded that a complaint by a power of attorney holder on behalf of original plaintiff is maintainable provided he has personal knowledge of the transaction in question. This Court further held as under:

> "12. In the context of the directions given by this Court, shifting the burden of proving on to the appellants that they have a share in the property, it was obligatory on the

> appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power-of-attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.
>
> 13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

This Court further held thus:

> "17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the [illegible] lf

of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of *Ram Prasad v. Hari Narain.* It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of *Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias* the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of Humberto Luis v. Floriano Armando Luis on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order 3 Rule 2 CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando.

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ram Prasad is the correct view.

The view taken in the case of Floriano Armando Luis cannot be said to have laid down a correct law and is accordingly overruled."

19. As noticed hereinabove, though *Janki Vashdeo Bhojwani* (supra), relates to powers of Power of Attorney holder under CPC but it was concluded therein that a plaint by a Power of Attorney holder on behalf of the original plaintiff is maintainable provided he has personal knowledge of the transaction in question. In a way, it is an exception to a well settled position that criminal law can be put in motion by anyone [vide Vishwa Mitter (supra)] and under the Statute, one stranger to transaction in question, namely, legal heir etc., can also carry forward the pending criminal complaint or initiate the criminal action if the original complainant dies [Vide *Ashwin Nanubhai Vyas vs. State of Maharashtra* (1967) 1 SCR 807]. Keeping in mind various situations like inability as a result of sickness, old age or death or staying abroad of the payee or holder in due course to appear and depose before the Court in order to prove the complaint, it is permissible for the Power of Attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course. However, it is expected that such power of attorney holder or legal representative(s) should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved in case payee or holder in due course, is unable to sign, appear or depose as complainant due to above quoted reasons. Keeping these aspects in mind, in *MMTC* (supra), this Court had taken the view that if complaint is filed for and on behalf of payee or holder in due course, that is good enough compliance with Section 142 of N.I. Act.

20. The stand of the appellant in Criminal Appeal No. 73 of 2007 is that no complaint can be filed and no cognizance of the complaint can be taken if the comp[illegible]of

attorney holder, since it is against Section 200 of the Code and deserves to be rejected. There is no dispute that complaint has to be filed by the complainant as contemplated by Section 200 of the Code, but the said Section does not create any embargo that the attorney holder or legal representative(s) cannot be a complainant.

21. The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

22. From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call

upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

23. In the light of the discussion, we are of the view that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous.

24. In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal.

where the payee is a proprietary concern, the complaint can be filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.

25. Similar substantial questions were raised in the appeal arising out of S.L.P (Crl.) No. 2724 of 2008, which stand answered as above. Apart from the above questions, one distinct query was raised as to whether a person authorized by a Company or Statute or Institution can delegate powers to their subordinate/others for filing a criminal complaint? The issue raised is in reference to validity of sub-delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a complaint on behalf of the complainant-payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub-delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

26. While holding that there is no serious conflict between the decisions in *MMTC* (supra) and *Janki Vashdeo Bhojwani* (supra), we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the

complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

27. We answer the reference on the above terms and remit the matter to the appropriate Bench for deciding the case on merits.

B.B.B. Reference Answered.

MANJIT SINGH & ANR.
v.
STATE OF PUNJAB & ANR.
(Criminal Appeal No. 2042 of 2010)

SEPTEMBER 13, 2013

[DIPAK MISRA AND VIKRAMAJIT SEN, JJ.]

Penal Code, 1860 – s.302/307 r/w s.34 – Firing of gunshots – Causing injuries to PW1 and death of his brother – Five accused – Conviction of A-1 and A-2 i.e. the appellants – Justification – Held: PWs-1 and 2, brother and father of the deceased, deposed in a vivid manner about the culpability of the accused persons in the crime – Non-examination of two witnesses did not affect the trustworthiness of PWs-1 and 2 – Though there was some embellishment by PW-1, the informant, and the other witnesses but that did not make the whole prosecution version untruthful – Non-seizure of blood-stained clothes and blood stains did not create dent in the prosecution version – The autopsy surgeon, PW-3, clearly opined that deceased had died because of gunshot injuries – The FSL report was clear – As per the FSL report, shots were fired from the weapons sent to the laboratory – Cogent evidence that the weapons belonged to accused-appellants and licenses were issued in their favour – Thus, ocular testimony of PWs-1 and 2 received clear corroboration from the medical evidence as well as from the report of the FSL – Conviction of the appellants accordingly affirmed.

Penal Code, 1860 – s.34 – Common intention – Existence of – When may be inferred – Death of PW1's brother and injuries caused to PW1 due to gun shots fired by the accused persons – Conviction of the two accused-appellants (A-1 and A-2) u/s.302/307 r/w s.34 – Plea that A-2 could not have been convicted with the aid of s.34 IPC – Held:

Not tenable – Scrutiny of the evidence made it clear that A-2 had accompanied A-1 and was present at the spot; that he had carried a weapon; that it was established by the prosecution that cartridges had been fired from his gun; and that both the appellants were closely related – Thus, the cumulative facts clearly establish that A-2 shared the common intention with A-1.

Appeal – Appeal against acquittal – Case pertaining to murder and attempt to murder – Five accused – A-4 and A-5 acquitted by trial court – A-3 acquitted by High Court – Plea that High Court erred in affirming the acquittal recorded by the trial Judge in respect of A-4 and A-5 and further erred in acquitting A-3 – Held: Not tenable – In the facts and circumstances of the case, the view expressed by the trial Judge in acquitting A-4 and A-5 and further the acquittal recorded by High Court acquitting A-3 was based on cogent reasoning and was a plausible view – Once a plausible view has been expressed and there has been proper appreciation of the evidence on record, the acquittal does not warrant any interference – Penal Code, 1860 – s.302/307 r/w s.34.

Evidence – Witness – Non-examination of – Effect – Held: It is not the number and quantity of witnesses, but the quality that is material – Duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon – In such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses – It is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness – Evidence Act, 1872 – s.134.

Evidence – Appreciation and evaluation of – Concept of

proof beyond reasonable doubt – Held: Cannot be made to appear totally unrealistic.

Maxims – Maxim falsus in uno, falsus in omnibus – Held: Is not applicable in India – It is merely a rule of caution – All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded – Unless the entire case of the prosecution suffers from infirmities, discrepancies and material contradictions and the prosecution utterly fails to establish its case, acquittal of some accused persons cannot be a relevant facet to determine the guilt of other accused persons – Evidence – Discrepancies in – Appreciation of.

The prosecution case was that while PW1 was sitting on the left mudguard of the tractor driven by his brother, they were stopped by a Maruti car driven by A-1, who parked it on the road in front of the tractor; and that thereafter the five accused persons alighted from the car, armed with rifles and guns, and fired gunshots which resulted in the death of PW1's brother and injuries to PW1. The incident allegedly occurred due to enmity of the accused persons against the victims as their father, PW2, had contested the village Sarpanch elections against the accused persons.

The trial court convicted A-1, A-2, and A-3 under Section 302/307 read with Section 34 IPC and sentenced them to undergo rigorous life imprisonment. A-3 was also separately convicted under Section 307 IPC. A-4 and A-5 were however acquitted by the trial court. The High Court affirmed the conviction of A-1 and A-2, but acquitted A-3 and therefore the present cross appeals by A-1 and A-2 on the one hand and the informant on the other.

A-1 and A-2 i.e. the appellants raised the following set of contentions before this Court:

(1) That non-examination of two crucial witnesses, namely, 'D' (who had come to the spot along with PW-2, and had arranged a car to take the deceased and the injured to the hospital and at his instance the site plan was prepared) and 'M' (who had carried the deceased and the injured to the hospital) materially affected the trustworthiness of the prosecution version.

(2) That three persons, namely, A-3, A-4 and A-5 were falsely roped in by the prosecution which showed the extent of falsehood that was taken recourse to by the informant, PW-1, and other witnesses and thus the testimonies of the so-called eye-witnesses could not be regarded as cogent, reliable and trustworthy.

(3) That the presence of two eye-witnesses, namely, PWs-1 and 2, at the scene of occurrence was gravely doubtful; the said two witnesses could not have been present at the spot as their statement that they had taken the deceased to the hospital was belied by the testimony of autopsy surgeon; their blood stained clothes had not been seized; and PW-1, who was sitting on the left mudguard of the tractor, had not received any serious injury despite the tractor had turned towards the left.

(4) That the wounds indicated that the shots were fired from a close range but the oral testimony was contrary to the same, and;

(5) That A-2 could not have been convicted with the aid of Section 34 IPC since he had not participated in the assault on the deceased.

On the other hand, PW1, the informant, in support of the appeal preferred by him, contended that the High Court fell into grave error by affirming the acquittal recorded by the trial Judge in respect of A-4 and A-5 and further committed serious illegality by acquitting A-3, despite the irreproachable evidence against him.

Dismissing all the appeals, the Court

HELD: 1.1. It is not the number and quantity of witnesses, but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness. [Para 24] [128-A-C]

1.2. In the case at hand, the plea taken is that it was 'M', who had taken the deceased and injured to the hospital and, therefore he is a material witness. The question that is required to be put whether the evidence of the said witness is essential to record a conviction or his non-examination would affect the trustworthiness of PWs-1 and 2 and other witnesses. As perceived, it can reasonably be stated that 'M' is not a material witness in that sense. As far as 'D' is concerned, if the testimony of other witness inspires confidence, his non-examination would not create a concavity in the case of the prosecution. The acceptance of testimonies of PWs-1 and 2, in the case at hand, would stand on their own and would not depend upon the version that could have come from 'D'. It is so as he is not the only competent

witness who would have been fully capable of explaining the factual situation correctly. Quite apart from the above, during the cross-examination of investigating officer, none of the accused persons had voiced their concerns by raising any apprehension regarding non-examination of the material witnesses. On a studied scrutiny it is found that, in fact, there is no cross-examination in that regard. [Para 25] [128-D-H; 129-A]

Masalti v. State of U.P. **AIR 1965 SC 202: 1964 SCR 133;** *Namdeo v. State of Maharashtra* **(2007) 14 SCC 150: 2007 (3) SCR 939;** *Bipin Kumar Mondal v. State of W.B.* **(2010) 12 SCC 91: 2010 (8) SCR 1036;** *State of H.P. v. Gian Chand* **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Takhaji Hiraji v. Thakore Kubersing Chamansing* **(2001) 6 SCC 145;** *Dahari v. State of U.P.* **(2012) 10 SCC 256: 2012 (8) SCR 1219;** *Harivadan Babubhai Patel v. State of Gujarat* **(2013) 7 SCC 45 and** *State of U.P. v. Iftikhar Khan and others* **(1973) 1 SCC 512: 1973 (3) SCR 328 – relied on.**

2.1. It is well settled in law that unless the entire case of the prosecution suffers from infirmities, discrepancies and material contradictions and the prosecution utterly fails to establish its case, acquittal of some accused persons cannot be a relevant facet to determine the guilt of other accused persons. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) has no application in India and has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded. [Para 27] [129-D-G]

2.2. In the instant case, the trial Judge acquitted A-5 on the ground that she had not contested any election; that she was not even residing in the [illegible] the

elections were held. The allegation in the FIR that she had given lalkara had not really got support from other witnesses and, hence, her presence at the spot was doubted. As far as A-4 is concerned, in the opinion of the trial Judge he had no concern with the accused persons or the deceased. The trial Judge, in essence, extended benefit of doubt to him inasmuch as he had neither participated in the occurrence nor had he shared the common intention. The High Court acquitted A-3 on the ground that he was not named in the FIR and further he had not carried any weapon. The High Court opined that he had been implicated because he had filed a writ petition against the police officers. If the evidence is scrutinized in proper perspective, it is clear that there has been some embellishment by the informant and other witnesses but giving such embroidery to a story would not make the whole prosecution version untruthful one. It can be treated to be an exaggeration by the prosecution but the consequence cannot be regarded as fatal. [Para 30] [131-C-H]

Dalbir Singh v. State of Haryana **(2008) 11 SCC 425: 2008 (8) SCR 1026;** *Krishna Mochi and Others v. State of Bihar* **(2002) 6 SCC 81: 2002 (3) SCR 1;** *Yanob Sheikh alias Gagu v. State of West Bengal* **(2013) 6 SCC 428: 2012 (13) SCR 1150;** *Balraje alias Trimbak v. State of Maharashtra* **(2010) 6 SCC 673: 2010 (6) SCR 764 – relied on.**

3. The plea that 'M' had alone brought the deceased and the injured to the hospital cannot be accepted to be correct. PW-8, who had treated PW1, had clearly stated that the deceased was brought dead to the hospital with the alleged history of gunshot injuries. In the cross-examination, he has clearly deposed that the dead body was brought to the hospital at 12.40 p.m. and PW1 came to the hospital at 12.40 p.m. That apart, it can be said with certitude that whether PW1 accompanied or not really

does not affect the prosecution case. As far as non-seizure of the blood-stained clothes and blood stains from the seat of the car are concerned, it does not create a dent in the prosecution version. In the case at hand it is perceptible that PWs-1 and 2, brother and father of the deceased, have deposed in a vivid manner about the culpability of the accused persons in the crime. The autopsy surgeon, PW-3, has clearly opined that the deceased had died because of gunshot injuries. The FSL report, Ext. P-AM/1, states with equal clarity that one cartridge was fired from left barrel of DBBL gun No. 56088, the other cartridge from its right barrel and three cartridges were fired from the rifle No. AB 97/5473. It is also brought out in the evidence the gun and the rifle were sent to the Forensic Science Laboratory in sealed parcels. As per the report the shots were fired from the weapons sent to the laboratory. It has been established by cogent evidence that the weapons belonged to the accused-appellants and licenses were issued in their favour. Thus, the ocular testimony of PWs-1 and 2 has received clear corroboration from the medical evidence as well as from the report of the FSL. [Para 31] [132-C-F, G-H; 133-A-C]

State of Rajasthan v. Arjun Singh and others **(2011) 9 SCC 115: 2011 (10) SCR 823 – relied on.**

4. The appellants also submitted that wounds would indicate that the shots were fired from a close range but the oral testimony is contrary to the same; and further that the person sitting on the left mudguard would have been affected as the tractor turned towards the left and, more so, when the deceased had sustained injury on the right cheek. However, these kind of discrepancies are bound to occur when an occurrence of the present nature takes place and one cannot expect the witnesses to state with precision. On these counts the prosecution version cannot be held to be unbelievable a[illegible]d

that the prosecution has not been able to establish the charges beyond reasonable doubt. It is because judicial evaluation of the evidence has to be appropriate regard being had to the totality of the facts and circumstances of the case and not on scrutiny in isolation and further the concept of proof beyond reasonable doubt cannot be made to appear totally unrealistic. [Para 32] [133-D-G]

Inder Singh and another v. The State (Delhi Administration) **(1978) 4SCC 161: 1978 (3) SCR 393 – relied on.**

5.1. On a perusal of the evidence of PWs 1 and 2 it is perceptible that A-2 was named in the FIR and he had accompanied A-1, his son-in-law. There has been seizure of .12 bore rifle which has been proven to have belonged to A-2 and the cartridges that have been recovered from the spot have been proven to have been fired from the .12 bore rifle that belonged to A-2. There is clear evidence that A-2 had fired from his .12 bore rifle but it had not hit anyone. From the material brought on record it is vivid that he had gone along with A-1 being armed with the weapon. [Para 34] [134-F-G; 135-A-B]

5.2. The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention

is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case. [Para 38] [137-F-H; 138-A]

5.3. On a scrutiny of the evidence it is found that A-2 had accompanied A-1 and was present at the spot; that he had carried a weapon; that it has been established by the prosecution that the cartridges had been fired from his gun; and that both the appellants are closely related. Thus, the cumulative facts would clearly establish that A-2 shared the common intention with A-1. The criticism advanced that A- 2 could not have been convicted in aid of Section 34 IPC, is not well founded. [Para 39 and 40] [138-B-C, F]

Ramashish Yadav and others v. State of Bihar **(1999) 8 SCC 555: 1999 (2) Suppl. SCR 285 – distinguished.**

Shreekantiah Ramayya Munipalli and another v. State of Bombay **AIR 1955 SC 287: 1955 SCR 1177;** *State of U.P. v. Iftikhar Khan and others* **(1973) 1 SCC 512: 1973 (3) SCR 328;** *Pandurang, Tukia and Bhillia v. State of Hyderabad* **(1955) 1 SCR 1083;** *Tukaram Ganpat Pandare v. State Maharashtra* **AIR 1974 SC 514;** *Krishnan and another v. State of Kerala* **(1996) 10 SCC 508: 1996 (5) Suppl. SCR 405;** *Surendra Chauhan v. State of M.P.* **(2000) 4 SCC 110: 2000 (2) SCR 515 – relied on.**

Mahbub Shah v. King Emperor **AIR 1945 PC 118 – referred to.**

6. In the facts and circumstances of the case, the view expressed by the trial Judge in acquitting A-4 and A-5 and further the acquittal recorded by the High Court acquitting A-3 is based on cogent reasoning and it is a plausible view. Once a plausible view has been expressed and there has been prope e

evidence on record, the acquittal does not warrant any interference. [Para 41] [139-C-D]

Case Law Reference:

1964 SCR 133	**relied on**	**Para 18**
2007 (3) SCR 939	**relied on**	**Para 19**
2010 (8) SCR 1036	**relied on**	**Para 20**
2001 (3) SCR 247	**relied on**	**Para 21**
2001) 6 SCC 145	**relied on**	**Para 22**
2012 (8) SCR 1219	**relied on**	**Para 23**
(2013) 7 SCC 45	**relied on**	**Para 23**
1973 (3) SCR 328	**relied on**	**Para 24**
2008 (8) SCR 1026	**relied on**	**Para 27**
2002 (3) SCR 1	**relied on**	**Para 27**
2012 (13) SCR 1150	**relied on**	**Para 28**
2010 (6) SCR 764	**relied on**	**Para 29**
2011 (10) SCR 823	**relied on**	**Para 31**
1978 (3) SCR 393	**relied on**	**Para 32**
1955 SCR 1177	**relied on**	**Para 34**
AIR 1945 PC 118	**referred to**	**Para 35**
(1955) 1 SCR 1083	**relied on**	**Para 35**
AIR 1974 SC 514	**relied on**	**Para 35**
1996 (5) Suppl. SCR 405	**relied on**	**Para 36**
2000 (2) SCR 515	**relied on**	**Para 37**
1999 (2) Suppl. SCR 285	**distinguished**	**Para 38**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2042 of 2010.

From the Judgment & Order dated 12.05.2009 of the High Court of Punjab & Haryana at Chandigarh in CRLA No. 628 of 2001.

WITH

Crl.A.Nos. 2276-2278 of 2010.

U.U. Lalit, Jayant K. Sud, AAG, S. Wasim A. Qadri, Jasbir Singh Malik, Varun Punia, Zaid Ali (for S.K. Sabharwal), S.C. Paul, Roopa Paul, Ranjeeta Raj, Satyendra Kumar, Chirag Khurana, Vishal Dabas, V. Kumar (for Kuldip Singh) J.P. Dhanda, N.A. Uamani, Resham Singh, Ashok Kumar Yadav, Satyendra Kumar for the appearing parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The two appellants, namely, Manjit Singh and Paramjit Singh, were tried along with three others in ST No. 54 of 2001 before the learned Additional Sessions Judge, Kapurthala for the offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code (IPC).

2. The facts which are essential to be stated are that on 8.11.1998 about 12:00 noon Amarjot Singh, the complainant, PW-1, along with his younger brother, Jagmohan Singh, the deceased, was going on a tractor towards Bholath for some domestic work. Jagmohan Singh was driving the tractor, whereas Amarjot Singh was sitting on the left mudguard of the tractor. After they reached village Pandori Arayiyan, they were stopped by a Maruti car bearing registration no. PB-10-X 7079, driven by Accused No. 1, Manjit Singh, who parked it on the road in front of the tractor. On seeing the car, Jagmohan Singh, stopped the tractor in the middle of the road. Manjit Singh, armed with a .315 bore rifle, Paramjit [illegible] of

Manjit Singh, armed with .12 bore gun, Jaswinder kaur, sister of Manjit Singh, and two unknown persons alighted from the car. One of the unknown persons was also armed with a .12 bore gun. After alighting from the car, Jaswinder Kaur raised "lalkara" to eliminate both the sons of Rajinderpal Singh, PW-2, father of the deceased, so that they would understand the consequences of contesting the election of Sarpanch against them. Jagmohan Singh tried to turn the tractor towards the left side and at that juncture Manjit Singh fired a gunshot which hit him on the right cheek as a result of which he fell down from the tractor in the fields. Paramjit Singh armed with a .12 bore gun had also fired at the two brothers. Amarjot Singh jumped from the tractor and received an injury on his right elbow. He saved himself by taking shelter behind the back wheel of the tractor. In the meantime, Rajinderpal Singh, PW-2, who was present at his tube-well motor situate nearby and Didar Singh s/o Joginder Singh, who was present in his field near the place of occurrence reached the spot and witnessed the incident. All the accused fled away from the scene of crime along with their respective weapons. Jagmohan Singh and Amarjot Singh were shifted to Civil Hospital, Bholath, in a car and in the hospital Jagmohan Singh was declared dead.

3. As the prosecution story further unfurls, the hospital authorities intimated about the death of Jagmohan Singh to the concerned police station whereafter the police party headed by SI, Swaran Singh, PW-5, arrived at the hospital and the SI recorded the Statement of Amarjot Singh on the basis of which a formal FIR was registered. The investigating agency got the post mortem done, prepared the site plan, collected the blood stained earth, the blood stained clothes of the deceased, three empty cartridges of .315 bore rifle and two empty cartridges of .12 bore from the spot and each item was put in separate sealed parcels on the basis of separate memorandum prepared and attested by the witnesses. After taking appropriate steps, accused persons were apprehended and the Maruti car, used in the commission of crime, was seized.

A-1, Manjit Singh, while in custody led to recovery of his licenced rifle .315 bore along with the cartridges and the licence in the iron box in the residential house of Jasbir Singh of Village Umarpura, one of his relatives. Similarly Paramjit Singh, A-2, made a disclosure that .12 bore licenced gun used by him had been taken by Sukhpal Singh of Kaki Pind. As per his statement a bag containing the remaining cartridges were kept concealed in the iron box under the clothes in his residential house. On the basis of the said statement, recovery of the iron box, the lock, the cartridges and the licence were recovered. On the basis of disclosure statement of Sukhpal Singh, A-3, who had taken .12 bore gun from Paramjit Singh, A-2, led to the place of discovery of the weapon hidden underneath the heap of chaff in the Haveli of Manjit Singh, A-1. The seized articles were sent to the FSL at Chandigarh. The investigating agency, after examining the witnesses and completing the other formalities, placed the charge-sheet before the learned Magistrate, who, in turn, committed the matter to the Court of Session.

4. The accused persons pleaded innocence and false implication due to animosity and on that basis claimed to be tried.

5. Be it noted, during the trial an application was moved under Section 319 of the Code of Criminal Procedure, 1973 (for short "the CrPC") to summon Jaswinder Kaur as an accused which was allowed, and during trial she availed the same plea and claimed to be tried.

6. The prosecution, in order to bring home the charges against the accused persons, examined 13 witnesses and got marked number of documents. The principal witnesses are Amarjot Singh, PW-1, the informant, Rajinderpal Singh, PW-2, father of the deceased, who was cited as an eye-witness, Dr. J.N. Dutta, PW-3, who had conducted the post mortem, Swaran Singh, PW-5, the Investigating Officer and Dr. Narinderpal

Singh, PW-7, who had examined Amarjot Singh. The rest of the witnesses are formal witnesses.

7. In their statements under Section 313 of the CrPC the plea of the accused Manjit Singh and Paramjit Singh was that they were arrested from their house on 9.11.1998 and the rifle and gun were also taken into police possession. In essence, they pleaded innocence and false implication. As far as Sukhpal Singh, A-3, is concerned, his version was that he had filed a writ petition against S.S.P. Dinkar Gupta, D.S.P Harmail Singh and S.I. Surjit Singh because he was illegally detained by the police earlier and, therefore, the police had conducted a raid in his house and falsely implicated him in the case. He had also stated that Manjit Singh and other were not known to him. The plea of Jaswinder Kaur was to the effect that after the death of her husband in 1990, she was residing at Jalandhar with her daughter and was suffering from heart ailments and had also suffered a brain haemorrhage. She also took the plea that on the date of occurrence she was away at Harnamdasspur to attend the cremation of a relative. Her further plea was that she had been falsely implicated on account of dispute relating to Panchayat election which was contested by her sister-in-law, wife of Manjit Singh.

8. On the basis of the ocular and documentary evidence brought on record the trial court found that the prosecution had been able to prove its case beyond all reasonable doubt against Manjit Singh, A-1, Paramjit Singh, A-2, and Sukhpal Singh, A-3, for committing the murder of Jagmohan Singh on 8.11.1998. He also found them guilty of firing at Amarjot Singh with the intention of committing murder and, accordingly, recorded conviction under Section 302/307 read with Section 34 of the Indian Penal Code (IPC) and sentenced each of them to undergo rigorous life imprisonment and to pay a fine of Rs.5000/- with a default clause under Section 302 IPC and for one year under Section 307 IPC and to pay a fine of Rs.2000/- with the default clause. It may be noted that Sukhpal Singh

was also separately convicted under Section 307 IPC. The trial court acquitted all the accused persons of the charges under Section 148 IPC. As far as Kamal Kumar, A-4 and Jaswinder Kaur, A-5, are concerned, he recorded an acquittal in respect of all the charges on the ground that the prosecution had not been able to bring home the charges against them.

9. Assailing the aforesaid judgment of conviction and order of sentence Manjit Singh, Paramjit Singh and Sukhpal Singh preferred Criminal Appeal No. 628-DB of 2001 and Sukhpal Singh challenged his individual conviction under Section 307 IPC in Criminal Appeal No. 621-DB of 2001. The acquittal of the accused persons was challenged by the informant Amarjot Singh in Criminal Revision No. 680 of 2002.

10. The High Court, by a common judgment and order dated 12.5.2009 which is impugned herein, affirmed the conviction of Manjit Singh and Paramjit Singh. However, as far as Sukhpal Singh is concerned, taking note of the material brought on record, doubted his presence at the scene of occurrence and, accordingly gave him the benefit of doubt. As he was acquitted in the main appeal, the appeal preferred by him assailing the conviction under Section 307 IPC was treated to have been rendered infructuous. In view of the decisions rendered in the appeal the criminal revision, preferred by Amarjot Singh, the brother of the deceased, stood dismissed.

11. Questioning the legal propriety of the said judgment and order Manjit Singh and Paramjit Singh have preferred Criminal Appeal No. 2042 of 2010 by special leave and the informant has preferred Criminal Appeal Nos. 2276-2278 of 2010 on obtaining permission to challenge the judgment of acquittal.

12. We have heard Mr. U.U. Lalit, learned senior counsel for the convicted appellants, Mr. Jayant K. Sud, learned Additional Advocate General for the State of Punjab, Mr. S.C. Paul, learned counsel for the informant

and Mr. J.P. Dhanda, learned counsel for the respondent No. 5 in criminal appeal preferred by Amarjot Singh.

13. Criticizing the appreciation of evidence and the findings recorded by the learned trial Judge as well as by the High Court Mr. Lalit, learned senior counsel, has contended that two crucial witnesses, namely, Didar Singh, an independent eye witness, who had not only witnessed the incident but had brought the car in which the deceased was shifted to the hospital and the site plan was prepared at his instructions, and Malkiat Singh, who had brought the deceased to the hospital, have not been examined and their non-examination creates a grave doubt about the version set forth by the prosecution. His further submission is that three others, namely, Kamal Kumar, Jaswinder Kaur and Sukhpal Singh were falsely roped in and that supports the plea advanced by the defence that there had been false implication of the accused persons in the crime. It is canvassed by him that the presence of PWs-1 and 2 at the place of occurrence is extremely doubtful, for according to the prosecution, seven gunshots were fired but none had hit the PW-1. That apart, PWs-1 and 2 claimed to have taken the deceased to the hospital in a condition when the seats of the car and their clothes were stained with blood, but the Investigating Officer, PW-5, has categorically deposed that he did not notice the clothes of PWs-1 and 2 to say that there were any blood stains on their clothes.

14. The learned senior counsel would submit that their carrying of the deceased to the hospital is also surrounded with immense suspicion inasmuch as the doctor who had conducted the post mortem has clearly stated that it was Malkiat Singh who had brought the deceased to the hospital and no document has been brought on record that PWs-1 and 2, who claimed to be eye-witnesses, had brought the deceased to the hospital. It is argued that the Investigating Officer did not find any pellets marks on the tractor and he did not take into possession the clothes and blood samples on the car seats for chemical

examination, which go a long way to create a dent in the prosecution story. He has further emphatically put forth that when the tractor had turned towards left, it is difficult to discern that the deceased sustained injury in the right cheek and the person sitting on the left mudguard did not get affected. It is next submitted by him that there has been blackening of wounds which would indicate that the injuries were caused from firing from a close range but the oral testimonies of PWs-1 and 2 evinces that the accused Manjit Singh had fired from the distance of one and half "karms". The last plank of argument of Mr. Lalit is that the appellant No. 2 could not have been convicted in aid of Section 34 IPC since he had not participated in the assault on the deceased, and further there was no recovery of the alleged .12 bore rifle.

15. Mr. Jayant K. Sud, learned Additional Advocate General for the State of Punjab, supporting the judgment of the High Court, has contended that the reappreciation of the evidence by the High Court while exercising appellate jurisdiction, cannot be faulted. The learned counsel would further submit that the learned trial Judge as well as the High Court has correctly placed reliance on the testimonies of PWs-1 and 2 as they are unimpeachable. It is also urged by him that the corroboration of injury by the medical evidence, the factum of recovery of weapons and other circumstances clearly establish the guilt of the accused and hence, the analysis made by the High Court can really not be flawed.

16. Mr. J.P. Dhanda, learned counsel for the informant, in support of the appeal preferred by him, contended that the High Court has fallen into grave error by affirming the acquittal recorded by the learned trial Judge in respect of two accused and has further committed serious illegality by acquitting Sukhpal Singh, A-3, despite the irreproachable evidence against him. It is submitted by him that the prosecution has clearly and specifically brought the motive into the forefront and despite definite roles being attributed t[illegible]d

persons, the learned trial Judge acquitted the accused persons, namely, Kamal Kumar, A-4, and Jaswinder Kaur, A-5 and the High Court totally erroneously gave the stamp of approval to the same.

17. The first submission of Mr. U.U. Lalit is that the non-examination of two crucial witnesses, namely, Didar Singh and Malkiat Singh creates a great doubt in the prosecution version which makes it absolutely incredible. On a perusal of the material on record it is clear that Didar Singh had come to the spot along with Rajinderpal Singh, PW-2, and had arranged a car to take the deceased and the injured to the hospital and at his instance the site plan was prepared. As far as Malkiat Singh is concerned, the assertion is that he had carried the deceased and the injured to the hospital but the evidence in this regard is extremely sketchy. Be that as it may, thrust of the matter is whether non-examination of these two witnesses materially affects the trustworthiness of the prosecution version or put it differently whether it really creates a dent in the testimony of the other eye witnesses and the surrounding circumstances on which the prosecution has placed reliance to bring home the guilt of the accused.

