GUDDA @ DWARIKENDRA
v.
STATE OF MADHYA PRADESH
(Criminal Appeal Nos. 1566-1567 of 2013)

SEPTEMBER 30, 2013

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

Penal Code, 1860 – s.302 – Murder – Three victims - 'S', and his wife and minor son – Accused-appellant allegedly assaulted the deceased persons with a knife after having invited them at his house for lunch – Motive of appellant in brutally assaulting 'S' with a knife allegedly stemmed from his abhorrence for his wife's relationship with 'S' – Conviction of appellant u/s.302 IPC – Justification – Held: Justified – Evidence of the two eye-witnesses, PW-5 and PW-7, found credible and trustworthy – Defense version that the incident occurred when 'S' attempted to rape the wife of appellant and on her resistance threatened to assault her with the knife, apparently unnatural and improbable – Plea of right to private defence and non-orchestrated nature of the offence vitiated by evidence of PW-9 – Prosecution case well supported and established by the evidence of PWs 5, 7, 9 and 18 coupled with the evidence of doctors, the post-mortem report and medical evidence – No room for any doubt as to the guilt of the appellant.

Sentence / Sentencing – Murder case – Three victims – Conviction of accused-appellant u/s.302 IPC – Death sentence awarded to appellant – Challenge to – Held: Awarding of life sentence is the rule, death is an exception – Application of "the rarest of the rare case" principle is dependent upon and differs from case to case – Reasonable proportion has to be maintained between brutality of the crime

and the punishment – In the case at hand, the factum of the crime being pre-ordained and the motive of the appellant in brutally assaulting the deceased-'S' with a knife after having invited him at his house for lunch stemmed from his suspicion on his wife's fidelity and his abhorrence for her relationship with the deceased-'S' – However, the same motive to murder the wife of 'S' and their only child does not find favor with the facts of the case – The other two murders seem to have translated due to the sudden realization of appellant and his extreme fear of being caught for the murder of 'S' and also, to save himself from being shunned by the society – Further, appellant is a young man of about 35 years and not having any criminal antecedents – Future possibilities of his reform also not ruled out – In the contextual facts, the brutality as evinced by the appellant would not fall within the ambit of the "rarest of the rare" cases so as to exercise the discretion of imposing capital punishment – Therefore, conviction of appellant u/s.302 affirmed, however, the sentence of death imposed on him commuted to imprisonment for life.

Three persons, namely, 'S', his pregnant wife and 5 year old minor son were murdered in the rented house of appellant. The prosecution case was that the appellant thoroughly detested the association of his wife, A2 with the deceased 'S' and did not like him visiting his house to meet A2 in spite of his strong opposition and therefore, hatched a conspiracy with A2 to murder the deceased persons on the pretext of inviting and hosting them for a lunch. PW-5 is the owner of the house where appellant and A2 resided as tenants. PW-7 is another tenant in the house of PW-5. PW-9 was known to the deceased persons and at the relevant time was in the neighborhood. PW-18 had accompanied PW-9 on the fateful day. PWs- 16 and 14 are the doctors who conducted post-mortem of the deceased persons.

In the statements recorded und[illegible]C,

the appellant stated that on the fateful day on returning from the market, he saw 'S' attempting to commit rape on A2 and was attacking her with the knife; and on his intervention, 'S' attempted to hit him and a fight ensued whereafter he snatched the knife from 'S' and hit him in order to protect his wife's modesty and their lives. It was further stated by the appellant that since the wife and child of 'S' intervened, they too suffered serious injuries leading to their death.

The Trial Court rejected the defence version and finding the evidence insufficient to establish the guilt of A2 beyond reasonable doubt held that appellant alone was guilty of murder of the deceased family and hence, convicted him under Section 302 IPC while acquitting A2 of the charge under Section 302 read with Section 120-B IPC. The Trial Court further found the case fit to be in the category of "rarest of the rare" and therefore, sentenced the appellant to death.

Aggrieved, the State preferred appeal against the acquittal of A2 while the appellant questioned his conviction and sentence. The High Court held that the trial court had not committed any error in acquitting A2 and in convicting the appellant under Section 302 of the IPC, and further confirmed the death sentence of the appellant.

Two issues arose for consideration before this Court: *firstly*, the conviction of the appellant and *secondly*, if the same be upheld his sentence.

Disposing of the appeals, the Court

HELD:

Issue one: Conviction

1.1. PW-5 in her evidence has testified in respect of the appellant assaulting the deceased persons with a

knife, refusing to stop even on intervention and thereafter, running away on his motorbike. PW-5's evidence is amply supported on all aspects by the evidence of PW-7, who has categorically stated that the appellant assaulted the deceased persons and continued to do so in spite of PW-5's intervention and thereafter, fled away on his motorcycle. The said evidence of the two eye-witnesses garners further support from the testimonies of PW-9 and 18 who saw PW-5 carrying the victim child out of the house and thereafter, the appellant running out with a knife in his hand and escaping on his motorcycle after extending threats to them. Further, the evidence of the eye-witnesses draws strength from the evidence of PWs-16 and 14 who conducted the post-mortem of the deceased persons testifying that the injuries were caused by a knife like weapon. The same has been further corroborated by the evidence of PW-19 (the Investigating Officer), in respect of recovery of the knife from a pit of sand at the instance of the appellant. The testimony of the two eye-witnesses is natural, convincing and well corroborated by the evidence of PWs 4, 8, 9 and 18 and the medical evidence. The two do not seem to have any animus against the appellant. Additionally, no such close alliance of the witnesses with the deceased persons has surfaced so as to prove their bias towards the appellant. Thus, the evidence of the two eye-witnesses is credible and trustworthy. [Paras 21, 22, 23] [308-B-H]

1.2. The defense version appears to be unnatural and improbable for the reason that when the appellant suspected the deceased person's illicit relationship with A2, the deceased would not have dared to enter the house of appellant, with his wife and child and attempted to rape A2 and on her resistance threatened to assault her with the knife. Further, the statement of appellant that when A2 was shouting for help, the

and the child continued to sit outside on the terrace while the appellant intervened to protect A2 and the deceased assaulted the appellant and on the intervention in the scuffle the wife and the child received the fatal injuries. The plea of right to private defence and non-orchestrated nature of the offence stand vitiated by the evidence of PW-9 who has testified that A2, immediately after the fateful incident has narrated the version of the genesis of the incident absolutely contrary to the version stated by the appellant. [Para 24] [309-B-E]

1.3. The prosecution case stands well supported and established by the evidence of PWs 5, 7, 9 and 18 coupled with the evidence of Doctors, the post-mortem report and medical evidence and does not leave any room for doubt as to the guilt of the appellant. Therefore, the Courts below have not committed any error in convicting the appellant for the murder of the three persons under Section 302 of the IPC and the conviction of the appellant requires to be upheld. [Para 25] [309-F-G]

Issue two: Sentencing

2.1. It is well settled that awarding of life sentence is the rule, death is an exception. A deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fiber of society would call for imposition of capital punishment in order to ensure that it acts as a deterrent. However, the application of "the rarest of the rare case" principle is dependent upon and differs from case to case. The number of deaths or the factum of whole family being wiped off cannot be the sole criteria for determining whether the case falls into the category of "rarest of rare". Further, one cannot loose sight of the fact that brutality also cannot be the only criterion for determining whether a case falls under the

"rarest of rare" categories. [Para 27] [310-C-D, F-G]

2.2. In the instant case, the genesis of crime and the manner of occurrence inside the house of the appellant remains clouded while the guilt has been clearly established with the aid of available evidence. The factum of the crime being pre-ordained and the motive of the appellant in brutally assaulting the deceased-'S' with a knife after having invited him at his house for lunch stems from his suspicion on his wife's fidelity and his abhorrence for her relationship with the deceased-'S'. However, the same motive to murder the wife of deceased-'S' and their only child does not find favor with the facts of the case. The farthest possibility and the maximum motivation which may be attributed could be the instant urge of the appellant to silence the two deceased persons who were not only present in his house during the commission of crime but also witnesses to it, magnifying the undeniable probabilities of them testifying against the appellant leading to the discovery of his crime and thus, the immediate translation of such fear by slaughtering them and obliterating their evidence against him. [Para 30] [311-B-E]

2.3. Indeed victims of the crime include an innocent child of 5 years and a pregnant lady who were assaulted by the appellant who was then in a position of trust having invited them to his house for lunch. But this alone would not be sufficient to place the crime in category of "rarest of the rare" as the proportion of culpability of the appellant could be separated for the three victims into two parts: the deceased 'S' and the pregnant lady and the young child. [Para 31] [311-F-G]

2.4. On one hand the crime is pre-mediated in respect of the deceased 'S', while on the other, no motive or pre-orchestration could be culled out for the other two deceased persons. The two mur[illegible]e

translated due to his sudden realization and extreme fear of being caught for the murder of 'S' and also, to save himself from being shunned by the society. The brutality envisaged in the pre-mediated murder of 'S' alone, in the light of present facts, does not inspire confidence so as to place it in the category of "rarest of the rare". Further, the appellant is a young man of about 35 years and neither does he have any criminal antecedents nor is it stated that he is or has been an anti-social element. The future possibilities of his reform also cannot be ruled out. [Para 32] [311-H; 312-A-C]

2.5. In a civilized society — a tooth for a tooth and an eye for an eye ought not to be the criterion to clothe a case with "rarest of the rare" jacket and the Courts must not be propelled by such notions in a haste resorting to capital punishment. Our criminal jurisprudence cautions the courts of law to act with utmost responsibility by analyzing the finest strands of the matter and it is in that perspective a reasonable proportion has to be maintained between the brutality of the crime and the punishment. It falls squarely upon the Court to award the sentence having due regard to the nature of offence such that neither is the punishment disproportionately severe nor is it manifestly inadequate, as either case would not subserve the cause of justice to the society. In jurisprudential terms, an individual's right of not to be subjected to cruel, arbitrary or excessive punishment cannot be outweighed by the utilitarian value of that punishment. [Para 33] [312-C-F]

2.6. In the contextual facts, the brutality as evinced by the appellant would not fall within the ambit of the "rarest of the rare" cases so as to exercise the discretion of imposing capital punishment. Therefore, while recording its concurrence with the findings and conclusions of the Courts below as regards the guilt of

the accused under Section 302, this Court is of the considered opinion that the sentence of death imposed on the appellant be commuted to imprisonment for life. [Para 35] [313-A-C]

Bachan Singh vs State Of Punjab, **1983 1 SCR 145;** *Machhi Singh v. State of Punjab*, **1983 SCR (3) 413;** *Ramnaresh v. State of Chhattisgarh,* **(2012) 4 SCC 257: 2012 (3) SCR 630;** *Swamy Shraddananda (2) v. State of Karnataka* **(2008) 13 SCC 767*:* 2008 (11) SCR 93;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498*,:* 2009 (9) SCR 90;** *Mohd. Farooq Abdul Gafur v. State of Maharashtra* **(2010) 14 SCC 641*:* 2009 (12) SCR 1093;** *Haresh Mohandas Rajput v. State of Maharashtra* **(2011) 12 SCC 56 : 2011 (14) SCR 921;** *State of Maharashtra v. Goraksha Ambaji Adsul* **(2011) 7 SCC 437: 2011 (9) SCR 41;** *Aqeel Ahmad v. State of U.P.* **(2008) 16 SCC 372 *:* 2008 (17) SCR 1330;** *Ram Pal v. State of U.P.* **(2003) 7 SCC 141 and** *Panchhi v. State of U.P,* **(1998) 7 SCC 177 and** *Dagdu and Ors. v. State of Maharashtra* **(1977) 3 SCC 68: 1977 (3) SCR 636 – referred to.**

Case Law Reference:

1983 1 SCR 145	**referred to**	**Para 26**
1983 SCR (3) 413	**referred to**	**Para 26**
2012 (3) SCR 630	**referred to**	**Para 26**
2008 (11) SCR 93	**referred to**	**Para 27**
2009 (9) SCR 90	**referred to**	**Para 27**
2009 (12) SCR 1093	**referred to**	**Para 27**
2011 (14) SCR 921	**referred to**	**Para 27**
2011 (9) SCR 41	**referred to**	**Para 27**
2008 (17) SCR 1330	**referred**	

(2003) 7 SCC 141	**referred to**	**Para 28**
(1998) 7 SCC 177	**referred to**	**Para 29**
1977 (3) SCR 636	**referred to**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1566-1567 of 2013.

From the Judgment & Order dated 16.01.2012 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Criminal Reference No.3 of 2010 and Criminal Appeal No. 2246 of 2010.

Vijay Kumar, Gopi Chand, Preeti Bhardwaj (for Sangeeta Kumar), for the Appellant.

Vibha Datta Makhija, Vanshja Shukla, Mishra Saurabh for the Respondent.

The Judgment of the Court was delivered by

H. L. DATTU, J. 1. Leave granted.

2. These appeals are directed against the judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Reference No. 03 of 2010 and Criminal Appeal No.2246 of 2010, dated 16.01.2012. By the common impugned judgment and order, the High Court has confirmed the judgment and order passed by the Additional Sessions Judge, Satna, in Sessions Trial No.257 of 2007, dated 07.09.2010, whereby and whereunder the learned Sessions Judge has convicted the appellant for offence punishable under Section 302 of Indian Penal Code, 1860 (for short, 'the IPC') and sentenced him to death.