18. In this context, a passage from *Masalti v. State of U.P.*[1] may fruitfully be reproduced:-

> "In the present case, however, we are satisfied that there is no substance in the contention which Mr Sawhney seeks to raise before us. It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised."

1. AIR 1965 SC 202.

19. In *Namdeo v. State of Maharashtra,*[2] it has been laid down that neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. The legal system in this country has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

20. In *Bipin Kumar Mondal v. State of W.B.*[3] the Court reiterated the principle stating that it is not the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible, trustworthy and reliable.

21. In *State of H.P. v. Gian Chand*[4] it has been ruled that non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution.

22. In *Takhaji Hiraji v. Thakore Kubersing Chamansing*[5]

2. (2007) 14 SCC 150.
3. (2010) 12 SCC 91.
4. (2001) 6 SCC 71.
5. (2001) 6 SCC 145.

the Court has opined that it is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself—whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court? If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.

23. In *Dahari v. State of U.P.*[6] while discussing about the non-examination of material witness, the Court has ruled that when the witness was not the only competent witness who would have been fully capable of explaining the factual situation correctly, and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar principle has been reiterated in *Harivadan Babubhai Patel v. State of Gujrat.*[7]

6. (2012) 10 SCC 256.

7. (2013) 7 SCC 45.

24. From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness (see: *State of U.P. v. Iftikhar Khan and others*[8]).

25. In the case at hand we find the plea taken is that it was Malkiat Singh, who had taken the deceased and injured to the hospital and, therefore he is a material witness. The question that is required to be put whether the evidence of the said witness is essential to record a conviction or his non-examination would affect the trustworthiness of PWs-1 and 2 and other witnesses. As we perceive, it can reasonably be stated that Malkiat Singh is not a material witness in that sense. As far as Didar Singh is concerned, tested on the parameters of the authorities referred to above, if the testimony of other witness inspires confidence, his non-examination would not create a concavity in the case of the prosecution. We may state here that the acceptance of testimonies of PWs-1 and 2, in the case at hand, would stand on their own and would not depend upon the version that could have come from Didar Singh. It is so as he is not the only competent witness who would have been fully capable of explaining the factual situation correctly. Quite apart from the above, it is worth noting here that during the cross-examination of investigating officer, none of the accused persons had voiced their concerns by raising any apprehension regarding non-examination of the material witnesses. We may repeat that on a studied scrutiny we find

8. (1973) 1 SCC 512.

that, in fact, there is no cross-examination in that regard. Thus, the aforesaid submission of the learned counsel is not acceptable.

26. The next limb of submission of the learned senior counsel for the appellant is that on apposite appreciation of the evidence in entirety it is clearly demonstrable that the falsehood rings in the statements of all the witnesses. Bolstering the said aspect, it is urged by him that the prosecution has falsely implicated three accused persons including a lady and that shows the extent of falsehood that has been taken recourse to by the informant, PW-1, and other witnesses. In essence, it is his proponement that testimonies of so-called eye-witnesses cannot be regarded as cogent, reliable and trustworthy.

27. It is well settled in law that unless the entire case of the prosecution suffers from infirmities, discrepancies and material contradictions and the prosecution utterly fails to establish its case, acquittal of some accused persons cannot be a relevant facet to determine the guilt of other accused persons. In *Dalbir Singh v. State of Haryana,*[9] a two-Judge Bench reproduced para 51 from *Krishna Mochi and Others v. State of Bihar*[10] wherein it has been stated that the maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded. Thereafter, the Bench proceeded to state as follows:-

> "Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See *Gurcharan Singh v. State of Punjab*[11].) The doctrine is a dangerous one, specially in India, for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.*[12] *and Ugar Ahir v. State of Bihar.*[13])"

28. In *Yanob Sheikh alias Gagu v. State of West Bengal,*[14] after referring to *Dalbir Singh* (supra) the Court observed that the acquittal of a co-accused per se is not sufficient to result in acquittal of the other accused. The court has to screen the entire evidence and does not extend the threat of falsity to universal acquittal. The court must examine the entire prosecution evidence in its correct perspective before

9. (2008) 11 SCC 245.
10. (2002) 6 SCC 81.
11. AIR 1956 SC 460.
12. (1972) 3 SCC 751.
13. AIR 1965 SC 277.
14. (2013) 6 SCC 428.

it can conclude the effect of acquittal of one accused on the other in the facts and circumstances of a given case.

29. In *Balraje alias Trimbak v. State of Maharashtra*[15] a two-Judge Bench has observed that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused.

30. Keeping the aforesaid principle in view we are required to test the acceptability of the evidence on record. The learned trial Judge has acquitted Jaswinder Kaur on the ground that she had not contested any election; that she was not even residing in the village in which the elections were held; and that she was residing in her own house at Jalandhar. The allegation in the FIR that she had given lalkara had not really got support from other witnesses and, hence, her presence at the spot was doubted. As far as Kamal Kumar is concerned, in the opinion of the learned trial Judge he had no concern with the accused persons or the deceased as he belongs to Ram Mandi in Jalandhar Cantonment. The learned trial Judge, in essence, has extended benefit of doubt to him inasmuch as he had neither participated in the occurrence nor had he shared the common intention. The High Court has acquitted Sukhpal Singh on the ground that he was not named in the FIR and further he had not carried any weapon. The High Court opined that he had been implicated because he had filed a writ petition against the police officers. If the evidence is scrutinized in proper perspective, it is clear that there has been some embellishment by the informant and other witnesses but giving such embroidery to a story would not make the whole prosecution version untruthful one. It can be treated to be an exaggeration by the prosecution but the consequence cannot be regarded as fatal. Therefore, we are not persuaded to accept the said submission canvassed on behalf of the appellants.

15. (2010) 6 SCC 673.

31. The next contention is that the presence of two eye-witnesses, namely, PWs-1 and 2, at the scene of occurrence is gravely doubtful. It has been urged that the said two witnesses could not have been present at the spot as their statement that they had taken the deceased to the hospital has been belied by the testimony of autopsy surgeon; their blood stained clothes had not been seized; and PW-1, who was sitting on the left mudguard of the tractor, had not received any serious injury despite the tractor had turned towards the left. To appreciate the said contention we have bestowed our anxious consideration and scrutinized the evidence on record. The plea that Malkiat Singh had alone brought the deceased and the injured to the hospital cannot be accepted to be correct. PW-8, Dr. Narender Singh, who had treated Amarjot Singh, had clearly stated that the deceased was brought dead to the hospital with the alleged history of gunshot injuries. At that time he had treated Amarjot Singh. In the cross-examination, he has clearly deposed that the dead body was brought to the hospital at 12.40 p.m. and Amarjot Singh came to the hospital at 12.40 p.m. That apart, it can be said with certitude that whether Amarjot Singh accompanied or not really does not affect the prosecution case. As far as non-seizure of the blood-stained clothes and blood stains from the seat of the car are concerned, it does not create a dent in the prosecution version. In this context, the authority in *State of Rajasthan v. Arjun Singh and others*[16] can profitably be referred to. In the said decision the Court has opined that absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place. It has been further observed that when there is ample unimpeachable ocular evidence and the same has received corroboration from the medical evidence, even the non-recovery of weapon does not affect the prosecution case. In the case at hand it is perceptible that PWs-1 and 2, brother and father of the deceased, have deposed in a vivid manner about the culpability

16. (2011) 9 SCC 115.

of the accused persons in the crime. The autopsy surgeon, PW-3, has clearly opined that the deceased had died because of gunshot injuries. The FSL report, Ext. P-AM/1, states with equal clarity that one cartridge was fired from left barrel of DBBL gun No. 56088, the other cartridge from its right barrel and three cartridges were fired from the rifle No. AB 97/5473. It is also brought out in the evidence the gun and the rifle were sent to the Forensic Science Laboratory in sealed parcels. As per the report the shots were fired from the weapons sent to the laboratory. It has been established by cogent evidence that the weapons belonged to the accused-appellants and licenses were issued in their favour. Thus, the ocular testimony of PWs-1 and 2 has received clear corroboration from the medical evidence as well as from the report of the FSL.

32. Learned counsel for the appellants has also submitted that wounds would indicate that the shots were fired from a close range but the oral testimony is contrary to the same. That apart, he submits that the person sitting on the left mudguard would have been affected as the tractor turned towards the left and, more so, when the deceased had sustained injury on the right cheek. In our considered opinion, these kind of discrepancies are bound to occur when an occurrence of the present nature takes place and one cannot expect the witnesses to state with precision. Needless to emphasise, on these counts the prosecution version cannot be held to be unbelievable and it cannot be held that the prosecution has not been able to establish the charges beyond reasonable doubt. It is because judicial evaluation of the evidence has to be appropriate regard being had to the totality of the facts and circumstances of the case and not on scrutiny in isolation and further the concept of proof beyond reasonable doubt cannot be made to appear totally unrealistic. In this context, we may profitably reproduce a passage from *Inder Singh and another v. The State (Delhi Administration)*[17]: -

17. (1978) 4 SCC 161.

> "Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal case, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human process. Judicial quest for perfect proof often accounts for police presentations of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic."

33. Thus analysed, the submission in this regard leaves us unimpressed and, accordingly, we repel the same.

34. The last plank of proponement of Mr. Lalit is that the appellant No. 2 could not have been convicted in aid of Section 34 IPC since he had not participated in the assault on the deceased. Apart from participation, he has also emphasised on non-recovery of alleged .12 bore rifle. On a perusal of the evidence of PWs 1 and 2 it is perceptible that Paramjit Singh was named in the FIR and he had accompanied Manjit Singh, his son-in-law. There has been seizure of .12 bore rifle which has been proven to have belonged to Paramjit Singh and the cartridges that have been recovered from the spot have been proven to have been fired from the .12 bore rifle that belonged to Paramjit Singh. There is a distinction in the case of Sukhpal Singh and Kamal Kumar on one hand and Paramjit Singh on the other. Sukhpal Singh was not named in the FIR. There was a litigation going on between him and the [illegible]al

Kumar was not known to any of the witnesses. There is clear evidence that Paramjit Singh had fired from his .12 bore rifle but it had not hit anyone. From the material brought on record it is vivid that he had gone along with Manjit Singh being armed with the weapon. The submission that is advanced is that he had not participated in the occurrence and, therefore, it could not be said that he had shared the common intention. In this context, we may refer to a three-Judge Bench decision in *Shreekantiah Ramayya Munipalli and another v. State of Bombay*[18], wherein it has been ruled thus: -

> ".... it is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by S. 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter.
>
> It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act."
>
> [Emphasis supplied]

18. AIR 1955 SC 287.

35. In the case of *Iftikhar Khan* (supra) another three-Judge Bench referred to *Mahbub Shah v. King Emperor*[19] and thereafter reiterated the principles stated in *Pandurang, Tukia and Bhillia v. State of Hyderabad*[20] wherein it has been stated that :-

> "at bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis".

36. In *Tukaram Ganpat Pandare v. State Maharashtra*[21] the Court opined thus: -

> "Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34."

37. In *Krishnan and another v. State of Kerala,*[22] Hansaria, J., in his concurring opinion, stated thus: -

> "**15**. Question is whether it is obligatory on the part of the prosecution to establish commission of an overt act to

19. AIR 1945 PC 118.
20. (1955) 1 SCR 1083.
21. AIR 1974 SC 514.
22. (1996) 10 SCC 508.

press into service Section 34 of the Penal Code. It is no doubt true that the court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act has *always* to be established? I am of the view that establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when "a criminal act is done by several persons in furtherance of the common intention of all". What has to be, therefore, established by the prosecution is that all the persons concerned had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipso loquitur*."

Be it noted, in the said case one of the accused had not caused any injury to the deceased.

38. In *Surendra Chauhan v. State of M.P.,*[23] the Court opined that the existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. Thereafter, the learned Judges proceeded to state that to apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence

23. (2000) 4 SCC 110.

of a common intention. It has to be inferred from the facts and circumstances of each case.

39. Regard being had to the aforesaid principles, we shall proceed to analyse the fact-situation in the present case. On a scrutiny of the evidence we find that the appellant No. 2 had accompanied appellant No. 1 and was present at the spot; that he had carried a weapon; that it has been established by the prosecution that the cartridges had been fired from his gun; and that both the appellants are closely related. Thus, the cumulative facts would clearly establish that the appellant No. 2 shared the common intention with the appellant No. 1. We will be failing in our duty if we do not notice the authority, namely, *Ramashish Yadav and others v. State of Bihar,*[24] which has been commended to us by Mr. Lalit. In the said case, the Court, after dealing with the applicability of Section 34 IPC, noted the fact that two accused-appellants caught hold of the deceased and thereafter, other accused persons came and assaulted him with 'gandasa' on account of which the deceased died and hence, they could not be roped in with the aid of Section 34 IPC. In our considered opinion the discussion in the said judgment has to be confined to the facts of the said case and cannot be applied as a rule.

40. In view of our aforesaid analysis, the criticism advanced by Mr. Lalit that the appellant No. 2 could not have been convicted in aid of Section 34 IPC, is not well founded.

41. Presently, we shall proceed to deal with the appeal preferred by the informant. We have already noted that the learned trial Judge has categorically opined that the accused persons, namely, Kamal Kumar and Jaswinder Kaur, were not present at the scene of occurrence. Jaswinder Kaur was arrayed as an accused on the basis of an application preferred under Section 319 of the Code of Criminal Procedure and host of material has been brought on record to establish the plea of

24. (1999) 8 SCC 555.

the defence that she had not contested the election and she was not present at the scene of occurrence. On a studied scrutiny of the evidence, the learned trial Judge has given credence to the same. As far as Kamal Kumar is concerned, he has nothing to do either with the deceased or the accused persons as he belongs to a different village and further he had not carried any weapon. The High Court has acquitted Sukhpal Singh on the foundation that there was animosity between the police officers and Sukhpal Singh and he had not carried any weapon. Thus, the view expressed by the learned trial Judge in acquitting Jaswinder Kaur and Kumar Kumar and further the acquittal recorded by the High Court acquitting Sukhpal Singh is based on cogent reasoning and, in our considered opinion, it is a plausible view. Needless to emphasise that once a plausible view has been expressed and there has been proper appreciation of the evidence on record, the acquittal does not warrant any interference.

42. In view of the above premised reasons, all the appeals are dismissed.

B.B.B. Appeals dismissed.

STATE OF ANDHRA PRADESH THROUGH I.G. NATIONAL INVESTIGATION AGENCY

v.

MD. HUSSAIN @ SALEEM

CRL. M.P. Nos. 17570 & 17571/2013

IN

SPECIAL LEAVE PETITION (CRL.) Nos. 7375/2012

SEPTEMBER 13, 2013

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

National Investigation Agency Act, 2008 – s.21 – Appeal from order of the Special Court under the Act, refusing or granting bail – Held: Shall lie only to a bench of two Judges of the High Court.

National Investigation Agency Act, 2008 – ss.2(g), 13, 14 and 16 – Bail application – Maintainability – Held: Where the NIA Act applies, the original application for bail shall lie only before the Special Court under the Act, and not before the High Court either u/s.439 or u/s.482 CrPC.

Interpretation of Statute – Construction of a section – Held: A Section is required to be read purposively and meaningfully – It is to be read in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively – A few sub-sections of a section cannot be separated from other sub-sections, and read to convey something altogether different from the theme underlying the entire section.

Issue pertaining to interpretation of Section 21 of the National Investigation Agency Act, 2008 arose for consideration in the present appeal.

The applicant-accused, besides other offences, was

also being prosecuted for "Scheduled Offences" under the said Act. Based on the premise that the order granting or refusing a bail is an interlocutory order, two-fold submissions were made on behalf of the applicant-accused:-

(i) That the order on a bail application is excluded from the coverage of Section 21(1) of the Act, which provides for the appeals to the High Court from any judgment, sentence or order of a special court both on facts and on law. It is only such appeals which are covered under Section 21(1) that are to be heard by a bench of two judges of the High Court as laid down under Section 21(2) of the Act. The appeal against refusal of bail lies to the High Court under Section 21(4) and not under Section 21(1), and therefore, it need not be heard by a bench of two Judges.

(ii) In any case, the bail application which the applicant had filed before the High Court was one under Section 21(4) of the Maharashtra Control of Organised Crimes Act, 1999 read with Section 439 CrPC, and was fully maintainable before a single Judge.

Dismissing the petitions, the Court

HELD: 1. In the instant case, the applicant is also being prosecuted for the offences under the provisions of The Unlawful Activities (Prevention) Act, 1967. This Act is included at Sl. No.2 in the Schedule to the NIA Act, 2008. The term "Scheduled Offence" is defined under Section 2(g) of the Act to mean an offence specified in the Schedule. Section 13 of the Act lays down the jurisdiction of Special Courts. When it comes to the Scheduled Offences, the Special Courts are given

exclusive jurisdiction to try them under Section 13(1) of the National Investigation Agency Act, 2008. When it is a composite offence covered under any Act specified in the Schedule and some other act, the trial of such offence is also to be conducted before the Special Court in view of Section 14(1) of the Act. Section 16(2) of the Act gives the power to the Special Court to conduct a summary trial, where the offence is punishable with imprisonment for a term not exceeding three years or with fine or both. In view of Section 16(3) of the Act, the application for bail by the accused lies before a Special Court. [Paras 8, 12] [148-G-H; 152-C-E, F-G]

2.1. Section 21(4) of the National Investigation Agency Act, 2008 provides that an appeal lies to the High Court against an order of the Special Court granting or refusing bail. However sub-Section (3) which is a prior sub-section, specifically states that 'except as aforesaid', no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court. Thus, as per the mandate of Section 21(3), when anybody is aggrieved by any judgment, sentence or order including an interlocutory order of the Special Court, no such appeal or revision shall lie to any Court except as provided under sub-Section (1) and (2), meaning thereby only to the High Court. No doubt, an order granting or refusing bail is an interlocutory order, but as provided under Section 21(4), the appeal against such an order lies to the High Court only, and to no other court as laid down in Section 21(3). Thus it is only the interlocutory orders granting or refusing bail which are made appealable, and no other interlocutory orders, which is made clear in Section 21(1), which lays down that an appeal shall lie to the High Court from any judgment, sentence or order, not being an interlocutory order of a Special Court. Thus other

interlocutory orders are not appealable at all. This is because as provided under Section 19 of the Act, the trial is to proceed on day to day basis. It is to be conducted expeditiously. Therefore, no appeal is provided against any of the interlocutory orders passed by the Special Court. The only exception to this provision is that orders either granting or refusing bail are made appealable under Section 21(4). This is because those orders are concerning the liberty of the accused, and therefore although other interlocutory orders are not appealable, an appeal is provided against the order granting or refusing the bail. Section 21(4), thus carves out an exception to the exclusion of interlocutory orders, which are not appealable under Section 21(1). The order granting or refusing the bail is therefore very much an order against which an appeal is permitted under Section 21(1) of the Act. [Para 13] [152-G-H; 153-A-G]

2.2. Section 21(2) provides that every such appeal under sub-Section (1) shall be heard by a bench of two Judges of the High Court. This is because of the importance that is given by the Parliament to the prosecution concerning the Scheduled Offences. They are serious offences affecting the sovereignty and security of the State amongst other offences, for the investigation of which this Special Act has been passed. If the Parliament in its wisdom has desired that such appeals shall be heard only by a bench of two Judges of the High Court, this Court cannot detract from the intention of the Parliament. There is no merit in the submission canvassed on behalf of the appellant that appeals against the orders granting or refusing bail need not be heard by a bench of two Judges. [Para 14] [153-G-H; 154-A-B, D]

2.3. It is a well settled canon of interpretation that when it comes to construction of a section, it is to be read

in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively. Besides, the text of a section has to be read in the context of the statute. A few sub-sections of a section cannot be separated from other sub-sections, and read to convey something altogether different from the theme underlying the entire section. That is how a section is required to be read purposively and meaningfully. [Para 15] [154-E-F]

Usmanbhai Dawoodbhai Memon and Ors. v. State of Gujarat **AIR 1988 SC 922: 1988 (3) SCR 225;** *State of Punjab v. Kewal Singh and Anr.* **1990 (Supp) SCC 147;** *State of Gujarat v. Salimbhai* **2003 (8) SCC 50: 2003 (3) Suppl. SCR 414 – relied on.**

Conclusion

3.1. An appeal from an order of the Special Court under NIA Act, refusing or granting bail shall lie only to a bench of two Judges of the High Court. [Para 20] [158-B]

3.2. The application for bail filed by the applicant in the present case is not maintainable before the High Court. Inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as The Unlawful Activities (Prevention) Act, 1967, such offences are triable only by Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. [Para 20] [158-C-E]

3.3. Where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a bench of two Judges of the High Court. [Para 20] [158-E-F]

Case Law Reference:

1988 (3) SCR 225	**relied on**	**Para 6**
1990 (Supp) SCC 147	**relied on**	**Para 17**
2003 (3) Suppl. SCR 414	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : CRLMP No. 17570 of 2013 IN SLP (Crl) No. 7375 of 2012.

From the Judgment and Order dated 07.09.2012 of the High Court of A.P. at Hyderabad in CRLP No. 6562 of 2012.

WITH

CRLMP No. 17571 of 2013 IN S.L.P. (Clr) No. 9788 of 2012.

Siddharth Luthra, ASG, Supriya Juneja, Meenakshi Grover, Padma Laxmi Nigam, B. Krishna Prasad for the Appellant.

Ram Jethmalani, Mahesh Jethmalani, Parresh Khanna, Deep Shikha Bharati, Anand, Pranav Dinesh, Karan Kalia, P.R. Mala, Nachiketa Joshi, Anil Soni, Rajeshwari Reddy (for Mohan Pandey), Anis Kumar Gupta for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. These Criminal Misc. Petitions have been filed by the applicant for impleadment, and clarification of the common order passed by this Court on 2.8.2013 in (i) SLP (Crl.) No.7375/2012 State of A.P. through I.G. National Investigating Agency Vs. Md. Hussain @ Saleem, and (ii) SLP (Crl.) No.9788/2012 *National Investigation Agency Vs. Ravi Dhiren Ghosh.* SLP (Crl.) No.7375/2012 arose from the judgment and order dated 7.9.2012 in CRLP No.6562/2012 passed by the Andhra Pradesh High Court. SLP (Crl.) No.9788/2012 arose out of the order passed by the Bombay High Court on Criminal Bail Application No.1063/2012. The relevant part of this order dated 2.8.2013 passed by this Court reads as follows:-

"*The only issue raised in these petitions is that in view of the provisions of Section 21 of the National Investigation Agency Act, 2008, the matters in the High Court ought to have been heard by a Division Bench, and not by a Single Judge. The submission made by the learned Additional Solicitor General is based on the provision of sub-section (2) of Section 21, which is a statutory requirement. That being so, the order passed by the High Courts deserve to be set aside, and the proceedings, namely, Crl. P.No.6562/2012 in the High Court of Andhra Pradesh and Criminal Bail Application No.1063/2012 in the Bombay High Court, will have to be restored to the Division Bench of the respective High Courts. Ordered accordingly.*"

2. The applicant herein is accused No.1 in Special (MCOC) CC No.1/09 pending before the learned NIA and MCOC Court Mumbai. The said case arises out of a bomb blast in Malegaon that occurred on 29.9.2008. A charge-sheet has been filed on 20.1.2009 against the applicant and others, including 3 absconding accused, under Sections 302/307/326/324/427/153-A/120-B of I.P.C., read with Sections 3,4,5 and 6 of Explosive Substance Act, 1908, Sections 3,5 and 25 of Indian Arms Act, 15,16,17, 18, 20 and 23 of Unlawful Activities (Prevention) Act, 1967, and Sections 3(1) (i), 3(1) (ii), 3(2), 3(4), and 3(5) of Maharashtra Control of Organised Crimes Act, 1999 (MCOC Act for short), before the Court of Special Judge (MCOCA) Greater Mumbai, Maharashtra. The National Investigation Agency has taken over the investigation of this case, by virtue of an order of the Central Government dated 1.4.2011 passed in exercise of the powers conferred upon it by Section 6(5) of The National Investigation Agency Act, 2008 (NIA Act for short).

3. The applicant is in custody and has preferred an application for bail on 23.10.2012, before a Single Judge of the Bombay High Court, bearing Criminal Bail Application No.1679 of 2012, under the provisions of Section 21(4) of the MCOC Act r/w Section 439 of the Code of Criminal Procedure, 1973 (Code for short).

4. It so transpired that during the pendency of this bail application, this Court passed the above referred common order dated 2.8.2013 in SLP (Crl.) No.7375/2012 and SLP (Crl.) No.9788/2012. The learned Special Public Prosecutor appearing in the matter brought this order to the notice of the learned Single Judge hearing the said Criminal Bail Application, and submitted that in view of the said order dated 2.8.2013 passed by this Court, the said Criminal Bail Application is required to be placed before a Division Bench of the High Court. The learned counsel appearing for the applicant submitted to the High Court that the aforesaid order of this Court has no application to the facts of the case of the applicant. The counsel for the applicant however further submitted that he shall seek necessary clarification with respect to the order passed by this Court. The learned Judge has, therefore, adjourned the hearing of the Criminal Bail Application. It is in these circumstances that the present Criminal Misc. Petitions have been filed seeking impleadment and also the following two prayers:-

(a) allow this application by clarifying/declaring that provisions of Section 21(2) of National Investigation Agency Act, 2008, applies only to those petitions/applications filed under Section 21(1) of the National Investigation Agency Act, 2008, and order of this Hon'ble Court dated 2.8.2013 passed in SLP (Crl.) No.7375 of 2012 & SLP (Crl.) No.9788 of 2012 does not apply to an appeal from an order of the Special Court refusing bail.

(b) Further declare/clarify that where the Maharashtra Control of Organised Crimes Act, 1999 applies, all bail matters shall be governed by Section 21 of the Maharashtra Control Organised Crimes Act, 1999, and not by Section 21 of the National Investigation Agency Act, 2008.

5. The principal submission on behalf of the petitioner is canvassed in ground (B) of this Criminal Misc. Petition which reads as follows:-

"*B. For that Section 21(2) of the NIA Act, 2008, prescribes that every appeal under sub-section (1) of 21 shall be heard by a Bench of 2 Judges of the Hon'ble High Court. Applications for Bail governed by the NIA Act, 2008 are not preferred under 21 (1) of the NIA but under Section 21(4) of the NIA Act, 2008 under which, appeals to the High Court lie only against an order of the special court granting or refusing bail. Appeals under 21(4) are not required to be heard by a Bench of 2 Judges of the High Court. In as much as this Court's order dated 2.8.2013 purports to hold, that appeals from orders of the special court, granting or refusing bail are to be heard by 2 Judges of the Mumbai High Court, the said order is manifestly contrary to the provisions of Section 21 of the NIA Act, 2008.*"

6. In support of this application it is further contended that the law is very well settled, and an order of refusal of bail is an interlocutory order as decided in more than one judgments of this Hon'ble Court. Reliance is placed on the judgment of this Court in *Usmanbhai Dawoodbhai Memon and Ors. v. State of Gujarat* (per A.P. Sen, J) reported in AIR 1988 SC 922. It is submitted that this Hon'ble Court in its order dated 2.8.2013 has not noticed that an order granting or rejecting bail is always considered to be an interlocutory one.

7. Mr. Ram Jethmalani, learned senior counsel has appeared in support of these Criminal Misc. Petitions, seeking impleadment and clarification as aforesaid. Mr. Sidhharth Luthra, learned Additional Solicitor General has appeared for the respondent National Investigation Agency.

8. Before we turn to the interpretation of Section 21, we must record that it is not disputed that amongst other provisions the applicant is also being prosecuted for the offences under the provisions of The Unlawful Activities (Prevention) Act, 1967. This Act is included at Sl. No.2 in the Schedule to the NIA Act,

2008. The term "Scheduled Offence" is defined under Section 2(g) of the Act to mean an offence specified in the Schedule. Section 13 of the Act lays down the jurisdiction of Special Courts. Section 13(1) provides that notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court, within whose local jurisdiction the said offence was committed. Section 14 gives the powers to the Special Courts with respect to other offences. Section 13(1) and 14 read as follows:-

*"**13. Jurisdiction of Special Courts –***

(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

14. Powers of Special Courts with respect to other offences-

(1) When trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorised by this Act or, as the case may be, under such other law."

Section 19 of the Act provides for a speedy trial of such matters on day to day basis, and also that these trials shall have the precedence over the trial of other cases against the accused.

9. In the present matter we are concerned with the interpretation of Section 21 of the NIA Act, 2008. It will therefore be necessary to reproduce the said section in its entirety. The said section reads as follows:-

*"21. **Appeals**. - (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.*

(2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days."

10. The principal submission of Mr. Ram Jethmalani, learned senior counsel appearing for the applicant has been based on the premise that the order gra il

is an interlocutory order, and for that purpose he relied upon the judgment of this Court in **Usmanbhai** (supra), wherein this Court has observed in paragraph 24 as follows:-

> "*24. ..... It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time....."*

11. Based on this premise Mr. Jethmalani has advanced two-fold submissions:-

(i) Firstly that the order on a bail application is excluded from the coverage of Section 21(1) of the Act, which provides for the appeals to the High Court from any judgment, sentence or order of a special court both on facts and on law. It is only such appeals which are covered under Section 21(1) that are to be heard by a bench of two judges of the High Court as laid down under Section 21(2) of the Act. The appeal against refusal of bail lies to the High Court under Section 21(4) and not under Section 21(1), and therefore, it need not be heard by a bench of two Judges.

(ii) In any case, it was submitted that the bail application which the applicant had filed before the Bombay High Court was one under Section 21(4) of the MCOC Act read with Section 439 of the Code of Criminal Procedure, and was fully maintainable before a single Judge. He has drawn our attention to the provision of Section 21 of the MCOC Act, 1999 for that purpose.

(iii) For the sake of record, we may refer to Section 21(4) of the MCOC Act which reads as follow:-

> *"4. Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless-*

> *(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and*
>
> *(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."*

12. Now, when we deal with these submissions we must note that when it comes to the Scheduled Offences, the Special Courts are given exclusive jurisdiction to try them under Section 13(1) of the Act. When it is a composite offence covered under any Act specified in the Schedule and some other act, the trial of such offence is also to be conducted before the Special Court in view of Section 14(1) of the Act. Section 16(2) of the Act gives the power to the Special Court to conduct a summary trial, where the offence is punishable with imprisonment for a term not exceeding three years or with fine or both. Section 16(3) of the Act declares as follows:-

> "*(3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offences as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session."*

In view of this provision, the application for bail by the accused lies before a Special Court.