Facts:

3. The Prosecution case : On 28.05.2007, at around 12:20 p.m., Dehati Nalishi (Ex. P-10) was recorded by the

Investigating Officer (PW-19) on the basis of information received from the complainant-Ramesh Prasad Gupta (PW-4) regarding murder of his nephew Sunil Gupta, his daughter-in-law Pushpa Gupta and grandson Gaurav, aged 5 years by the appellant in his rented house. Thereafter, an FIR was registered for the offence punishable under Section 302 of the IPC, inquest proceedings were conducted and the dead bodies were sent for post-mortem examination. On further investigation, blood-stained pieces of wall, cement floor, etc. along with a mobile phone, a Katar (sharp edged weapon) and the Motorcycle of the deceased were seized from the appellant's house. On 31.05.2007, the appellant was arrested and at his instance an iron knife was recovered and sent for forensic examination.

4. On further investigation it surfaced that the appellant thoroughly detested the association of his wife, Smt. Geeta (A2) with the deceased-Sunil Gupta. It has come on record that the appellant did not like the deceased-Sunil Gupta visiting his house to meet A2 in spite of his strong opposition and therefore, hatched a conspiracy with A2 to murder the deceased persons on the pretext of inviting and hosting them for a lunch. On the basis of the same, the charge-sheet was filed against the appellant and A2 for offences punishable under Sections 302/34 and 120-B of the IPC and the case was committed to trial by order dated 10.09.2001.

5. In the statements recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short 'the Code') the appellant has stated that on 27.05.2007, when the school was closed during holidays, the deceased had come to his house in his absence and asked his wife to come to school in the morning insisting upon completion of some pending work. The day next, around 9.00 A.M. the deceased had sent message for A2 again. Then, the appellant had called the deceased and categorically told him that A2 would only go to the school when the school reopens. He has also stated

returning from the market at 11:30 AM, he heard the cries of A2 for help and noticed the wife of the deceased and the child sitting on the terrace of his house. He has further stated that when he went inside, he saw the deceased attempting to commit rape and was attacking A2 with the knife. On his intervention, the deceased attempted to hit him and a fight ensued where he snatched the knife from the deceased and hit him in order to protect his wife's modesty and their lives. It is also stated that wife of the deceased and the child intervened between them and therefore suffered serious injuries leading to their death. A2 has supported the said defence in her statement.

6. The Prosecution has examined 19 witnesses in support of its case including three eye-witnesses PWs-5, 7 and 8. We would only notice the evidence of witnesses relevant for the disposal of this appeal, *viz*., PWs-4, 5, 7, 9 and 18 along with the evidence of Doctors.

7. PW-4 is the informant and has testified that on the fateful day at 12.00 P.M. he overheard a mob in the market that the appellant had committed murder of three persons in his rented house. Upon proceeding towards the said house of Subhadra Jaiswal (PW-5), he found dead bodies of the deceased persons lying in the passage of the house. On enquiry, PW-5 had informed him that about 45 minutes ago, the appellant slaughtered them by a *Katar* and fled away and that A2 had also received injuries on her leg.

8. PW-5 is the owner of the house where the appellant and A2 resided as tenants. She has stated that she was acquainted with the deceased persons as they used to visit the appellant's house. She has testified that on the fateful day at 11.00 AM, she heard the shrieks from the staircase of her house and upon reaching the spot, she witnessed the deceased followed by the appellant with a knife in his hands running down the stairs. Thereafter, the appellant started assaulting the deceased with

the knife and despite her intervention he proceeded to assault the deceased family. She ran out after grabbing the child and immediately rushed to the house of A2's mother who resided in the neighborhood and informed about the incident. On returning, she found that the deceased persons had succumbed to their injuries and the appellant had fled.

9. PW-7, Smt. Munni, is another tenant in the house of PW-5. In her evidence she has stated to have heard the sound of something falling from the stairs and cries at 12.00 PM on the fateful day, whereafter she went towards door of her house and witnessed the appellant assaulting the deceased persons with a knife. She has further stated that though PW-5 attempted to intervene, the appellant continued to assault the deceased persons.

10. PW-9, Lale @ Lal Singh was known to the deceased persons and at the relevant time was in the neighborhood. He has stated that at 11:45 AM, he heard PW-5 screaming and coming out of the appellant's house with the child-Gaurav. When he went near the child, he noticed the stab injuries to which he had succumbed. In the meanwhile, the appellant came out of the house with a knife and threatened others not to stop him and fled away on his motorcycle. Further, PW-9 has stated that on proceeding towards the passage of the house, he found the deceased-couple lying in a pool of blood and A2 sitting on the stairs. Upon enquiry from A2, she stated that the appellant detested her relationships with the deceased-Sunil Gupta and that the deceased family was invited for lunch at her house, where the quarrel broke out and resulted in murder of the three deceased persons by the appellant.

11. PW-18, Dinesh Singh, had accompanied PW-9 on the fateful day and thus, is a witness to the incident and has corroborated the testimony of PW-9.

12. PWs- 16 and 14 are the Doctors who conducted post-mortem of Pushpa Gupta, Sunil Gupta v

respectively and have deposed in respect of the 26 week pregnancy of the deceased-Pushpa Gupta, the injuries sustained by them, weapon of crime as sharp edged knife and the cause of death to be excessive hemorrhage due to ante-mortem injuries.

13. The Trial Court has relied on primarily the evidence of eye-witnesses PWs-5 and 7, whose evidence is corroborated by the evidence of PWs-4, 8, 9 and 18 and the medical evidence of PWs-16 and 14 and the post-mortem report of the deceased persons and the medical report of A2 to reject the defense version and record a finding that the appellant had invited the deceased family for lunch and upon a quarrel thereat, attacked Sunil Gupta with a knife and thereafter, assaulted Sunil Gupta, his wife and his child to death. The motive of the appellant is recorded as the suspicion of the appellant on the fidelity of A2 and her continuous engagement with Sunil Gupta even after his warnings. On the basis of the aforesaid, the Trial Court has found the evidence insufficient to establish the guilt of A2 beyond reasonable doubt and reached the conclusion that the appellant alone is guilty of murder of the deceased family and hence, convicted him under Section 302 of the IPC while acquitting A2 of the charge under Section 302 read with Section 120-B of the IPC. The Trial Court has considered the following factors and found the present case fit into the category of "rarest of the rare" and therefore, sentenced the appellant to death for the following reasons :

a. The appellant had apparently no reason to commit the murder of three persons especially the murder of a pregnant woman and an innocent child,

b. He was under no duress or provocation by any visible circumstances,

c. His conduct in stabbing the deceased persons was "so brutal, cruel, grotesque and diabolical"

d. Manner of commission of crime being unsympathetic and "dastardly".

14. Aggrieved by the aforesaid, the State had preferred an appeal against the acquittal of A2 and the appellant had questioned his conviction and sentence. The High Court has disposed of the said appeals along with the reference for confirmation of death sentence of the appellant. The High Court has considered the evidence on record at length and the judgment and order of the Trial Court and after considering all aspects of the case in the light of the submissions made by the parties has reached the conclusion that the Trial Court has not committed any error whatsoever in acquitting A2 and convicting the appellant for the offence under Section 302 of the IPC. The High Court has dismissed the appeals filed by the State as well the appellant-herein and confirmed the sentence of death of the appellant.

15. Aggrieved by the aforesaid dismissal of his appeal and confirmation of his conviction and sentence, the appellant is before us in this appeal.

16. We have heard Shri Vijay Kumar, learned counsel appearing for the appellant-accused and Smt.Vibha Dutta Makhija, learned senior counsel appearing for the respondent-State at length. We have also carefully perused the evidence on record including the evidence of the eye-witnesses and the statements of the appellant and A2 under Section 313 of the Code and the judgments and orders of the Courts below.

Submissions

17. Shri Kumar would submit that Courts below have erred in placing heavy reliance on the evidence of eye-witnesses, PWs-5 and 7 and rejecting the defence version of the incident. He would further contend that the plea of right to private defence put forth by the accused persons is not properly appreciated by the Trial Court and therefore, the co[illegible]d

persons deserves to be set aside. On the question of sentence, he would submit, that the incident occurred at the spur of the movement when the deceased-Sunil Gupta injured the appellant when he tried to protect his wife, and further the appellant had to use the knife to defend himself from the assault made by the deceased-Sunil Gupta. He would further submit that the wife of the deceased and child suffered injuries only when they tried to intervene between the deceased-Sunil Gupta and the appellant and therefore, the death sentence deserves to be commuted. He would submit that neither the murder was pre-planned nor did the appellant had any motive and that the manner and time of occurrence must be considered in the background of his mental condition and agony while weighing the mitigating and aggravating factors towards determination of his sentence.

18. Smt. Makhija would support the judgment and order of the Courts below and submit that the conviction of the appellant is justified in the light of evidence of Prosecution Witnesses and post-mortem reports. On the question of sentence, she would submit that the appellant has committed the murder of three innocent persons in a pre-ordained fashion driven by the suspicion of fidelity of his wife (A2). Further, that no provocation or duress could be gathered from the facts of the case in respect of the wife or child who were brutally slaughtered and therefore, the case falls into the category of "rarest of rare" warranting the imposition of death sentence on the appellant.

19. The learned counsels have addressed this Court on two issues: *firstly*, the conviction of the appellant and *secondly*, if the same be upheld his sentence. We would discuss the two issues sequentially.

Issue one: Conviction

20. The submission of Shri Kumar in respect of the non-credibility of the eye-witnesses relied upon by the Courts below

to establish the guilt of the appellant and reject the statements of the appellant and A2 fails to convince us.

21. As already noticed by us, PW-5 in her evidence has testified in respect of the appellant assaulting the deceased persons with a knife, refusing to stop even on intervention and thereafter, running away on his motorbike. PW-5's evidence is amply supported on all aspects by the evidence of PW-7, who has categorically stated that the appellant assaulted the deceased persons and continued to do so in spite of PW-5's intervention and thereafter, fled away on his motorcycle. The said evidence of the two eye-witnesses garners further support from the testimonies of PW-9 and 18 who saw PW-5 carrying the child out of the house and thereafter, the appellant running out with a knife in his hand and escaping on his motorcycle after extending threats to them. The cross-examination of the aforesaid witnesses has neither punctured their testimonies nor elicited sufficient material to reject the prosecution version.

22. Apart from the aforesaid, the evidence of the eye-witnesses draws strength from the evidence of PWs-16 and 14 who conducted the post-mortem of the deceased persons testifying that the injuries were caused by a knife like weapon. The same has been further corroborated by the evidence of PW-19, in respect of recovery of the knife from a pit of sand at the instance of the appellant.

23. The testimony of the two eye-witnesses is natural, convincing and well corroborated by the evidence of PWs 4, 8, 9 and 18 and the medical evidence. The two do not seem to have any animus against the appellant. There is nothing on record to suggest any dispute between the two eye-witnesses and the appellant or hint towards bitterness in their relationships so as to suggest their false testimony against him. Additionally, no such close alliance of the witnesses with the deceased persons has surfaced so as to prove their bias towards the appellant. Thus, the evidence of the two eye-witnesses is credible and trustworthy.

24. It is true that there is no evidence to establish the genesis of the incident. The incident has occurred within the four walls of the appellant's house. In a scenario of this nature the prosecution and the defense version has to be tested on the touchstone of probabilities and truthfulness. In our considered view the defense version appears to be unnatural and improbable. We say so for the reason that when the appellant suspected the deceased person's illicit relationship with A2, the deceased would not have dared to enter the house of appellant, with his wife and child and attempted to rape A2 and on her resistance threatened to assault her with the knife. Further, the statement of appellant that when A2 was shouting for help, the wife of the deceased and the child continued to sit outside on the terrace while the appellant intervened to protect A2 and the deceased assaulted the appellant and on the intervention in the scuffle the wife and the child received the fatal injuries. The plea of right to private defence and non-orchestrated nature of the offence stand vitiated by the evidence of PW-9 who has testified that A2, immediately after the fateful incident has narrated the version of the genesis of the incident absolutely contrary to the version stated by the appellant. On this aspect of the matter, we are in consonance with the concurring observations of the Courts below.

25. In the light of the aforesaid, we are of the considered view that the prosecution case stands well supported and established by the evidence of PWs 5, 7, 9 and 18 coupled with the evidence of Doctors, the post-mortem report and medical evidence and does not leave any room for doubt as to the guilt of the appellant. Therefore, in our considered opinion, the Courts below have not committed any error in convicting the appellant for the murder of the three persons under Section 302 of the IPC and the conviction of the appellant requires to be upheld.

Issue two: Sentencing

26. We are mindful of the concept of and the caution to

be exercised in classifying "rarest of the rare" cases in the light of the dictum of this Court in *Bachan Singh case* and *Macchi Singh case* which elucidated upon the few of many aggravating and the mitigating factors which must be judicially weighed and balanced while deciding upon the sentence proportional to the crime committed. In *Ramnaresh v. State of Chhattisgarh,* (2012) 4 SCC 257 this Court has reflected upon the aforesaid decisions and collectively listed the principles laid down therein and the factors which must be borne in mind by the Court.

27. It is well settled that awarding of life sentence is the rule, death is an exception. The principles laid down earlier and restated in the various decisions of this Court can be broadly stated that a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fiber of society would call for imposition of capital punishment in order to ensure that it acts as a deterrent. *(See: Swamy Shraddananda (2) v. State of Karnataka,* (2008) 13 SCC 767*, Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,* (2009) 6 SCC 498*, Mohd. Farooq Abdul Gafur v. State of Maharashtra,* (2010) 14 SCC 641*, Haresh Mohandas Rajput v. State of Maharashtra,* (2011) 12 SCC 56 *and State of Maharashtra v. Goraksha Ambaji Adsul,* (2011) 7 SCC 437*).* However, the application of "the rarest of the rare case" principle is dependent upon and differs from case to case.

28. This Court has consistently held that the number of deaths or the factum of whole family being wiped off cannot be the sole criteria for determining whether the case falls into the category of "rarest of rare". *(See: Aqeel Ahmad v. State of U.P.,* (2008) 16 SCC 372*, Ram Pal v. State of U.P.,* (2003) 7 SCC 141*)*

29. Further, we cannot loose sight of the fact that brutality also cannot be the only criterion for determining whether a case

falls under the "rarest of rare" categories. In *Panchhi v. State of U.P,* this Court has reiterated the said principle and thereby justified the commutation of sentence from death to life imprisonment.

30. We would now revert to the facts of the instant case. The genesis of crime and the manner of occurrence inside the house of the appellant remains clouded while the guilt has been clearly established with the aid of available evidence. The factum of the crime being pre-ordained and the motive of the appellant in brutally assaulting the deceased-Sunil Gutpa with a knife after having invited him at his house for lunch stems from his suspicion on his wife's fidelity and his abhorrence for her relationship with the deceased-Sunil Gupta. However, the same motive to murder the wife of deceased-Sunil Gupta and their only child does not find favor with the facts of the case. The farthest possibility and the maximum motivation which may be attributed could be the instant urge of the appellant to silence the two deceased persons who were not only present in his house during the commission of crime but also witnesses to it, magnifying the undeniable probabilities of them testifying against the appellant leading to the discovery of his crime and thus, the immediate translation of such fear by slaughtering them and obliterating their evidence against him.

31. Indeed victims of the crime include an innocent child of 5 years and a pregnant lady who were assaulted by the appellant who was then in a position of trust having invited them to his house for lunch. But this alone would not be sufficient to place the crime in category of "rarest of the rare" as the proportion of culpability of the appellant could be separated for the three victims into two parts: the deceased and the pregnant lady and the young child.

32. As stated above, on one hand the crime is pre-mediated in respect of the deceased husband, while on the other, no motive or pre-orchestration could be culled out for the other two deceased persons. The two murders seem to have

translated due to his sudden realization and extreme fear of being caught for the murder of the Sunil Gupta and also, to save himself from being shunned by the society. Having said so, the brutality envisaged in the pre-mediated murder of Sunil Gupta alone, in the light of present facts, does not inspire confidence so as to place it in the category of "rarest of the rare". Further, the appellant is a young man of about 35 years and neither does he have any criminal antecedents nor is it stated that he is or has been an anti-social element. The future possibilities of his reform also cannot be ruled out.

33. In a civilized society — a tooth for a tooth and an eye for an eye ought not to be the criterion to clothe a case with "rarest of the rare" jacket and the Courts must not be propelled by such notions in a haste resorting to capital punishment. Our criminal jurisprudence cautions the courts of law to act with utmost responsibility by analyzing the finest strands of the matter and it is in that perspective a reasonable proportion has to be maintained between the brutality of the crime and the punishment. It falls squarely upon the Court to award the sentence having due regard to the nature of offence such that neither is the punishment disproportionately severe nor is it manifestly inadequate, as either case would not sub-serve the cause of justice to the society. In jurisprudential terms, an individual's right of not to be subjected to cruel, arbitrary or excessive punishment cannot be outweighed by the utilitarian value of that punishment.

34. We reiterate the observations of this Court in *Dagdu and Ors. v. State of Maharashtra,* (1977) 3 SCC 68 and *Subhash Ramkumar case (supra)* that all murders are inhuman, some only more so than others. The degree of brutality has to be ascertained in contrast with other cases and the criteria and the tests laid down in *Bachan Singh case (supra)* and further streamlined in *Macchi Singh case (supra)* writ large upon the Courts the caution which must be borne in mind while declaring a crime so revolting and dia[illegible]s nothing less but capital punishment.

35. In the contextual facts, we are of the considered view that the brutality as evinced by the appellant herein would not fall within the ambit of the "rarest of the rare" cases so as to exercise the discretion of imposing capital punishment. In the light of the aforesaid and having regard to the nature of the offence and the methodology adopted by the appellant, the facts at hand fail to convince us that the case falls into the category of "rarest of the rare" to justify the imposition of death penalty. Therefore, while recording our concurrence with the findings and conclusions of the Courts below as regards the guilt of the accused under Section 302, we are of the considered opinion that the sentence of death imposed on the appellant be commuted to imprisonment for life.

36. In view of the above, we set aside the judgment and order passed by the High Court and commute the death sentence imposed on the appellant into life sentence.

37. The appeals are disposed of in the aforesaid terms.

B.B.B. Appeals disposed of.

U.P. POWER CORPORATION LTD. AND ANOTHER
v.
VIRENDRA LAL (DEAD) THROUGH L.RS.
(Civil Appeal No.8949 of 2013)

OCTOBER 3, 2013

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

Service Law – Misconduct – Punishment – Imposition of, by higher/ appellate authority – Justification – Held: A higher authority may pass order imposing punishment, if the right of appeal is not taken away – If the appellate authority passes order as the primary authority and there is provision for further appeal or revision or review, it cannot be said that the said order suffers from any illegality – In the case at hand, the Chairman was the competent authority to pass order of punishment against the delinquent employee, while appeal/ representation from the order of the Chairman lay before the UPSEB – However, by virtue of the order of punishment having been passed by the UPSEB itself, remedy of appeal was denied to the delinquent employee and consequently, the Tribunal and the High Court were justified in setting aside the order of UPSEB – U.P. State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 1975 – Regulation 6.

'V', the predecessor-in-interest of the respondents, was an Assistant Engineer in the U.P. State Electricity Board (UPSEB). He had released electricity to one consumer beyond the approved estimate as a consequence of which wrongful loss was caused to UPSEB. Disciplinary proceedings were initiated against 'V'. The inquiry committee commenced enquiry. Meanwhile 'V' stood superannuated, but the proceedings continued and, eventually, the inquiry report was served

on 'V'. Considering the submissions put forth by 'V' in his representation, the UPSEB held him guilty of misconduct and ordered deduction of 10% amount of the pension payable to him.

'V' preferred petition before the State Public Service Tribunal contending, *inter alia*, that the power to deal with the report of the inquiry committee vested in the Chairman of the UPSEB under regulation 6(4) of U.P. State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 1975 but in his case as the punishment had been imposed by the UPSEB, he had been deprived of the right of appeal. The order passed by UPSEB was set aside by the Tribunal. The judgment of the Tribunal was affirmed by the High Court, and therefore the present appeal.

Dismissing the appeal, the Court

HELD: 1. Regulation 6 of the U.P. State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 1975 deals with constitution of Committee to enquire into cases. Sub-regulation (4) of the said Regulation empowers the Chairman to deal with the report and recommendations of the Inquiry Committee in accordance with the relevant Regulations and pass final orders in respect of officers upto the rank of Superintending Engineer. 'V' retired from service as an Assistant Engineer which rank is lower than the Superintending Engineer. Hence, the Chairman was authorized to pass the order of punishment. Sub-regulation (5) of Regulation 6 makes it clear that if an order is passed by the Chairman, an appeal or representation, as the case may be, lies to the Board. In any case it is subject to challenge in the hierarchical system of the UPSEB. [Paras 9, 10, 11 and 12] [320-C, F-G; 321-F-G]

2. A higher authority may pass an order imposing a punishment and the same would withstand scrutiny if the right of appeal is not taken away. That apart, if the appellate authority passes an order as the primary authority and there is provision for further appeal or revision or review it cannot be said that the said order suffers from any illegality. In the case at hand, there is no denial of the fact that the UPSEB passed the order for deduction of 10% pension from the delinquent employee. Under the Regulations, there is a stipulation that an appeal or representation, as the case may be, from the order of the Chairman shall lie to the UPSEB. The Regulation clearly provides that in case of an Assistant Engineer the Chairman is the competent authority to pass the order of punishment and, therefore, by virtue of the order passed by the UPSEB, remedy of appeal was denied to the delinquent employee. Under these circumstances, the view expressed by the High Court has to be regarded as flawless. [Para 21] [326-G; 327-A-C]

***Surjit Ghosh v. Chairman & Managing Director, United Commercial Bank and others* (1995) 2 SCC 474; *Electronics Corporation of India v. G. Muralidhar* (2001) 10 SCC 43; *A. Sudhakar v. Postmaster General, Hyderabad and another* (2006) 4 SCC 348: 2006 (3) SCR 373 and *S. Loganathan v. Union of India and others* (2012) 1 SCC 293: 2011 (14) SCR 1081 – relied on.**

***State of Uttar Pradesh v. Brahm Datt Sharma and another* (1987) 2 SCC 179: 1987 (2) SCR 444; *Takhatray Shivadattray Mankad v. State of Gujarat* 1989 Supp (2) SCC 110: 1989 (3) SCR 214 and *Balbir Chand v. Food Corporation of India Ltd. and others* (1997) 3 SCC 371: 1996 (10) Suppl. SCR 156– referred to.**

Case Law Reference:

1987 (2) SCR 444	referred to	Para 12
1989 (3) SCR 214	referre	

(1995) 2 SCC 474	**relied on**	**Para 15**
1996 (10) Suppl. SCR 156	**referred to**	**Para 16**
(2001) 10 SCC 43	**relied on**	**Para 18**
2006 (3) SCR 373	**relied on**	**Para 19**
2011 (14) SCR 1081	**relied on**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8949 of 2013.

From the Judgment & Order dated 11.02.2011 of the High Court of Judicature at Allahabad, Lucknow Bench in Writ Petition (S/B) No.211 of 2011.

Shiv Kumar Tripathi, V.N. Raghupathy for the Appellants.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Calling in question the legal acceptability of the order dated 11.2.2011 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, in Writ Petition (S/B) No. 211 of 2011 whereby the Division Bench has affirmed the judgment dated 23.9.2010 passed by the State Public Service Tribunal, Lucknow, (for short "the tribunal") in claim petition No. 683 of 2000 wherein the tribunal had set aside the order dated 12.10.1999 passed by the U.P. State Electricity Board (UPSEB) imposing punishment of deduction of 10% amount of pension payable to the original respondent, Virendra Lal, predecessor-in-interest of the respondents herein, the U.P. Power Corporation Ltd. (for short "the Corporation) and its functionaries have preferred this appeal by special leave.

3. The expose' of facts are that late Virendra Lal was posted as Assistant Engineer in Electricity Distribution Division, Sultanpur in the year 1984 and at that time he had released

electricity to one consumer, namely, M/s. Arif Cement Industries, Jagdishpur, beyond the approved estimate as a consequence of which wrongful loss was caused to UPSEB. After the authorities of the UPSEB came to know about the same, the matter was forwarded to the inquiry committee on 27.9.1994 for initiation of a disciplinary proceeding on the basis of which on 23.2.1998, the inquiry committee framed charges against him and called for an explanation. The delinquent employee filed his reply on 16.4.1998 and thereafter the inquiry committee commenced the enquiry. On 30.6.1998, late Virendra Lal stood superannuated. On 28.1.1999 the inquiry report was served on him and he was granted opportunity to submit a representation pertaining to the inquiry report. On 21.3.1999 he filed his representation and considering the submissions put forth in the representation on 12.10.1999 the UPSEB passed the order of punishment as has been stated hereinbefore. The said order was communicated to late Virendra Lal by the Joint Secretary of the UPSEB.

4. Grieved by the aforesaid order, Virendra Lal preferred claim petition No. 683 of 2000 before the tribunal contending, inter alia, that there is no statutory provision in the UPSEB for recovery from the pension of a retired officer; that the power to deal with the report of the inquiry committee vests in the Chairman of the UPSEB in regulation 6(4) of U.P. State Electricity Board (Officers and Servants) (Conditions of Service) Regulations, 1975 (for short "the Regulations") but as the punishment had been imposed by the UPSEB he had been deprived of the right of appeal; that other officers with similar allegations had been exonerated but he alone was proceeded which was discriminatory in nature; and that the manner in which the proceeding was conducted was violative of the principles of natural justice and had caused serious prejudice to him. The stand and stance put forth by him was opposed by the UPSEB.

5. The tribunal adverting to the application of certain Rules, violation of principles of natural j[illegible]n

commencement of the departmental proceeding and the prejudice caused to the delinquent employee set aside the order dated 12.10.1999 and directed to release the deducted amount of pension to the applicant therein with simple interest @ 8 per cent per annum from the date the amount was due to the date of the actual payment and further directed for release of the pension forthwith.

6. Being dissatisfied with the aforesaid order the Corporation preferred a writ petition before the High Court and the Division Bench disposed of the same by passing the following order

> "During the course of argument, it has been admitted by the petitioners' counsel that under Rules, Chairman is the disciplinary authority who is competent to pass the order. Justification has been given by the petitioners' counsel that since the claimant respondent is a retired person, power was exercised by the Board. Even if an employee is retired, the power should be exercised by the same authority who has been conferred power to work as disciplinary authority under rules. Power cannot be usurped by the higher authority in violation of the service rules. Accordingly, the impugned order passed by the tribunal does not seem to suffer from any impropriety or illegality."