13. The above referred Section 21(4) provides that an appeal lies to the High Court against an order of the Special Court granting or refusing bail. However sub-Section (3) which is a prior sub-section, specifically states that 'except as aforesaid', no appeal or revision shall lie to any court from any judgment, sentence or order including a

a Special Court. Therefore, the phrase 'except as aforesaid' takes us to sub-Sections (1) and (2). Thus when anybody is aggrieved by any judgment, sentence or order including an interlocutory order of the Special Court, no such appeal or revision shall lie to any Court except as provided under sub-Section (1) and (2), meaning thereby only to the High Court. This is the mandate of Section 21(3). There is no difficulty in accepting the submission on behalf of the appellant that an order granting or refusing bail is an interlocutory order. The point however to be noted is that as provided under Section 21(4), the appeal against such an order lies to the High Court only, and to no other court as laid down in Section 21(3). Thus it is only the interlocutory orders granting or refusing bail which are made appealable, and no other interlocutory orders, which is made clear in Section 21(1), which lays down that an appeal shall lie to the High Court from any judgment, sentence or order, not being an interlocutory order of a Special Court. Thus other interlocutory orders are not appealable at all. This is because as provided under Section 19 of the Act, the trial is to proceed on day to day basis. It is to be conducted expeditiously. Therefore, no appeal is provided against any of the interlocutory orders passed by the Special Court. The only exception to this provision is that orders either granting or refusing bail are made appealable under Section 21(4). This is because those orders are concerning the liberty of the accused, and therefore although other interlocutory orders are not appealable, an appeal is provided against the order granting or refusing the bail. Section 21(4), thus carves out an exception to the exclusion of interlocutory orders, which are not appealable under Section 21(1). The order granting or refusing the bail is therefore very much an order against which an appeal is permitted under Section 21(1) of the Act.

14. Section 21(2) provides that every such appeal under sub-Section (1) shall be heard by a bench of two Judges of the High Court. This is because of the importance that is given by the Parliament to the prosecution concerning the Scheduled

Offences. They are serious offences affecting the sovereignty and security of the State amongst other offences, for the investigation of which this Special Act has been passed. If the Parliament in its wisdom has desired that such appeals shall be heard only by a bench of two Judges of the High Court, this Court cannot detract from the intention of the Parliament. Therefore, the interpretation placed by Mr. Ram Jethmalani on Section 21(1) that all interlocutory orders are excluded from Section 21(1) cannot be accepted. If such an interpretation is accepted it will mean that there will be no appeal against an order granting or refusing bail. On the other hand, sub-Section (4) has made that specific provision, though sub-Section (1) otherwise excludes appeals from interlocutory orders. These appeals under sub-Section (1) are to be heard by a bench of two Judges as provided under sub-Section (2). This being the position, there is no merit in the submission canvassed on behalf of the appellant that appeals against the orders granting or refusing bail need not be heard by a bench of two Judges.

15. We cannot ignore that it is a well settled canon of interpretation that when it comes to construction of a section, it is to be read in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively. Besides, the text of a section has to be read in the context of the statute. A few sub-sections of a section cannot be separated from other sub-sections, and read to convey something altogether different from the theme underlying the entire section. That is how a section is required to be read purposively and meaningfully.

16. (i) As noted earlier, the submission of the applicant is two-fold. Firstly, as stated above the appeal against an order granting or refusing bail under Section 21(4) of the Act need not be before a bench of two Judges, which is untenable as noted above.

(ii) The other submission is that the application for bail which is made by the applicant before the High Court is an original application under Section 21(4) and

with Section 439 of the Code, and is therefore, maintainable before a Single Judge of the High Court. As far as this submission is concerned, it has been repelled in the judgment of **Usmanbhai** (supra) relied upon by the counsel of the applicant himself. That was a matter under Terrorist and Disruptive Activities (Prevention) Act (28 of 1987) shortly known as TADA. This Act also had a similar provision in Section 19(1) thereof which read as follows:-

> *"19 (1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.*
>
> *(2) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court."*

It is also material to note that Section 20(8) of TADA had provisions identical to Section 21(4) of MCOC Act. The Gujarat High Court while interpreting the provisions of TADA had held that it did not have the jurisdiction to entertain the application for bail either under Section 439 or under Section 482 of the Code. That view was confirmed by this Court by specifically stating at the end of para 22 of its judgment in *Usmanbhai's* case (supra) in following words:-

> "*We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under S. 439 or under S. 482 of the Code."*

17. The view taken by this Court in *Usmanbhai* was reiterated in *State of Punjab v. Kewal Singh and Anr.* reported in 1990 (Supp) SCC 147. That was also a matter under TADA, and the application for bail by the respondents was rejected by the designated court. Thereupon they had moved the High

Court under Section 439 of Cr.P.C. for grant of bail, and a learned single Judge of Punjab & Haryana High Court had enlarged them on bail on the ground that the co-accused had been granted bail. The order in this matter is also passed by a bench presided over by A.P. Sen, J. This Court set aside the order passed by the High Court and clearly observed in paragraph 2 as follows :-

> "2. …*We are of the view that the High Court had no jurisdiction to entertain an application for bail under Section 439 of the Code. See Usmanbhai Dawoodbhai Memon V. State of Gujarat…."*

Thereafter, the Court observed in paragraph 3:-

> "*3. We however wish to make it clear that the respondents may move the Designated Court for grant of bail afresh. The Designated Court shall deal with such application for bail, if filed, in the light of the principles laid down by this Court in Usmanbhai Dawoodbhai case."*

18. It is material to note that the view taken in *Usmanbhai* (supra) was further confirmed by this Court in *State of Gujarat v. Salimbhai* reported in 2003 (8) SCC 50, to which our attention was drawn by Mr. Luthra, the learned Additional Solicitor General appearing for the NIA. This time the Court was concerned with similar provisions of Prevention of Terrorism Act, 2002 (POTA for short). Section 34 of POTA is entirely identical to Section 21 of the NIA Act except that it did not contain the second proviso to sub-Section 5 of Section 21 of NIA Act (which has been quoted above), and which proviso has no relevance in the present case. It was specifically contended in that matter by the learned counsel for the respondent that the power of the High Court to grant bail under Section 439 of Cr.P.C. had not been taken away by POTA. In para 39 of the judgment this Court confirmed the view taken in **Usmanbhai** in the following words:-

"13. Section 20 of TADA contained an identical provision which expressly excluded the applicability of Section 438 of the Code but said nothing about Section 439 and a similar argument that the power of the High Court to grant bail under the aforesaid provision consequently remained intact was repelled in Usmanbhai Dawoodbhai Menon v. State of Gujarat. Having regard to the scheme of TADA, it was held that there was complete exclusion of the jurisdiction of the High Court to entertain a bail application under Section 439 of the Code. This view was reiterated in State of Punjab v. Kewal Singh (1990 Supp SCC 147)".

19. In this judgment in *State of Gujarat v. Salimbhai* (supra), the Court specifically rejected the plea based on Section 439 of the Code by holding that the High Court under the special statute could not be said to have both appellate and original jurisdiction in respect of the same matter. The Court observed in para 14 thereof as follows:

"14. That apart, if the argument of the learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 Cr.P.C. in the original or concurrent jurisdiction which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious."

Thus, the law on the issue in hand is very well settled, and there are three previous judgments of this Court already holding the field, and yet the same challenge is being raised once again,

though now in respect to the NIA Act.

20. The order passed by this Court on 2.8.2013 in SLP (Crl.) No.7375/2012 and SLP (Crl.) No.9788/2012 is therefore clarified as follows:-

(a) Firstly, an appeal from an order of the Special Court under NIA Act, refusing or granting bail shall lie only to a bench of two Judges of the High Court.

(b) And, secondly as far as prayer (b) of the petition for clarification is concerned, it is made clear that inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as The Unlawful Activities (Prevention) Act, 1967, such offences are triable only by Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. The application for bail filed by the applicant in the present case is not maintainable before the High Court.

(c) Thus, where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a bench of two Judges of the High Court.

22. The Criminal Misc. Petitions are therefore dismissed. Registry to send a copy of this order to the Andhra Pradesh and Bombay High Courts forthwith.

B.B.B. Petitions dismissed.

RAJASTHAN STATE ROAD TRANSPORT CORP. & ORS.
v.
BABU LAL JANGIR
(Civil Appeal No. 8245 of 2013)

SEPTEMBER 16, 2013

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

Service Law – Retirement – Compulsory retirement – Respondent working in appellant-transport Corporation compulsorily retired from service in the year 2002 – Writ Petition – High Court held that the acts of misconduct pointed out against the respondent pertained to a period more than 12 years before his compulsory retirement and it was unjust, unreasonable and arbitrary to retire the respondent prematurely on the basis of old and stale material pertaining to the period 1978-1990 – Quashing of the order of compulsory retirement of respondent – Justification – Held: The entire service record is relevant for deciding as to whether the government servant needs to be eased out prematurely – However, at the same time, subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively – What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the concerned employee has become a deadwood and it is public interest to retire him compulsorily – On facts, insofar as period 1978-1990 is concerned, the respondent was charge sheeted in 19 cases – In few cases he was exonerated and in some other cases he was given minor penalty which projects a dismal picture – Even the service record after 1990 i.e. in last 12 years preceding the order of retirement does not depict a rosy picture – In any case, nothing to show the performance of respondent became better during this period – Order of

compulsory retirement accordingly upheld – Industrial Employment (Standing Orders) Act, 1946 – Rajasthan State Road Transport Workers and workshop Employees Standing Orders, 1965 – r.18-D.

Service Law – Retirement – Compulsory retirement – Nature of – Scope for judicial review – Held: The order of compulsory retirement is neither punitive nor stigmatic – It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases – Interference is permissible only on the ground of non application of mind, malafide, perverse, or arbitrary or if there is non-compliance of statutory duty by the statutory authority – Power to retire compulsorily, the government servant in terms of service rule is absolute, provided the authority concerned forms a bonafide opinion that compulsory retirement is in public interest.

Service Law – Retirement – Compulsory retirement – Considerations for – Entire service record – If to be looked at – Adverse entries – Relevance of – Held: After promotion of an employee, the adverse entries prior thereto have no relevance and can be treated as wiped off when the case of the employee is to be considered for further promotion – However, this 'washed off theory' has no application when case of an employee is assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement – The rationale is that since such an assessment is based on "entire service record", there is no question of not taking into consideration earlier old adverse entries or record of the old period – While such a record can be taken into consideration, at the same time, the service record of the immediate past period are to be given due credence and weightage.

The Respondent worked in appellant-Rajasthan State Road Transport Corporation. The appellant had framed Standing Orders for its employ[illegible]e

Rajasthan State Road Transport Workers and workshop Employees Standing Orders, 1965. There was amendment in these Standing Orders and certain new clauses under rule 18, were inserted introducing the provision of compulsory and voluntary retirement. The clauses pertaining to compulsory retirement gives the appellant-Corporation absolute right to retire any employee after he attains the age of 50 years or on completion of 25 years service whichever is earlier.

A Screening Committee was constituted by the appellant-Corporation to look into the conduct and continuance of four employees including the respondent who had attained the age of 50 years or had completed 25 years of service. The Committee, on perusal of the record of the respondent, recommended his compulsory retirement. The Review Committee approved the proposal of the Screening Committee and based thereon, the Competent Authority passed orders in the year 2002, compulsorily retiring the respondent from service.

Challenging this action of the appellant, the respondent filed Writ Petition in the High Court. The Single Judge of the High Court held that the various acts of misconduct pointed out by the appellant-Corporation against the respondent pertained to a period more than 12 years before his compulsory retirement and that the appellant-Corporation was not able to point out any deficiency in the work and conduct of the Respondent for over 10 years immediately preceding his compulsory retirement and it was thus, unjust, unreasonable and arbitrary to retire the respondent prematurely on the basis of old and stale material. Accordingly the order of compulsory retirement of the respondent was quashed. The appellant preferred writ appeal which was dismissed by the Division Bench, and therefore the present appeal.

Allowing the appeal, the Court

HELD:1.1. After the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this 'washed off theory' will have no application when case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale is that since such an assessment is based on "entire service record", there is no question of not taking into consideration an earlier old adverse entries or record of the old period. While such a record can be taken into consideration, at the same time, the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant. [Para 24] [179-F-H; 180-A-B]

1.2. In the present case, the High Court could not have set aside the order of compulsory retirement merely on the ground that service record pertaining to the period 1978-90 being old and stale could not be taken into consideration at all. The entire service record is relevant for deciding as to whether the government servant needs to be eased out prematurely. Of course, at the same time, subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively. What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the concerned employ a

deadwood and it is public interest to retire him compulsorily. The Authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that inspite of satisfactory performance, the Authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review." [Para 25] [180-C-H]

1.3. Insofar as period of 1978-1990 is concerned, the respondent was charge sheeted in 19 cases. In few cases he was exonerated and in some other cases he was given minor penalty like admonition, stoppage of pay, annual grade increment for a limited period. The aforesaid record projects the dismal picture. The High Court has observed that there is nothing adverse in the career of the respondent after 1990 i.e. in last 12 years preceding the order of retirement. These observations are not correct inasmuch as: (a) There was an inquiry against the respondent for which he was imposed the penalty of stoppage of increment for two years. He had made a representation against this penalty on 5.11.1998 which was dismissed on 25.5.1998 and (b) Further another criminal case was also instituted against him in the year 1999. Though outcome of this criminal case is not mentioned, fact remains that the accident was caused by the Respondent while driving the bus of the appellant Corporation, and the appellant corporation had to pay heavy compensation to the victims as a result of orders passed by MACT. Thus even the service record after 1990 does not depict a rosy picture. In any case, there is

nothing to show his performance became better during this period. [Paras 26, 27] [181-A-B; 184-C-G]

1.4. The order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the ground of non application of mind, malafide, perverse, or arbitrary or if there is non-compliance of statutory duty by the statutory authority. Power to retire compulsorily, the government servant in terms of service rule is absolute, provided the authority concerned forms a bonafide opinion that compulsory retirement is in public interest. [Para 28] [184-G-H]

1.5. In the case at hand, the impugned order of the High Court is set aside thereby upholding the order of compulsory retirement. [Para 29] [185-B-C]

Pyare Mohan Lal v. State of Jharkhand and Ors. **(2010) 10 SCC 693;** *Baikuntha Nath Das & Anr.* v. *Chief District Medical Officer, Baripara & Anr.;***1992 (2) SCC 299;** *The State of Punjab* v. *Gurdas Singh*; **1998 (4) SCC 92 and** *Union of India v. Col. J.N. Sinha & Anr.* **1970 (II) LLJ 284 – relied on.**

Brij Mohan Singh Chopra v. State of Punjab **1987 (2) SCC 188 – held overruled.**

Badrinath v. Government of Tamil Nadu and Ors. **2000(8) SCC 395; 2000(6) SCALE 618 – referred to.**

Case Law Reference:

1987 (2) SCC 188	**held overruled**	**Para 9**
1992 (2) SCC 299	**relied on**	**Para 14**
1998 (4) SCC 92	**relied on**	**Para 14**
1970 (II) LLJ 284	**relied on**	

2000(8) SCC 395 referred to Para 18

(2010) 10 SCC 693 relied on Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8245 of 2013.

From the Judgment & Order dated 16.01.2013 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Civil Special Appeal (Writ) No. 965 of 2012.

S.K. Bhattacharya, Niraj Bobby Paonam for the Appellant.

Babu Lal Jangir (Respondent-In-Person).

The Judgment of the Court was delivered by

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

2. Rajasthan State Road Transport Corporation is the appellant in the instant petition through of which it impugns the validity of the orders dated 16.1.2013 passed by Division Bench of the High Court of Judicature For Rajasthan, Bench at Jaipur. The Division Bench has dismissed the Writ Appeal of the appellant and confirmed the orders of the Additional Judge passed in the Writ Petition filed by the respondent herein, quashing the orders of compulsory retirement of the respondent with the direction that the respondent would be deemed to be in the service as if the order of compulsory retirement had not been passed and as a consequence the respondent is held entitled to all consequential benefits.

3. The Respondent joined the services of the appellant on the post of Driver on 14.2.1977. He was placed on probation for a period of one year.

4. The appellant has framed Standing Orders for its employees known as the Rajasthan State Road Transport Workers and workshop Employees Standing Orders, 1965 (hereinafter to be referred as the 'Standing Orders'). These

orders are duly certified by the Authority under the provisions of Industrial Employment (Standing Orders) Act, 1946. Subsequently, there was an amendment in these Standing Orders and certain new clauses under rule 18, were inserted introducing the provision of compulsory and voluntary retirement. The same are reproduced herein below:

"18-D(1) <u>COMPULSORY RETIREMENT</u>

Notwithstanding anything contained in the regulations the Corporation may if is of the opinion that it is in the interest of the Corporation to do so, have the absolute right to retire any Corporation employee after, he has attained the age of 50 years or on the date he completes 25 years of service whichever is earlier, or on any date thereafter, by giving him 3 months notice in writing or three months pay and allowances in lieu thereof.

18-D (2) <u>VOLUNTARY RETIREMENT</u>

Notwithstanding anything contained here in before Corporation employee may after giving three months previous notice in writing, retire from the service on the date on which he completes 20 years service on the date he attains the age of 45 years or on any other date thereafter."

5. It is clear from the above that the clauses pertaining to compulsory retirement gives the Petitioner-Corporation absolute right to retire any employee after he attains the age of 50 years or on completion of 25 years service whichever is earlier.

6. A Screening Committee was constituted by the Petitioner Corporation in 27.3.2002 to look into the conduct and continuance of four employees who had attained the age of 50 years or had completed 25 years of service. Among these four persons, name of the Respondent also appeared.

7. This committee, on perusal e

respondent, recommended his compulsory retirement. The Review Committee held its meeting on 8.4.2002 to review the report of the Screening Committee and after perusal of the report of the Screening Committee, the Review Committee approved the proposal of the Screening Committee. Based on the recommendation of the Review Committee, the Competent Authority passed the orders dated 9.4.2002, compulsorily retiring the respondent from service. As three months previous notice is required under rule 18-D (1) of the Standing Orders, in lieu thereof the respondent was sent three months' salary cheque.

8. Challenging this action of the appellant, the respondent filed the Writ Petition in the High Court of Judicature for Rajasthan. The appellant herein (Respondent in the Writ Petition) appeared and decided a Writ Petition by filing counter affidavit. It was the highlight of the petitioner's defense that the service record of the respondent showed a dismal picture, in as much as between the year 1978-1990, nearly 19 cases of misconduct were foisted upon the respondent which resulted into some or the other kind of penalty like admonition or stoppage of pay or annual grade increment for a limited period. So much so, in the year 1992 a criminal case against the respondent was initiated under Section 279 read with Section 304 (a) of IPC and Section 18/118 of the Motor Vehicles Act. In that case he was given the benefit of doubt and released. However, a departmental inquiry was held in which penalty of imposition or stoppage of two years' increment was imposed upon him. A representation against this penalty was also dismissed. In the year 1999 another criminal case was instituted against the Respondent because of the accident of the bus of the petitioner which was driven by the Respondent as Driver. The victims had also filed their claim before the Motor Claim Tribunal (MACT) and the Appellant -Corporation had to suffer heavy loss by paying compensation in the said case. However, in criminal case, the Respondent was acquitted. The appellant also pointed out that the service record

of the Respondent revealed that he was also involved in the another accident in the year 1999 in which he suffered serious burn injuries. Because of this, he had moved an application requesting the Petitioner-Corporation to give him light job. Accordingly, he was posted as staff car Driver at Head Office. This job was given to him virtually showing mercy, which did not entail regular hard work. It was thus, argued by the Appellant -Corporation that the aforesaid entire service record was gone into by the Screening Committee as well as the Review Committee on the basis of which the decision was taken to retire the Respondent prematurely.

9. The learned Single Judge of the High Court, however, did not eschew the aforesaid submission of the Appellant - Corporation giving the reason that the various acts of misconduct pointed out by the Petitioner-Corporation against the Respondent herein pertained to the period between 1978-90, whereas the order of compulsory retirement was passed 12 years thereafter i.e. on 9.4.2002. In the opinion of the learned Single Judge, thee minor misconducts of the period more than 12 years before the compulsory retirement were not sufficient to come to the conclusion that the compulsory retirement of the respondent was in public interest. The learned Single Judge also observed that record of immediate past period was not looked into at all and on the basis of current purpose it could not be said that respondent had become deadwood or had become inefficient who needed to be weeded out. It also It also remarked that the appellant corporation was not able to point out any deficiency in the work and conduct of the Respondent for over 10 years immediately preceding his compulsory retirement. It was thus, unjust, unreasonable and arbitrary to retire the respondent prematurely on the basis of old and stale material. For coming to this conclusion the learned Single Judge drew sustenance from the judgment of this Court in *Brij Mohan Singh Chopra v. State of Punjab* 1987 (2) SCC 188.

10. Not satisfied with the aforesaid outcome, the appellant preferred Writ Appeal before the Division Bench but without any success as the said Writ Appeal has been dismissed by the Division Bench,echoing the reasons given by the ld. Single Judge. While upholding the order of the learned Single Judge, the Division Bench also noted that the recorded date of birth, at the time of entry of the Respondent into service, was 7.7.1951. Since the normal age of superannuation is 60 years, the respondent would have continued in service till the year 2011. Since he was prematurely retired and that retirement has been set aside with the direction that he deems to be in service, the respondent would have to be treated in service till July, 2011. However, before the Division Bench, the respondent raised the dispute about his date of birth contending that his actual date of birth was 21.1.1957 which was even recorded in some of the official documents. He thus pleaded that he had right to continue in service even beyond July 2011 i.e. upto the end of January, 2017.

11. The High Court, however refrained from passing any order on this aspect and observed that it would be open to the respondent to submit a proper presentation before the concerned authority of the Appellant -Corporation who will examine the records of his date of birth and take a decision thereon. It further directed:

> "In case his date of birth is ultimately determined to be 7/7/1951, all consequential benefits following the interference with the order of compulsory retirement would be released to him. In the eventuality of his date of birth being determined to be 21.9.1957, the Corporation would consider his reinstatement in service."

12. On the very first day i.e. on 23.8.13, when this petition came up for hearing, the respondent appeared person. He showed his willingness to argue the matter himself finally at the admission stage itself. As this course of action was agreeable

to the Counsel for the petitioner as well, the parties were heard at length.

13. From the narration of facts stated above and specifically from the perusal of the judgment of the learned Single Judge which is upheld by the Division Bench on the same reasoning it is apparent clear that the main reason for setting aside the order of compulsory retirement is that adverse entries/ minor mis-conducts of the Respondent related to the period 1978-90 i.e 12 years prior to premature retirement were taken into consideration and there was no material whatsoever before this Review Committee in the recent past on the basis of which, the requisite opinion could be framed that the premature retirement of the respondent was in public interest. Again, as pointed above, for arriving at this conclusion, the High Court extensively relied upon judgment of this Court in *Brij Mohan Singh Chopra (supra).*

14. First and foremost argument of the learned Counsel for the appellant was that judgment of this Court in Brij Mohan Singh Chopra (supra) was overruled by three member Bench in *Baikuntha Nath Das & Anr*. v. *Chief District Medical Officer, Baripara & Anr.;*1992 (2) SCC 299, and it was specifically recorded so in subsequent judgment in the case of *The State of Punjab* v. *Gurdas Singh*; 1998 (4) SCC 92. This calls for examination of this argument in the first instance.

15. A reading of *Baikuntha Nath* judgment would reveal that the main issue in that case was as to whether the employer could act upon, un-communicated adverse remarks and whether observance of the principles of natural justice was necessary before taking a decision to compulsory retire a government servant. The court answered both the questions in the negative holding that it was permissible for the Government to even look into and consider un-communicated adverse remarks. It was also held that since the premature retirement was not stigmatic in nature and such an action was based on subjective satisfaction of the Governme[illegible]n

for importing facet of natural justice in such a case. In the process of discussion and giving reasons for the aforesaid opinion, the Court took note of various judgments. Decision in the case of *Brij Mohan Singh Chopra* (supra) was also specifically dealt with. In this case there were no adverse entries in the confidential records of the appellant for a period of five years prior to the impugned order of premature retirement. Within five years there were two adverse entries. However, these adverse remarks were not communicated to the employee. The order based on un-communicated adverse entries was set aside on two grounds namely:

(i) It was not reasonable and just to consider adverse entries of remote past and to ignore good entries of recent past. If the entries for the period of more than 10 years past are taken into account it would be act of digging out past to get some material to make an order against the employee.

(ii) Since the adverse entries were not even communicated, it was unjust and unfair and contrary to principles of natural justice to retire prematurely a government employee on the basis of adverse entries which are either not communicated to him or if communicated, representations made against those entries are not considered and disposed of.

16. After taking note of the aforesaid grounds on which the order of compulsory retirement in *Brij Mohan Singh Chopra (supra)* was set aside, the Court in *Baikuntha Nath Das (supra)* dealt with the second ground alone namely whether principles of natural justice were required to be followed or it was permissible for the Government to take into consideration the adverse entries which were either not communicated to him or if communicated representations made against those entries were still pending. This second proposition of Brij Mohan Singh Chopra was held as not the correct proposition in law and principles of natural justice could not be brought in such a case.

The Court had noted that this reasoning was in conflict with the earlier judgment in the case *Union of India v. Col. J.N. Sinha & Anr.* 1970 (II) LLJ 284 and agreed with the view taken in J.N. Sinha's Case.

17. It clearly follows from the above that in so far as first ground in *Brij Mohan Singh Chopra* namely consideration of adverse entries of remote past was inappropriate to compulsory retire an employee, was not touched or discussed. In fact, on the facts of the Baikunth Nath Dass, this proposition did not arise for consideration at all. No doubt, in Gurdas Singh's Case, it has been specifically remarked that the judgment in *Brij Mohan Singh Chopra* (supra) has been overruled in *Baikuntha Nath (supra).* It would be relevant to point out that even Gurdas Singh was a case relating to un-communicated adverse entries. Therefore, Brij Mohan Singh Chopra was overruled only on the second proposition.

18. The fact that the issue as to whether remote past of the employee can be taken into consideration or not was not dealt with in *Baikuntha Nath Das* or *Gurdas Singh Case* was specifically noticed by this Court in the case of *Badrinath v. Government of Tamil Nadu and Ors*. 2000(8) SCC 395; 2000(6) SCALE 618. That was a case where this question of taking into consideration the old records came up directly for discussion. The court discussed the judgment in *Brij Mohan Singh Chopra* and pointed out that three judge Bench in *Baikuntha Nath Das* overruled *Brij Mohan Singh Chopra Case only o*n the second aspect, namely non-communication of the adverse reports. In so far as first aspect, which pertained to considering adverse entries of old period, the Court also pointed out that in Para 32 of *Baikuntha Nath Das Case,* various legal principles/propositions were summed up and drew attention to principle No.(iv) in that para with which we are concerned. It reads as under:

"So far as the appeals before us are concerned, the High

Court has looked into the relevant record and confidential records has opined that the order of compulsory retirement was based not merely upon the said adverse remarks but other material as well. Secondly, it has also found that the material placed before them does not justify the conclusion that the said remarks were not recorded duly or properly. In the circumstances, it cannot be said that the said remarks were not recorded duly or properly. In the circumstances, it cannot be said that the order of compulsory retirement suffers from mala fides or that it is based on no evidence or that it is arbitrary."

19. On that basis following pertinent observations were made in *Badrinath* case:

"54. We are however concerned with the first point stated in Brij Mohan Singh Chopra's case as explained and accepted in principle (iv) of para 34 of the three Judge Judgment in Baikunth Nath Das. We have already extracted this passage in principle (iv) of para 34. It reaffirms that old adverse remarks are not to be dug out and that adverse remarks made before an earlier selection for promotion are to be treated as having lost their 'sting'. This view of the three Judge Bench, in our view, has since been not departed from. We shall, therefore, refer to the two latter cases which have referred to this case in Baikunth Nath Das. The second of these two latter cases has also to be explained.

55. In the first of these latter cases, namely, Union of India v. V.R. Seth MANU/SC/0286/1994 : (1994)IILLJ411SC the point related both to adverse remarks of a period before an earlier promotion but also to uncommunicated adverse remarks. It was held that the Tribunal was wrong in holding in favour of the officer on the ground that

uncommunicated adverse remarks could not be relied upon for purposes of compulsory retirement. So far as the remarks prior to an earlier promotion this Court did not hold that they could be given as much weight as those in later years. The Court, in fact, relied upon Baikunth Nath Das case decided by three Judge Bench which had proposition (iv) in para 34 (at p. 315-316) had clearly accepted that adverse remarks prior to an earlier promotion lose their 'sting'.

56. The second case is the one in State of Punjab v. Gurdas Singh MANU/SC/0256/1998 : AIR1998SC1661 . The facts there were that there were adverse remarks from 1978 prior to 1984 when the officer was promoted and there were also adverse remarks for the period 18.6.84 to 31.3.85. The compulsory retirement order was passed on 3.9.87. The said order was quashed by the Civil Court on the ground that his record prior to his promotion i.e. prior to 1984 could not have been considered and two adverse entries after 1984 were not communicated and could not be relied upon. The three Judge Bench, while clearly setting out proposition (iv) in para 34 (at p. 315-316) of Baikunth Nath Das which said that adverse remarks prior to promotion lose their sting, held that they were following the said judgment and they allowed the appeal of the State. Following Baikunth Nath Das, the Bench felt that uncommunicated adverse remarks could be relied upon and in that case these entries related to the period after an earlier promotion. That ground alone was sufficient for the case. There is a further observation (at p. 99, para 11) that an adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped n

into consideration while considering the overall performance of the employee during the whole tenure of service.

57. The above sentence in Gurdas Singh needs to be explained in the context of the Bench accepting the three Judge Bench ruling in Baikunth Nath Das. Firstly, this last observation in Gurdas Singh's case does not go against the general principle laid down in Baikunth Nath Das to the effect that though adverse remarks prior to an earlier promotion can be taken into account, they would have lost their 'sting'. Secondly, there is a special fact in Gurdas Singh's case, namely, that the adverse remarks prior to the earlier promotion related to his "dishonesty". In a case relating to compulsory retirement therefore, the sting in adverse remarks relating to dishonesty prior to an earlier promotion cannot be said to be absolutely wiped out. The fact also remains that in Gurdas Singh's case there were other adverse remarks also even after the earlier promotion, regarding dishonesty though they were not communicated. We do not think that Gurdas Singh is an authority to say that adverse remarks before a promotion however remote could be given full weight in all situations irrespective of whether they related to dishonesty or otherwise. As pointed in the three Judge Bench case in Baikunth Nath Das, which was followed in Gurdas Singh they can be kept in mind but not given the normal weight which could have otherwise been given to them but their strength is substantially weakened unless of course they related to dishonesty."

20. If one were to go by the dicta in *Badrinath* Case, obvious conclusion would be that even if there are adverse remarks in the service career of an employee they would lose

there effect, when that employee is given promotion to the higher post and would not be taken into account when the case of that employee for compulsory retirement is taken up for consideration, except only those adverse entries in the confidential reports of that employee which touch upon his integrity. Thus, Badrinath case interprets principle (iv) in para 32 of Baikunth Dass to mean such adverse remarks for the period prior to promotion, unless they are related to dishonesty, would be substantially weekend after the promotion.

21. This interpretation given in *Badrinath* case, which was the judgment rendered by two member Bench, has not been accepted by three member bench of this Court, subsequently, in *Pyare Mohan Lal v. State of Jharkhand and Ors.* (2010) 10 SCC 693. After discussing various judgments, including the judgments referred to by us hitherto, the Court clarified and spelled out the circumstances in which the earlier adverse entries/ record would be wiped of and the circumstances in which the said record, even of remote past would not lose its significance. It is lucidly conceptualized under the head "Washed Off Theory" as follows:

"WASHED OFF THEORY

"19. In *State of Punjab v. Dewan Chuni Lal* MANU/SC/0497/1970 : AIR 1970 SC 2086, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

20. Similarly, a two-Judge Bench of this Court in *Baidyanath Mahapatra v.* *d*

Anr. MANU/SC/0051/1989 : AIR 1989 SC 2218, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and remain on record as part of past history.