7. We have heard Mr. Shiv Kumar Tripathi, learned counsel for the appellants. Despite service of notice on the legal heirs of the original respondent, there has been no appearance.

8. Criticizing the order passed by the High Court it is submitted by Mr. Tripathi that the High Court has fallen into error by opining that even in respect of a retired employee the power should be exercised by the same authority who had been conferred power to act as the disciplinary authority under the Regulations. It is urged by him that if the higher authority initiates the disciplinary proceeding and imposes the punishment and no prejudice is caused the order of punishment cannot be

annulled on that score. It is further canvassed by him that as the High Court has only addressed to a singular issue and arrived at the conclusion, the matter deserves to be remitted to the High Court for adjudication on other issues.

9. It is not in dispute that the disciplinary proceeding was initiated against the original respondent while he was in service and thereafter the proceeding continued and, eventually, the Board passed the order of punishment. Learned counsel for the appellants has drawn our attention to the Regulations. Regulation 6 deals with constitution of Committee to enquire into cases. Sub-regulation (4) of the said Regulation reads as follows: -

> "(4) The Chairman shall in relation to Officers and servants upto the rank of Superintending Engineer deal with the report and recommendations of the Inquiry Committee in accordance with the relevant regulations and pass final orders. In the case of Officers above the rank of Superintending Engineer, the Chairman shall place the report of the Inquiry Committee along with its recommendations, if any, before the Board, who shall pass final orders."

10. On a perusal of the aforequoted sub-regulation it is quite vivid that the Chairman has been empowered to deal with the report and recommendations of the Inquiry Committee in accordance with the relevant Regulations and pass final orders in respect of officers upto the rank of Superintending Engineer. The delinquent employee, Late Virendra Lal, retired from service as an Assistant Engineer which rank is lower than the Superintending Engineer. Hence, the Chairman was authorized to pass the order of punishment. As the factual matrix would reveal the order of punishment was passed on 12.10.1999 and the Board had passed that order. The said order reads as follows: -

> "The Board has asked to s

representation within 14 days providing him a copy of enquiry report received from enquiry committee vide letter No. 490-Shija-05d/SEB-99-7(38)-05D/96. Shri Lal has submitted his representation on 21.3.1999 and it has been found after examination thereof that Shri Virendra Lal could not clarify in his representation as to why he has installed a sub-station deviating from approved estimate. The recommendation by Enquiry Committee that Shri Lal is guilty of providing wrongful gain to consumer and wrongful loss to Board is proper and appropriate.

Therefore Shri Virendra Lal (77031) then Assistant Engineer (presently retired) has been found the guilty of misconduct and charges levelled against him, so the order hereby is passed to deduct 10% amount of the pension payable to him for 5 years with due compliance of the CCA Rules.

By the order of the Board

Sd/-
S.P. Singh
Joint Secretary
11.10.1999"

11. At this stage, it is appropriate to refer to sub-regulation (5) of Regulation 6 which reads as follows: -

"(5) An appeal or representation, as the case may be, from the orders of the Chairman passed under sub-regulation (4) shall lie to the Board."

12. Thus, if an order is passed by the Chairman, an appeal or representation, as the case may be, lies to the Board. In any case it is subject to challenge in the hierarchical system of the UPSEB. Learned counsel has commended us to the decision in *State of Uttar Pradesh v. Brahm Datt Sharma and another*[1]. The said decision only supports the proposition that if a

1. (1987) 2 SCC 179.

disciplinary proceeding against an employee of the Government is initiated in respect of a misconduct committed by him and if he retires from service on attaining the age of superannuation before completion of the disciplinary proceedings and charges are of serious nature, then it is open to the Government to take proceedings against the Government servant in accordance with the rules for the reduction of pension and gratuity.

13. In *Takhatray Shivadattray Mankad v. State of Gujarat,*[2] the appellant therein was compulsorily retired on January 12, 1962 in one of the departmental proceedings. Two other proceedings were instituted in the year 1963 and that is earlier to his attaining the age of superannuation on January 14, 1964. These departmental proceedings were dropped on the ground that they had been rendered infructuous. Thereafter, the proceedings were revived and, eventually, certain punishment was imposed pertaining to determination of his pension. The learned Judges dealing with the said submission opined thus:-

"The learned counsel for the appellant strenuously contended that after the disciplinary inquiries had been dropped on the ground that they had become infructuous, the government was not right and justified in reducing the pension and gratuity on the same charges which were the subject matter of the enquiries. This argument of the learned counsel, in our opinion, does not merit consideration because the charges against the appellant were not made use of for awarding any punishment after his retirement from service but only for determining the quantum of the appellant's pension in accordance with the rules relating to the payment of pension and gratuity."

To arrive at the said conclusion the Court relied upon the principles stated in *Brahm Datt Sharma* (supra).

14. In the case at hand, we may note with profit that though

2. 1989 Supp (2) SCC 110.

the tribunal has recorded that there is no provision for continuance of such a proceeding, yet the said issue need not be addressed to as we are only concerned with the controversy, as has emerged in this appeal, whether the UPSEB could have imposed the punishment accepting the recommendations of the Inquiry Committee.

15. In this context, we may fruitfully refer to the authority in *Surjit Ghosh v. Chairman & Managing Director, United Commercial Bank and others.*[3] In the said case, the disciplinary proceeding was initiated against the delinquent employee by the Deputy General Manager of United Commercial Bank, the respondent therein. The disciplinary authority at the relevant time was the Divisional Manager/ Assistant General Manager (Personnel) and an appeal against their order lay to the Deputy General Manager or any other officer of the same rank. Against the order of the Deputy General Manager a review lay to the General Manager. In this backdrop a contention was raised that the appellant was deprived of an opportunity to prefer an appeal provided under the Regulations and the same goes to the root of the dismissal order. The said contention was combatted by the employer contending, inter alia, that when the Deputy General Manager is higher in rank than the disciplinary authority and the order of punishment has been passed by the higher authority, no prejudice has been caused to the employee. A further contention was raised that in the facts and circumstances of the case it should be held that when the order of punishment is passed by higher authority, no appeal is available under the Regulations as it is not necessary to provide for the same. Repelling the said argument the Court opined that it is true that when an authority higher than the disciplinary authority itself imposes the punishment, the order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of

3. (1995) 2 SCC 474.

a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/ Regulations. Thereafter, the learned Judges proceeded to state thus:

> "The higher or appellate authority may choose to exercise the power of the disciplinary authority in some cases while not doing so in other cases. In such cases, the right of the employee depends upon the choice of the higher/appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality. Hence we are of the view that the contention advanced on behalf of the respondent-Bank that when an appellate authority chooses to exercise the power of disciplinary authority, it should be held that there is no right of appeal provided under the Regulations cannot be accepted."

16. In *Balbir Chand v. Food Corporation of India Ltd. and others*[4] the Court adverted to the relevant rule position and came to hold that in normal circumstances the Managing Director being the appellate authority should not have passed the order of punishment so as to enable the delinquent employee to avail right of appeal. The Court observed that it is a well-settled legal position that an authority lower than the appointing authority cannot take any decision in the matter of disciplinary action, but there is no prohibition in law that the higher authority should not take decision or impose the penalty as the primary authority in the matter of disciplinary action. On that basis, it cannot be said that there will be discrimination violating Article 14 of the Constitution or causing material prejudice. It is relevant to state here that the decision in *Surjit Ghosh* (supra) was pressed into service but the same was distinguished stating that in the said judgment under the Rules officer lower in hierarchy was the disciplinary authority but the

4. (1997) 3 SCC 371.

appellate authority had passed the order removing the officer from service and thereby, the remedy of appeal provided under the Rules was denied. In those circumstances, this Court opined that it caused prejudice to the delinquent as he would have otherwise availed of the appellate remedy and his right pertaining to his case being considered by an appellate authority on question of fact was not available. But it cannot be laid as a rule of law that in all circumstances the higher authority should consider and decide the case imposing penalty as a primary authority under the Rules. Be it noted, in the said case a right of second appeal/revision was provided to the Board and, in fact, an appeal was preferred to the Board. Regard being had to the said fact situation, this was Court declined to interfere.

17. Thus, from the aforesaid it is quite clear that in *Balbir Chand* (supra) though the Court approved the principles laid down in *Surjit Ghosh* (supra), yet distinguished the same keeping in view the rule position. Be it noted, the Court made a distinction between the non-availability of the appellate remedy in entirety and availability of a remedy or a revision with the higher authority and preservation and non-extinction of the said right.

18. In *Electronics Corporation of India v. G. Muralidhar*[5] the order of termination was not passed by the disciplinary authority but by the appellate authority and on that score the High Court had quashed the order of termination and directed reinstatement with back wages. After adverting to the facts of the case the learned Judges declined to accept the submission of the appellant therein that the judgment rendered in *Surjit Ghosh* case (supra) should be limited to the facts of that case. The Court further took note of the fact that there was no general provision which conferred a power of review or revision on the Board against an order passed by the Chairman-cum-Managing Director who had passed the order of dismissal and,

5. (2001) 10 SCC 43.

therefore, even if the Board may be a higher authority to the Chairman-cum-Managing Director to hold that an appeal would lie against an order of termination passed by the CMD would tantamount to a fresh legislation since there is no general provision which confers a power of review or revision on the Board against any order passed by the CMD. Being of this view, the Court on the foundation of the ratio laid down in *Surjit Ghosh* (supra) ruled that the order of punishment was vitiated.

19. In this regard reference to the principles laid down in *A. Sudhakar v. Postmaster General, Hyderabad and another*[6] is fruitful. We may aptly quote a passage from the same: -

> "**18.** It is now trite that an authority higher than the appointing authority would also be the designated authority for the purpose of Article 311 of the Constitution. Even the Appellate Authority can impose a punishment subject, of course, to the condition that by reason thereof the delinquent officer should not be deprived of a right of appeal in view of the fact that the right of appeal is a statutory right. However, if such right of appeal is not embellished, an authority higher than the appointing authority may also act as a disciplinary authority."

20. In *S. Loganathan v. Union of India and others,*[7] a two-Judge Bench placed reliance on the decisions rendered in *Surjit Ghosh* (supra) and *Electronics Corporation of India* (supra) and, eventually, opined that as the appellant's right to appeal had not been affected by the authority passing the order, the punishment imposed could not be said to be vitiated in law.

21. From the aforesaid enunciation of law it is graphically clear that a higher authority may pass an order imposing a punishment and the same would withstand scrutiny if the right of appeal is not taken away. That apart, if the appellate authority passes an order as the primary authority and there is provision

6. (2006) 4 SCC 348.
7. (2012) 1 SCC 293.

for further appeal or revision or review it cannot be said that the said order suffers from any illegality. In the case at hand, there is no denial of the fact that the UPSEB has passed the order for deduction of 10% pension from the delinquent employee. Under the Regulations which we have reproduced hereinbefore there is a stipulation that an appeal or representation, as the case may be, from the order of the Chairman shall lie to the UPSEB. The Regulation clearly provides that in case of an Assistant Engineer the Chairman is the competent authority to pass the order of punishment and, therefore, by virtue of the order passed by the UPSEB remedy of appeal was denied to the delinquent employee. Under these circumstances, the view expressed by the High Court has to be regarded as flawless and, accordingly, we concur with the same.

22. Consequently, the appeal, being devoid of merit, stands dismissed without any order as to costs.

B.B.B. Appeal dismissed.

PANCHANAND MANDAL @ PACHAN MANDAL & ANR.
v.
STATE OF JHARKHAND
(Criminal Appeal No. 2173 of 2009)

OCTOBER 4, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

Penal Code, 1860 – s.304B – Dowry death – Allegations of – Prosecution case inter alia based on dying declaration (Ext.4) and statements made by PWs 13 and 14, the brother and mother of the deceased – Conviction of appellants (parents-in-law of the deceased) – Justification – Held: Not justified – Statement made by PW13 not reliable since no evidence to suggest that just before the death PW-13 had talked to deceased or that deceased was in the condition to make statements – Her statement corroborated by PW-14, but not corroborated by PW-12 – Ext.4, the dying declaration also suffers from infirmities – ASI who recorded the dying declaration was not produced by the prosecution for examination or cross-examination – Non-appearance of ASI prejudicially affected the defendant's interest as they were denied the opportunity to cross-examine him – The dying declaration (Ext.4) was not certified by any medical expert stating that the deceased was in medically fit condition for giving statement – Though such certificate is not mandatory, it was the duty of the officer who recorded the same to mention whether the deceased was in mentally and medically fit condition for making such statement, particularly when the case was of a third degree burn which could lead to death – Ominous allegations were made against the in-laws of the deceased – No specific incident stated by the PW-13 or PW-14 in their statements – Nothing on record to suggest that deceased was subjected to cruelty and harassment "soon

before her death" and "in connection with the demand of dowry" – Moreover, deceased did not make any statement in her dying declaration indicating demand of dowry – Valid doubt as to authenticity of the dying declaration – Evidence of cruelty and harassment in general not sufficient to attract s.304B IPC – Prosecution miserably failed to prove the case beyond reasonable doubt.

The sister of PW-14(informant) suffered burn injuries and later died in Hospital. The prosecution case was that when the deceased was baking bread in the kitchen, her in-laws poured kerosene oil on her head and set fire to her sari saying that she had not brought a cow and a golden ring in dowry. It was alleged that the deceased was always harassed for dowry and sometimes was even assaulted. The father-in-law, mother-in-law, two brother-in-laws and husband of the deceased were charge-sheeted for trial. PW-13 is the mother of the deceased while PW-12 is a co-villager of PW14 who had gone with him to see the deceased in hospital. Ext.4 is stated to be the dying declaration. Mainly on the basis of the dying declaration (Ext.4) and the statements of the PW-12, PW-13 and PW-14, the trial court convicted the parents-in-law and brothers-in-law of the deceased under Section 304B/ 34 IPC and sentenced them to life imprisonment, but acquitted the deceased's husband on the ground that he was not present at the scene of occurrence. The order of the trial court was affirmed by the High Court.

The parents-in-law i.e. the appellants contended that PWs 13 and 14 being mother and brother of the deceased were interested witnesses while PW-12 was a co-villager, and therefore their evidences could not be relied upon. Further, according to the appellant, no reliance should be placed on Ext.4, the so called dying declaration, as the ASI, who recorded the dying declaration was not examined and there was no certificate in the dying

declaration that the deceased was in a mentally and medically fit condition to making statements.

Allowing the appeal, the Court

HELD: 1. Section 304B(1), IPC deals with Dowry Death. To attract the provision, the following basic ingredients of the offence are required to be established: (i) The Death of the woman should be caused by burns or fatal injury or otherwise; than under normal circumstances; (ii) Such death should have occurred within 7 years of her marriage; (iii) She must have been subjected to cruelty or harassment by husband or any relative of her husband; and (iv)Such cruelty or harassment should be for or in connection with demand of dowry. [Para 10] [336-D, G-H; 337-A-B]

Biswajit Halder Alias Babu Halder And Others vs. State of W.B. **(2008) 1 SCC 202: 2007 (4) SCR 120 – referred to.**

2.1. From the findings of the Trial Court, as affirmed by the High Court, it is clear that the case of the prosecution is solely based on an FIR(Ext.1), Dying Declaration(Ext.4) and the statements made by PWs 13 and 14. [Para 9] [336-D]

2.2. PW-14, brother of the deceased has stated that marriage of the deceased took place about 5 years prior to the date of death. He also stated that the relationship of the deceased with her husband and with in-laws were good initially. He further stated that later there was a demand of dowry in the form of demand for a cow and a gold ring. PW-13, mother of the deceased has also made statement that the marriage of the deceased took place about 5 years prior to the death. According to her, the deceased at death bed told her about the burning by father-in-law and mother-in-law and stated that there was a demand of dowry and harassment

cannot be relied upon in view of the fact that there is no evidence to suggest that just before the death PW-13 had talked to the deceased or that the deceased was in the condition to make statements. Her statement is corroborated by PW-14, who was present in the hospital, but not corroborated by PW-12- a neighbor who was also said to be present in the hospital. [Para 12] [337-D-G]

2.3. Ext.4 – the dying declaration also suffers from infirmities. The ASI who recorded the dying declaration was not produced by the prosecution for examination or cross-examination. The explanation given by the prosecution in this matter was that the attendance of the ASI could not be secured inspite of summons issued against him and the letters written to the Superintendent of Police. The Trial Court wrongly held that this was a convincing explanation. In fact, non-appearance of ASI has prejudicially affected the defendant's interest as they were denied the opportunity to cross-examine him. It is admitted that dying declaration (Ext.4) was not certified by any medical expert stating that the deceased was in medically fit condition for giving statement. Though such certificate is not mandatory, it was the duty of the officer who recorded the same to mention whether the deceased was in mentally and medically fit condition for making such statement, particularly when the case was of a third degree burn which could lead to death. [Para 13] [337-H; 338-A-D]

2.4. Ominous allegations have been made against the in-laws of the deceased. No specific incident has been stated by the PW-13, mother of the deceased or PW-14, brother of the deceased in their statements. Nothing is on the record to suggest that the deceased was subjected to cruelty and harassment "soon before her death" and "in connection with the demand of dowry". Moreover, the deceased has not made any statement in her dying declaration indicating demand of dowry.

Defence has successfully created a valid doubt as to authenticity of the dying declaration as the police officer who recorded the same was not examined. Such deficiency in evidence proves fatal for the prosecution case as evidence of cruelty and harassment in general is not sufficient to attract Section 304B IPC. [Paras 14, 15] [328-D-E, G-H]

2.5. The prosecution miserably failed to prove the case beyond reasonable doubt. Hence, the conviction and sentence awarded cannot be maintained. [Para 16] [339-A]

Case Law Reference:

2007 (4) SCR 120 referred to Para 11

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2173 of 2009.

From the Judgment & Order dated 20.09.2006 of the High Court of Jharkhand at Ranchi in Crl. A.No. 441 of 2001.

Anil Karnwal (A.C.), Sanjeev K. Bhardwaj, Manoj Joshi for the Appellants.

Jayesh Gourav, Amrendra Kumar Choubey, Krishnanand Pandeya for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred against the judgment dated 20th September, 2006 passed by the Division Bench of the Jharkhand High Court, Ranchi in Criminal Appeal No. 441 of 2001. By its impugned judgment, the Division Bench dismissed the criminal appeal filed by the appellants and affirmed the order of conviction and sentence passed by the Trial Court. Thus Trial Court order, finding the appellants Panchanan Mandal @Pachan Mandal and Malti De[illegible]s

guilty of the offence under Section 304(B)/34 IPC and convicting them with imprisonment for life was upheld by the High Court.

2. The case of the prosecution is based on fard-beyan (I.R.) of informant Bachchu Sao (PW-14) who is the brother of the deceased – Basanti Devi. According to the fard-beyan(I.R.) recorded on 14th August, 1998 at Sadar Hospital, Giridih, the marriage of his deceased sister Basanti Devi was solemnised with the accused Kaleshwar Mandal about five years prior to her death. On 12th August, 1998, Bachcho Sao got information that his sister- Basanti Devi had suffered burns and was admitted in Giridih Sadar Hospital for treatment. He came to Sadar Hospital, Giridih alongwith other members of his family in the evening of 12th August, 1998 itself. He saw his sister had been badly charred with fire. Her whole body had sustained burns. On 13.8.1998 at about 11.00A.M. when she regained her senses, she told him that at about 9.00-10.00 at the night of 11.8.1998 while she was baking bread in the kitchen of her –in-laws house; her father-in-law-accused Panchanan Mandal, his wife-accused Malti Devi and his two sons Falo Mandal and Daso Mandal came there. Her father-in-law poured kerosene oil on her head from a tin and her mother-in-law set fire to her sari with a burning wood of her oven saying that she had not brought a cow and a golden ring in dowry. Her elder brother-in-law (jaith)- Falo Mandal and younger brother-in-law(Daiver)- Daso Mandal took out knives and started threatening her that if she cried aloud she would be killed. When she tried to extinguish fire and came out of the room, all the accused persons pushed her inside the kitchen with lathis and they kept on watching her burning. She also stated him that her husband had gone to Calcutta but while leaving for Calcutta, he had asked the members of his family to kill the deceased by burning. In the fard-beyan, it is further stated that whenever the deceased used to come to the house of her informant brother, she used to say that her-in-laws always harass her for a cow and a ring as dowry and sometimes they even assaulted her. Her statement had also been recorded by an A.S.I. of Police

on 13.8.1998 at about noon at the hospital itself. The deceased succumbed to the injuries at about 2.00 A.M. on 14.8.1998 during the course of her treatment.

3. On the basis of fard-beyan(I.R.), Madhupur P.S. case No.160/98 dated 16.8.1998 was registered at Madhupur Police Station. After investigation father-in-law, mother-in-law, two brother-in-laws and husband of the deceased were charge-sheeted for trial.

4. The accused denied the charges leveled against them and pleaded their innocence. Their defence was that Basanti Devi had accidently caught fire while she was cooking food in her in-laws house; the accused persons had tried their level best to extinguish the fire, but still she sustained injuries. Her in-laws brought her to Giridih hospital for her treatment and the accused persons had spent a huge amount for her treatment. Thus, they were not liable for any offence on account of her death which was actually caused due to accidental fire.

5. To bring home the charges, the prosecution examined 16 witnesses. PW-1(Chhatradhari Mandal; PW-2(Sanjay Kumar Mandal); PW-3 (Kedar Ram); PW-4 (Pairu Kole; PW-5 (Tulsi Mandal), PW-7(Nunulal Mandal); and PW-11 (Janki Mandal) did not support the case of the prosecution and were declared hostile. PW-6 (Kameshwar Mandal); PW-8 (Tribhuvan Ram); PW-10 (Jiwan Mandal) tendered on behalf of the prosecution. PW-16 (Ashok Kr. Mishra) being a formal witness has proved the post-mortem report of the deceased which was marked as Ext.7.

PW-14 Bachchu Sao is the brother of the deceased who is also the informant, PW-13; Bholia Devi is the mother of the deceased, PW-12; Gulab Sah is the co-villager of the informant, who had also gone with informant to see the deceased in hospital; PW-9; Janardhan Tiwary is the I.O. of the case. Ext.4 is stated to be the dying declaration. Mainly on the basis of the dying declaration (Ext.4) and the statem

13 and PW-14, the Trial Court held the charges under Section 304B/34 IPC proved against the four accused. All the four accused were convicted and sentenced. The other accused Kaleshwar Mandal, husband of the deceased was acquitted of the charges on the ground that he left the village prior to the occurrence which means that he was not present at the scene of occurrence.

6. Learned counsel for the appellants submitted that PWs 13 and 14 being mother and brother of the deceased are interested witnesses. PW-12 is also their co-villager. Therefore, their evidences are not fit for reliance. According to him, the other independent witnesses PWs. 1,2,3,4,5,7 and 11 have not said that the deceased was subject to cruelty for dowry. The evidences of PWs 12, 13 and 14 should be rejected out-right. Further, according to the learned counsel for the appellant, no reliance should be placed on Ext.4, so called dying declaration, for different reasons. C.Paswan, ASI, who recorded the dying declaration has not been examined. There is no certificate in the dying declaration that the deceased was in a mentally and medically fit condition for making those statements. Further, according to the learned counsel for the appellant, in the case of burning it is not possible for the person to be in medically fit condition to give statement as recorded in Ext.4.

7. Learned counsel for the State urged that in fard-beyan, ingredients of Section 304B(1)I.P.C. being present, the presumption of dowry death will go against the accused. According to him, as per statement of PW-14, brother of the deceased and PW-13, mother of the deceased, the marriage took place about 5 years prior to her death, cow and golden ring demanded by her in-laws, the said demand was not met by her family and her in-laws used to assault her because those demands were not fulfilled. The informant has made clear statement in his evidence that in the beginning, the conjugal life of his deceased sister was sweet but later on the accused persons started subjecting her to cruelty in connection with

demand for a cow and a golden ring by way of dowry. These demands definitely fall within the meaning of dowry as contemplated under Section 2 of the Dowry Prohibition Act. Therefore, from the evidence of PWs-13 and 14, it is clear that the deceased was subjected to cruelty and harassment by her husband and in-laws.

8. We have heard Mr. Anil Karnwal, learned counsel, who assisted the Court as Amicus Curiae on behalf of the appellant and Mr. Jayesh Gourav, learned counsel for the State.

We have also perused the evidence on record.

9. From the findings of the Trial Court, as affirmed by the High Court, we have noticed that the case of the prosecution is solely based on an FIR(Ext.1), Dying Declaration(Ext.4) and the statements made by PWs 13 and 14.

10. Section 304B(1), IPC deals with Dowry Death and is stated as follows:

> (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death."

To attract the provision, the following basic ingredients of the offence are required to be established:

(i) The Death of the woman should be caused by burns or fatal injury or otherwise; than under normal circumstances;

(ii) Such death should have occurred within 7 years of her marriage.

(iii) She must have been subjected to cruelty or harassment by husband or any relative of her husband; and

(iv) Such cruelty or harassment should be for or in connection with demand of dowry.

11. This Court in the case of *Biswajit Halder Alias Babu Halder And Others vs. State of W.B.,* (2008) 1 SCC 202 held that under Section 304-B IPC the prosecution cannot escape the burden of proof that the harassment or cruelty was relating to the demand for dowry and the same was caused within seven years of marriage.

12. In the present case, PW-14; Bachchu Sao, brother of the deceased has stated that marriage of the decased took place about 5 years prior to the date of death. He also stated that the relationship of the deceased with her husband and with in-laws were good initially. He further stated that later there was a demand of dowry in the form of demand for a cow and a gold ring. PW-13; Bholia Devi, mother of the deceased has also made statement that the marriage of the deceased took place about 5 years prior to the death. According to her, the deceased at death bed told her about the burning by father-in-law and mother-in-law and stated that there was a demand of dowry and harassment. But her statement cannot be relied upon in view of the fact that there is no evidence to suggest that just before the death PW-13; Bolia Devi had talked to the deceased or that the deceased was in the condition to make statements. Her statement is corroborated by PW-14, Bachchu Sao, who was present in the hospital, but not corroborated by PW-12; Gulab Sah- a neighbor who was also said to be present in the hospital.