This view has been adopted by this Court in *Baikuntha Nath Das* (supra).

21. However, a three-Judge Bench of this Court in *State of Orissa and Ors. v. Ram Chandra Das* MANU/SC/0613/1996 : AIR 1996 SC 2436, had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. The Court held as under:

Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or

irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension.

(Emphasis added)

22. This judgment has been approved and followed by this Court *in State of Gujarat v. Umedbhai M. Patel* MANU/SC/0140/2001 : AIR 2001 SC 1109, emphasising that the "entire record" of the government servant is to be examined.

23. In *Vijay Kumar Jain* (supra), this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. 'Vigour or sting of an adverse entry is not wiped out' merely it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant."

22. Stating that the judgment of larger Bench would be binding, the washed off theory is summed up by the Court in the following manner:

"In view of the above, the law can b e

that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record".

23. It clearly follows from the above that the clarification given by two Bench judgment in *Badrinath* is not correct and the observations of this Court in *Gurdas Singh* to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

24. The principle of law which is clarified and stands crystallized after the judgment in *Pyare Mohan Lal v. State of Jharkhand and Ors.;* 2010 (10) SCC 693 is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped off when the case of the government employee is to be considered for further promotion. However, this 'washed off theory' will have no application when case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration an earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time, the service record of the

immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power. However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant.

25. Having taken note of the correct principles which need to be applied, we can safely conclude that the order of the High Court based solely on the judgment in the case of *Brij Mohan Singh Chopra* was not correct. The High Court could not have set aside the order merely on the ground that service record pertaining to the period 1978-90 being old and stale could not be taken into consideration at all. As per the law laid down in the aforesaid judgments, it is clear that entire service record is relevant for deciding as to whether the government servant needs to be eased out prematurely. Of course, at the same time, subsequent record is also relevant, and immediate past record, preceding the date on which decision is to be taken would be of more value, qualitatively. What is to be examined is the "overall performance" on the basis of "entire service record" to come to the conclusion as to whether the concerned employee has become a deadwood and it is public interest to retire him compulsorily. The Authority must consider and examine the overall effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the Authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review."

26. With this we revert to the facts of the present case:

In so far as period of 1978-1990 is concerned, the respondent was charge sheeted in 19 cases. In few cases he was exonerated and in some other cases he was given minor penalty like admonition, stoppage of pay, annual grade increment for a limited period. The gist of these cases is as follows:

S. No	Charge Sheet	Date	Details of Charges	Date of Order	Details of decision	Remarks
1.	1648	11.8.1978	Negligent Driving	417/7-2-79	Exonerated	
2.	798	25.10.79	Recovered fare from 15 passengers without ticket	2783/ 27.8.84	Yearly increment stopped and forfe--iture of salary for suspension period	
3.	2314	20.11.80	Corruption	3454/ 22.10.84.	Stoppage of yearly increment for one year	
4.	1235	27.4.83	Absent from duty	1708/ 7.4.86	Absolved from charges without intimation	
5.	1035	31.3.83	Excess consumption	1709/ 3.4.86	Stoppage of one/ two increments	
6.	1754	13.6.84	Misbehavior with conductor	3453/ 22.10.84.	Absolved from charge	

7.	162	8.1.85	Absent from duty without intimation	5123/ 4.12.85	Stoppage of yearly increment for one year without commutative effect and forfeiture of salar for suspension period appeal No. 3588/ 29.8.88 pending	
8.	1798	4.4.85	Damage to tyre			
9.	2298	29.4.85	Absent from duty without intimation	5123/ 4.12.1985	Stoppage of one increment & forfeiture of salary for suspension period	
10.	3928	26.2.85	Vehicle accident	830/ 5.12.85	Stoppage of two increments without commutative effect	
11.	3763	1.8.90	Excess consumption of Diesel	68/14.2.94	Order for recovery and or warning for future recovered Rs. 132.60.	
12.	3090	30.10.82	Different types of complaints			

13.	4669	30.10.85	Damage to tyre	11830/ 5.12.88	Stoppage of two increments without commutative effect and forfeiture of salary for the suspension period.	
14.	316	23.1.86	Bad behavior	4953/ 12.10.87	1. Stoppage of one increment. Forfeiture of salary for the suspension period. 2. Less Diesel average	
15.	134	12.1.87	Demanding money from driver	11830/ 5.12.88	Stoppage of two increments without commulative effect under consideration	
16.	4745	1.11.85				
17.	3361	13.7.97	Refusal to take vehicle	706/ 10.2.88	Absolved, released the salary for the suspension period	

18.	2041	21.4.87	Negligent driving of vehicle	2815/ 9.6.93	Absolved released the salary for suspension period.	
19.	3792/	27.7.87	Less average of Diesel	2686/ 5.5.89	Recovered Rs. 72/-	

27. The aforesaid record projects the dismal picture. The High Court has observed that the respondents have not been able to show anything adverse in the career of the respondent after 1990 i.e. in last 12 years preceding the order of retirement. These observations are not correct in as much as:

(a) There was an inquiry against the respondent for which he was imposed the penalty of stoppage of increment for two years. He had made a representation against this penalty on 5.11.1998 which was dismissed on 25.5.1998.

(b) Further another criminal case was also instituted against him in the year 1999. Though outcome of this criminal case is not mentioned, fact remains that the accident was caused by the Respondent while driving the bus of the appellant Corporation, and the appellant corporation had to pay heavy compensation to the victims as a result of orders passed by MACT.

Thus even the service record after 1990 does not depict a rosy picture. In any case, there is nothing to show his performance became better during this period.

28. It hardly needs to be emphasized that the order of compulsory retirement is neither punitive nor stigmatic. It is based on subjective satisfaction of the employer and a very limited scope of judicial review is available in such cases. Interference is permissible only on the gr n

of mind, malafide, perverse, or arbitrary or if there is non-compliance of statutory duty by the statutory authority. Power to retire compulsorily, the government servant in terms of service rule is absolute, provided the authority concerned forms a bonafide opinion that compulsory retirement is in public interest.(See: AIR 1992 SC 1368)

29. Accordingly, we have no option but to set aside the impugned order of the High Court thereby upholding order of the compulsory retirement. The appeal is allowed with no order as to costs.

B.B.B. Appeal allowed.

KOLLAM CHANDRA SEKHAR
v.
KOLLAM PADMA LATHA
(Civil Appeal No. 8264 of 2013)

SEPTEMBER 17, 2013

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

Hindu Marriage Act, 1955 – s.13(1)(iii) – Dissolution of marriage on ground of mental illness of spouse – Divorce petition filed by appellant-husband pleading that respondent-wife was suffering from schizophrenia – Respondent-wife filed petition for restitution of conjugal rights – Trial Court allowed the divorce petition and dismissed the petition for restitution of conjugal rights – Judgment reversed by the High Court – Justification – Held: Justified – The High Court rightly examined the entire evidence on record and correctly found fault with the findings of fact recorded by the trial court with regard to the ailment attributed to respondent for seeking dissolution of marriage under the ground of 'unsound mind' which is a non-existent fact – Inability to manage his or her affairs is an essential attribute of an "incurably unsound mind" – The facts pleaded and the evidence placed on record produced by the appellant did not establish such inability as a ground on which dissolution of marriage was sought for by him – Respondent had not only completed MBBS but also did a post graduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to work in the said post – Appellant did not prove the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing positive and substantive evidence on record and on the other

hand, it is proved that respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS – The respondent, even if she did suffer from schizophrenia, is in a much better health condition at present – The two parties in this case must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment – It is not in the best interest of either the respondent or her daughter who is said to be of adolescent age for grant of a decree of dissolution of marriage as prayed for by the appellant.

The questions which arose for consideration in the present appeal were:- 1) Whether respondent-wife was suffering from a serious mental disorder i.e. schizophrenia or incurable unsoundness of mind, and can this be considered as a ground for divorce under Section 13(1) (iii) of the Hindu Marriage Act, 1955; 2) Whether the High Court had correctly re-appreciated the facts pleaded and evidence on record while dismissing the divorce petition of the appellant-husband and allowing the petition for restitution of conjugal rights of the respondent-wife and 3) Whether the judgment and decree of trial court granting divorce to the appellant-husband should be restored and the petition for conjugal rights filed by the respondent-wife dismissed.

Dismissing the appeal, the Court

HELD: 1.1. The High Court rightly examined the entire evidence on record and correctly found fault with the findings of fact recorded by the trial court with regard to the ailment attributed to the respondent for seeking dissolution of marriage under the ground of 'unsound mind' which is a non-existent fact. The judgment of the High Court in not granting a decree of divorce and allowing the petition for restitution of conjugal rights, is upheld. [Paras 15, 24] [203-F; 211-G]

1.2. In the instant case, as per the evidence of RW-2, Superintendent, Institute of Mental Health, Hyderabad, schizophrenia is a treatable, manageable disease, which can be put on par with hypertension and diabetes. So also, PW-4, Professor and Head of Department of Psychiatry at NIMHANS, Bangalore who had examined the respondent, stated that the team could not find any evidence suggesting schizophrenia at the time of their examining the respondent and he had stated in his cross-examination that no treatment including drugs was given to her at NIMHANS as they did not find any abnormality in her. They thus gave her a certificate of normal mental status, based on the absence of any abnormal findings in her medical report including psychiatric features in the past history and normal psychological test. The trial Judge misread the contents of the report dated 24.4.1999 given by the Doctors of Institute of Mental Health, Hyderabad (Exh. B-10) and also wrongly interpreted the same and recorded the finding that the respondent is suffering from the ailment of 'schizophrenia'. [Para 16] [206-C-F]

1.3. The trial court erroneously came to the conclusion that the respondent was suffering from schizophrenia by relying on the evidence of PW-1, who is the appellant and as per the opinion given by the Committee of Doctors in Ex.B-10 [certified copy of report from Institute of Mental Health, Government Hospital for Mental Care, Sanjeeva Reddy Nagar, Hyderabad]. In the deposition by witness RW-2, he has stated in his examination-in-chief that Schizophrenia has become eminently treatable with the advent of many new psychiatric drugs. He further stated that many patients with schizophrenia are able to lead a near normal life with medication. The appellant has not proved the allegations made in the petition against the respondent by adducing positive and substantive evide o

substantiate the same and that the alleged ailment of the respondent would fall within the provision of Section 13(1)(iii) of the Act. Therefore, he has not made out a case for grant of decree for dissolution of marriage. [Para 17] [207-A-E]

1.4. Inability to manage his or her affairs is an essential attribute of an "incurably unsound mind". The facts pleaded and the evidence placed on record produced by the appellant in this case does not establish such inability as a ground on which dissolution of marriage was sought for by him before the trial court. [Para 18] [208-F]

1.5. The contents of Exh.B-10 as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1) (iii) of the Act. The report states that the respondent, although suffering from 'illness of schizophrenic type', does not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms are fairly under control with the medication which had been administered to her. It was further stated that if there is good compliance with treatment coupled with good social and family support, a schizophrenic patient can continue their marital relationship. In view of the aforesaid findings and reasons recorded, it is clear that the patient is not suffering from the symptoms of schizophrenia. [Para 19] [209-B-E]

1.6. The respondent had not only completed MBBS but also did a post graduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to

work in the said post. The appellant-husband cannot simply abandon his wife because she is suffering from sickness. [Para 20] [209-F-H]

1.7. The respondent, even if she did suffer from schizophrenia, is in a much better health condition at present. Therefore, this Court cannot grant the dissolution of marriage on the basis of spouse's illness. The appellant has not proved the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing positive and substantive evidence on record and on the other hand, it has been proved that the respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS, as deposed by PW-4 in his evidence before the trial court. [Para 21] [210-B-D]

1.8. The findings and reasons recorded in setting aside the judgment and decree of the trial court is neither erroneous nor does it suffer from error in law which warrants interference by the Supreme Court. Therefore, this Court cannot interfere with the impugned judgment of the High Court as the same is well-reasoned and based on cogent reasoning of facts and evidence on record. [Para 22] [210-E-F]

1.9. Under Hindu law, marriage is an institution, a meeting of two hearts and minds and is something that cannot be taken lightly. Life is made up of good times and bad, and the bad times can bring with it terrible illnesses and extreme hardships. The partners in a marriage must weather these storms and embrace the sunshine with equanimity. Any person may have bad health, this is not their fault and most times, it is not within their control, as in the present case, the respondent was unwell and was taking treatment for the same. The ir

share of problems. Can this be a reason for the appellant to abandon her and seek dissolution of marriage after the child is born out of their union? Since the child is now a grown up girl, her welfare must be the prime consideration for both the parties. The two parties in this case must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment. The respondent must stick to her treatment plan and make the best attempts to get better. It is not in the best interest of either the respondent or her daughter who is said to be of adolescent age for grant of a decree of dissolution of marriage as prayed for by the appellant. [Para 23] [210-G; 211-C-F]

Ram Narain Gupta vs. Rameshwari Gupta **(1988) 5 SCC 247 – held applicable.**

Vinita Saxena vs. Pankaj Pandit **(2006)3 SCC 778 : 2006 (3) SCR 116 – referred to.**

Tarlochan Singh vs. Jit Kaur **AIR 1986 P & H 379; *Pramatha Kumar Maity vs. Ashima Maity* AIR 1991 Cal 123 and *Mt. Tilti vs. Alfred Rebert Jones* AIR 1934 All 273 – referred to.**

Whysall vs. Whysall **(1959) 3 All ER 389 – referred to.**

Ranganath Misra's Mayne's Treatise on Hindu Law and Usage, Fifteenth Edition, **2003, Bharat Law House at p.97 – referred to.**

Case Law Reference:

AIR 1986 P & H 379	**referred to**	**Para 11**
(1988) 5 SCC 247	**held applicable**	**Para 14**
2006 (3) SCR 116	**referred to**	**Para 15**
(1959) 3 All ER 389	**referred to**	**Para 18**
AIR 1991 Cal 123	**referred to**	**Para 18**
AIR 1934 All 273	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8264 of 2013.

From the Judgment & Order dated 28.09.2006 of the High Court of Andhra Pradesh at Hyderabad in C.M.A. No. 2858 and 2859 of 2002.

Jaideep Gupta, B. Suyodhan, Tatini Basu for the Appellant.

Pallav Sisodia, Y. Raja Gopala Rao, Y. Vismai Rao, H.N. Rath for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. This appeal is directed against the common judgment and order dated 28.09.2006 passed in CMA No. 2858 of 2002 and CMA No. 2859 of 2002 of the High Court of Andhra Pradesh as it has set aside the judgment and decree of divorce granted in favour of the appellant-husband dissolving the marriage between the appellant and respondent by dismissing the Original Petition No. 203 of 2000 filed by the appellant for dissolution of their marriage under Section 13 (1)(iii) of the Hindu Marriage Act, 1955 (in short 'the Act') and allowing the Original Petition No. 1 of 1999 filed by the respondent-wife against the appellant by granting restitution of conjugal rights urging various facts and legal contentions.

3. The factual and rival legal contentions urged on behalf of the parties are adverted to in this judgment with a view to examine the tenability of the appellant's submissions. The relevant facts are stated as hereunder:

The marriage between the appellant and the respondent was solemnized on 31.05.1995 at Kakin

as per Hindu rites and customs and their marriage was consummated. It is the case of the appellant that at the time of marriage, he was working as Senior Resident at the All India Institute of Medical Sciences in New Delhi. After marriage, the respondent-wife joined the appellant at New Delhi and secured employment in the said Institute.

4. It is the case of both the parties that when they were living at New Delhi, the brother of the appellant died in an accident. At that point of time, the appellant herein came to Yanam (Andhra Pradesh) leaving the respondent at Delhi, who gave birth to a female child on 07.07.1997.

It is contended by the learned senior counsel for the appellant, Mr.Jaideep Gupta, in the pleadings that dispute arose between the appellant and his parents on the one hand and the in-laws of the deceased brother of the appellant on the other. There were threats to kill the appellant. During that period, respondent's father stayed in the company of the appellant and his parents at Yanam. At that time, both the appellant and the respondent suffered tensions and they were restless on account of the situation created by the in-laws of the appellant's deceased brother. Both of them received medical treatment and due to depression, appellant submitted his resignation and the respondent also resigned from her job at AIIMS. The appellant then joined as Assistant Professor in Gandhi Hospital at Secunderabad. The respondent and the child also joined him at Hyderabad. It is their further case that while they were in Hyderabad, the appellant used to receive threatening calls from the in-laws of his deceased brother which used to create tension in their family. The respondent was treated for hypothyroidism problem.

5. In the counter statement filed by the respondent, she contended that after one year of their marriage, the appellant and his parents started harassing her by demanding colour television, refrigerator etc. In May 1998, after the death of the father of the respondent, the appellant went on insisting that the

respondent gets the house situated at Rajahmundry registered in his name and when she refused, he started to torture her. The respondent applied for post-graduate entrance examination, which was scheduled to be held on 13.08.1998, and the appellant was making arrangements to go to Madras on 12.08.1998 in connection with FRCS admission. On 11.08.1998, the appellant picked up a quarrel with the respondent insisting that she must get the house at Rajahmundry registered in his name to which she did not agree. The respondent also requested him not to go to Madras as she has to appear for the Post-Graduate entrance examination on 13.08.1998 for which the respondent alleged that the appellant badly tortured her both physically and mentally. A telegram was sent to her mother with false allegations of her mental illness with a view to create evidence as he could have as well conveyed the message through telephone as there was telephone facility at the house of her parents. As the appellant was preparing to appear for FRCS examination and would spend most of his time in the libraries and the respondent and their child would be left alone without help, he suggested that the appellant should go to Rajahmundry and stay with her parents to which she agreed and went to Rajahmundry and joined Chaitanya Nursing Home and Bhavani Nursing Home to work as a doctor. In the second week of November, 1998, the appellant came to Rajahmundry and asked the respondent to go to Yanam and stay with his parents saying that she can have the company of his parents and she can carry on the medical profession along with his father who was also a doctor to which she agreed. Thereafter, the appellant got issued a notice dated 25.11.1998 to the respondent making certain false allegations saying that she was suffering from schizophrenia and she had suicidal tendencies etc., with the object of marrying again for fat dowry. The respondent has denied that she suffered from schizophrenia or suicidal tendencies and further stated that during her delivery days and subsequently on account of the threats received from in-laws of the appellant's deceased brother, there was some depression for

was treated and the appellant never allowed her to go through the prescriptions of her treatment at anytime and she was also not allowed to see the medicines given to her as part of treatment for her depression. It is stated by her that she believes that as part of the ill motive of the appellant, he might have administered some medicines to build up a false case against her with a view to file petition for dissolution of marriage. The respondent got issued a reply notice to the lawyer of the appellant mentioning the above facts on 18.12.1998.

6. It is further contended by the learned senior counsel for the respondent, Mr. Pallav Sisodia, that the appellant never cared for her and encouraged his parents to dislodge her from the family house. She filed O.S. No.53 of 1998 on the file of District Munsif's Court, Yanam for permanent injunction against the parents of the appellant and filed Interlocutory Application No. 237 of 1998 for temporary injunction against them not to evict her from the residential house where she was staying. It is further stated that the appellant has no right to withdraw from her society and demand for divorce and that she is entitled for restitution of conjugal rights. It is contended by the respondent that the impugned judgment is a well-considered judgment both on facts and in law and the Division Bench of the High Court rightly allowed the appeals filed by the respondent refusing to grant a decree of divorce in favour of the appellant and granting a decree for restitution of conjugal rights in favour of the respondent. Therefore, the respondent has prayed for dismissal of the petition filed by the appellant praying for grant of decree of divorce against her.

7. The appellant filed the counter statement to the petition for restitution of conjugal rights denying the allegations made in the petition. He contended that the behaviour of the respondent even when they were staying at New Delhi was marked by emotional disturbances and she also received treatment from a psychiatrist there. He has further stated that he underwent severe mental stress due to irrational behavioural

pattern of the respondent. Her erratic behaviour started increasing as time passed by. She started manifesting symptoms of schizophrenia like violent or aggressive behaviour and a tendency to be harsh and hostile towards other members of the family without any reason whatsoever which were not visible earlier. For that reason, she was kept with her parents' family so that she can develop a sense of security which is required for patients suffering from schizophrenia. He has further stated that she also started developing the symptoms like sudden withdrawal and being silent for long periods without any communication.

8. Further, he has stated that after the death of his brother, he brought his wife and child to Hyderabad where he had secured a job as Assistant Professor of Orthopaedics in Gandhi Medical College. He further contended that on account of the death of his brother, tension developed in his family and that neither he nor his family members harassed the respondent demanding goods etc. He also stated that at the time of marriage, mental status of the respondent was not known to him. Further, the respondent tried to evict his parents from their house at Yanam and when she failed in her attempt, she filed O.S. No. 53 of 1998 at District Munsif's Court, Yanam which shows her erratic attitude towards the parents of the appellant.

9. The respondent fell seriously ill due to which the appellant sent her mother a telegram to come and take care of her. She went to live with her mother at Rajahmundry as she consulted some psychiatrists who advised her to live with her mother. The appellant visited her after two weeks and found that her mental condition had aggravated to such a point that it would be impossible for him to live with her as her husband. He contended that she was showing all the classical symptoms of schizophrenia including violence, psychotic behaviour, suicidal tendencies, withdrawal symptoms and abnormal and irrational behaviour including in the matter of her speech and her conversation. She also used to say t[illegible]o

commit suicide and he was, thus, worried about her and the child. The respondent was continuously on psychiatric treatment. The above facts were narrated by the appellant in his divorce petition filed before the trial court. He has further contended that under the circumstances narrated above, it was impossible for him to resume cohabitation with the respondent as he was afraid of danger to his life and that of his daughter and therefore, he requested the Court for grant of a decree of divorce and that the respondent's petition for restitution of conjugal rights be dismissed as she is not entitled to the relief prayed for by her.

10. The learned trial Judge in his judgment held that the appellant is entitled to a decree of divorce if not annulment of marriage and that since the disease of the respondent was not disclosed to the appellant before marriage, she is not entitled to a decree of restitution of conjugal rights. As a result, O.P. 1/99 filed by the respondent for restitution of conjugal rights was dismissed and O.P.203/2000 filed by the appellant for grant of divorce was allowed by dissolving the marriage between the appellant and the respondent and decree of divorce was granted.

11. The trial court relied on the certified copy of report from Institute of Mental Health, Government Hospital for Mental Care, Sanjeeva Reddy Nagar, Hyderabad, bearing No. A and D/402/99 submitted to the Registrar (Judicial) High Court of Andhra Pradesh, Hyderabad, marked as Exh. B-10, given as per procedure and by conducting chemical examination etc. It is stated that the report clearly showed that the respondent is suffering from schizophrenia. The trial court relied on the case of *Tarlochan Singh Vs. Jit Kaur,*[1] where it was held that since the fact of the wife being a patient of schizophrenia was not disclosed to the husband before marriage, it would amount to matrimonial fraud and therefore it was held the husband was entitled to decree of divorce if not annulment of marriage.

1. AIR 1986 P & H 379.

12. Being aggrieved by the common judgment and decree of the trial court passed in O.P. Nos. 1/99 and 203/2000 the respondent filed appeals before the High Court of Andhra Pradesh questioning the correctness of the same urging various grounds. The High Court on re-appreciation of pleadings and evidence held that there is no positive evidence to show that the respondent has suffered schizophrenia and even in the case that she suffered from schizophrenia, it cannot be said that she was suffering from such a serious form of the disease that it would attract the requirements of Section 13 (1) (iii) of the Act for grant of decree for dissolution of marriage between the parties.

13. On perusal of the facts and legal evidence on record and hearing rival legal contentions urged by both the parties, the points that would arise for consideration of this Court are:

(1) Whether the respondent is suffering from a serious mental disorder i.e. schizophrenia or incurable unsoundness of mind, and can this be considered as a ground for divorce under Section 13 (1) (iii) of the Hindu Marriage Act, 1955?

(2) Whether the High Court has correctly re-appreciated the facts pleaded and evidence on record while dismissing the divorce petition of the appellant and allowing the petition for restitution of conjugal rights of the respondent?

(3) Whether the appeal filed by the appellant has to be allowed and we must restore the judgment and decree of trial court and dismiss the petition for conjugal rights filed by the respondent?

(4) What order?

14. Answer to point nos.1 to 3:

These points are answered to

interrelated. On careful scrutiny of the pleadings and evidence on record and the decision of this Court referred to above, the provision of Section 13(1) (iii) of the Act is interpreted and the meanings of 'unsound mind' and 'mental disorder' as occurring in the above provisions of the Act are examined and referred to in the impugned judgment. The High Court, while examining the correctness of the findings recorded in the common judgment of the trial court, has placed reliance on *Ram Narain Gupta vs. Rameshwari Gupta,*[2] wherein this Court has interpreted the provision of Section 13(1)(iii) of the Act and laid down the law regarding mental disorder or unsound mind as a ground available to a party to get dissolution of the marriage. The relevant portions with regard to 'unsoundness of mind' and 'mental disorder' from the case referred to supra are extracted hereunder:

> "**20.**The context in which the ideas of unsoundness of "mind" and "mental disorder" occur in the Section as grounds for dissolution of a marriage, require the assessment of the degree of the "mental disorder". Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law.
>
> **21.** The answer to the apparently simple — and perhaps misleading — question as to "who is normal?" runs inevitably into philosophical thickets of the concept of mental normalcy and as involved therein, of the 'mind' itself. These concepts of "mind", "mental phenomena" etc., are more known than understood and the theories of "mind" and "mentation" do not indicate any internal consistency, let alone validity, of their basic ideas. Theories of "mind" with cognate ideas of "perception" and "consciousness" encompass a wide range of thoughts, more ontolopical than enistemological. Theories of mental phenomena are diverse and include the dualist concept — shared by Descartes and Sigmund Freud — of the separateness of the existence of the physical or the material world as distinguished from the non-material mental world with its existence only spatially and not temporally. There is, again, the theory which stresses the neurological basis of the "mental phenomenon" by asserting the functional correlation of the neuronal arrangements of the brain with mental phenomena. The "behaviourist" tradition, on the other hand, interprets all reference to mind as "constructs" out of behaviour. "Functionalism", however, seems to assert that mind is the logical or functional state of physical systems. But all theories seem to recognise, in varying degrees, that the psychometric control over the mind operates at a level not yet fully taught to science. When a person is oppressed by intense and seemingly insoluble moral dilemmas, or when grief of loss of dear ones etch away all the bright colours of life, or where a broken marriage brings with it the loss of emotional security, what standards of normalcy of behaviour could be formulated and applied? The arcane infallibility of science has not fully pervaded the study of the non-material dimensions of "being".

2. (1988) 5 SCC 247.

22. Speaking of the indisposition of science towards this study, a learned Author says:

> "...we have inherited cultural resistance to treating the conscious mind as a biological phenomenon like any other. This goes back to Descartes in the seventeenth century. Descartes divided the world into two kinds of substances: mental substances and physical substances. Physical substances were the proper domain of science and mental substances were the property of religion. Something of an acceptance of th[illegible]n

to the present day. So, for example, consciousness and subjectivity are often regarded as unsuitable topics for science. And this reluctance to deal with consciousness and subjectivity is part of a persistent objectifying tendency. People think science must be about objectively observable phenomena. On occasions when I have lectured to audiences of biologists and neurophysiologists, I have found many of them very reluctant to treat the mind in general and consciousness in particular as a proper domain of scientific investigation.

...the use of the noun "mind" is dangerously inhabited by the ghosts of old philosophical theories. It is very difficult to resist the idea that the mind is a kind of a thing, or at least an arena, or at least some kind of black box in which all of these mental processes occur.

23. Lord Wilberforce, referring to the psychological basis of physical illness said that the area of ignorance of the body-mind relation seems to expand with that of knowledge. In *McLoughlin* v. *O' Brian*, the learned Lord said, though in a different context: (All ER p. 301)

"Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts..."

24. But the illnesses that are called "mental" are kept distinguished from those that ail the "body" in a fundamental way. In "*Philosophy and Medicine*", Vol. 5 at

page X the learned Editor refers to what distinguishes the two qualitatively:

"Undoubtedly, mental illness is so disvalued because it strikes at the very roots of our personhood. It visits us with uncontrollable fears, obsessions, compulsions, and anxieties....

. . . This is captured in part by the language we use in describing the mentally ill. One *is* an hysteric, *is* a neurotic, *is* an obsessive, *is* a schizophrenic, *is* a manic-depressive. On the other hand, one *has* heart disease, *has* cancer, *has* the flu, *has* malaria, *has* smallpox..."

The principle laid down by this Court in the aforesaid case with all fours is applicable to the fact situation on hand wherein this Court has rightly referred to Section 13 (1) (iii) of the Act and explanation to the said clause and made certain pertinent observations regarding "unsound mind" or "mental disorder" and the application of the same as grounds for dissolution of marriage. This Court cautioned that Section 13 (1) (iii) of the Act does not make a mere existence of a mental disorder of any degree sufficient in law to justify the dissolution of marriage. The High Court in the present case stated that a husband cannot simply abandon his wife because she is suffering from sickness and relied on the evidence of RW-2, Dr. Krishna Murthy, Superintendent, Institute of Mental Health, Hyderabad, wherein it is stated by him that schizophrenia can be put on par with diseases like hypertension and diabetes on the question of treatability meaning that constant medication is required in which event the disease would be under control. The High Court also relied on the evidence of PW-4, Dr. Ravi S. Pandey, Professor and Head of Department of Psychiatry at NIMHANS, Bangalore, who had examined the respondent and stated that the team could not find any evidence suggesting that she has been suffering from schizophrenia at the time of examining her and also stated in his cross-examination that no treatment including drugs were given to her at NIM[illegible]t

find any abnormality in her behaviour. He also stated that it is true that psychiatrically there is no contra-indication in leading a normal conjugal life. Thus, they gave her a certificate, which is marked as Exh. B-11, based on clinical examination and in the absence of any abnormal behaviour including psychiatric features in the past history of respondent. The High Court has not accepted the finding of fact recorded by the trial court on the contentious issue and further stated that "schizophrenia" does not appear to be such a dangerous disease and it can be controlled by drugs and in the present case, this finding is supported by evidence of RW-2, who has stated in his examination-in-chief that the appellant herein has not made any reference to any of the acts of the respondent that can constitute "schizophrenia" ailment. It is further held by the High Court that there is no positive evidence to show that the respondent has suffered from schizophrenia and even in the case she has suffered from some form of schizophrenia, it cannot be said that she was suffering from such a serious form of the disease that would attract the requirement as provided under Section 13 (1) (iii) of the Act and that it is of such a nature that it would make life of the appellant so miserable that he cannot lead a marital life with her.

15. We are of the opinion that the High Court has rightly examined the entire evidence on record and correctly found fault with the findings of fact recorded by the trial court with regard to the ailment attributed to the respondent for seeking dissolution of marriage under the ground of 'unsound mind' which is a non-existent fact. In the case of *Vinita Saxena v. Pankaj Pandit,*[3] this Court has examined in detail the issue of schizophrenia wherein the facts are different and the facts and evidence on record are not similar to the case on hand. Therefore, the observations made in the judgment for grant of decree for dissolution of marriage under Section 13 (1) (ia) and Section 13(1) (iii) of the Act cannot be applied to the fact

3. (2006) 3 SCC 778.

situation of the case on hand. But, we would like to examine what was said in that case on the issue of this disease, schizophrenia -:

"**What is the disease and what one should know?**

*A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

*It is customary to define 'delusion' more or less in the following way. A delusion is a false unshakeable belief, which is out of keeping with the patient's social and cultural background. German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences.

*Apophanous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions are also the result of auditory hallucinations, bodily hallucinations and experiences of passivity. Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self-reference hallucinosis. Ideas of delusions or reference are not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes

The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear. One is a bit more likely to become schizophrenic if he has a family member with the illness. Stre[illegible]e schizophrenia, but can make the s

Risks

Without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

Schizophrenia is a chronic, disabling mental illness characterised by:

*Psychotic symptoms
*Disordered thinking
*Emotional blunting

How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

*In the late teens or early twenties in men
*In the twenties to early thirties in women

What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period of relapse).

Initial symptoms appear gradually and can include:

*Feeling tense
*Difficulty in concentrating
*Difficulty in sleeping
*Social withdrawal

What are psychotic symptoms?

*Psychotic symptoms include:
*Hallucinations: hearing voices or seeing things.
*Delusions: bizarre beliefs with no basis in reality (for example delusions of persecution or delusions of grandeur).

These symptoms occur during acute or psychotic phases of the illness, but may improve during periods of remission.

A patient may experience:

*A single psychotic episode during the course of the illness
*Multiple psychotic episodes over a lifetime…"

16. As per evidence of RW-2, schizophrenia is a treatable, manageable disease, which can be put on par with hypertension and diabetes. So also, PW-4, who had examined the respondent at NIMHANS, Bangalore stated that the team could not find any evidence suggesting schizophrenia at the time of their examining the respondent and he had stated in his cross-examination that no treatment including drugs was given to her at NIMHANS as they did not find any abnormality in her. They thus gave her a certificate of normal mental status, based on the absence of any abnormal findings in her medical report including psychiatric features in the past history and normal psychological test. We have carefully perused the Report marked as Exh. B-10 dated 24.4.1999 given by the Doctors of Institute of Mental Health, Hyderabad before the trial court. The learned trial Judge has misread the contents of the said report and also wrongly interpreted the same and recorded the finding that the respondent is suffering from the ailment of 'schizophrenia' and therefore he has accepted the case of the appellant who has made out a ground under Section 13(1) (iii) of the Act wherein it is stated that a spouse suffering from schizophrenia or incurably unsound mind is a ground for dissolution of the marriage between the parties.

17. The High Court has thus rightly set aside the decree of dissolution of marriage granted in favour of the appellant and dismissed his petition and granted a decree of restitution of conjugal rights in favour of the respondent by allowing her petition. The High Court has recorded th

appreciation of material evidence on record and has rightly held that the trial court has erroneously come to the conclusion that the respondent was suffering from schizophrenia by relying on the evidence of PW-1, who is the appellant herein and as per the opinion given by the Committee of Doctors in Ex.B-10. In the deposition by witness RW-2, Dr. K.Krishna Murthy, he has stated in his examination-in-chief that Schizophrenia has become eminently treatable with the advent of many new psychiatric drugs. He further stated that many patients with schizophrenia are able to lead a near normal life with medication. The trial court has erroneously relied on certain cases referred to and applied the principle laid down in those cases to the facts of this case even though they are not applicable to the case on hand either on facts or in law as the appellant has not proved the allegations made in the petition against the respondent by adducing positive and substantive evidence on record to substantiate the same and that the alleged ailment of the respondent would fall within the provision of Section 13(1)(iii) of the Act. Therefore, he has not made out a case for grant of decree for dissolution of marriage. We have carefully examined Ex. Nos. X-6 to X-11, which are the prescriptions of medicine prescribed to her by Dr. Mallikarjuna Rao, Dr. Pramod Kumar and Dr.M.Kumari Devi. The above prescriptions mention the symptoms of the ailment of the respondent, which were in the nature of delusions, suspicious apprehensions and fears, altered behaviours, suicidal tendency and past history of depression. Reliance is placed by PW 1 on the above documentary evidence to prove that the respondent was suffering from the mental disorder of schizophrenia and therefore it squarely falls within the provision of Section 13(1)(iii) of the Act for grant of decree of dissolution of marriage in his favour. The High Court has rightly held that the trial court has erroneously accepted the same and recorded its finding of fact on the contentious issues to pass decree of divorce in favour of the appellant, which is contrary to the decision of this Court in the case of *Ram Narain Gupta vs. Rameshwari Gupta* supra. The same decision has been relied

upon by the respondent before the High Court, wherein the said decision was correctly accepted by it to set aside the erroneous finding of fact recorded by the trial court on the contentious issue.

18. The legal question that arises for our consideration is whether the marriage between the parties can be dissolved by granting a decree of divorce on the basis of one spouse's mental illness which includes schizophrenia under Section 13 (1) (iii) of the Act. In the English case of *Whysall v. Whysall,*[4] it was held that a spouse is 'incurably of unsound mind' if he or she is of such mental incapacity as to make normal married life impossible and there is no prospect of any improvement in mental health, which would make this possible in future. The High Court of Judicature at Calcutta, in *Pramatha Kumar Maity v Ashima Maity*[5] has held that mental disorder of the wife, even if proved, cannot, by itself, warrant a decree of divorce and it must be further proved that it is of such a nature as the husband could not be expected to live with the wife. The Allahabad High Court, in *Mt. Tilti Vs. Alfred Rebert Jones*[6] has held that where it has come on record that the wife has improved her educational qualifications and has been looking after her children, the apprehension of the husband that there is danger to his life or to his children is not borne out is the finding recorded in the said case. Inability to manage his or her affairs is an essential attribute of an "incurably unsound mind". The facts pleaded and the evidence placed on record produced by the appellant in this case does not establish such inability as a ground on which dissolution of marriage was sought for by him before the trial court.

19. The High Court has rightly set aside the said finding and allowed the appeal of the respondent after careful scrutiny

4. (1959) 3 All ER 389.
5. AIR 1991 Cal 123.
6. AIR 1934 All 273.

of Exh.B-10. The correctness of the finding of the High Court in the impugned judgment is seriously challenged by the learned senior counsel on behalf of the appellant in this appeal. We have examined this contention, after careful perusal of the contents of Exh.B-10. In our considered view, the contents of the report as stated by the team of doctors do not support the case of the appellant that the respondent is suffering from a serious case of schizophrenia, in order to grant the decree of divorce under Section 13(1) (iii) of the Act. The report states that the respondent, although suffering from 'illness of schizophrenic type', does not show symptoms of psychotic illness at present and has responded well to the treatment from the acute phases and her symptoms are fairly under control with the medication which had been administered to her. It was further stated that if there is good compliance with treatment coupled with good social and family support, a schizophrenic patient can continue their marital relationship. In view of the aforesaid findings and reasons recorded, we have to hold that the patient is not suffering from the symptoms of schizophrenia as detailed above.

20. We are of the view that the High Court in exercise of its appellate jurisdiction has rightly come to a different conclusion that the respondent is not suffering from the ailment of schizophrenia or incurable unsoundness of mind. Further, the High Court has rightly rejected the finding of the trial court which is based on exh.B-10 and other documentary and oral evidence by applying the ratio laid down by this Court in the case of *Ram Narain Gupta vs. Rameshwari Gupta* referred to supra. A pertinent point to be taken into consideration is that the respondent had not only completed MBBS but also did a post graduate diploma in Medicine and was continuously working as a Government Medical Officer and had she been suffering from any serious kind of mental disorder, particularly, acute type of schizophrenia, it would have been impossible for her to work in the said post. The appellant-husband cannot simply abandon his wife because she is suffering from sickness. Therefore, the

High Court allowed both the CMAs and dismissed O.P. No. 203/2000 filed by the appellant for divorce and allowed O.P. No.1/99 filed by the respondent for restitution of conjugal rights wherein the High Court granted decree of restitution of conjugal rights in favour of the respondent.

21. It is thus clear that the respondent, even if she did suffer from schizophrenia, is in a much better health condition at present. Therefore, this Court cannot grant the dissolution of marriage on the basis of one spouse's illness. The appellant has not proved the fact of mental disorder of the respondent with reference to the allegation made against her that she has been suffering from schizophrenia by producing positive and substantive evidence on record and on the other hand, it has been proved that the respondent is in much better health condition and does not show signs of schizophrenia as per the most recent medical report from NIMHANS, as deposed by PW-4 in his evidence before the trial court.

22. For the aforesaid reasons, we are of the firm view that the findings and reasons recorded in setting aside the judgment and decree of the trial court is neither erroneous nor does it suffer from error in law which warrants our interference and calls for setting aside the impugned judgment and decree of the first appellate court. Therefore, this Court cannot interfere with the impugned judgment of the High Court as the same is well-reasoned and based on cogent reasoning of facts and evidence on record and accordingly, we answer point no.4 in favour of the respondent.

23. Under Hindu law, marriage is an institution, a meeting of two hearts and minds and is something that cannot be taken lightly. In the Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realised[7]. In Vedic Index I it is stated that "The

7. Vedic Index, I, 484, 485; CHI,I,89 as in Ranganath Misra J. Revised., Mayne's Treatise on Hindu Law and Usage, Fifteenth [illegible] w House at p.97.

high value placed on the marriage is shown by the long and striking hymn". In Rig Veda, X, 85; "Be, thou, mother of heroic children, devoted to the Gods, Be, thou, Queen in thy father-in-law's household. May all the Gods unite the hearts of us "two into one" as stated in Justice Ranganath Misra's 'Mayne's Treatise on Hindu Law and Usage'[8]. Marriage is highly revered in India and we are a Nation that prides itself on the strong foundation of our marriages, come hell or high water, rain or sunshine. Life is made up of good times and bad, and the bad times can bring with it terrible illnesses and extreme hardships. The partners in a marriage must weather these storms and embrace the sunshine with equanimity. Any person may have bad health, this is not their fault and most times, it is not within their control, as in the present case, the respondent was unwell and was taking treatment for the same. The illness had its fair share of problems. Can this be a reason for the appellant to aband n her and seek dissolution of marriage after the child is born out of their union? Since the child is now a grown up girl, her welfare must be the prime consideration for both the parties. In view of the foregoing reasons, we are of the opinion that the two parties in this case must reconcile and if the appellant so feels that the respondent is still suffering, then she must be given the right treatment. The respondent must stick to her treatment plan and make the best attempts to get better. It is not in the best interest of either the respondent or her daughter who is said to be of adolescent age for grant of a decree of dissolution of marriage as prayed for by the appellant. Hence, the appeal is liable to be dismissed.

24. Accordingly, we dismiss the appeal and uphold the judgment of the High Court in not granting a decree of divorce and allowing the petition for restitution of conjugal rights. Therefore, we grant a decree for restitution of conjugal rights under Section 9 of the Act in favour of the respondent.

B.B.B. Appeal dismissed.

8. Fifteenth Edition, 2003, Bharat Law House at p.97.

VYAS RAM @ VYAS KAHAR & ORS.
v.
STATE OF BIHAR
(Criminal Appeal No.791 OF 2009)

SEPTEMBER 20, 2013

[A.K. PATNAIK AND H.L. GOKHALE, JJ.]

Terrorists and Disruptive Activities (Prevention) Act, 1987 – s.3(1) – Retaliatory attack by group of extremists leading to death of 35 persons and injury to 7 persons – Accused-appellants convicted and sentenced to death – Justification – Held: On facts, even if deficiencies in the prosecution are ignored, prosecution case against appellant no.2 is rather weak – His name not mentioned in the FIR – PW-2 injured witness failed to identify appellant no.2 in Court – None of the other witnesses including PW-3, another injured witness, attributed any role to him – In the circumstances, appellant no.2 deserves acquittal – As far as appellant no.3 is concerned, in addition to his name being mentioned in the FIR as one who was slitting the throats, he was identified by PW-2 injured witness in Court – Appellant no.3 was attributed the role of slitting the throats by PW-2 in his oral deposition – Though other witnesses did not attribute any specific role to him, he was identified by them as a participant in the crime – As far as appellant no.1 is concerned, PW-2 stated in oral evidence that he was slitting the throats, and he identified him in the court as well, though no other witness attributed any particular role to him – PW2 being an injured witness, his testimony cannot be ignored – He attributed a specific role to appellants nos.1 and 3 – Conviction of these two accused us.302 IPC and other charges accordingly upheld – However, the incident occurred in 1992 and the charges were framed in 2004 and more than nine years passed thereafter also, and the appellants have been facing the trauma of the crime and the

trial all this period – Besides, the manner in which the investigation proceeded far from satisfactory – Possibility that due to their poverty and caste conflict the accused were drawn in the melee and participated in the crime – Taking into account the circumstances, death sentence awarded to appellant nos.1 and 3 commuted to life imprisonment, which is to mean the rest of their natural life – Penal Code, 1860 – ss.302 r/w 149, 364 r/w 149, 307 r/w 149, s.436 r/w 149 and s.435 r/w 149.

Penal Code, 1860 – s.149 – Common intention – Punishment prescribed by s.149 – Nature of – Held: It is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly – At the same time if a person is a mere bystander, and no specific role is attributed to him, he may not come under the wide sweep of s.149.

In a gruesome carnage, a group of extremists caused the death of 35 persons and injury to 7 persons. All the victims belonged to the Bhumihar community. The incident was claimed to be an attack by the members of the Maoist Communist Centre (MCC) in retaliation to an earlier attack by the Bhumihar community.

The Designated Trial Judge sentenced four accused to death under Section 3(1) of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA), and to life imprisonment under Section 302 r/w 149 of IPC. Their death sentence was confirmed by a bench of three judges of this Court by a majority of two versus one in Krishna Mochi and Others v. State of Bihar (wherein the Senior Judge on the bench viz. Hon'ble Mr. Justice M.B. Shah, rendered a separate judgment acquitting one accused and commuting the death sentence of the other three to life imprisonment). Another group of four accused though convicted under Section 3(1) of TADA,

were sentenced to rigorous imprisonment for life on each count. Their conviction and sentence was set aside by this Court in Bihari Manjhi and Others v. State of Bihar and Rajendra Paswan v. State of Bihar.

Three other accused viz. Tyagi Manjhi alias Tyagi-jee, Vijay Yadav and Madhusudan Sharma, tried along with the accused-appellants, were acquitted for want of sufficient evidence. The three appellants were, however, held to be members of an unlawful assembly, and convicted and sentenced to death under Section 3(1) of TADA, and to life imprisonment on each count under Sections 302 r/w 149, 364 r/w 149, 307 r/w 149 of I.P.C, and for rigorous imprisonment for 10 years under Section 436 r/w 149 IPC and rigorous imprisonment for 1 year under Section 435 r/w 149 IPC.

Before this Court, the main grounds raised by the appellants pertained to unreliable investigation especially in the light of the non examination of the informant, and the belated recording of the statement of the witnesses. Furthermore, the appellants stressed upon the fact that no particular role was assigned to them, and in such a scenario there cannot be any conviction, leave aside the death sentence, for merely being present in the unlawful assembly at the place of incident.

Partly allowing the appeal and dismissing the Death Reference case, the Court

HELD: 1. The defining ingredient for the involvement of the accused would be the common intention. Section-149 of I.P.C makes it amply clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the comm e

is a member of the same assembly, is guilty of that offence. The punishment prescribed by Section-149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. At the same time if a person is a mere bystander, and no specific role is attributed to him, he may not come under the wide sweep of Section 149. [Para 18] [230-B-D]

Baladin v. State of U.P **AIR 1956 SC 181 and** *Masalti v. State of U.P.* **AIR 1965 SC 202: 1964 SCR 133 – relied on.**

2.1. The submission of the appellants which does merit a close scrutiny and a thorough examination by the court is, however, concerning the allegedly faulty investigation, especially the failure of the prosecution to conduct a Test Identification Parade, and the delay in recording the statements of the witnesses which according to them rendered the entire alleged identification of the appellants doubtful. [Para 19] [230-E-F]

2.2. In the present case, as per the statement of PW 21 the investigation prior to him had been conducted by PW22 who was the sub inspector and the officer incharge of Tekari Police station at the time of occurrence, as Ram Japit who had originally been entrusted with the investigation had fallen ill. PW 22 was the one who was the officer incharge of the Tekari P.S, and had gone for routine patrol at about 9 p.m. on 12.2.92, when he heard sounds of explosion. He heard from one person, whom he met on the way, that explosion was taking place in the north. On going there, he met three chowkidaars who told him that 'partywalas' had come, and set the village on fire, and were terrorising people by firing and exploding bombs. Interestingly, none of these people, through whom the police had come to know of the incident, were examined. Their fard bayan was not taken. PW 22 has

stated in his deposition that he informed the SP of the gravity of the situation, and the SP came at the place of occurrence with his force and they all proceeded further. At this point of time, they were approached by one Sarwan Kumar, who had come running to them, after coming to know that they were police officers. His hands were tied at his back, he told them that extremists had come to the village, and had proceeded toward the east. Sarwan Kumar was also not examined. The reason given for this by PW22 is that Sarwan Kumar did not give the entire account of the happening, and because the entire village was on fire. The statements of none of the women who were weeping near the culvert were recorded either. Understandably, they were very upset, and possibly not in the position to give their statements. However, this does not explain as to why the statements of none of those people from whom the police had originally come to know of the incident, had been recorded, and why the F.I.R was recorded on the Fard bayan of the informant later at 3 a.m. in the morning when the chowkidaars, the mukhiya and Sarwan Singh had much earlier informed the police about the incident. [Para 25] [232-G-H; 233-A-H]

2.3. PW 22 claims to have taken over the investigation after Ram Japit Kumar was not available at the place of occurrence, but he did not have any written orders or approval for proceeding with the investigation. In para 28 of his deposition it is also revealed that none of the material exhibits of the case were submitted to the Court as the Malkhana had been attacked by the extremists in 1996, and all its articles were, consequently destroyed. In para 35 of his cross examination he had admitted that it had been recorded in para 23 of the police case diary that Ram Japit was busy with the investigation. In para 2 of the case diary it was mentioned that investigation of this case had been endorsed by the SP to Ram Japit Kumar who was at the

This contradicts his statement that Ram Japit was not available at the place of occurrence. In para 43, PW22 admits that no T.I.P was conducted of any suspect. PW22 investigated the case for only 8 days, and did not mention any time and place of the examination of any of the witnesses. There are also discrepancies in the depositions of PW21 and PW22 as far as the extent of case diary recorded by PW22 is concerned. In addition to this, no seizure list was prepared. [Paras 26, 27] [234-B-F]

Krishna Mochi and Others v. State of Bihar **2002 (6) SCC 81: 2002 (3) SCR 1;** *Bihari Manjhi and Others v. State of Bihar and Rajendra Paswan v. State of Bihar* **2002 (4) SCC 352: 2002 (2) SCR 1173;** *Kamaksha Rai v. State of U.P.* **1999 (8) SCC 701;** *Binay Kumar Singh v. State of Bihar* **1997(1) SCC 283: 1996 (8) Suppl. SCR 225 and** *Dilavar Hussain v. State of Gujarat* **1991 (1) SCC 253: 1990 (2) Suppl. SCR 108 – referred to.**

Vijay Kumar Baldev Sharma v. State of Maharashtra **2007 (12) SCC 687: 2007 (7) SCR 601;** *Hitendra Vishnu Thakur v. State of Maharashtra* **AIR 1994 SC 2623: 1994 (1) Suppl. SCR 360 and** *Jamuna Chaudhary v. State of Bihar* **AIR 1974 SC 1822: 1974 (2) SCR 609 – cited.**

3.1. In the present case, even if the deficiencies in the prosecution are ignored, and the oral evidence on record is looked into, the case of prosecution against appellant no.2 is rather weak. His name was not mentioned in the FIR. PW-2 who is an injured witness, though states in the dock that he had seen the appellants slitting the throats, he failed to identify appellant no.2 in Court. None of the other witnesses including PW-3, who is another injured witness, have attributed any role to him. None of them said that he was a member of MCC. Madhusudan who was named at Sr. No.5 in the FIR also faced a similar allegation. It was PW-2 who named Madhusudan as one

of the accused who slit the throats of the deceased, but had failed to identify him in the dock. In the absence of other witnesses throwing any light on his participation in the occurrence, Madhusudan was acquitted by the designated Judge. In paragraph 39 of his judgment in Krishna Mochi**, Hon'ble Mr. Justice Aggarwal (who had rendered the leading judgment of conviction) rejected the theory of some of the accused being mere sight-seers. This was because, as the paragraph indicates, a specific role was attributed to them such as entering into the houses by breaking open the doors, and forcibly taking the inmates, tying their hands and taking them to the temple and thereafter near to the canal, where their legs were tied, and thereafter killing some of them. As far as appellant no.2 is concerned, no such role is attributed to him by any of the witnesses. This being so, appellant no.2 is entitled to have the same yardstick applied to him as was applied to Madhusudan. In the circumstances, appellant no.2 deserves an acquittal. [Para 29] [235-E-H; 236-A-C]**

3.2. As far as appellant no.3 is concerned, in addition to his name being mentioned in the FIR as one who was slitting the throats, he was identified by PW-2 injured witness in Court. Appellant no.3 is attributed the role of slitting the throats by PW-2 in his oral deposition. Though other witnesses did not attribute any specific role to him, he was identified by them as a participant in the crime. As far as appellant no.1 is concerned, though his name was mentioned in the FIR, the heinous act of slitting the throats was not attributed to him in the FIR. PW-2 has however stated in oral evidence that appellant no.1 was slitting the throats, and he identified him in the court as well, though no other witness has attributed any particular role to him. PW2 being an injured witness, his testimony cannot be ignored. It is true that his testimony was not accepted in Krishna Mochi, h

respect to other accused. In the present case, he has attributed a specific role to these two accused. There is no reason to discard his evidence. The conviction of these two accused under Section 302 of IPC and other charges will have to be upheld. [Paras 30 and 31] [236-D-H]

3.3. Question of sentence in regard to appellant nos. 1 and 3: It is true that in Krishna Mochi, by a majority of two versus one, the crime in the instant case was held to be one which deserved the extreme penalty of death. However, as far as the present trial is concerned, the occurrence of the crime is of February 1992 and the charges were framed in May 2004. More than nine years have gone thereafter also, and the appellants have been facing the trauma of the crime and the trial all this period. Besides, the manner in which the investigation has proceeded was far from satisfactory. In all cases where death sentences are to be awarded, the circumstances of the accused are also required to be considered. The leading judgment of conviction in Krishna Mochi, was rendered by Hon'ble Aggarwal J., and he noted in para 33 of his judgment that in the present case there was more or less a caste war between the haves and the have nots. The appellants belonged to the latter category. The present incident was claimed to be a retaliatory attack by the members of MCC. They are essentially the persons belonging to the scheduled castes and backward classes, and economically weaker and exploited sections of society. The attack was supposed to be in retaliation to an earlier attack by the Bhumihar community, led by the Ranvir Sena. It must also be noted that none of the witnesses have attributed to these appellants that they belonged to the MCC. It is quite possible that due to their poverty and caste conflict in the villages they were drawn in the melee and participated in the crime. At the same time no harm was done to women and children. Appellant

No.1 worked with one Jamuna Singh. No harm was done to any member from his family either. This is not to say that such acts are to be condoned, but at the same time after taking into account these circumstances of the accused, death sentence was not warranted. [Para 32] [237-A-H; 238-A-B]

3.4. Though the FIR was common, the testimonies in the two cases are in fact different, and on the analysis thereof one comes to the conclusion that one of the accused is not guilty, however, the other two are, but considering the circumstances in their case the death sentence is not warranted. The judgment convicting appellant no.2 is set-aside, and he will stand acquitted. As far as appellant nos.1 and 3 are concerned, although their conviction under the offences for which they were charged is upheld, the death sentence awarded to them is commuted to imprisonment for life, which is to mean the rest of their natural life. [Paras 33, 35] [238-C-D; 239-D-F]

Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka **AIR 2008 SC 3040: 2008 (11) SCR 93 and** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **2009 (6) SCC 498: 2009 (9) SCR 90 – relied on.**

Bachan Singh v. State of Punjab **1980 (2) SCC 684 and** *Machi Singh v. State of Punjab* **1983 (3) SCC 470: 1983 (3) SCR 413 – referred to.**

Case Law Reference:

2002 (3) SCR 1	**referred to**	**Para 4**
2002 (2) SCR 1173	**referred to**	**Para 5**
2007 (7) SCR 601	**cited**	**Para 10**
1994 (1) Suppl. SCR 360	**cited**	**Para 12**
AIR 1956 SC 181	**relie**	

1964 SCR 133	**relied on**	**Para 17**
1974 (2) SCR 609	**cited**	**Para 19**
1999 (8) SCC 701	**referred to**	**Para 23**
1996 (8) Suppl. SCR 225	**referred to**	**Para 23**
1990 (2) Suppl. SCR 108	**referred to**	**Para 28**
1980 (2) SCC 684	**referred to**	**Para 32**
1983 (3) SCR 413	**referred to**	**Para 32**
2008 (11) SCR 93	**relied on**	**Para 34**
2009 (9) SCR 90	**relied on**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 791 of 2009.

From the Judgment & Order dated 11.02.2009 of the Designated Court, Gaya in Case No. 430 of 1992.

WITH

Death Ref. Case (Crl.) No. 2 of 2011.

Kamini Jaiswal, Abhimanue Shreshta, Shomita Bakshi, K.G. Shaikh for the Appellants.

Nagendra Rai, Shantanu Sagar, Smarhar Singh, Abhishek Singh, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This Criminal Appeal No. 791/2009 filed by Vyas Kahar alias Vyas-jee, Naresh Paswan and Bugal Mochi alias Bugal Ravidas seeks to challenge the Death sentence awarded to them by the Sessions Judge-of the-Designated Court, Gaya, State of Bihar, by his judgment and order dated 11.02.2009 in C.R Case No.430 of 1992 arising out of Tekri PS Case No.19/1992. All of them have been

convicted and sentenced to death under Section 3(1) of The Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereafter referred to as TADA), and for life imprisonment on each count under Sections 302 read with 149, 364 r/w 149, 307 r/w 149 of Indian Penal Code (IPC in short), for rigorous imprisonment for 10 years under Section 436 r/w 149 IPC, and rigorous imprisonment for 1 year under Section 435 r/w 149 IPC. The Death Reference Case (R) No.2 of 2011 arises out of the award of death sentence made by the said learned Judge under Section 366 of the Code of Criminal Procedure, 1973 (Cr.P.C.) r/w Section 19 of TADA.

The initiation of prosecution

2. As per the First Information Report (FIR) dated 13.02.1992, there was a gruesome carnage in which 35 persons were killed, and 7 persons were injured. All of them belonged to the Bhumihar community of village Bara, police station Tekari, District Gaya, State of Bihar. The FIR was lodged on the basis of the fard-bayan of the informant Satendra Kumar Sharma who had stated that at 9:30 pm on 12.02.92, when the informant was preparing to go to bed, he heard sounds of explosions and firing. He saw the village ablaze. About 10-15 unknown people knocked at the door of his house violently, and told him that they had come to pick up one Dayanand and Haridwar Singh, as according to them they were hidden in one of the houses. When the informant opened the door, he was forcibly taken to the north-eastern side of the village, near a temple. He found many of his relatives sitting there, and their hands were tied at the back by the extremists. Soon thereafter 5-6 people including one of the appellants, viz. Bugal Mochi came there, and told the other extremists to bring all those people near the canal since their leader one Kirani Yadav had directed so. The ladies were sent home, and these people were taken near the canal. The informant claims that he had overheard the extremists saying that they did not intend to spare any person belonging to the Bhumihar

heard from the west, and some of the extremists, including Bugal Mochi fearing the arrival of police started slitting the necks of people. The informant somehow managed to escape, though he lists some 37 persons whose dead bodies he claims to have seen. He also mentions the name of 8 injured people. The extremists retreated soon after the arrival of police, shouting slogans of "MCC (Maoist Communist Centre) zindabad". According to him there were about 500 extremists in all, out of whom some 300 were armed with firearms and explosives, and many were in police uniform. He named 34 people in the FIR including two of the appellants viz. Vyas Ram and Bugal Mochi, but the name of Naresh Paswan is not mentioned.

3. On the statement of the informant, the police registered the case under Sections 3, 4 and 5 of TADA, and under Sections 147, 148, 149, 302, 307, 326, 436, 452, 341 and 342 of IPC. During the investigation, many arrests were made, and the confessional statement of Bihari Manjhi was recorded. After further investigation the charge-sheet was submitted against as many as 119 persons, out of whom 13 were brought to trial, showing the remaining persons as absconders.

Proceeding of the trial at the earlier stage

4. The learned Designated Judge who conducted the trial of the Case C.R. No.430 of 1992, by his judgment and order dated 8.6.2001, acquitted four of these accused viz. Nanhey Yadav, Nanak Teli, Naresh Chamar and Ramashish Mahto. Four other accused viz. Krishna Mochi, Dharmendra Singh alias Dharu Singh, Nanhey Lal Mochi and Veer Kuer Paswan alias Veer Kuer Dusadh were sentenced to death under Section 3(1) of TADA, and for life imprisonment under Section 302 r/w 149 of IPC. Their death sentence was confirmed by a bench of three judges of this Court by a majority of two versus one, on 15.04.2002 in Criminal Appeal No.761 of 2001 read with Death Reference No.1 of 2001 i.e. *Krishna Mochi and Others v. State of Bihar* reported in 2002 (6) SCC 81 (wherein the Senior Judge on the bench viz. Hon'ble Mr. Justice M.B. Shah,

rendered a separate judgment acquitting Dharmendra Singh and commuting the death sentence of the other three to life imprisonment).

5. Another group of accused facing the said trial viz. Bihari Manjhi, Ramautar Dusadh alias Lakhan Dusadh, Rajendra Paswan and Wakil Yadav though convicted under Section 3(1) of TADA, were sentenced to rigorous imprisonment for life on each count. Bihari Manjhi, Ramautar Dusadh and Wakil Yadav filed one appeal, and Rajendra Paswan filed a separate one. Both these appeals were heard together and allowed. Their conviction and sentence was set aside by this Court in a unanimous judgment of the same bench of three judges rendered on the same day i.e. 15.04.2002 in *Bihari Manjhi and Others v. State of Bihar* and *Rajendra Paswan v. State of Bihar,* reported in 2002 (4) SCC 352.

Acquittal of three other accused in the present proceeding

6. Three other accused viz. Tyagi Manjhi alias Tyagi-jee, Vijay Yadav and Madhusudan Sharma, were tried along with the present appellants subsequently, as all of them were absconding at the time of the earlier mentioned proceeding. The charges were framed against them on 15.04.04. As reflected in the presently impugned judgment and order, all the accused pleaded to be not guilty, and took the defence of false implication. At the end of the trial, the above referred Tyagi Manjhi, Vijay Yadav and Madhusudan Sharma were acquitted for want of sufficient evidence. The three appellants herein were, however, held guilty and sentenced to death amongst other punishments as mentioned earlier.