13. Ext.4 – the dying declaration also suffers from infirmities. The author who recorded the dying declaration

C.Paswan, ASI was not produced by the prosecution for examination or cross-examination. The explanation given by the prosecution in this matter was that the attendance of the ASI could not be secured inspite of summons issued against him and the letters written to the Superintendent of Police, Deoghar and Giridih. The Trial Court wrongly held that this was a convincing explanation. In fact, non-appearance of ASI has prejudicially affected the defendant's interest as they were denied the opportunity to cross-examine him. It is admitted that dying declaration (Ext.4) was not certified by any medical expert stating that the deceased was in medically fit condition for giving statement. Though such certificate is not mandatory, it was the duty of the officer who recorded the same to mention whether the deceased was in mentally and medically fit condition for making such statement, particularly when the case was of a third degree burn which could lead to death.

14. In the instant case, ominous allegations have been made against the in-laws of the deceased. No specific incident has been stated by the PW-13; Bholia Devi, mother of the deceased or PW-14; Bachchu Saw, brother of the deceased in their statements. Nothing is on the record to suggest that the deceased was subjected to cruelty and harassment "soon before her death" and "in connection with the demand of dowry".

15. Thus, we find that, practically there was no evidence to prove that there was any cruelty or harassment for or in connection with the demand of dowry soon before the death of the deceased. Moreover, the deceased has not made any statement in her dying declaration indicating demand of dowry. Defence has successfully created a valid doubt as to authenticity of the dying declaration as the police officer who recorded the same was not examined. Such deficiency in evidence proves fatal for the prosecution case as evidence of cruelty and harassment in general is not sufficient to attract Section 304B IPC.

16. In view of the above facts, we hold that the prosecution miserably failed to prove the case beyond reasonable doubt. Hence, the conviction and sentence awarded cannot be maintained. We accordingly set aside the impugned judgment dated 10.8.2001 passed by the Session Judge, Deoghar in Sessions Trial No.; 158/1999 in respect to Panchanan Mandal and Malti Devi and the judgment dated 20.9.2006 passed by the Division Bench of the Jharkhand High Court in Criminal Appeal. No. 441/2001. Appeal is allowed. The accused are directed to be released forthwith, if not required in any other case.

B.B.B. Appeal allowed.

VISHNU (DEAD) BY L.RS.

v.

STATE OF MAHARASHTRA AND OTHERS

(Civil Appeal No. 3680 of 2005)

OCTOBER 4, 2013

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

Arbitration – Irrigation project – Agreement with State Government – Clause in the agreement – Nature of – Distinction between expert determination and arbitration – Tender submitted by appellant for irrigation project accepted by respondent-State Government – Parties entered into agreement – Disputes arose from execution of the project – Clause 30 of the agreement – If contemplated arbitration and could be construed as an arbitration clause – Plea of appellant that Clause 30 of the agreement made the decision of the Superintending Engineer binding on all parties to the agreement and, therefore, the trial Court was right in treating the same as an arbitration clause – Held: Nothing in the language of Clause 30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle – Power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism – Supervisory control was given to the Superintending Engineer for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that quality of work was not compromised – Further, inherent danger in treating the Superintending Engineer as an Arbitrator – Task of deciding the dispute could not have been assigned to the Superintending Engineer as he could not be expected to make adjudication with an un-biased mind – Even if he may not be actually biased, the contractor will

always have a lurking apprehension that his decision will not be free from bias – High Court rightly held that Clause 30 of the agreement was not an Arbitration agreement – Contract.

The tenders submitted by the appellant for an irrigation project were accepted by the Competent Authority and agreements were executed between the parties on 19.5.1983 and 5.10.1983 ('B-1 Agreements'). In January 1985, the appellant abandoned the works and claimed damages in lieu of the alleged loss suffered by him. Subsequently, the appellant also filed application under Section 20 of the Arbitration Act, 1940 for settlement of accounts and prayed that respondent Nos.3 and 4 be directed to file Arbitration Agreement in terms of Clause 30 of B-1 Agreement executed between the parties and an Arbitrator be appointed to decide all the disputes. The trial Court allowed the application and declared that Clause 30 of B-1 Agreement is an arbitration clause. The trial Court also appointed the Chief Engineer (PWD) as an Arbitrator and referred all the disputes to him. Revision Application filed by the respondents was allowed by the Single Judge of the High Court which held that Clause 30 of B-1 Agreement cannot be treated as an arbitration clause.

The appellant contended before this Court that the impugned order was liable to be set aside because the High Court's interpretation of Clause 30 of B-1 Agreement was erroneous. It was emphasized that Clause 30 of B-1 Agreement made the decision of the Superintending Engineer binding on all parties to the agreement and, therefore, the trial Court was right in treating the same as an arbitration clause.

Dismissing the appeals, the Court

HELD: 1.1. A conjoint reading of Clauses 29 and 30 of the B-1 Agreements entered into between the parties

shows that the appellant had to execute all works subject to the approval in all respects of Superintending Engineer of the Circle, who could issue directions from time to time about the manner in which work was to commence and execute. By virtue of Clause 30, decision of the Superintending Engineer of the Circle was made final, conclusive and binding on all the parties in respect of all questions relating to the meaning of the specifications, designs, drawings, quality of workmanship or materials used on the work or any other question relating to claim, right, matter or things arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders, etc. These two clauses by which the Superintending Engineer was given over all supervisory control were incorporated for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that quality of work is not compromised. The power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems which could crop up during execution of the work. Since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by the parties to be the best person who could provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc. It was felt that if all this was left to be decided by the regular civil Courts, the object of expeditious execution of work of the project would be frustrated. This is the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decision on various matters. However, there is nothing in the language of Clause 30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle. [Para 17] [349-G-H; 350-A-F]

1.2. Further, in terms of Clause 29 of B-1 Agreement, the Superintending Engineer of the Circle was invested with the authority to approve all works to be executed under the contract. In other words, the Superintending Engineer was to supervise execution of all works. The power conferred upon him to take decision on the matters enumerated in Clause 30 did not involve adjudication of any dispute or lis between the State Government and the contractor. It would have been extremely anomalous to appoint him as Arbitrator to decide any dispute or difference between the parties and pass an award. How could he pass an award on any of the issues already decided by him under Clause 30? Suppose, he was to decline approval to the designs, drawings etc. or was to object to the quality of materials etc. and the contractor had a grievance against his decision, the task of deciding the dispute could not have been assigned to the Superintending Engineer. He could not be expected to make adjudication with an un-biased mind. Even if he may not be actually biased, the contractor will always have a lurking apprehension that his decision will not be free from bias. Therefore, there is an inherent danger in treating the Superintending Engineer as an Arbitrator. [Para 26] [361-H; 362-A-D]

1.3. The High Court had rightly held that Clause 30 of B-1 Agreement is not an Arbitration Agreement and the trial Court was not right in appointing the Chief Engineer as an Arbitrator. [Para 31] [370-C]

Mallikarjun v. Gulbarga University **(2004) 1 SCC 372: 2003 (5) Suppl. SCR 272 and** *Punjab State v. Dina Nath* **(2007) 5 SCC 28: 2007 (6) SCR 536 – distinguished.**

State of U.P. v. Tipper Chand **(1980) 2 SCC 341;** *State of Maharashtra v. M/s Ranjeet Construction* **[Decision of Supreme Court in C.A. No.4700/1985];** *State of Orissa v.*

Damodar Das **(1996) 2 SCC 216: 1995 (6) Suppl. SCR 800;** *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur* **(1999) 2 SCC 166: 1999 (1) SCR 181;** *K.K. Modi v. K.N. Modi* **(1998) 3 SCC 573: 1998 (1) SCR 601 and** *Bihar State Mineral Development Corporation and another v. Encon Builders (I)(P) Limited* **(2003) 7 SCC 418: 2003 (2) Suppl. SCR 812 – relied on.**

Russell on Arbitration, ***21st Edn.*** **– referred to.**

Case Law Reference:

2003 (5) Suppl. SCR 272	**distinguished**	**Para 13**
2007 (6) SCR 536	**distinguished**	**Para 13**
(1980) 2 SCC 341	**relied on**	**Para 14**
1995 (6) Suppl. SCR 800	**relied on**	**Para 14**
1999 (1) SCR 181	**relied on**	**Para 22**
1998 (1) SCR 601	**relied on**	**Para 24**
2003 (2) Suppl. SCR 812	**relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3680 of 2005.

From the Judgment & Order dated 06.05.2004 of the High Court of Judicature at Bombay Bench at Aurangabad in Civil Revision Application No. 447 of 1997.

WITH

C.A. No. 3681 of 2005.

Rana Mukherjee, Anjul Dwivedi, Baisy Mannah for the Appellant.

Manish Pitale for the Respondents.

The Judgment of the Court was de

G.S. SINGHVI, J. 1. Whether Clause 30 of B-1 Agreements entered into between the Government of Maharashtra and the appellant is in the nature of an arbitration clause is the question which arises for consideration in this appeal filed against judgment dated 6.5.2004 of the learned Single Judge of the Bombay High Court, Aurangabad Bench.

2. The tenders submitted by the appellant, who is now represented by his legal representatives, for Tondapur Medium Project, Jalgaon Medium Project Division, Jalgaon and Hatnoor Canal Division No.3, Chopda, District Jalgaon were accepted by the Competent Authority and five agreements were executed between the parties on 19.5.1983 and 5.10.1983 (hereinafter referred to as 'B-1 Agreements').

3. In January 1985, the appellant abandoned the works and submitted bills for the works already done. He also claimed damages in lieu of the alleged loss suffered by him.

4. After four years, the appellant served notice under Section 80 CPC and then filed Civil Suit No.995/1989 before the trial Court for declaring the recovery proceedings initiated by the defendants as illegal, null and void.

5. During the pendency of the suit, the appellant filed an application under Section 21 of the Arbitration Act, 1940 (for short, 'the 1940 Act') and prayed that the matter may be referred to an Arbitrator by appointing the Superintending Engineer or any other Arbitrator as the sole Arbitrator in terms of Clause 30 of B-1 Agreement. The same was dismissed by the trial Court vide order dated 29.7.1994 on the ground that both the parties had not given consent for making a reference to an Arbitrator.

6. Soon thereafter, the appellant filed an application under Order VI Rule 17 CPC for leave to amend the plaint and incorporate an additional prayer for reference of the dispute to

an Arbitrator. The same was allowed by the trial Court vide order dated 27.9.1994.

7. The respondents challenged the aforesaid order in Civil Revision Application No.153/1995, which was partly allowed by the learned Single Judge of the High Court and the order of the trial Court granting leave to the appellant to amend the prayer clause was set aside.

8. In the meanwhile, the appellant filed application dated 3.2.1995 under Section 20 of the 1940 Act for settlement of accounts and prayed that respondent Nos.3 and 4 may be directed to file Arbitration Agreement in terms of Clause 30 of B-1 Agreement executed between the parties and an Arbitrator may be appointed to decide all the disputes. On 17.6.1995, the trial Court directed the parties to adduce evidence on the nature of Clause 30 of B-1 Agreement.

9. After considering the evidence adduced by the parties and by placing reliance on some judgments of the High Courts, the trial Court allowed the application and declared that Clause 30 of B-1 Agreement is an arbitration clause. The trial Court also appointed Shri D.G. Marathe, Chief Engineer (PWD) as an Arbitrator and referred all the disputes to him.

10. Civil Revision Application No.447 of 1997 filed by the respondents against the order of the trial Court was allowed by the learned Single Judge of the Bombay High Court and it was held that Clause 30 of B-1 Agreement cannot be treated as an arbitration clause. In support of this conclusion, the High Court relied upon the judgment of this Court in Civil Appeal No. 4700/1985 – *State of Maharashtra v. M/s. Ranjeet Construction.*

11. While issuing notice of the special leave petition on 4.1.2005, this Court passed the following order:

"The learned counsel for the petitio n

a three Judge Bench decision of this Court in *Mallikarjun Vs. Gulbarga University* 2004 (1) SCC, 372 wherein a similar clause, as arises for consideration in the present case, was held to be an arbitration clause.

The abovesaid decision seems to be at divergence from the view taken by a two Judge Bench decision in *Bharat Bhushan Bansal Vs.U.P. Small Industries Corporation Ltd., Kanpur* 1999 (2) SCC, 166 wherein reliance has been placed on two judgments, of this Court, each by three Judges, namely, *State of Orissa Vs. Damodar Das* 1996 (2) SCC, 216 and *State of U.P. Vs. Tipper Chand* 1980(2) SCC, 341.

Issue notice to the respondents and place for hearing before a three Judge Bench.

Issue notice also on the prayer for grant of interim relief."

12. By an order dated 11.07.2005, the three-Judge Bench referred the matter to the Constitution Bench for resolving the conflicting opinions expressed by the co-ordinate Benches. However, vide order dated 8.12.2010, the Constitution Bench declined to decide the matter and directed that the case be listed before the three Judge Bench.

13. Shri Rana Mukherjee, learned counsel for the appellant argued that the impugned order is liable to be set aside because the High Court's interpretation of Clause 30 of B-1 Agreement is contrary to the law laid down in *Mallikarjun v. Gulbarga University* (2004) 1 SCC 372 and *Punjab State v. Dina Nath* (2007) 5 SCC 28. Learned counsel emphasized that Clause 30 of B-1 Agreement makes the decision of the Superintending Engineer binding on all parties to the agreement and, therefore, the trial Court was right in treating the same as an arbitration clause. Shri Mukherjee further argued that in view of circulars dated 9.5.1977, 12.8.1982 and 21.5.1983 issued by the State Government, Clause 30 of B-1 Agreements has

to be treated as an arbitration clause and the respondents had no right to challenge the reference made by the trial Court and thereby question the wisdom of the State Government.

14. Shri Manish Pitale, learned counsel for the respondents relied upon the judgments of this Court in *State of U.P. v. Tipper Chand* (1980) 2 SCC 341, *State of Orissa v. Damodar Das* (1996) 2 SCC 216 and *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur* (1999) 2 SCC 166 and argued that Clause 30 of B-1 Agreement cannot be construed as an arbitration clause simply because the decision of the Superintending Engineer is made binding on all parties to the contract. Learned counsel submitted that the judgment in *Mallikarjun v. Gulbarga University* (supra) is clearly distinguishable because Clause 30 of the Agreement, which was interpreted in that case was substantially different from the one under consideration. Shri Pitale pointed out that the Superintending Engineer of Gulbarga Circle was not directly involved in the execution of contract between the University and the appellant, whereas Superintending Engineer, who has been named as the officer in Clause 30 of B-1 Agreement entered into between the appellant and the State Government is overall incharge of the work.

15. We have considered the respective arguments. Clauses 29 and 30 of the B-1 Agreement entered into between the parties read as under:

"Clause 29.—All works to be executed under the contract shall be executed under the direction and subject to the approval in all respects of the Superintending Engineer of the Circle for the time being, who shall be entitled to direct at what point or points and in what manner they are to be commenced, and from time to time carried on.

Clause 30 —Except where otherwise specified in the contract and subject to the powers delegated to him by Government under the Code ru e

decision of the Superintending Engineer of the Circle for the time being shall be final, conclusive, and binding on all parties to the contract upon all questions, relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter, or thing whatsoever, if any way arising, out of, or relating to or the contracts designs, drawings, specifications, estimates, instructions, orders, or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising, during the progress of the work, or after the completion or abandonment thereof."

16. Para 224 of the Maharashtra Public Works Manual, as amended by Government C.M. No. CAT-1070/460 – DSK.2, dt.9/5/1977, reads as under:

"Para 224 – Clause 30 of B-1 and B-2 Agreement forms lays down that the decision of the Superintending Engineer in certain matters relating to the contract would be final. The Superintending Engineer's decision taken under this clause should be considered as that taken as an Arbitrator and this should be considered as the decision taken under the Arbitration Act. The decisions taken by the Superintending Engineer under the other clauses should be considered different from his decision taken under clause 30 of B-1 and B-2 tender agreement as an arbitrator."

17. We shall first consider the question whether Clause 30 of B-1 Agreement can be construed as an arbitration clause. A conjoint reading of Clauses 29 and 30 of B-1 Agreements entered into between the parties shows that the appellant had to execute all works subject to the approval in all respects of Superintending Engineer of the Circle, who could issue directions from time to time about the manner in which work was to commence and execute. By virtue of Clause 30, decision

of the Superintending Engineer of the Circle was made final, conclusive and binding on all the parties in respect of all questions relating to the meaning of the specifications, designs, drawings, quality of workmanship or materials used on the work or any other question relating to claim, right, matter or things arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders, etc. These two clauses by which the Superintending Engineer was given over all supervisory control were incorporated for smooth execution of the works in accordance with the approved designs and specifications and also to ensure that quality of work is not compromised. The power conferred upon the Superintending Engineer of the Circle was in the nature of a departmental dispute resolution mechanism and was meant for expeditious sorting out of problems which could crop up during execution of the work. Since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by the parties to be the best person who could provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc. It was felt that if all this was left to be decided by the regular civil Courts, the object of expeditious execution of work of the project would be frustrated. This is the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decision on various matters. However, there is nothing in the language of Clause 30 from which it can be inferred that the parties had agreed to confer the role of arbitrator upon the Superintending Engineer of the Circle.

18. In Russell on Arbitration, 21st Edn., the distinction between an expert determination and arbitration has been spelt out in the following words:

"Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter o[illegible]e

contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive…. Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; …. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

19. A clause substantially similar to Clause 30 of B-1 Agreement was interpreted by a three Judge Bench in *State of U.P v. Tipper Chand* (supra) and it was held that the same cannot be construed as an arbitration clause. Paragraphs 2 and 3 of the judgment which contain the reasons for the aforesaid conclusion are reproduced below:

"2. The suit out of which this appeal has arisen was filed by the respondent before us for recovery of Rs. 2000 on account of dues recoverable from the Irrigation

Department of the petitioner State for work done by the plaintiff in pursuance of an agreement, clause 22 of which runs thus:

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor."

3. After perusing the contents of the said clause and hearing learned Counsel for the parties we find ourselves in complete agreement with the view taken by the High Court. Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

20. In *State of Maharashtra v. M/s. Ranjeet Construction* (supra), the two Judge Bench of this Court interpreted Clause 30 of the agreement entered into betw[illegible]h

is almost identical to the clause under consideration, relied upon the judgment in *State of U.P. v. Tipper Chand* (supra) and held that Clause 30 cannot be relied upon for seeking a reference to an Arbitrator of any dispute arising under the contract.

21. In *State of Orissa v. Damodar Das* (supra), the three Judge Bench interpreted Clause 21 of the contract entered into between the appellant and the respondent for construction of sump and pump chamber etc. for pipes W/S to Village Kentile. The respondent abandoned the work before completion of the project and accepted payment of the fourth running bill. Subsequently, he raised dispute and sent communication to the Chief Engineer, Public Health, Orissa for making a reference to an Arbitrator. The Subordinate Judge, Bhubaneswar allowed the application filed by the respondent under Section 8 of the 1940 Act and the order passed by him was upheld by the High Court. This Court referred to Clause 25 of the agreement, relied upon the judgment in *State of U.P. v. Tipper Chand* (supra) and held that the said clause cannot be interpreted as providing resolution of dispute by an Arbitrator. Paragraphs 9 and 10 of the judgment, which contain discussion on the subject, are extracted below:

"9. The question, therefore, is whether there is any arbitration agreement for the resolution of the disputes. The agreement reads thus:

"25. Decision of Public Health Engineer to be final.— Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

10. Section 2(a) of the Act defines "arbitration agreement" to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Indisputably, there is no recital in the above clause of the contract to refer any dispute or difference present or future to arbitration. The learned counsel for the respondent sought to contend from the marginal note, viz., "the decision of Public Health Engineer to be final" and any other the words "claim, right, matter or thing, whatsoever in any way arising out of the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract" and contended that this clause is wide enough to encompass within its ambit, any disputes or differences arising in the aforesaid execution of the contract or any question or claim or right arising under the contract during the progress of the work or after the completion or sooner determination thereof for reference to an arbitration. The High Court, therefore, was right in its conclusion that the aforesaid clause gives right to arbitration to the respondent for resolution of the dispute/claims raised by the respondent. In support thereof he relied on Ram Lal Jagan Nath v. Punjab State through Collector AIR 1966 Punj 436. It is further contended that for the decision of the Public Health Engineer to be final, the contractor must be given an opportunity to submit his case to be heard either in person or through counsel and a decision th

It envisages by implication existence of a dispute between the contractor and the Department. In other words, the parties construed that the Public Health Engineer should be the sole arbitrator. When the claim was made in referring the dispute to him, it was not referred to the court. The respondent is entitled to avail of the remedy under Sections 8 and 20 of the Act. We find it difficult to give acceptance to the contention. A reading of the above clause in the contract as a conjoint whole, would give us an indication that during the progress of the work or after the completion or the sooner determination thereof of the contract, the Public Health Engineer has been empowered to decide all questions relating to the meaning of the specifications, drawings, instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to, the contract drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the works or the execution or failure to execute the same has been entrusted to the Public Health Engineer and his decision shall be final. In other words, he is nominated only to decide the questions arising in the quality of the work or any other matters enumerated hereinbefore and his decision shall be final and bind the contractor. A clause in the contract cannot be split into two parts so as to consider one part to give rise to difference or dispute and another part relating to execution of work, its workmanship etc. It is settled now that a clause in the contract must be read as a whole. If the construction suggested by the respondent is given effect then the decision of the Public Health Engineer would become final and it is not even necessary to have it made rule of the court under the Arbitration Act. It would be hazardous to the claim of a contractor to give such instruction and give power to the Public Health Engineer to make any dispute final and binding on the contractor. A careful reading of the clause

in the contract would give us an indication that the Public Health Engineer is empowered to decide all the questions enumerated therein other than any disputes or differences that have arisen between the contractor and the Government. But for clause 25, there is no other contract to refer any dispute or difference to an arbitrator named or otherwise."

(emphasis supplied)

22. In *K.K. Modi v. K.N. Modi* (1998) 3 SCC 573, this Court interpreted Clause 9 of the Memorandum of Understanding signed by two groups of Modi family. Group 'A' consisted of Kedar Nath Modi (younger brother of Seth Gujjar Mal Modi and his three sons) and Group 'B' consisted of five sons of Seth Gujjar Mal Modi. To resolve the disputes and differences between two groups, the financial institutions, which had lent money, got involved. Ultimately, a Memorandum of Understanding was signed by the parties on 24.1.1989, Clause 9 of which reads as under:

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

The Chairman, Industrial Finance Corporation of India (IFCI) formed a committee of experts to assist him in deciding various questions. The committee of experts and the Chairman held discussion with both the groups. On 8.12.1995, the Chairman, IFCI gave his detailed report / decision. In his covering letter, the Chairman indicated that the Memorandum of Understanding had been substantially implemented during 1989 to 1995 and with his decisions on the disputes / clarifications given by him, it will be possible to implement the remaining part. The report of the Chairm n

the competent Court as an award nor any application was submitted for making the report a rule or decree of the Court. However, the Chairman issued series of directions for implementing the report. On 18.5.1996, the appellants filed a petition under Section 33 of the 1940 Act in the Delhi High Court challenging report dated 8.12.1995 by asserting that it was an award in arbitration proceedings. The opposite parties filed civil suit in the High Court to challenge the report of the Chairman.

23. One of the questions formulated by this Court was whether Clause 9 of the Memorandum of Understanding constituted an Arbitration Agreement and whether the decision of the Chairman, IFCI constituted an award. The two Judge Bench first culled out the following attributes of an Arbitration Agreement:

> "(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
>
> (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,
>
> (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
>
> (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
>
> (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
>
> (6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.
>
> The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

The Court then referred to several precedents including English cases and held:

> "In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another na[illegible]s

intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with the valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so."

(emphasis supplied)

24. In *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Limited, Kanpur* (1999) 2 SCC 166, the two Judge Bench interpreted Clauses 23 and 24 of the agreement entered into between the parties for execution of work of construction of a factory and allied buildings of the respondent at India Complex, Rai Bareli. Those clauses were as under:

"Decision of the Executive Engineer of the UPSIC to be final on certain matters

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

Decision of the MD of the UPSIC on all other matters shall be final

24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein."

It was argued on behalf of the appellant that Clause 24 should be construed as an arbitration clause because the decision of the Managing Director was binding on both the parties. The two Judge Bench analysed Clauses 23 and 24 of the agreement, referred to the judgment in *K.K. Modi v. K.N. Modi* (supra), *State of U.P. v. Tipper Chand* (supra), *State of Orissa v. Damodar Das* (supra) and observed:

"In the present case, the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In para 18.067 of Vol. 2 of Hudson on Building and Engineering Contracts. Illustration (8) deals with the case where, by the terms of a contract, it was provided that the engineer

> "shall be the exclusive judge upon all matters relating to the construction, incidents, and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties."

It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.

Since clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. there will, however, be no order as to costs."

25. The aforesaid judgments fully support the view taken by us that Clause 30 of B-1 Agreement is not an arbitration clause.

26. The issue deserves to be looked into from another angle. In terms of Clause 29 of B-1 Agreement, the

Superintending Engineer of the Circle was invested with the authority to approve all works to be executed under the contract. In other words, the Superintending Engineer was to supervise execution of all works. The power conferred upon him to take decision on the matters enumerated in Clause 30 did not involve adjudication of any dispute or lis between the State Government and the contractor. It would have been extremely anomalous to appoint him as Arbitrator to decide any dispute or difference between the parties and pass an award. How could he pass an award on any of the issues already decided by him under Clause 30? Suppose, he was to decline approval to the designs, drawings etc. or was to object to the quality of materials etc. and the contractor had a grievance against his decision, the task of deciding the dispute could not have been assigned to the Superintending Engineer. He could not be expected to make adjudication with an un-biased mind. Even if he may not be actually biased, the contractor will always have a lurking apprehension that his decision will not be free from bias. Therefore, there is an inherent danger in treating the Superintending Engineer as an Arbitrator. This facet of the problem was highlighted in the judgment of the two Judge Bench in *Bihar State Mineral Development Corporation and another v. Encon Builders (I)(P) Limited* (2003) 7 SCC 418. In that case, the agreement entered into between the parties contained a clause that any dispute arising out of the agreement shall be referred to the Managing Director of the Corporation and his decision shall be final and binding on both the parties. After noticing several precedents, the two Judge Bench observed:

> "There cannot be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic tribunal. The said domestic tribunal must be an impartial one. It is a well-settled principle of law that a person cannot be a judge of his own cause. It is further well settled that justice shou[illegible]t

manifestly seen to be done.

Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial tribunal.

As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation.

It will bear repetition to state that the action of the second appellant itself was in question and, thus, indisputably, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause."