7. The designated court observed that as far as the accused, Tyagi Manjhi and Vijay Yadav were concerned, both of them had been named in the confessional statement of Bihari Manjhi but that confession was not accepted to be reliable by the Supreme Court in *Bihar*

State of Bihar (supra). The aforesaid confessional statement had not been produced before Chief Judicial Magistrate while producing the accused Bihari Manjhi before him, and the said statement was produced for the first time at the time of the trial i.e. after a lapse of five years from the date of its alleged recording. Thus it was hit by rule 15 of TADA (Prevention) Rules, 1987. In the absence of other evidence, these two accused were therefore acquitted, as it was held that the prosecution had not been able to prove the charges against them. As far as Madhusudan was concerned, he was named in the FIR at serial no.5. The only prosecution witness, PW2, Birendra Singh who had named him as one of the accused who had slit throats of the deceased, had failed to identify him in the dock. There was no other evidence to throw light on his participation in this incident. Madhusudan was also accordingly acquitted.

Prosecution case against the present appellants

8. Appellant No.1 Vyas Ram who was named in the FIR at serial no.1 had been identified by PW-2, Birendra Singh. He had identified him in the dock also. He had also been identified by PW-16 Brajesh Kumar, and PW-17 Bunda Singh who had identified all the appellants in the dock. Appellant No.3 Bugal Mochi had been identified by PW-2, PW-3 Lawlesh Singh and PW-15 Ram Sagar Singh apart from PW-16 and PW-17. Appellant No.2 Naresh Paswan was also identified by all of these witnesses except PW-3.

9. The evidence of these prosecution witnesses was held to be sufficient to show their participation in the crime since they were held to be members of an unlawful assembly, and were sentenced to death under Section 3(1) of TADA, and for life imprisonment on each count under Sections 302 r/w 149, 364 r/w 149, 307 r/w 149 of I.P.C, and for rigorous imprisonment for 10 years under Section 436 r/w 149 IPC and rigorous imprisonment for 1 year under Section 435 r/w 149 IPC.

Submissions by the appellants

10. The main grounds raised by the learned counsel for the appellants Ms. Kamini Jaiswal to challenge the impugned order are the non application of TADA in the present case, the effect of the amended Section 20A of TADA, unreliable investigation especially in the light of the non examination of the informant, and the belated recording of the statement of the witnesses. The learned counsel for the appellants, has referred to the supplementing opinion of Katju J. in *Vijay Kumar Baldev Sharma v. State of Maharashtra* reported in 2007 (12) SCC 687, and submitted that after TADA came to an automatic end on 24.05.1995, and when there was no further extension of the period for which the act would remain in force, the continuation of the proceeding thereafter was clearly violative of the constitution.

11. It was further submitted that the prosecution had not been able to prove the notification of the notified area as required under Section 2(f) of TADA, and therefore, the constitution of the designated court for this area under Section 9(1) of the act was bad. Section 9(1) of the TADA lays down that "The Central Government or the State Government may by notification in the official Gazette constitute one or more designated courts, for such an area or areas or for such case or class or group of cases as may be specified in the Notification." It is, therefore, necessary to prove that the area/ district where the occurrence took place is notified under Section 2(f) to invoke TADA.

12. The learned counsel for appellants also relied on the amended Section 20A which came into existence on 22-05-1993. According to Section 20A(1) no information in the form of FIR can be recorded by the police without prior written approval of the District Superintendent of the police. That is the condition precedent for recording of the FIR, and no cognizance of an offence can be taken without compliance of Section 20A(1). It was contended that in *Hiten*

State of Maharashtra reported in AIR 1994 SC 2623, this Court has held that the amended Section 20A had retrospective effect.

13. However, most of these arguments have already been rejected by the relevant observations in the majority judgment of this Court in Death reference 1/2001, i.e. *Krishna Mochi's* case (supra) decided on 15.04.02. Besides as far as applicability of Section 20A is concerned, the submission on behalf of the appellant is not wholly correct. In fact at the end of paragraph 25 of *Hitendra Thakur* (supra), this court has held that the amendment of 1993 would apply to the cases which were pending investigation on 22.5.1993, and in which the challan had not been filed in Court till then. The present case was registered on 13.02.1992, the charge-sheet was submitted on 12.02.1993, and the cognizance was taken 6 days thereafter i.e. on 18.02.1993. Thus, all these steps were taken before coming into force of the amendment act. Therefore, the appellants cannot claim the benefit of the amendment, nor does the case cited by them come to their rescue.

14. Non-examination of the informant is once again stressed by the appellants in defence. The informant is, as claimed by the appellants, a member of Sawarna Liberation Front, and was the accused in the carnage known as Miyanpur Narsanghar. Non examination of S.I. Ram Japit Kumar also weakens the prosecution's case, because according to the counsel for appellants he was entrusted with the preliminary investigation, but neither the case diary was brought in, nor was he examined.

15. The learned senior counsel for the State Mr. Rai on the other hand submitted that the above submission is completely misconceived, and reiterated the findings of the Apex Court in para 35 of *Krishna Mochi v. State* (supra) viz. that an F.I.R is not a substantial piece of evidence, and non-examination of the informant would not entitle the appellants to

an order of acquittal on this ground alone. The case should be examined on the basis of the evidence led by the prosecution. The carnage of Miyanpur had taken place after the carnage in the present case. The prosecution witnesses in the present case had supported the Fard-Bayan. As far as non-examination of Ram Japit Kumar is concerned, it was submitted that he was directed to investigate the case under the verbal orders of Suptd. of Police, Gaya. However, Ram Japit Kumar never made himself available for taking over the investigation of the case, and then the investigation was consequently entrusted to Suresh Chander Sharma, who had been examined as a prosecution witness (PW-21). This has also been observed in para 36 of the judgment in *Krishna Mochi* (supra).

16. Furthermore, the appellants have stressed upon the fact that no particular role was assigned to them, and in such a scenario there cannot be any conviction, leave aside the death sentence, for merely being present in the unlawful assembly at the place of incident. In *Baladin v. State of U.P* reported in AIR 1956 SC 181 a bench of three Judges held in paragraph 19 as follows:-

> "*19. … It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142, Indian Penal Code."*

The Court was concerned with a trial of some 57 persons for murder of 6 persons, out of whom 36 were convicted under Sections 148, 201/149 and 302/149 IPC, and 9 of whom were sentenced to death, and others were given different punishments for the roles assigned to them. This court examined the evidence, and upheld their sentences including death. Where some specific role was attributed to some of the accused like inciting the mob, the court held in paragraph 24 of the judgment that the theory of the per

seer will not help them. However, at the same time, where the court found that four of the appellants had not been assigned any particular part in the occurrence, nor any overt act had been attributed to them, they were given benefit of doubt and acquitted. The court held in paragraph 28 that "they might possibly have been spectators who got mixed up in the crowd."

17. In *Masalti v. State of U.P.* reported in AIR 1965 SC 202, the accused had brutally killed one Gayadin and four members of his family, and then set the bodies on fire in the middle of the field. This had happened due to rivalry between two factions. F.I.R disclosed 35 persons as assailants and five more persons were added to the list by a subsequent committal order leading to the charges being framed against all 40 persons. A bench of four judges of this Court did not accept the defence that specific role had not been attributed to the accused, and that the mere presence of the accused in the unlawful assembly at the time of the incident does not justify the imposition of death sentence. However, as a rule of prudence, the court fixed the minimum number of witnesses needed to accept prosecution case to base a conviction on. It was emphasised by the court that it was unsafe to rely on the evidence of persons who spoke generally without specific reference to the identity of the individuals, and their overt acts that took place in the course of incident. This judgment laid down the principle of common liability viz., that where a crowd of assailants, who were the members of an unlawful assembly proceed to commit a crime, in pursuance of the common object of that assembly, it is often not possible for the witnesses to describe the actual part played by each one of them, and when a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In that case several weapons were carried by different members of the unlawful assembly, and an accused who was the member of such an assembly and was carrying firearms was not permitted to take any advantage

of the fact that he did not use those firearms, though other members of the assembly used their respective firearms.

18. Thus, the defining ingredient for the involvement of the accused would be the common intention. Section-149 of I.P.C makes it amply clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence. *Masalti* (supra) emphatically brings home the principle that the punishment prescribed by Section-149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. At the same time we cannot ignore the law as laid down in *Baladin (*supra) that if a person is a mere bystander, and no specific role is attributed to him, he may not come under the wide sweep of Section 149.

19. The submission of the appellants which does merit a close scrutiny and a thorough examination by the court is, however, concerning the allegedly faulty investigation, especially the failure of the prosecution to conduct a Test Identification Parade, and the delay in recording the statements of the witnesses which according to them rendered the entire alleged identification of the appellants doubtful. The appellants claim to be entitled to the benefit of doubt as it is dangerous to uphold the death sentence of the appellants on such shaky evidence. The appellants draw support from a judgment in the case of *Jamuna Chaudhary v. State of Bihar* reported in AIR 1974 SC 1822. In that case benefit of doubt was given to some of the accused in view of the unsatisfactory material on record. At the same time, we must also note that in that very matter where there was evidence of an injured witness, deposing against the accused, the same was accepted. The appellants have also drawn the attention of the cou[illegible]et

of persons who were accused in the same case had been acquitted in the case of *Bihari Manjhi and Others v. State* (supra). However, here the bone of contention is with respect to their participation itself, in the light of the deficiency in the investigation. Those deficiencies also find a place in Hon'ble Mr. Justice Shah's observations in the *Krishna Mochi* case (supra).

Deficiencies in the prosecution:-

Non examination of Investigating Officer, Non submission of his case records

20. Suresh Chander Sharma (PW21) who had taken over the investigation after Ram Japit Kumar, had admitted in his cross examination that the entire investigation had been conducted by Ram Japit Kumar. PW 21 had not recorded the statements of many witnesses including the three chowkidaars who were the first to meet inspector Vijay Pratap Singh the then Station Incharge, and report the incident to him when he had come on patrolling, and heard the sounds of firing and explosion. The investigation conducted by Ram Japit had never been brought on record nor was his case diary submitted. PW21 had also admitted that the case diary was not with him, and that he had not seen the notification under TADA (para 61). It was also admitted that investigation has been done on the oral instructions of the Superintendent of Police without the necessary written orders from him or Director General of Police.

Statement of the SP

21. According to the statement of the Superintendent of Police Sunil Kumar, he received the information of Bihari Manjhi's arrest on 27.2.1992, and he went there to record the statement. He claims to have met Bihari Manjhi and told him to make his statement without fear or favour, and Bihari Manjhi did so. However, the same officer was not able to identify Bihari Manjhi in the Court. Moreover, the police personnel of P.S.

Tekari were busy in making arrests, and a number of V.I.Ps were visiting. So the investigation had been entrusted to Suresh Chander Sharma, Inspector from Chandauti Police Station. Surprisingly, he does not remember whether written permission, to invoke TADA was taken or not, and whether under TADA the investigation had to be carried out only by an officer of rank of DSP or above.

Station in-charge of Police Station Bodh Gaya, Virendra Kumar Singh.

22. He admitted that he was an accused in the murder case of Vasuki Yadav, nephew of Vakil Yadav, (one of the accused in the present case), and had filed a petition before the Supreme Court for quashing the cognizance taken against him in that case.

23. Hon'ble Mr. Justice Shah had drawn support from the principle laid down in *Masalti's* case to emphasise the impossibility of basing the conviction on such shaky investigation. Such a view had been taken in a catena of other judgments, like *Kamaksha Rai v. State of U.P.,* reported in 1999 (8) SCC 701. These principles were also followed in *Binay Kumar Singh v. State of Bihar* reported in 1997(1) SCC 283.

24. The delay in recording the statements of witnesses by the Investigating Officer and absence of the Test Identification Parade were also instrumental in demolishing the credibility of the investigation, and thus led to Hon'ble Mr. Justice Shah's dissenting opinion.

Analysis of the evidence on record

25. In the present case, as per the statement of PW 21 Suresh Chander Sharma the investigation prior to him had been conducted by PW22, Vijay Pratap Singh who was the sub inspector and the officer incharge of Tekari Police station at the time of occurrence, as Ram Japit wh[illegible]n

entrusted with the investigation had fallen ill. He further adds that case diary from para 1- 222 had been recorded by PW22 and the rest, from 223 to 538, by himself. He does not know whether S.P wrote any letter to the government for the invocation of TADA. PW 22 was the one who was the officer incharge of the Tekari P.S, and had gone for routine patrol at about 9 p.m. on 12.2.92, when he heard sounds of explosion. He heard from the Mukhia Sideshwar Yadav, whom he met on the way, that explosion was taking place in the north. On going there, he met three chowkidaars, Krishna Yadav, Bhola Paswan and Dafadar Ramparwesh Singh who told him that 'partywalas' had come, and set the village on fire, and were terrorising people by firing and exploding bombs. Interestingly, none of these people, through whom the police had come to know of the incident, were examined. Their fard bayan was not taken. PW 22 has stated in his deposition that he informed the SP of the gravity of the situation, and the SP came at the place of occurrence with his force and they all proceeded further. At this point of time, they were approached by one Sarwan Kumar, who had come running to them, after coming to know that they were police officers. His hands were tied at his back, he told them that extremists had come to the village, and had proceeded toward the east. Sarwan Kumar was also not examined. The reason given for this by PW22 is that Sarwan Kumar did not give the entire account of the happening, and because the entire village was on fire. The statements of none of the women who were weeping near the culvert were recorded either. Understandably, they were very upset, and possibly not in the position to give their statements. However, this does not explain as to why the statements of none of those people from whom the police had originally come to know of the incident, had been recorded, and why the F.I.R was recorded on the Fard bayan of the informant Satyendra Sharma later at 3 a.m. in the morning when the chowkidaars, the mukhiya and Sarwan Singh had much earlier informed the police about the incident. In fact statements of none of the women, and persons belonging to the communities of

Brahmans, schedule castes or Yadavs were recorded by PW-22.

26. PW 22 claims to have taken over the investigation after Ram Japit Kumar was not available at the place of occurrence, but he did not have any written orders or approval for proceeding with the investigation. In para 28 of his deposition it is also revealed that none of the material exhibits of the case were submitted to the Court as the Malkhana had been attacked by the extremists in 1996, and all its articles were, consequently destroyed. In para 35 of his cross examination he had admitted that it had been recorded in para 23 of the police case diary that Ram Japit was busy with the investigation. In para 2 of the case diary it was mentioned that investigation of this case had been endorsed by the SP to Ram Japit Kumar who was at the place of occurrence. This contradicts his statement (para 26) that Ram Japit was not available at the place of occurrence.

27. In para 43, PW22 admits that no T.I.P was conducted of any suspect. PW22 investigated the case for only 8 days, and did not mention any time and place of the examination of any of the witnesses. There are also discrepancies in the depositions of PW21 and PW22 as far as the extent of case diary recorded by PW22 is concerned. PW 21 has stated it to be from para 1-222, while PW22 has stated it to be from 2-22 in para 27, and in para 40, he has stated it to be from 1-212. In addition to this, no seizure list was prepared. In the deposition of PW 20, it was found that informant was never seen after the recording of fard bayan and further statement. In para 12 he also states that there was no need for obtaining sanction from government for invoking TADA as there was provision to that effect. He did not specify the provision.

With evidence being in such a state, the question would be - who could be convicted ?

28. We cannot forget that in *Kris* e

accused were tried on the basis of same FIR, and two Judges in a bench of three upheld the conviction of Krishna Mochi, Dharmendra Singh, Nanhe Lal Mochi and Veer Kuer Paswan. Hon'ble Mr. Justice M.B. Shah, in paragraph 96 of his judgment, noted that the investigation was totally defective, the witnesses had exaggerated to a large extent, they had not assigned any specific role to the accused except their presence in the mob at the time of offence, they nowhere stated that the identified accused were having any weapon of offence, and the investigating officers had not recovered any weapon of offence or any incriminating article from their possession. In paragraph 96 (2) he referred to *Dilavar Hussain v. State of Gujarat* 1991 (1) SCC 253 and observed that when the accused are charged with heinous brutal murders punishable with highest penalty, the judicial approach in such cases has to be cautious, circumspect and careful. He acquitted Dharmendra Singh. As far as the other accused were concerned, although he upheld that conviction, presumably in view of the oral evidence on record, in view of the deficiencies noted by him, he altered their death sentence to life imprisonment.

29. In the present case, even if we decide to ignore the similar deficiencies in the prosecution, and look into the oral evidence which has come on record, the case of prosecution against appellant no: 2, Naresh Paswan is rather weak. His name was not mentioned in the FIR. PW-2 Birendra Singh who is an injured witness, though states in the dock that he had seen the appellants slitting the throats, he failed to identify Naresh Paswan in Court. None of the other witnesses including PW-3 Lawlesh Singh, who is another injured witness, have attributed any role to him. None of them said that he was a member of MCC. It is material to note that Madhusudan who was named at Sr. No.5 in the FIR also faced a similar allegation. It was PW-2 Birendra Singh who named Madhusudan as one of the accused who slit the throats of the deceased, but had failed to identify him in the dock. In the absence of other witnesses throwing any light on his participation in the occurrence,

Madhusudan was acquitted by the learned designated Judge. In paragraph 39 of his judgment in *Krishna Mochi* (supra) Hon'ble Mr. Justice Aggarwal, rejected the theory of some of the accused being mere sight-seers. This was because, as the paragraph indicates, a specific role was attributed to them such as entering into the houses by breaking open the doors, and forcibly taking the inmates, tying their hands and taking them to the temple and thereafter near to the canal, where their legs were tied, and thereafter killing some of them. As far as Naresh Paswan is concerned, no such role is attributed to him by any of the witnesses. This being so, Naresh Paswan is entitled to have the same yardstick applied to him as was applied to Madhusudan. In the circumstances, in our view, Naresh Paswan deserves an acquittal.

30. As far as the other appellant no.3, Bugal Mochi is concerned, in addition to his name being mentioned in the FIR as one who was slitting the throats, he was identified by PW-2 injured witness Birendra Singh in Court. Bugal Mochi is attributed the role of slitting the throats by Birendra Singh in his oral deposition. Though other witnesses did not attribute any specific role to him, he was identified by them as a participant in the crime.

31. As far as appellant no.1, Vyas Ram is concerned, though his name was mentioned in the FIR, the heinous act of slitting the throats was not attributed to him in the FIR. PW-2, Birendra Singh has however stated in oral evidence that Vyas Ram was slitting the throats, and he identified him in the court as well, though no other witness has attributed any particular role to him. Birendra Singh being an injured witness, his testimony cannot be ignored. It is true that his testimony was not accepted in *Krishna Mochi,* but that was so with respect to other accused. In the present case, he has attributed a specific role to these two accused. There is no reason to discard his evidence. The conviction of these two accused under Section 302 of IPC and other charges will have to be upheld.

Question of sentence

32. Then comes the question of sentence to appellant nos.1 and 3 i.e. Vyas Ram and Bugal Mochi. It is true that in *Krishna Mochi* (supra), by a majority of two versus one, the crime in the instant case was held to be one which deserved the extreme penalty of death. This was apparently on the lines of the judgment of the Constitution Bench in *Bachan Singh v. State of Punjab* 1980 (2) SCC 684 as being one belonging to the rarest of the rare category. We have, however, to note that as far as the present trial is concerned, the occurrence of the crime is of February 1992 and the charges were framed in May 2004. More than nine years have gone thereafter also, and the appellants have been facing the trauma of the crime and the trial all this period. Besides, as noted earlier, the manner in which the investigation has proceeded was far from satisfactory. In all cases where death sentences are to be awarded, the circumstances of the accused are also required to be considered as laid down by the Constitution Bench in *Bachan Singh* (supra) and later by a bench of three Judges in *Machi Singh v. State of Punjab* 1983 (3) SCC 470. The leading judgment of conviction in *Krishna Mochi* (supra), was rendered by Hon'ble Aggarwal J., and he noted in para 33 of his judgment that in the present case there was more or less a caste war between the haves and the have nots. The appellants belonged to the latter category. The present incident was claimed to be a retaliatory attack by the members of MCC. They are essentially the persons belonging to the scheduled castes and backward classes, and economically weaker and exploited sections of society. The attack was supposed to be in retaliation to an earlier attack by the Bhumihar community, led by the Ranvir Sena. It must also be noted that none of the witnesses have attributed to these appellants that they belonged to the MCC. It is quite possible that due to their poverty and caste conflict in the villages they were drawn in the melee and participated in the crime. At the same time no harm was done to women and children. Appellant No.1 Vyas Ram worked with

one Jamuna Singh. No harm was done to any member from his family either. This is not to say that such acts are to be condoned, but at the same time we have to consider as to whether after taking into account these circumstances of the accused, death sentence was warranted. We do not think so.

33. It was emphasised before us on behalf of the State that in *Krishna Mochi* (supra), the death sentence was upheld as against four accused, by a majority of two versus one, on the basis of an FIR which is common to the present case, and that this was so done by relying upon oral testimonies recorded in that case which are somewhat similar to those in the present case. In this connection we must state that though the FIR was common, the testimonies in the two cases are in fact different, and on the analysis thereof we have come to the conclusion that one of the accused is not guilty, however, the other two are , but considering the circumstances in their case the death sentence is not warranted.

34. Even with respect to the death sentence awarded in *Krishna Mochi* (supra), having considered the dissenting opinion rendered by Hon'ble Shah J., we must note the approach adopted by this Court, subsequently, in a judgment of three judges in the case of *Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka* reported in AIR 2008 SC 3040. A Sessions Court and the High Court had imposed death sentence on the appellant in that matter, and two judges of this court who heard the matter had differed on the issue of sentence. The matter was referred to three judges. The Court substituted the death sentence by imprisonment for life, though directed that the appellant shall not be released till the rest of his life. It was observed in paragraph 37 of the judgment as follows:-

> *"37..... The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court ....."*

We may as well profitably refer to what was observed in para 149 of *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* reported in 2009 (6) SCC 498 which is to the following effect:-

> *"149. Principle of prudence, enunciated by* ***Bachan Singh*** *is sound counsel on this count which shall stand us in good stead – whenever in the given circumstances, there is difference of opinion with respect to any sentencing prop (sic)/rationale, or subjectivity involved in the determining factors, or lack of thoroughness in complying with the sentencing procedure, it would be advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment."*

35. (i) In the circumstances, Crl. Appeal No.791 of 2009 is allowed in part. The judgment convicting appellant no.2, accused Naresh Paswan is set-aside, and he will stand acquitted. He is acquitted of the offences for which he was charged, and it is ordered that he be released forthwith if not required in any other case.

(ii) As far as appellant nos.1 and 3, accused Vyas Ram and Bugal Mochi are concerned, although their conviction under the offences for which they were charged is upheld, the death sentence awarded to them is commuted to imprisonment for life, which is to mean the rest of their natural life.

(iii) Consequently, the Death Reference Case (R) No.2 of 2011 filed by State of Bihar is hereby dismissed.

B.B.B. Appeal partly allowed & Death Reference dismissed.

STATE OF RAJASTHAN
v.
A.N. MATHUR & ORS.
(Civil Appeal No. 8469 of 2013)

SEPTEMBER 23, 2013

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

Service Law – Retiral benefits – Payment of – Change in policy – Resolutions passed by the Board of Management of the University in relation to giving options to the University employees for changing from Contributory Provident Fund scheme to Pension Scheme – Change effected subsequently set aside by the appellant-State – Justification – Held: Though the University is an autonomous body, any financial liability incurred by it is to be ultimately discharged with the financial help of appellant-State – Inspite of the clear and unambiguous provisions of s.39, the Board of Management of the University did not get necessary assent of the Chancellor, i.e. the Governor of the State before effecting the change in the scheme with regard to payment of the retiral benefits to its employees – The University could not have unilaterally decided to give huge financial benefit to its employees without taking consent of the Chancellor, i.e. the Governor of the State in violation of s.39 – Control exercised by the State on the University in the financial matters is completely justified – The State was entitled to reject the change effected by the University – Rajasthan Agricultural University, Udaipur Act, 2000 – ss.2(h) r/w s.8 and ss.38 and 39 – Pension Rules, 1990.

The University in question is an autonomous body constituted under the Rajasthan Agricultural University, Udaipur Act, 2000, but dependent on the appellant-State in its financial matters, especially in relation to expenditure pertaining to salary and allowances given to

its employees. On 7th December, 2000, the Board of Management of the University passed resolution giving option to its employees to either continue under the existent Contributory Provident Fund Scheme or opt for a pension scheme under the Pension Rules, 1990. Another resolution in this regard was passed by the Board of Management of the University on 18th December, 2009.

Before giving option under the resolutions dated 7th December, 2000 and 18th December, 2009, the University had not consulted the appellant. Upon getting information about the Pension Scheme, the appellant, under its order dated 3rd June, 2011, did not approve the same. When the order dated 3rd June, 2011 issued by the appellant was communicated to the University, by order dated 30th November, 2011, the University withdrew its resolutions dated 7th December, 2000 and 18th December, 2009.

The University employees approached the High Court by filing several writ petitions. The High Court quashed the order dated 3rd June, 2011 passed by the appellant, and, therefore the present appeals.

Allowing the appeals, the Court

HELD: 1. According to Section 39 of the Act, it was obligatory on the part of the Board of Management of the University to submit the resolutions dated 7th December, 2000 and 18th December, 2009 to the Chancellor i.e. to the Governor of the State of Rajasthan before inviting options from the employees. The High Court ought not to have constrained the University to continue to pay pension to the respondent-employees, especially in view of the fact that the change effected in the payment of retiral benefits to the employees was never approved by the Chancellor of the University as required under

Section 39 of the Act. [Paras 23, 27] [250-H; 251-A; 252-B-C]

2. The provisions in Section 39 of the Act are of vital importance because the legislature wanted to have some control over the University, though the University is an autonomous body. The reason behind having such a control could be for the fact that the University is given substantial financial assistance by the appellant as seen from the provisions of Section 36 of the Act. Any financial liability incurred by the University is to be ultimately discharged by the University with the financial help of the appellant-State. [Para 28] [252-D-E]

3. Inspite of the clear and unambiguous provisions of Section 39 of the Act, the Board of Management of the University did not get necessary assent of the Chancellor, i.e. the Governor of the State of Rajasthan before effecting the change in the scheme with regard to payment of the retiral benefits to its employees. When the appellant is reimbursing the expenditure incurred by the University by giving grants or financial aids in one form or the other, the control exercised by the State on the University in the financial matters is completely justified. The University cannot unilaterally decide to give huge financial benefit to its employees without taking consent of the Chancellor, i.e. the Governor of the State of Rajasthan in violation of the provisions of Section 39 of the Act. [Para 29] [252-E-F, H; 253-A-B]

4. From the contents of the order dated 3rd June, 2011, passed by the State of Rajasthan it is clear that because of the changed policy adopted by the University in the matter of payment of the retiral benefits to its employees, financial burden on the University would be substantially increased and ultimately that burden will have to be discharged by the State of Rajasthan. As the University had taken the decision to [illegible]s

employees for changing the manner in which they were to be given retiral benefits in violation of Section 39 of the Act, the State of Rajasthan was entitled to reject the change effected by the University. The High Court was not correct while quashing and setting aside the order dated 3rd June, 2011 passed by the appellant-State of Rajasthan. [Paras 30, 31] [253-B-D, F]

5. So far as the submission with regard to violation of the principles of natural justice is concerned, by not giving hearing to the concerned employees, the action of the University would not become void. Violation of one of the principles of natural justice would make the action voidable but not void. Even if the University gives notices to all the employees calling upon them to show cause as to why the option exercised by them should not be cancelled so as to restore the original scheme of the Contributory Provident Fund, and even after considering the replies of the employees, the University cannot continue to give pension to the employees. If issuance of show cause notice is a mere formality, that would not affect the decision taken by the University in pursuance of the order dated 3rd June, 2011 because the order dated 3rd June, 2011 passed by the appellant-State is absolutely legal and by virtue of the said order, the resolutions dated 7th December, 2000 and 18th December, 2009 passed by the University have been quashed. Even if the employees were not given any notice, the final decision taken by the University is not bad in law. The order dated 3rd June, 2011 passed by the appellant-State shall operate and the employees shall be given retiral benefits as per the Contributory Provident Fund Scheme which was in force prior to 7th December, 2000. [Paras 33, 34, 35 and 36] [254-A-F, G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8469 of 2013.

From the Judgment & Order dated 19.7.2012 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (Writ) No. 431 of 2012.

WITH

C.A. Nos. 8470, 8471, 8472, 8473, 8474, 8475, 8476, 8477, 8478, 8479 and 8480 of 2013.

Dr. Manish Singhvi, AAG, Pragati Neekhra, H.D. Thanvi, Rishi Motoliya, Preeti Thanvi, Sarad Kumar Singhania for the Appellant.

S.S. Shamshery, V.M. Vishnu, Arun Bhardwaj, Bharat Sood, C.S. Ashri Milind Kumar for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted in all the special leave petitions.

2. Being aggrieved by the judgment delivered in D.B. Civil Special Appeal (Writ) No.431 of 2012 in S.B. Civil Writ Petition No.9843 of 2011 dated 19th July, 2012, delivered by the High Court of Rajasthan, the appellant-State of Rajasthan has filed the present set of appeals.

3. As all the appeals arise out of a common judgment delivered by the Rajasthan High Court, all the appeals were heard together at the request of the learned counsel appearing for the concerned parties.

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

Maharana Pratap University of Agriculture and Technology (hereinafter referred to as 'the University') is an autonomous body performing the function of making provisions for imparting education in different branches of study, particularly Agriculture,

Horticulture, Veterinary Science, Animal Husbandry etc. to the students and is constituted under the provisions of the Rajasthan Agricultural University, Udaipur Act, 2000 (hereinafter referred to as 'the Act'). The University is the employer of other respondents, who had been either working under the University and now retired or they are still in the employment of the University.

5. The University had framed a Provident Fund Scheme for its employees. Accordingly, in the past, upon retirement, the employees of the University used to get their own contribution as well as contribution of the University by way of retiral benefits as per the provisions of the said scheme. On 7th December, 2000, the Board of Management of the University passed a resolution whereby it gave an option to its employees to either continue under the Contributory Provident Fund Scheme or to opt for a pension scheme under the Pension Rules, 1990. Certain employees had opted for the Pension Scheme. Once again, the Board of Management of the University passed another resolution on 18th December, 2009 inviting options from the employees as to whether they wanted to join the Pension Scheme or wanted to continue under the Contributory Provident Fund Scheme. In pursuance of the second resolution, some more employees had opted for the Pension Scheme.

6. Though the University is an autonomous body constituted under the provisions of the Act, it is dependant on the appellant-State in its financial matters, as the University is unable to generate sufficient funds to meet with its expenditure. According to Section 36 of the Act, the appellant-State has to provide grant to the University to meet its expenditure, especially in relation to the expenditure pertaining to salary and allowances given to its employees. Thus, the University gets substantial funds from the appellant. Due to the option exercised by several employees in favour of the Pension Scheme, financial burden of the University had been substantially increased and the said burden was ultimately to

be discharged by the appellant. It is pertinent to note here and it is an admitted fact that before giving such an option under the resolutions dated 7th December, 2000 and 18th December, 2009, the University did not even consult the appellant in the matter of changing the scheme with regard to payment of retiral benefits to its employees.

7. The appellant was unaware of the resolutions passed by the Board of Management of the University, whereby its employees were offered an opportunity to opt for the Pension Scheme, but upon getting information about the change effected by the University regarding implementation of the Pension Scheme, upon due deliberation by the Finance Department of the appellant, under its order dated 3rd June, 2011, the appellant did not approve the same.

8. When the order dated 3rd June, 2011 issued by the appellant had been communicated to the University, by an order dated 30th November, 2011, the University withdrew its resolutions dated 7th December, 2000 and 18th December, 2009.

9. As a result of the withdrawal of the two resolutions by the University on 30th November, 2011, the employees, who had opted for the Pension Scheme were deprived of the benefit of the Pension Scheme, and the University had to make necessary accounting adjustments for making payment of the provident fund to the employees, which the employees were entitled to upon their retirement. Some of the employees were very much in service and therefore, there was no question of any recovery and the University had to merely pass necessary book entries. The employees who had opted for the Pension Scheme and had already retired had either to make payment to or receive some amount from the University upon change made in the scheme.

10. Upon the Pension Scheme being abolished and as the

employees had to either pay back the amount of pension received from the University or had to accept the Contributory Provident Fund scheme, they had approached the High Court of Rajasthan by filing several writ petitions. Some of the employees, who had not opted for the pension scheme, had also filed petitions praying that they be permitted to opt for the pension scheme even if there was delay in opting for the same. The said writ petitions had been heard together by the learned single Judge of the High Court and they had been allowed by a common judgment dated 5th April, 2012. By virtue of the said judgment, the order dated 3rd June, 2011 passed by the appellant- the Government of Rajasthan had been quashed and as a result thereof, the employees who had opted for the Pension Scheme were to be paid pension by the University in accordance with the Pension Rules.

11. Being aggrieved by the aforestated judgment delivered by the learned Single Judge, the University preferred intra-court appeals and the said appeals have been dismissed by the Division Bench of the Rajasthan High Court by virtue of the impugned judgment and therefore, the State of Rajasthan has filed these appeals because ultimately, the burden of payment of pension to the employees would be passed over to the State of Rajasthan as per Section 36 of the Act.

12. The learned counsel appearing for the appellant, while challenging the validity of the impugned judgment as well as the judgment delivered by the learned single Judge of the Rajasthan High Court had mainly submitted that the Resolutions passed by the Board of Management of the University inviting options in relation to the Pension Scheme were in violation of the provisions of Section 39 of the Act. Extracts of Sections 38 and 39 of the Act are reproduced hereinbelow:

> **"38. Statutes** – Subject to the provisions of this Act, the Statutes of the university may provide for any matter connected with the affairs of the university and shall in

> particular, provide the following namely:-
>
> 1. to 6. xxx xxx xxx.
>
> 7. Establishment of pension and insurance schemes for the benefit of officers, teachers and other employees of the University and the rules, terms and conditions of such schemes.
>
> 8 to 14. xxx xxx xxx"
>
> **"39. Statutes how made** –
>
> 1. Statutes under this Act shall be proposed by the Board and submitted to the Chancellor for his assent and shall come into force only after the assent is received and notified by the Vice-Chancellor.
>
> 2. Any statutes may be amended or repealed by the Board with the assent of the Chancellor.
>
> 3. All Statutes made under this Act shall be published in the official Gazette."

13. The learned counsel appearing for the appellant had vehemently submitted that before considering the change in the scheme with regard to giving different retiral benefits to its employees, the Board of Management of the University ought to have taken consent of the Chancellor, i.e. the Governor of the State of Rajasthan as per provision of Section 39 of the Act. Thus, without consent of the State of Rajasthan, who is ultimately going to be burdened with the financial liability relating to payment of the retrial benefits, the University could not have changed the policy with regard to payment of the retiral benefits.

14. The learned counsel had then submitted that when the facts about the resolutions passed by the Board of Management of the University, which h[illegible]d

by the Chancellor, were brought to the notice of the State of Rajasthan, the said resolutions were duly considered by the State of Rajasthan and when it was found that because of the said resolutions financial liability of the State was being increased for no justifiable reason, the State was constrained to pass the order dated 3rd June, 2011, whereby both the resolutions passed by the Board of Management of the University had been quashed and set aside.

15. Thus, the short but forceful submission of the learned counsel appearing for the State was that the change effected in the scheme under which the employees were given retiral benefits was not legal or was not in accordance with the provisions of the Act and therefore, the employees who had opted for the Pension Scheme cannot be given pension and they will have to continue with the Contributory Provident Fund scheme. In the circumstances, he had prayed that the appeals should be allowed and the impugned judgment confirming the judgment of the learned Single Judge of the Rajasthan High Court should be quashed and set aside.

16. On the other hand, the learned counsel appearing for the University had passively supported the submissions made by the learned counsel appearing for the State and he had to admit the fact that before inviting options from the employees in pursuance of the two resolutions referred to hereinabove, approval of the Chancellor, i.e. the Governor of the State of Rajasthan had not been obtained by the Board of Management of the University.

17. The appeal was vehemently opposed on behalf of the employees of the respondent- University.

18. The learned counsel appearing for the employees had submitted that the employees had opted for the Pension Scheme within the period prescribed by the resolutions passed by the Board of Management of the University and therefore,

the University had no right to make any change in the policy thereafter.

19. It had been further submitted that some of the respondent employees had also started getting pension upon their retirement in pursuance of the option exercised by them. According to the learned counsel, it would be unjust to change the scheme with regard to the retiral benefits considering the lapse of time and it would be unfair to the employees who are getting pension as per the option exercised by them. It had been further submitted that the change effected in the policy with regard to payment of retiral benefits by the University was retrospective in nature and therefore, it was bad in law.

20. The learned counsel appearing for the employees had also submitted that before effecting change in the scheme, no notice was ever issued to the employees and therefore, the action of the withdrawal of the Pension Scheme was against the principles of natural justice.

21. The learned counsel appearing for the employees had supported the reasons given in the impugned judgment and had also submitted that certain other universities in the State of Rajasthan were also giving benefit of a pension scheme to its employees and therefore, there was no justification on the part of the University from preventing its employees from getting the benefit of the Pension Scheme. He had, therefore, submitted that the appeals should be dismissed.

22. We have heard the learned counsel at length and have carefully considered the provisions of the Act, and the resolutions passed by the University as well as the order dated 3rd June, 2011 passed by the appellant-State.

23. Upon carefully going through the statutory provisions, we are of the view that the High Court ought not to have constrained the University to continue to pay pension to the respondent-employees, especially in vi e

change effected in the payment of retiral benefits to the employees was never approved by the Chancellor of the University as required under Section 39 of the Act.

24. As stated hereinabove, though the University is an autonomous body, it is much dependent on the State of Rajasthan in its financial matters. It gets substantial funds from the State for performing its duties and possibly for the said reason the State has control over it in the financial affairs. Be that as it may, Section 39 of the Act makes it mandatory to get approval or assent of the Chancellor of the University before effecting any change in the Statute.

25. Section 38 of the Act clearly indicates that the University can provide for any matter connected with the affairs of the University and in particular, the matters which have been referred to under Section 38 of the Act. In the instant case, we are concerned with clause 7 of Section 38 of the Act, which also pertains to establishment of pension scheme for the benefit of the employees of the University. Thus, it is open to the University to frame or change any scheme with regard to payment of retiral benefits to its employees.

26. In the instant case, the University wanted to change the scheme–from the Contributory Provident Fund scheme to the Pension Scheme. The University had given option to its employees to opt either for the Pension Scheme or to continue with the Contributory Provident Fund scheme and for that purpose, two resolutions, viz. resolutions dated 7th December, 2000 and 18th December, 2009 had been passed by the Board of Management of the University. In the said process, the University missed to look at the provisions of Section 39, which makes it obligatory for the Board of Management of the University to submit the proposed amendment to the Chancellor of the University for his assent. The amended statute would come into force only after the assent is received and the same is notified by the Vice-Chancellor of the University. The

Chancellor, as per the provisions of Section 2(h) read with Section 8 of the Act, is the Governor of the State of Rajasthan.

27. According to the aforestated provision of Section 39 of the Act, it was obligatory on the part of the Board of Management of the University to submit the resolutions dated 7th December, 2000 and 18th December, 2009 to the Chancellor i.e. to the Governor of the State of Rajasthan before inviting options from the employees. If the assent of the Chancellor, i.e. the Governor of the State of Rajasthan is not received by the University, the amended statute would not come into force.

28. The aforestated provisions in Section 39 of the Act are of vital importance because the legislature wanted to have some control over the University, though the University is an autonomous body. The reason behind having such a control could be for the fact that the University is given substantial financial assistance by the appellant as one can see from the provisions of Section 36 of the Act. Any financial liability incurred by the University is to be ultimately discharged by the University with the financial help of the appellant-State.

29. In spite of the clear and unambiguous provisions of Section 39 of the Act, the Board of Management of the University did not get necessary assent of the Chancellor, i.e. the Governor of the State of Rajasthan before effecting the change in the scheme with regard to payment of the retiral benefits to its employees. The change in scheme would result into a huge financial liability on the University, which ultimately will have to be borne by the appellant- the State of Rajasthan. Had the University been having complete autonomy and had been not dependent on the State of Rajasthan in its financial matters, possibly Section 39 of the Act would not have been incorporated in the Act in the form in which it is at present. When the appellant is reimbursing the expenditure incurred by the University by giving grants or financial aids in one form or

the other, the control exercised by the State on the University in the financial matters is completely justified. The University cannot unilaterally decide to give huge financial benefit to its employees without taking consent of the Chancellor, i.e. the Governor of the State of Rajasthan in violation of the provisions of Section 39 of the Act.

30. From the contents of the order dated 3rd June, 2011, passed by the State of Rajasthan it is clear that because of the changed policy adopted by the University in the matter of payment of the retiral benefits to its employees, financial burden on the University would be substantially increased and ultimately that burden will have to be discharged by the State of Rajasthan. As the University had taken the decision to give an option to its employees for changing the manner in which they were to be given retiral benefits in violation of Section 39 of the Act, the State of Rajasthan was entitled to reject the change effected by the University.

31. For the aforestated reasons, in our opinion, the order dated 3rd June, 2011 passed by the appellant, whereby both the resolutions passed by the University in relation to giving options to its employees for changing the Contributory Provident Fund scheme to the Pension Scheme, is absolutely just and legal. We are, therefore, of the view that the High Court was not correct while quashing and setting aside the order dated 3rd June, 2011 passed by the appellant-State of Rajasthan.

32. A submission had been made on behalf of the employees that some other universities in the State of Rajasthan are giving pension to its employees. Be that as it may, each University has a different set of rules and if another university had adopted a different policy in accordance with law or as per its rules and regulations, we cannot say that the order dated 3rd June, 2011 passed by the appellant is incorrect. According to us, the said submission is not relevant and therefore, we do not accept the said submission.

33. So far as the submission with regard to violation of the principles of natural justice is concerned, in our opinion, by not giving hearing to the concerned employees, the action of the University would not become void. Violation of one of the principles of natural justice would make the action voidable but not void.

34. Let us see as to what would happen if the University gives notices to all the employees calling upon them to show cause as to why the option exercised by them should not be cancelled so as to restore the original scheme of the Contributory Provident Fund. Even after considering the replies of the employees, the question is whether the University can continue to give pension to the employees? Answer to the question would be in the negative. If issuance of show cause notice is a mere formality, in our opinion, that would not affect the decision taken by the University in pursuance of the order dated 3rd June, 2011 because the order dated 3rd June, 2011 passed by the appellant-State is absolutely legal and by virtue of the said order, the resolutions dated 7th December, 2000 and 18th December, 2009 passed by the University have been quashed.

35. In view of the above facts, we are of the view that even if the employees were not given any notice, the final decision taken by the University is not bad in law.

36. In the aforestated circumstances, we quash and set aside the impugned judgment delivered by the Division Bench of the Rajasthan High Court, which has confirmed the judgment delivered by the learned single Judge. The order dated 3rd June, 2011 passed by the appellant-State shall operate and the employees shall be given retiral benefits as per the Contributory Provident Fund Scheme which was in force prior to 7th December, 2000. The University shall make necessary adjustments so as to revive the Contributory Provident Fund Scheme either by accounting entries or by making payment of appropriate amount in case of retired

of whom changes are to be affected. We clarify that if prior to passing the resolution dated 7th December, 2000 by the Board of Management of the University, if there was any scheme about payment of pension to its employees and if any of the employees had opted for the said scheme, payment of pension to such employees would not be affected by virtue of this judgment.

37. The appeals are allowed with no order as to costs.

B.B.B. Appeals allowed.

VINOD RAGHUVANSHI
v.
AJAY ARORA AND ORS.
(Criminal Appeal No. 1477 of 2013)

SEPTEMBER 23, 2013

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

Code of Criminal Procedure, 1973 – s.482 – Excise auction – Liquor contract awarded to partnership firm – Complaint made by respondent no. 1 that while negotiating and accepting the contract, partnership deed dated 5.3.2002 was utilised, wherein respondent no.1 had also invested a huge amount, but the said deed was subsequently replaced by a forged/fabricated deed dated 6.3.2003 in which respondent no.1 was not a partner – Magistrate registered case against appellant-District Excise Officer and two others u/ss.420 and 120-B – Application filed by appellant u/s.482 CrPC for quashing of the complaint – Dismissed by High Court – Propriety – Held: Proper – Serious allegations of cheating by replacing the partnership deed dated 5.3.2002 by a forged partnership deed dated 6.3.2003 with the connivance of the appellant and other officers in his office were made – Particulars were furnished to establish that the partnership deed dated 6.3.2003 was a forged document – Reports submitted by the Addl. Excise Commissioner and the Deputy Commissioner of Excise made it evident that replacement of partnership deed could have not been possible without the connivance of appellant and others – Question of delay in lodging complaint totally immaterial since all the facts came to the notice of the complainant at a much belated stage when the report etc. were placed by the State Authorities before the High Court – For taking cognizance or issuing process in a complaint case, the Court must have merely a prima facie satisfaction that there is some material on record to proceed

against the accused – In the instant case, the Magistrate issued process after being fully satisfied that some material was available on record to proceed against the appellant and others – Penal Code, 1860 – ss. 420 and 120-B.

Code of Criminal Procedure, 1973 – s.482 – Criminal proceedings – Quashing of – Scope – Held: An investigation should not be shut out at the threshold if the allegations have some substance – When a prosecution at the initial stage is to be quashed, the test to be applied by the court is whether the uncontroverted allegations as made, prima facie establish the offence – At this stage neither the court can embark upon an inquiry, whether the allegations in the complaint are likely to be established by evidence or nor the court should judge the probability, reliability or genuineness of the allegations made therein.

A partnership firm constituted with the intention to carry on the business of liquor was reconstituted and a deed dated 5.3.2002 was executed inducting among others the respondent no.1 as a partner. The firm participated in the excise auctions and being a successful bidder, the liquor contract was awarded to it. Respondent no. 1 filed complaint alleging that while negotiating and accepting the liquor contract for the year 2003-2004, the partnership deed dated 5.3.2002 was utilised, wherein respondent no.1 had also invested a huge amount, but the said deed was subsequently replaced by a forged/fabricated deed dated 6.3.2003 in which the respondent no.1 was not a partner. Respondent no.1 also filed representation before the Excise Commissioner. 'BKV', the Addl. Excise Commissioner, conducted inquiry and submitted report dated 2-12-2005 to the effect that the appellant, being a District Excise Officer, was responsible for replacement of the partnership deed as it was not practically possible to do so without his connivance.

Subsequently, respondent no.1 filed Writ Petition before the High Court seeking direction for initiation of departmental proceedings against the appellant on the basis of inquiry report dated 2.12.2005, however, the case was referred to the Excise Commissioner for further inquiry. 'DRJ', the Deputy Commissioner of Excise submitted inquiry report dated 1.5.2007 recording findings similar to the report dated 2.12.2005 and expressing the view that the appellant being the head of the District Excise Office, Bhopal, was indirectly responsible. The State Government, however, informed the Excise Commissioner that no ground was found to initiate departmental inquiry against the appellant.

Subsequently, respondent no.1 filed complaint against the appellant and two others in the court of Chief Judicial Magistrate. The CJM registered case against the appellant and two others under Sections 420 and 120-B IPC. Aggrieved, the appellant filed application under Section 482 CrPC for quashing of the complaint. The application was however dismissed by the High Court and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. In the complaint filed by the respondent no.1 dated 21.1.2008 in the court of CJM, Bhopal, serious allegations of cheating by replacing the partnership deed dated 5.3.2002 by a forged partnership deed dated 6.3.2003 with the connivance of the appellant and other officers in his office were made. Particulars had been furnished to establish that the partnership deed dated 6.3.2003 was a forged document. The deed dated 6.3.2003 had been deposited in the office of the appellant on the same date at Bhopal. The stamp papers had been purchased on 6.3.2003 itself at Sagar and the deed had been executed on 6.3.2003 at 12 noon at Bhopal by a

Notary. This could not be possible as one of the partners remained present on 6.3.2003 for the purpose of auction of Excise at Ujjain, though he had been shown as signing the said document at Bhopal on the same date. [Para 7] [266-E-H]

1.2. The reports submitted by 'BKV' and 'DRJ' make it evident that the appellant and others had been involved, as such the replacement could have not been possible without the connivance of the appellant and others. Though there is material on record to show that the State Government did not accept the said reports, however, it is a question of fact to be established as to whether and to what extent the complainant had been aware of those developments. The record of the Excise Commissioner, Gwalior makes it evident that the excise auction for the year 2003-04 had been on the basis of the partnership deed dated 5.3.2002 and the said deed was on record upto 11.3.2003. As regards what had happened in the office of the appellant and who had done it and whether the appellant can be held responsible for the same, would depend upon the evidence adduced in the court. [Paras 9, 10] [267-D-E, F-H]

2. For taking cognizance or issuing process in a complaint case, the court must have merely a *prima facie* satisfaction that there is some material on record to proceed against the accused. In the instant case, the CJM, Bhopal issued process after being fully satisfied that some material was available on record to proceed against the appellant and others. [Para 15] [269-H; 270-A-B]

Debendra Nath Bhattacharyya and Ors. v. The State of W.B. and Anr. **AIR 1972 SC 1607;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi* ***and Ors.*** **AIR 1976 SC 1947;** *Smt. Manju Gupta v. Lt. Col. M.S. Paintal* **AIR 1982 SC 1181;** *Union of India v. Prafulla Kumar Samal and Anr.* **AIR 1979 SC 366;** *Smt. Rumi Dhar v. State of W. B. and Anr.* **AIR 2009**

SC 2195 and *Shoraj Singh Ahlawat and Ors. v. State of U.P. and Anr.* **AIR 2013 SC 52 – relied on.**

3. The question of delay in this case remains totally immaterial in view of the fact that all these facts came to the notice of the complainant at a much belated stage in 2007 when the report etc. had been placed by the State Authorities before the High Court. [Para 17] [270-H; 271-A]

Kishan Singh (D) through L.Rs. v. Gurpal Singh and Ors. **AIR 2010 SC 3624 – distinguished.**

4. It is a settled legal proposition that while considering the case for quashing of the criminal proceedings the court should not "kill a still born child", and appropriate prosecution should not be stifled unless there are compelling circumstances to do so. An investigation should not be shut out at the threshold if the allegations have some substance. When a prosecution at the initial stage is to be quashed, the test to be applied by the court is whether the uncontroverted allegations as made, *prima facie* establish the offence. At this stage neither the court can embark upon an inquiry, whether the allegations in the complaint are likely to be established by evidence or nor the court should judge the probability, reliability or genuineness of the allegations made therein. More so, the charge sheet filed or charges framed at the initial stage can be altered/amended or a charge can be added at the subsequent stage, after the evidence is adduced in view of the provisions of Section 216 Cr.P.C. So, the order passed even by the High Court or this Court is subject to the order which would be passed by the trial court at a later stage. [Para 19] [271-G-H; 272-A-D]

Umesh Kumar v. State of Andhra Pradesh **JT 2013 (12) SC 213 – relied on.**

5. There is no cogent reason to interfere with the impugned complaint or orders impugned herein. [Para 20] [272-D-E]

Case Law Reference:

AIR 1972 SC 1607	**relied on**	**Para 11**
AIR 1976 SC 1947	**relied on**	**Para 12**
AIR 1982 SC 1181	**relied on**	**Para 13**
AIR 1979 SC 366	**relied on**	**Para 14**
AIR 2009 SC 2195	**relied on**	**Para 14**
AIR 2013 SC 52	**relied on**	**Para 14**
AIR 2010 SC 3624	**distinguished**	**Para 16**
JT 2013 (12) SC 213	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1477 of 2013.

From the Judgment & Order dated 11.11.2008 of the High Court of Judicature, Madhya Pradesh at Jabalpur in Misc. Criminal Case No. 5521 of 2008.

Ashok Shrivastava, Ankur Kulkarni, Pragya Baghel, Manik Karanjawala for the Appellant.

P.S. Patwalia, Arvind Varma, Sumeer Sodhi, Gagan Gupta, Senthil Jagadeesan, C.D. Singh, Sunny Chaudhary, Aditi Mohan, Deepika Shori, Damini Hajela for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the impugned judgment and order dated 11.11.2008 passed by the High Court of Madhya Pradesh at Jabalpur in Misc. Criminal Case No. 5521 of 2008 dismissing

the application of the appellant filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') by which the appellant had sought quashing of a complaint under Sections 420 and 120-B of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') filed by the respondent no.1.

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

A. On 27.2.2002, a partnership firm in the name and style of "M/s. Ashok Traders" (hereinafter referred to as "firm") was constituted and a partnership deed was executed on the same date with the intention to carry on business of liquor. The firm consisted of seven partners.

B. The said partnership firm was reconstituted and a deed dated 5.3.2002 was executed inducting among others the respondent no. 1, namely, Shri Ajay Arora as a partner of the firm and the said firm now consisted of twelve partners. As per clause 10 contained in the deed, the partnership firm was to be terminated on 31.3.2003.

C. The said firm participated in the excise contracts for Bhopal District for the year 2002-2003 and had been a successful bidder. The excise auctions for the year 2003-2004 was held on 6.3.2003 and the said firm participated in the auction and being a successful bidder, the contract was awarded to it.

D. The respondent no. 1 filed a complaint alleging that while negotiating and accepting the contract for the year 2003-2004, the reconstituted partnership deed dated 5.3.2002 was utilised, wherein the said complainant-respondent no. 1 had also invested a huge amount, but the said deed was subsequently replaced by a forged/fabricated deed dated 6.3.2003 in which the respondent no.1 was not a partner. The respondent no.1 could acquire the know[illegible]t

a much belated stage when he preferred to enter into certain transactions with the bank.

E. Aggrieved, respondent no. 1 filed a Criminal Complaint Case No. 3968 of 2003 on 18.7.2003 against nine partners of the reconstituted firm alleging that the said partners had replaced the Deed of Partnership dated 5.3.2002 in the bank, and a forged partnership deed dated 6.3.2003 was implanted in the excise office in its place to deprive him of the profits of the firm.

F. The respondent no.1 also filed a complaint before the Chief Secretary, Government of Madhya Pradesh in this regard. The Chief Secretary sought a report in that respect from the Office of the Collector (Excise), District Bhopal. The Collector (Excise), District Bhopal submitted a report dated 4.9.2003 stating that the said contract had been awarded on the basis of partnership deed dated 6.3.2003 and there was no substance in the allegation made by the respondent no. 1 that the partnership deed dated 5.3.2002 had been replaced by partnership deed dated 6.3.2003.

G. Aggrieved, the respondent no. 1 filed Writ Petition No. 28262 of 2003 before the Madhya Pradesh High Court seeking various directions for inquiry in this regard and the High Court vide order dated 5.1.2004 asked the respondent no. 1 to make a detailed representation to the Commissioner of Excise and if such a representation was filed, the Commissioner of Excise was directed to decide the same. In pursuance of the said order, the respondent no. 1 filed a representation dated 10.1.2004 before the Excise Commissioner.

H. After conducting the inquiry, Shri B.K. Vyas, Addl. Excise Commissioner submitted a report dated 2.12.2005, to the effect that the excise contract was granted to the said firm on the basis of the partnership deed dated 5.3.2002 and the same stood replaced later on by partnership deed 6.3.2003 and the appellant, being a District Excise Officer, was responsible

for such replacement as it was not practically possible to do so without his connivance.

I. The respondent no.1 filed Writ Petition No. 2617 of 2007 before the Madhya Pradesh High Court seeking a direction for initiation of departmental proceedings against the appellant on the basis of inquiry report dated 2.12.2005, however, as the said inquiry report was not considered to be sufficient by the authorities for taking further action, the case was referred to the Principal Secretary to the Excise Commissioner vide letter dated 4.12.2006 for conducting further inquiry into the matter.

J. Shri D.R. Johri, Deputy Commissioner of Excise, conducted the inquiry and submitted an inquiry report dated 1.5.2007 recording the findings similar to the report dated 2.12.2005. The view expressed therein is that the appellant being the head of the District Excise Office, Bhopal, was **indirectly responsible**.

K. The Government of Madhya Pradesh vide letter dated 23.8.2007 informed the Excise Commissioner that no ground was found to initiate the departmental inquiry against the appellant.

L. In the aforesaid background, the respondent no. 1 filed a complaint on 21.1.2008 against the appellant and two others under Sections 420, 467, 468, 471 and 120-B IPC in the court of Chief Judicial Magistrate (hereinafter referred to as 'CJM'), Bhopal. The CJM recorded the statement of the complainant and after considering the pre-charge evidence, vide order dated 10.4.2008, registered the case against the appellant and two others under Sections 420 and 120-B IPC.

M. It may also be pertinent to point out that the respondent no. 1 also filed a complaint against the appellant before the Lokayukta, that was dismissed vide order dated 21.4.2008.

N. Aggrieved, the appellant filed an application under Section 482 Cr.P.C. for quashing of

21.1.2008. However, the High Court dismissed the said application vide impugned judgment and order dated 11.11.2008.

Hence, this appeal.

3. Shri Ashok Shrivastava, learned Senior counsel appearing for the appellant has submitted that the High Court has committed an error in dismissing the application of the appellant as the complaint filed by the respondent no.1 is nothing, but an abuse of the process of the court. The appellant stood exonerated in various departmental enquiries initiated on the complaint of the respondent no.1. More so, the High Court failed to appreciate that the complaint had been filed after a delay of 5 years against the appellant, though against the alleged partners of the firm, the complaint had been instituted in 2003 itself. The delay in filing the complaint by itself was a good ground for quashing the same. The complainant-respondent no.1 was fully aware of all the developments and there is nothing on record to show that the contract had been obtained by the said firm on the basis of the partnership deed dated 5.3.2002, and it had been subsequently replaced by the partnership deed dated 6.3.2003. The appellant by no means can be held responsible directly or indirectly for any such act. The report dated 2.12.2005 submitted by Shri B.K. Vyas and subsequently by Shri D.R. Johri dated 1.5.2007 had not been accepted by the State Authorities, being based on surmises and conjectures. Thus, the appeal deserves to be allowed and the complaint dated 21.1.2008 is liable to be quashed.

4. Shri P.S. Patwalia, learned Senior counsel for respondent no.1 has opposed the appeal contending that there was no delay in lodging the complaint against the appellant as the complainant could know about the activities of the appellant only after getting the enquiry reports which had been made available to him in the year 2007 itself. The question of replacement of the partnership deed dated 5.3.2002 by another partnership deed dated 6.3.2003, which deprived the

complainant-respondent no.1 of all the benefits of the partnership firm, though the complainant had contributed huge amount to get the liquor contract for the year 2003-04, amounts to a fraud which had been committed in the office headed by the appellant. It could not have been possible to replace the earlier partnership deed without the connivance of the appellant. The manner in which the deed dated 6.3.2003 has been executed, itself reveals that it is a forged deed. The appeal lacks merit and is liable to be dismissed.

5. Shri Arvind Varma, learned Senior counsel appearing for the State of Madhya Pradesh has supported the case of the appellant submitting that the reports submitted by Shri B.K. Vyas and Shri D.R. Joshi were not accepted by the State Government. More so, once the Lokayukta had examined the grievance of the complainant in detail and did not find any truth in it, the High Court ought to have quashed the complaint.

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

7. In the complaint filed by the respondent no.1 dated 21.1.2008 in the court of CJM, Bhopal, serious allegations of cheating by replacing the partnership deed dated 5.3.2002 by a forged partnership deed dated 6.3.2003 with the connivance of the appellant and other officers in his office were made. Particulars had been furnished to establish that the partnership deed dated 6.3.2003 was a forged document. The deed dated 6.3.2003 had been deposited in the office of the appellant on the same date at Bhopal. The stamp papers had been purchased on 6.3.2003 itself at Sagar and the deed had been executed on 6.3.2003 at 12 noon at Bhopal by a Notary. This could not be possible as one of the partners, namely, Shri Anand Kumar Tiwari remained present on 6.3.2003 for the purpose of auction of Excise at Ujjain, though he had been shown as signing the said document at Bhopal on the same date. Alongwith the auction record sent by the Excise office, Bhopal to the office of Commissioner of [illegible]h

the Collector, Bhopal on 11.3.2003, a copy of the partnership deed dated 6.3.2003 had also been enclosed. Had it been the case that the contract was awarded on the basis of partnership deed dated 6.3.2003, the said partnership deed could have been sent to the office of the Excise Commissioner at Gwalior.

8. The Inquiry report submitted by Shri B.K. Vyas, Additional Commissioner of Excise, Madhya Pradesh and further Inquiry Report submitted by Shri D.R. Johri, referred to hereinabove had found the appellant and 2 others, namely, Shri R.K. Goel and Shri O.P. Sharma involved in the commission of acts amounting to misconduct by manipulating the Government record for providing undue benefits to the partner of the firm and causing loss to the complainant.

9. The learned CJM, Bhopal examined the complainant and issued the process. The reports submitted by Shri B.K. Vyas and Shri D.R. Johri make it evident that the appellant and others had been involved, as such the replacement could have not been possible without the connivance of the appellant and others. Undoubtedly, the CJM, Bhopal asked the complainant as is evident from the Order sheet dated 28.3.2008 as to what had been the fate of the said reports, particularly the inquiry report submitted by Shri B.K. Vyas dated 2.12.2005, to which the complainant replied that no action had been taken on the same.

10. Though there is material on record to show that the State Government did not accept the said reports, however, it is a question of fact to be established as to whether and to what extent the complainant had been aware of those developments. The record of the Excise Commissioner, Gwalior makes it evident that the excise auction for the year 2003-04 had been on the basis of the partnership deed dated 5.3.2002 and the said deed was on record upto 11.3.2003. As regards what had happened in the office of the appellant and who had done it and whether the appellant can be held responsible for the same, would depend upon the evidence adduced in the court.

11. In *Debendra Nath Bhattacharyya & Ors. v. The State of W.B. & Anr.,* AIR 1972 SC 1607, this Court held:

> *"The mere existence of some grounds which would be material in deciding whether the accused should be convicted or acquitted does not generally indicate that the case must necessarily fail. On the other hand, such grounds may indicate the need for proceeding further in order to discover the truth after a full and proper investigation."*

12. In *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.,* AIR 1976 SC 1947, this Court held that where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused or where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible or where the complaint suffers from fundamental legal defects, the proceedings become liable to be quashed.

13. In *Smt. Manju Gupta v. Lt. Col. M.S. Paintal,* AIR 1982 SC 1181, this Court held that in a case where no specific allegation or any overt act has been ascribed to a person in the matter of the commission of an offence, the proceedings may be quashed.

14. In *Union of India v. Prafulla Kumar Samal & Anr.,* AIR 1979 SC 366, this Court dealt with the issue observing:

> *"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:*
>
> *(1)That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted p[illegible]*

the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;

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

(3) The test of determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

(See also: *Smt. Rumi Dhar v. State of W. B. & Anr.,* AIR 2009 SC 2195; and *Shoraj Singh Ahlawat & Ors. v. State of U.P. & Anr.,* AIR 2013 SC 52)

15. Thus, it is evident that for taking cognizance or issuing

process in a complaint case, the court must have merely a *prima facie* satisfaction that there is some material on record to proceed against the accused. In the instant case, the CJM, Bhopal issued process after being fully satisfied that some material was available on record to proceed against the appellant and others.

16. In *Kishan Singh (D) through L.Rs. v. Gurpal Singh & Ors.,* AIR 2010 SC 3624, this Court held :

"22. In cases where there is a delay in lodging an FIR, the court has to look for a plausible explanation for such delay. In the absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an afterthought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the civil court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case."

17. The question of delay in this case remains totally immaterial in view of the fact that all these facts came to the notice of the complainant at a much belated stage in 2007 when

the report etc. had been placed by the State Authorities before the High Court.

18. In *Umesh Kumar v. State of Andhra Pradesh,* JT 2013 (12) SC 213, this Court held as under:

> *"12……..Law does not prohibit entertaining the petition under Section 482 Cr.P.C. for quashing the charge sheet even before the charges are framed or before the application of discharge is filed or even during its pendency of such application before the court concerned. The High Court cannot reject the application merely on the ground that the accused can argue legal and factual issues at the time of the framing of the charge. However, the inherent power of the court should not be exercised to stifle the legitimate prosecution but can be exercised to save the accused to undergo the agony of a criminal trial……*
>
> *xxx xxx xxx xxx xxx*
>
> *25. Thus, in view of above, the order of the High Court impugned before us cannot be termed as a final decision. The order is subject to further order which could be passed by the trial court under Section 216 Cr.P.C., on the basis of the evidence to be led during trial. If the impugned order is dubbed as having attained finality, the provisions of Section 216 Cr.P.C. would render otiose/ nugatory. Thus, the same is to be read that the said order had been passed taking into consideration the material which was available "**at that stage**" and it is still open to the trial court to add or alter the charges according to the evidence produced before it."*

19. It is a settled legal proposition that while considering the case for quashing of the criminal proceedings the court should not "kill a still born child", and appropriate prosecution should not be stifled unless there are compelling circumstances

to do so. An investigation should not be shut out at the threshold if the allegations have some substance.

When a prosecution at the initial stage is to be quashed, the test to be applied by the court is whether the uncontroverted allegations as made, *prima facie* establish the offence. At this stage neither the court can embark upon an inquiry, whether the allegations in the complaint are likely to be established by evidence or nor the court should judge the probability, reliability or genuineness of the allegations made therein. More so, the charge sheet filed or charges framed at the initial stage can be altered/amended or a charge can be added at the subsequent stage, after the evidence is adduced in view of the provisions of Section 216 Cr.P.C. So, the order passed even by the High Court or this Court is subject to the order which would be passed by the trial court at a later stage.

20. In view of the above, we do not see any cogent reason to interfere with the impugned complaint or orders impugned herein. The appeal is devoid of any merit and is accordingly dismissed.

B.B.B. Appeal dismissed.

RANJIT SINGH

v.

STATE OF M.P. AND OTHERS

(Criminal Appeal No. 1545 of 2013)

SEPTEMBER 27, 2013

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

Bail – Grant of – Enlargement of accused-appellant on bail by the Sessions Judge on the strength of an earlier order of the High Court – Justification – Held: On facts, not justified – The Sessions Judge had erroneous perception and fallacious understanding of the earlier High Court order and absolutely misconstrued it – There was no deliberation with regard to the requirements u/s.439 CrPC in the order passed by the Sessions Judge – Relevant aspects while dealing with an application for bail were not kept in view by the Sessions Judge – Grant of bail though involves exercise of discretionary power of the court, yet said exercise has to be made in a judicious manner and not as a matter of course – If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court – However, vide the impugned order, the High Court took note of certain supervening circumstances to cancel the bail, which exercise in the obtaining factual matrix was not necessary – Since the High Court cancelled the bail by taking certain other aspects into consideration, appellant permitted to move application for regular bail – On such application being moved, the same shall be considered on its own merits – Code of Criminal Procedure, 1973 – s.439.

In a criminal case involving the death of a person, FIR was registered against the appellant for offences punishable under Sections 307, 302/34, 147, 148, 149, 120B IPC and Sections 25 and 27 of the Arms Act. Apprehending arrest, the appellant filed application under

Section 438 CrPC before the Sessions Judge, who rejected the same. The appellant then preferred a second application for grant of anticipatory bail, this time before the High Court. Vide order dated 1-2-2013 in M.Cr.C. No. 701 of 2013, a Single Judge of the High Court disposed of the application with a direction to the appellant to surrender before the Competent Court and to apply for regular bail. The appellant thereafter moved application under Section 439 CrPC before the Sessions Judge, who vide order dated 6-2-2013 admitted the appellant to bail.

However, entertaining an application under Section 482 CrPC, the Division Bench of the High Court modified the order dated 1-2-2013 passed in M.Cr.C. No. 701 of 2013 and on that basis cancelled the order granting bail in favour of the appellant. The appellant preferred SLP before the Supreme Court which set aside the order of the Division Bench of the High Court but granted liberty to the complainant to proceed against the order of the Sessions court, granting bail, if so advised.

Thereafter the complainant and wife of the deceased filed application under Section 439(2) CrPC before the High Court for cancellation of the bail order dated 6.2.2013 passed by the Sessions Judge.

By the impugned order dated 16-8-2013 in M.Cr.C. No. 3370 of 2013, a Single Judge of the High Court held that the Sessions Judge misread the order dated 1-2-2013 in M.Cr.C. No. 701 of 2013, ignored relevant material and did not consider the well recognized principles underlying the power to grant bail. Referring to the criminal antecedents of the appellant and, further that there was *prima facie* material that after release on bail, he gave threatening to the widow of the deceased and her children and obstructed the course of justice, the Single Judge of the High Court cancelled the bail granted by the Sessions Judge and direct[illegible]o

surrender before the Sessions Judge. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. In the instant case, it is manifest that there was no deliberation with regard to the requirements under Section 439 CrPC in the order passed by the Sessions Judge. The order read in entirety clearly reflects that the Sessions Judge had an erroneous perception and fallacious understanding of the order passed by the High Court in M.Cr.C. No. 701 of 2013 and had absolutely misconstrued the order. Thus, the order passed by the Sessions Judge is totally unjustified and illegal. [Para 19] [286-C-E]

2. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court. The Sessions Judge misconstrued the order passed by the High Court. However, the High Court in M.Cr.C. No. 3370 of 2013 took note of certain supervening circumstances to cancel the bail, which exercise in the obtaining factual matrix was not necessary as the grant of bail was absolutely illegal and unjustified as the court below had enlarged the accused on bail on the strength of the order passed in M.Cr.C. No. 701 of 2013 remaining oblivious of the parameters for grant of bail under Section 439 Cr.P.C. It is well settled in law that grant of bail though involves exercise of discretionary power of the court, yet the said exercise has to be made in a judicious manner and not as a matter of course. [Para 20] [286-F-H; 287-A-B]

3.1. Since the relevant aspects while dealing with an application for bail were not kept in view by the Sessions Judge, therefore, the order passed by him is set aside. In view of the extinction of the order granting bail, the appellant shall surrender forthwith to custody failing

which he shall be taken to custody as per law. Liberty is granted to the appellant to move an application for grant of regular bail. On such application being moved, the same shall be considered on its own merits. [Para 25] [289-B-D]

3.2. However, because of this above direction the judgment of the High Court is required to be modified as the single Judge has cancelled the bail by taking certain other aspects into consideration. It would have been appropriate on the part of the High Court to set aside the order of granting bail by the Additional Sessions Judge and permit the accused to surrender to custody and move an application for regular bail. Accordingly, the order passed by the High Court is modified to that extent. [Para 26] [289-D-F]

Chaman Lal v. State of U.P. **(2004) 7 SCC 525: 2004 (3) Suppl. SCR 584;** *Prasanta Kumar Sarkar v. Ashis Chatterjee* **(2010) 14 SCC 496: 2010 (12) SCR 1165;** *Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another* **(2012) 9 SCC 446: 2012 (7) SCR 584 and** *Central Bureau of Investigation v. V. Vijay Sai Reddy* **2013 (7) SCALE 15 – relied on.**

4. However, something more is required to be stated. In the case at hand, the order passed by the single Judge of the High Court in M.Cr.C. No. 701 of 2013 was potent enough to create enormous confusion. And it has so happened. It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the precedents and issue directions which are permissible in law. The observations made by the single Judge while dealing with second application under Section 438 CrPC was not at all warranted under any circumstance as it was neither in consonance with the language employed in Section 438 CrPC nor in accord with the established principles of law of

anticipatory bail. The said order has been interpreted by this Court as an order only issuing a direction to the accused to surrender, but it has really created colossal dilemma in the mind of the Sessions Judge. [Para 29] [291-G; 292-A-C]

Rashmi Rekha Thatoi and another v. State of Orissa and others **(2012) 5 SCC 690: 2012 (5) SCR 674;** *Gurbaksh Singh, Sibbia v. State of Punjab* **(1980) 2 SCC 565: 1980 (3) SCR 383;** *Savitri Agarwal v. State of Maharashtra* **(2009) 8 SCC 325: 2009 (10) SCR 978;** *Adri Dharan Das v. State of West Bengal* **(2005) 4 SCC 303: 2005 (2) SCR 188;** *State of Maharashtra v. Mohd. Rashid* **(2005) 7 SCC 56;** *Union of India v. Padam Narain Aggarwal* **(2008) 13 SCC 305: 2008 (14) SCR 179;** *Bay Berry Apartments (P) Ltd.* v. *Shobha,* **(2006) 13 SCC 737 and** *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey,* **(2006) 1 SCC 479 – referred to.**

Case Law Reference:

2004 (3) Suppl. SCR 584	**relied on**	**Para 21**
2010 (12) SCR 1165	**relied on**	**Para 22**
2012 (7) SCR 584	**relied on**	**Para 23**
2013 (7) SCALE 15	**relied on**	**Para 24**
2012 (5) SCR 674	**referred to**	**Para 28**
1980 (3) SCR 383	**referred to**	**Para 28**
2009 (10) SCR 978	**referred to**	**Para 28**
2005 (2) SCR 188	**referred to**	**Para 28**
(2005) 7 SCC 56	**referred to**	**Para 28**
2008 (14) SCR 179	**referred to**	**Para 28**
(2006) 13 SCC 737	**referred to**	**Para 28**
(2006) 1 SCC 479	**referred to**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1545 of 22013.

From the Judgment & Order dated 16.08.2013 of the High Court of Madhya Pradesh, Gwalior Bench at Gwalior in Miscellaneous Criminal Case No. 3370 of 2013.

Anupam Lal Das, Anirudh Singh, Dipesh Sinha for the Appellant.

Surendra Singh, D.S. Parmar, Susheel Tomar, Abha R. Sharma for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. This appeal, by special leave, is directed against the order dated 16.8.2013 passed by the High Court of Madhya Pradesh, Bench at Gwalior, in M.Cr.C. No. 3370 of 2013 whereby the learned single Judge has cancelled the order of bail granted by learned first Additional Sessions Judge, Guna vide order dated 6.2.2013 to the appellant.

3. The facts giving rise to the present appeal are that on 14.8.2012 an FIR bearing No. 376/2012 was registered at Police Station, Kotwali, Guna, for offences punishable under Sections 307, 147, 148, 149, 120B read with Section 34 of the Indian Penal Code (IPC) and Sections 25 and 27 of the Arms Act alleging that the appellant along with one Abhishek Hada and two unknown persons had come to the market place where an altercation ensued between them and the informant and others. It was alleged in the FIR that two of these four persons were carrying weapons and they fired at the informant, respondent No. 3 herein, and one Dilip Singh. After the injured succumbed to the injuries, Section 302 IPC was added. The appellant apprehending arrest filed an application under Section 438 of the Code of Criminal Procedure (CrPC) before the first Additional Sessions Judge, G[illegible]r

dated 14.9.2012 rejected the same. Being unsuccessful in obtaining an anticipatory bail the appellant filed M.Cr.C. No. 8023 of 2012 which was dismissed as withdrawn.

4. As the facts would further uncertain, after a gap of sometime the appellant preferred the second application for grant of anticipatory bail and the learned single Judge in M.Cr.C. No. 701 of 2013, by order dated 1.2.2013, took note of the fact that the petitioner therein was an accused in crime No. 376/12 registered for commission of offences punishable under Sections 307, 302/34, 147, 148, 149, 120-B IPC and Sections 25 and 27 of the Arms Act and the submissions canvassed on behalf of the learned counsel for the accused and the learned counsel for the prosecution and ultimately directed as follows: -

> "Considering the nature of the allegation and the evidence collected in the case-diary, the petition is disposed of with a short direction that the petitioner shall surrender before the Competent Court and shall apply for regular bail and the same shall be considered upon furnishing necessary bail bond."

5. After the said order came to be passed, the appellant moved two applications, one under Section 44(2) and the other under Section 439 CrPC before the learned Sessions Judge, Guna, who transferred the applications to the learned Additional Sessions Judge for consideration. The learned Additional Sessions Judge, Guna, admitted the appellant to bail on imposition of certain conditions. We shall refer to the said order in detail when we deal with the legal propriety of the same and the cancellation of the same by the High Court by the impugned order.

6. At this juncture, it is apposite to note that the wife of the deceased filed S.L.P. (Crl.) No. 2055 of 2013 assailing the order dated 1.2.2013 passed by the learned single Judge in M.Cr.C. No. 701 of 2013. This Court allowed the application

for permission to file the special leave and thereafter observed as follows: -

> "Although, we are of the view that this special leave petition has no substance, since the order under challenge merely directed the respondent-accused to surrender and pray for regular bail."

7. Be it noted, in the said order taking note of the grievance that the wife and children of the deceased were threatened by the accused this Court granted liberty to apply to the Superintendent of Police, Guna, M.P. and also the Station House Officer of Police Station Kotwali, Guna and a direction was issued that if such application would be made, the said authorities shall look into the matter with all seriousness and take appropriate steps for the safety of the wife and the children. This Court also took note of the fact that an application for modification of the order was pending before the Division Bench of the High Court and, accordingly, observed that the Division Bench may consider disposing of the said application as expeditiously as possible.

8. The Division Bench, while dealing with the application for modification, i.e., M.Cr.C. No. 971 of 2013, vide order dated 15.3.2013, reproduced the order passed in M.Cr.C. No. 701 of 2013 and ascribing certain reasons modified the order and set aside the order dated 6.2.2013 granting regular bail by the learned Additional Sessions Judge to the accused.

9. Grieved by the aforesaid order, the appellant preferred Special Leave Petition (Crl.) No. 2826 of 2013. This Court on 4.4.2013, while dealing with the legal substantiality of the said order, opined thus: -

> "Having heard learned counsel for the parties, we are of the view that no useful SLP (Crl.) 2826/13 purpose will be served in keeping this matter pending here in view of the fact that the Code of Criminal Proc[illegible]e

for any review against an order passed in criminal proceedings.

The proceedings before the Division Bench was entirely misconceived. In the event the order of the learned Single Judge of the High Court was misconstrued by the learned trial court while granting bail to the petitioner, the remedy of the complainant would be to challenge the same before the High Court.

Accordingly, the Special Leave Petition is allowed, the order of the Division Bench of the High Court impugned in the Special Leave Petition is set aside. The complainant will be at liberty to proceed against the order of the trial court, granting bail, if so advised."

10. It may be noted here that a grievance was made with regard to grant of police protection and this Court taking note of its earlier order dated 6.3.2013 made certain observations.

11. At this stage, we may sit in a time machine and take note of certain proceedings and the orders passed therein as they have been emphatically stressed upon by Mr. Anupam Lal Das, learned counsel for the appellant. An application for cancellation of bail was filed before the learned 1st Additional Sessions Judge, Guna by Dinesh Raghuvanshi, the informant, who, on 2.4.2013, withdrew the application as by that time the Division Bench had already set aside the order granting bail. It is also necessary to state that the Additional Public Prosecutor, Guna, had also filed application for cancellation of bail on 11.2.2013. An assertion has been made by learned counsel for the appellant that the same has been withdrawn when the High Court was moved for cancellation of the order granting bail. We have referred to these events, as the learned counsel has endeavoured hard to impress upon us that there has been suppression of facts by the informant as well as the State, but we have no scintilla of doubt that the non-reference to the said facts or non-mentioning of the same has, in fact, no

impact on the merits of the impugned order passed by the High Court.

12. Coming back to the chronology of narration, after disposal of the Special Leave Petition (Crl.) 2826 of 2013, the informant and the wife of the deceased filed an application under Section 439(2) CrPC for cancellation of bail order dated 6.2.2013 passed by the learned 1st Additional Sessions Judge, Guna in Bail Application No. 13 of 2013. The learned single Judge, by the impugned order, narrated the factual matrix, referred to the order passed by the High Court under Section 438 CrPC, took note of the submissions advanced at the Bar and after referring to certain authorities which deal with cancellation of bail, the allegations made in the FIR, the proceedings before the High Court and this Court, import of the order passed in M.Cr.C. No. 701 of 2013 and thereafter stated thus: -

"In the instant case, as pointed hereinabove, the learned First ASJ has not taken pain to consider the aforesaid aspects. When this Court has expressly given the direction that respondent No. 1 shall surrender before the Competent Court and shall apply for regular bail and the same shall be considered, it was the bounden duty of the learned First ASJ to consider whether respondent No. 1 is entitled for the benefit of bail or not. It is unfortunate that despite the objection raised on behalf of the petitioners that this Court has not granted the bail, the learned First ASJ, Guna, did not think it fit to seek the clarification from this Court. Instead of doing so, the learned First ASJ has granted the benefit of bail to respondent No. 1."

13. Thereafter, the learned single Judge referred to the criminal antecedents of the accused and, ultimately, passed the following order: -

"In view of the aforesaid analysis, considering that learned First ASJ, Guna, while granting ba of

this Court passed in M.Cr.C. No. 701/13 on 1.2.13, has ignored relevant material and has not considered the well recognized principles underlying the power to grant bail and further that there is prima facie material that after releasing on bail, respondent No. 1 gave threatening to the widow of the deceased and her children and obstructed the course of justice, the petition deserves to be allowed. Hence, it is allowed and the bail granted by learned First ASJ, Guna, vide order dated 6/2/2013 to respondent No. 1 is hereby cancelled. Bail Bonds of respondent No. 1 are cancelled. It is directed that respondent No. 1 shall surrender before the learned First ASJ, Guna, and he shall be taken into custody forthwith."

14. We have heard Mr. Anupam Lal Das, learned counsel appearing for the appellant, Mr. Surendra Singh, learned senior counsel appearing for respondent Nos. 2 and 3, and the learned counsel for the State.

15. First, we shall deal with the order passed by the High Court in M.Cr.C. No. 701 of 2013. We have already reproduced the same. The said order was the subject-matter of challenge in Special Leave Petition (Crl.) No. 2055 of 2013 and this Court has observed that the order under challenge was a mere direction to the accused to surrender and pray for bail. Thus, this is the interpretation placed by this Court on that order. It is apt to mention here that prior to passing of the said order the learned Additional Sessions Judge had allowed the application for grant of regular bail. The Division Bench entertaining an application under Section 482 CrPC had modified the order dated 1.2.2013 passed in M.Cr.C. No. 701 of 2013 and on that basis had cancelled the order granting bail in favour of the accused. The said order was assailed before this Court in Special Leave Petition (Crl.) No. 2826 of 2013 and it was set aside holding that the order was wholly misconceived as the Division Bench could not have reviewed the earlier order under Section 482 CrPC. However, as stated hereinbefore, this Court

clearly stated that in the event the order of the learned single Judge of the High Court is misconstrued by the learned trial Court while granting bail to the accused, remedy of the complainant would be to challenge the same before the High Court. There cannot be any trace of doubt that the challenge to the grant of bail order by the learned Additional Sessions Judge was kept alive by this Court and, accordingly, application was filed before the High Court which has been dealt with by the learned single Judge by the impugned order.

16. The thrust of the matter is whether the learned trial Judge has actually misconstrued the order and granted bail or has really considered the necessary facets as required to be considered while entertaining an application under Section 439 CrPC. We have bestowed our anxious consideration and carefully scrutinized the order dated 6.2.2013 passed by the learned Additional Sessions Judge, Guna. It is manifest that the learned trial Judge accepted the application for surrender and thereafter referring to the order passed in M.Cr.C. No. 701 of 2013 has opined thus: -

> "In the aforementioned case the Hon'ble High Court vide its order dated 01.02.2013 passed the orders with the directions that the applicant will surrender himself before the Competent Court and he will submit his application for regular bail, and the said concerned court will accept the said application after furnishing of bail bonds. Therefore, the Hon'ble High Court has issued the orders to the competent court in favour of the applicant. In compliance of order dated 01.02.2013 passed by the Hon'ble High Curt in MCRC Case No. 701/13 u/s 438 Cr.P.C. surrendered before the Ld. Court, and because for trial of case u/s 302 IPC the Ld. Court is the Competent Court, hence the application of surrender of applicant may be accepted and the bail application u/s 439 Cr.P.C. submitted by the applicant may please be decided."

17. It is apt to note here that numb d

Additional Sessions Judge has referred to the order passed by the High Court and at one stage he has stated as follows: -

> "… the applicant had submitted a bail application being No. 154/2012 u/s 438 Cr.P.C. before the Ld. Session Judge. The said application was rejected on 14.09.2012 by the Ld. First Additional Session Judge Shri R.P. Mankalia and being aggrieved with the said order, the applicant filed a petition being application No. M.C.R.C. No. 701/13 u/s 438 Cr.P.C. before the Hon'ble High Court of Madhya Pradesh at Gwalior Bench. In this matter, the Hon'ble High Court passed its judgment and order dated 01.02.2013 with the directions that the applicant will surrender himself before the competent court and the applicant will submit his application for regular bail and the concerned court will accept the application and bail bonds of the applicant. Therefore the Hon'ble High Court has issued the directions for the Competent Court in favour of the applicant."

18. After so stating the learned trial Judge has referred to the submissions, application for remand for further investigation and, eventually, passed the following order: -

> "It has been revealed after perusal of case and case diary of the case that the bail application of the co-accused persons has already been admitted by the Hon'ble High Court. Offence of the applicant/ accused person is not different from the offence of other co-accused persons. Applicant himself has presented himself before the Ld. Session Judge, Guna and he also presented himself before this Court. After hearing all the parties by the Hon'ble High Court of Madhya Pradesh at Gwalior Bench titled Ranjit Singh Versus State of Madhya Pradesh in M.C.R.C. No. 701/13, the Hon'ble High Court has passed the orders for furnishing necessary bail bonds, hence, the application filed by the applicant u/s 439 Cr.P.C. is justified and found proper, therefore, the application of the applicant is accepted and he may be enlarged on bail on furnishing two bail bonds of sureties of Rs.75,000-75,000 each and personal bail bond of Rs.1,50,000/- to the satisfaction of Chief Judicial Magistrate, Guna."

19. We have reproduced the said order in extenso to appreciate whether as a matter of fact the learned Additional Sessions Judge has misconstrued the import of the order or decided the application under Section 439 CrPC regard being had to the considerations that are to be kept in mind while dealing with such an application. As is evincible, there has been no deliberation with regard to the requirements under Section 439 CrPC. The order read in entirety clearly reflects that the learned Additional Sessions Judge had an erroneous perception and fallacious understanding of the order passed by the High Court and it is clear as day that the regular bail was granted on the bedrock of the order passed by the High Court. He had absolutely misconstrued the order. Thus, the order passed by the learned Additional Sessions Judge is totally unjustified and illegal.

20. It needs no special emphasis to state that there is distinction between the parameters for grant of bail and cancellation of bail. There is also a distinction between the concept of setting aside an unjustified, illegal or perverse order and cancellation of an order of bail on the ground that the accused has misconducted himself or certain supervening circumstances warrant such cancellation. If the order granting bail is a perverse one or passed on irrelevant materials, it can be annulled by the superior court. We have already referred to various paragraphs of the order passed by the High Court. We have already held that the learned trial Judge has misconstrued the order passed by the High Court. However, we may hasten to add that the learned single Judge has taken note of certain supervening circumstances to cancel the bail, but we are of the opinion that in the obtaining factual matrix the said exercise was not necessary as the grant of bail

and unjustified as the court below had enlarged the accused on bail on the strength of the order passed in M.Cr.C. No. 701 of 2013 remaining oblivious of the parameters for grant of bail under Section 439 Cr.P.C. It is well settled in law that grant of bail though involves exercise of discretionary power of the court, yet the said exercise has to be made in a judicious manner and not as a matter of course.

21. In *Chaman Lal v. State of U.P.,*[1] this Court, while dealing with an application for bail, has stated that certain factors are to be borne in mind and they are: -

> "…. (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and (iii) prima facie satisfaction of the court in support of the charge."

22. In *Prasanta Kumar Sarkar v. Ashis Chatterjee,*[2] this Court, while emphasizing on the exercise of discretionary power generally has to be done in strict compliance with the basic principles laid down in plethora of decisions of this Court, has observed as follows: -

> "9… among other circumstances, the factors which are to be borne in mind while considering an application for bail are:
>
> (i) whether there is any prima facie or reasonable ground to be believed that the accused had committed the offence;
>
> (ii) nature and gravity of the accusation;
>
> (iii) severity of the punishment in the event of conviction;

1. (2004) 7 SCC 525.
2. (2010) 14 SCC 496.

> (iv) danger of the accused absconding or fleeing, if released on bail;
>
> (v) character, behavior, means, position and standing of the accused;
>
> (vi) likelihood of the offence being repeated;
>
> (vii) reasonable apprehension of the witnesses being influenced; and
>
> (viii) danger, of course, of justice being thwarted by grant of bail."

23. The said principles have been reiterated in *Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another.*[3]

24. In this context, we may refer with profit to the recent pronouncement in *Central Bureau of Investigation v. V. Vijay Sai Reddy*[4] wherein the learned Judges have expressed thus:-

> "**28**. While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/ State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "*reasonable grounds for believing*" instead of *"the evidence"* which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce *prima facie* evidence

3. (2012) 9 SCC 446.
4. 2013 (7) SCALE 15.

in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

25. We repeat at the cost of repetition that the aforesaid aspects have not been kept in view by the learned Additional Sessions Judge and, therefore, we are obliged in law to set aside the order passed by him and we so do. In view of the extinction of the order granting bail, the appellant shall surrender forthwith to custody failing which he shall be taken to custody as per law. Liberty is granted to the appellant to move an application for grant of regular bail. Needless to say, on such application being moved, the same shall be considered on its own merits regard being had to the parameters which have been laid down in aforestated authorities.

26. We may hasten to add that because of our above direction the judgment of the High Court is required to be modified as the learned single Judge has cancelled the bail by taking certain other aspects into consideration. We may clearly state that it would have been appropriate on the part of the High Court to set aside the order of granting bail by the learned Additional Sessions Judge and permit the accused to surrender to custody and move an application for regular bail. Accordingly, the order passed by the High Court is modified to that extent. It needs to be stated that when an application for regular bail is moved, the learned trial Judge shall be free to deal with the matter as per law without being influenced by the factum that there had been an order of cancellation of bail. We have said so as we have set aside the order admitting the appellant to bail as it is illegal and unjustified being solely based on the observation made by the High Court in its order passed in M.Cr.C. No. 701 of 2013. We may further add that proper opportunity shall be afforded to the Public Prosecutor to put forth his stand and stance at the time of consideration of the application preferred by the accused for grant of bail.

27. After saying so we would have proceeded to record

our formal conclusion. But, something more is required to be stated. We are absolutely conscious that this Court on earlier occasion in Special Leave Petition (Crl.) No. 2055 of 2013 had clearly stated that the order under challenge merely directed the respondent-accused to surrender and pray for regular bail. The said clarification was made by this Court. Prior to that, the learned trial Judge misconstruing the order had enlarged the accused on bail.

28. This Court in *Rashmi Rekha Thatoi and another v. State of Orissa and others*[5] has dealt with an order of the High Court whereby the learned single Judge, while not granting anticipatory bail to some accused persons, had directed that in case the accused persons surrender and move an application for regular bail, they shall be released on bail on such terms and conditions as may be deemed fit and proper. After referring to the language employed in Section 438 CrPC, the Constitution Bench decision in *Gurbaksh Singh, Sibbia v. State of Punjab,*[6] and the law laid down in *Savitri Agarwal v. State of Maharashtra,*[7] *Adri Dharan Das v. State of West Bengalr,*[8] *State of Maharashtra v. Mohd. Rashid*[9] and *Union of India v. Padam Narain Aggarwal,*[10] this Court has ruled thus:-

> "**33.** We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in *Gurbaksh Singh Sibbia* had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative

5. (2012) 5 SCC 690.
6. (1980) 2 SCC 565.
7. (2009) 8 SCC 325.
8. (2005) 4 SCC 303.
9. (2005) 7 SCC 56.
10. (2008) 13 SCC 305

pronouncement and the principles that have been culled out in *Savitry Agarwal* there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it is not inclined to grant anticipatory bail to the petitioner-accused it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in *Gurbaksh Singh Sibbia* and the principles culled out in *Savitri Agarwal*."

In the said case it has also been observed thus: -

"… it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in *Bay Berry Apartments (P) Ltd. v. Shobha*[11] and *U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey."*[12]

29. In the case at hand, though such an order was not passed by the learned single Judge, yet the order passed by him was potent enough to create enormous confusion. And it has so happened. It is the duty of the superior courts to follow the command of the statutory provisions and be guided by the

11. (2006) 13 SCC 737.

12. (2006) 1 SCC 479.

precedents and issue directions which are permissible in law. We are of the convinced opinion that the observations made by the learned single Judge while dealing with second application under Section 438 CrPC was not at all warranted under any circumstance as it was neither in consonance with the language employed in Section 438 CrPC nor in accord with the established principles of law relating to grant of anticipatory bail. We may reiterate that the said order has been interpreted by this Court as an order only issuing a direction to the accused to surrender, but as we find, it has really created colossal dilemma in the mind of the learned Additional Sessions Judge. We are pained to say that passing of these kind of orders has become quite frequent and the sagacious saying, "A stitch in time saves nine" may be an apposite reminder now. We painfully part with the case by saying so.

30. The appeal is disposed of in terms of the modification in the order passed by the learned single Judge in M.Cr.C. No. 701 of 2013 and the observations made hereinabove.

B.B.B. Appeal disposed of.