27. We may now notice the judgments relied upon by the learned counsel for the appellant and find out whether the proposition laid down therein supports his argument that Clause 30 should be treated as an arbitration clause.

28. The facts of *Mallikarjun v. Gulbarga University* case (supra) were that the respondent-University had accepted the tender submitted by the appellant for construction of an indoor stadium. In pursuance of the work order issued by the competent authority, the appellant completed the construction. Thereafter, he invoked the arbitration clause for resolution of the disputes which arose from the execution of the project. Superintending Engineer, PWD, Gulbarga Circle was entrusted with the task of deciding the disputes. The parties filed their respective claims before the Superintending Engineer. He considered the same and passed an award. The appellant filed execution

petition in the Court of Principal Civil Judge (Senior Division), Gulbarga. The respondent filed an objection petition under Section 47 of the CPC. The Executing Court rejected the objection. The University challenged the decision of the Executing Court and pleaded that the agreement on the basis of which the dispute was referred to the Superintending Engineer was not an arbitration agreement and, as such, award made by him cannot be treated as one made under the 1940 Act. The High Court accepted the plea of the University and set aside the order of the trial Court. Clause 30 of the agreement which came up for interpretation by this Court was as under:

> "The decision of the Superintending Engineer of Gulbarga Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of dispute arising between the contractor and Gulbarga University."

After analyzing the aforesaid clause and making a reference to essential elements of arbitration agreement enumerated in *Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Limited* (supra), the three Judge Bench held:

> "Applying the aforesaid principle to the present case, clause 30 requires the Superintending Engineer, Gulbarga Circle, Gulbarga, to give his decision on any dispute that may arise out of the contract. Furth[illegible]e

agreement postulates present or future differences in connection with some contemplated affairs inasmuch as there also was an agreement between the parties to settle such difference by a private tribunal, namely, the Superintending Engineer, Gulbarga Circle, Gulbarga. It was also agreed between the parties that they would be bound by the decision of the Tribunal. The parties were also ad idem.

In the aforesaid view of the matter, it must be held that the agreement did contain an arbitration clause."

The Bench distinguished the judgment in Bharat Bhushan Bansal's case by making the following observations:

"A bare comparison of clause 30 of the contract agreement involved in the present matter and clauses 23 and 24 involved in Bharat Bhushan Bansal case would show that they are not identical. Whereas clause 30 of the agreement in question provides for resolution of the dispute arising out of the contract by persons named therein; in terms of clause 24, there was no question of decision by a named person in the dispute raised by the parties to the agreement. The matters which are specified under clauses 23 and 24 in Bharat Bhushan Bansal case were necessarily not required to arise out of the contract, but merely claims arising during performance of the contract. Clause 30 of the agreement in the present case did provide for resolution of the dispute arising out of the contract by the Superintending Engineer, Gulbarga Circle, Gulbarga. For that reason, the case relied upon by the learned counsel for the respondent is distinguishable.

Once clause 30 is constituted to be a valid arbitration agreement, it would necessarily follow that the decision of the arbitrator named therein would be rendered only upon allowing the parties to adduce evidence in support of their respective claims and counter-claims as also upon hearing

the parties to the dispute. For the purpose of constituting the valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must specifically be mentioned therein. Such conditions, it is trite, are implicit in the decision-making process in the arbitration proceedings. Compliance with the principles of natural justice inheres in an arbitration process. They, irrespective of the fact as to whether recorded specifically in the arbitration agreement or not are required to be followed. Once the principles of natural justice are not complied with, the award made by the arbitrator would be rendered invalid. We, therefore, are of the opinion that the arbitration clause does not necessitate spelling out of a duty on the part of the arbitrator to hear both parties before deciding the question before him. The expression "decision" subsumes adjudication of the dispute. Here in the instant case, it will bear repetition to state, that the disputes between the parties arose out of a contract and in relation to matters specified therein and, thus, were required to be decided and such decisions are not only final and binding on the parties, but they are conclusive which clearly spells out the finality of such decisions as also their binding nature.

A clause which is inserted in a contract agreement for the purpose of prevention of dispute will not be an arbitration agreement. Such a provision has been made in the agreement itself by conferring power upon the Engineer-in-Charge to take a decision thereupon in relation to the matters envisaged under clauses 31 and 32 of the said agreement. Clauses 31 and 32 of the said agreement provide for a decision of the Engineer-in-Charge in relation to the matters specified therein. The jurisdiction of the Engineer-in-Charge in relation to such matters are limited and they cannot be equated with an arbitration agreement. Despite such clauses meant for e

arising out of a contract, significantly, clause 30 has been inserted in the contract agreement by the parties.

The Superintending Engineer, Gulbarga Circle, Gulbarga, is an officer of the Public Works Department in the Government of Karnataka. He is not an officer of the University. He did not have any authority or jurisdiction under the agreement or otherwise either to supervise the construction works or issue any direction(s) upon the contractor in relation to the contract job. He might be an ex officio member of the Building Committee, but thereby or by reason thereof, he could not have been given nor in fact had been given an authority to supervise the contract job or for that matter issue any direction upon the contractor as regards performance of the contract."

(emphasis supplied)

29. In *Punjab State v. Dina Nath* (supra), the two Judge Bench was called upon to consider whether clause 4 of work order No.114 dated 16.5.1985 constituted an arbitration agreement. The clause in question was as under:

"Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No.1, Chandigarh for orders and his decision will be final and acceptable/ binding on both the parties."

After noticing the judgment in *K.K. Modi v. K.N. Modi,* the Court observed:

"Keeping the ingredients as indicated by this Court in K.K.Modi in mind for holding a particular agreement as an arbitration agreement, we now proceed to examine the aforesaid ingredients in the context of the present case:

(a) Clause 4 of the Work Order categorically states that the decision of the Superintending engineer shall

be binding on the parties.

(b) The jurisdiction of the Superintending Engineer to decide the rights of the parties has also been derived from the consent of the parties to the Work Order.

(c) The agreement contemplates that the Superintending Engineer shall determine substantive rights of parties as the clause encompasses all varieties of disputes that may arise between the parties and does not restrict the jurisdiction of the Superintending Engineer to specific issues only.

(d) That the agreement of the parties to refer their disputes to the decision of the Superintending Engineer is intended to be enforceable in law as it is binding in nature.

The words "any dispute" appears in clause 4 of the Work Order. Therefore, only on the basis of the materials produced by the parties in support of their respective claims a decision can be arrived at in resolving the dispute between the parties. The use of the words "any dispute" in clause 4 of the Work order is wide enough to include all disputes relating to the said Work Order. Therefore, when a party raises a dispute for non-payment of money after completion of the work, which is denied by the other party, such a dispute would come within the meaning of "arbitration agreement" between the parties. Clause 4 of the Work Order also clearly provides that any dispute between the department and the contractor shall be referred to the Superintending Engineer, Hydel Circle No.1, Chandigarh for orders. The word "orders" would indicate some expression of opinion, which is to be carried our, or enforced and which is a conclusion of a body (in this case Superintending engineer, Hydel Cir

Then again the conclusion and decision of the Superintending Engineer will be final and binding on both the parties. This being the position in the present case and in view of the fact that clause 4 of the Work Order is not under challenge before us, the decision that would be arrived at by Superintending Engineer, Hydel Circle No.1, Chandigarh must also be binding on the parties as a result whereof clause 4 must be held to be a binding arbitration agreement."

The Bench distinguished the judgment in *State of Orissa v. Damodar Das* (supra) by making the following observations:

"From a plain reading of this clause in Damodar Das it is evident that the powers of the Public Health Engineer were essentially to supervise and inspect. His powers were limited to the questions relating to the meaning of the specifications, drawings and instructions, quality of workmanship or materials used on the work or as to any other question, claim, right, matter, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same. However, in the case before us, the Superintending Engineer was given full power to resolve any dispute arising between the parties which power in our view is wide enough to cover any nature of dispute raised by the parties. The clause in the instant case categorically mentions the word "dispute" which would be referred to him and states "his decision would be final and acceptable/binding on both the parties."

30. In our opinion, neither of the judgments relied upon by Shri Mukherjee help the cause of his client. In Mallikarjun's case, this Court noted that Superintending Engineer, Gulbarga Circle, Gulbarga was not an officer of the University and he did not have any authority or jurisdiction either to supervise the construction work or issue any direction to the contractor in

relation to the project. The Court also emphasized that the parties had agreed that any dispute arising from the contract would be referred to the decision of the Superintending Engineer. These factors are missing in the instant case. Likewise, Clause 4 of the work order which came up for interpretation in *Punjab State v. Dina Nath* (supra) contemplated resolution by the Superintending Engineer of any dispute arising between the department and the contractor. Therefore, the relevant clause of the work order was rightly treated as an Arbitration Agreement.

31. In view of the above discussion, we hold that the High Court had rightly held that Clause 30 of B-I Agreement is not an Arbitration Agreement and the trial Court was not right in appointing the Chief Engineer as an Arbitrator.

32. Before concluding, we may observe that circulars issued by the State Government may provide useful guidance to the authorities involved in the implementation of the project but the same are not conclusive of the correct interpretation of the relevant clauses of the agreement and, in any case, the Government's interpretation is not binding on the Courts.

33. In the result, the appeals are dismissed.

B.B.B. Appeals dismissed.

M/S. ARCOT TEXTILE MILLS LTD.

v.

THE REGIONAL PROVIDENT FUND COMMISSIONER AND ORS.

(Civil Appeal No. 9488 of 2013)

OCTOBER 18, 2013

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

Employees Provident Funds and Miscellaneous Provisions Act, 1950:

s.71 and 7Q – Appeal u/s. 71 – Against the order passed u/s. 7Q – Maintainability of – Held: An order is amenable to appeal u/s. 71 if it is passed as a composite order u/ss. 7A and 7Q – But if the order is an independent order u/s. 7Q alone, such order is not appealable.

s. 7Q – Demand u/s. 7Q – Applicability of principle of natural justice (Audi alteram partem) – Held: The principle of natural justice is applicable to the demand u/s. 7Q only in a narrow manner i.e. limited to the realm of computation which is statutorily provided – Principle of Natural Justice.

Appeal – Right to appeal – Held: Cannot be assumed to exist unless expressly provided for by a statute.

Maxim – Audi alteram partem – Applicability of.

The questions for consideration in the present appeal were whether an appeal is maintainable against an order passed u/s. 7Q of Employees' Provident Funds and Miscellaneous Provisions Act, 1952, and whether the principles of natural justice would get attracted, when in independent exercise of power under s. 7Q of the Act, a demand comes into existence.

Partly allowing the appeal, the Court

HELD: 1.1. On a perusal of s.71 of Employees Provident Funds and Miscellaneous Provisions Act, 1952, it is evident that an appeal to the tribunal lies in respect of certain action of the Central Government or order passed by the Central Government or any authority on certain provisions of the Act. Though an appeal lies against recovery of damages under Section 14B of the Act, no appeal is provided for against imposition of interest as stipulated under Section 7Q. Section 14B has been enacted to penalize the defaulting employers as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements but at the same time it is meant to provide compensation or redress to the beneficiaries, i.e., to recompense the employees for the loss sustained by them. The entire amount of damages awarded under Section 14B except for the amount relatable to administrative charges is to be transferred to the Employees' Provident Fund. [Para 15] [383-G-H; 384-A-C]

Organo Chemical Industries and Anr. vs. Union of India and Ors. **AIR 1979 SC 1803: 1980 (1) SCR 61 – relied on.**

1.2. It is clear and unambiguous that s.71 does not provide for an appeal against the determination made under 7Q. It is well settled in law that right of appeal is a creature of statute, for the right of appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. This being the position a provision providing for appeal should neither be construed too strictly nor too liberally, for if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. A right of

appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. An appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. [Para 17] [385-A-D]

Ganga Bai vs. Vijay Kumar and Ors. **(1974) 2 SCC 393: 1974 (3) SCR 882;** *Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad and Ors.* **(1999) 4 SCC 468: 1999 (2) SCR 895;** *State of Haryana vs. Maruti Udyog Ltd. and Ors.* **(2000) 7 SCC 348: 2000 (3) Suppl. SCR 185;** *Super Cassettes Industries Limited vs. State of U.P. and Anr.* **(2009) 10 SCC 531: 2009 (14) SCR 627;** *Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement and Anr.* **(2010) 4 SCC 772: 2010 (4) SCR 608;** *Competition Commission of India vs. Steel Authority of India Limited and Anr.* **(2010) 10 SCC 744: 2010 (11) SCR 112 – relied on.**

1.3. An order passed under Section 7A is an order that determines the liability of the employer under the provisions of the Act and while determining the liability, the delay in payment of the dues and component of interest are also determined. It is a composite order. That it is an order passed under Section 7A and 7Q together. Such an order shall be amenable to appeal under Section 7I. The same is true of any composite order a facet of which is amenable to appeal and Section 7I of the Act. But, if for some reason when the authority chooses to pass an independent order under Section 7Q, the same is not appealable. [Para 18] [386-A-C]

1.4. In the present case, it is evident that the appellant had sent a communication dated 3.10.2007 to the

Regional Provident Fund Commissioner submitting that that establishment could not pay the provision fund dues from 1998 due to financial crisis, etc. and it was remitting Rs.83,01,037.80 (Rupees eighty three lacs one thousand thirty seven and eighty paise only) from 1998 to April 2006. Under these circumstances, there was no adjudication with regard to liability, as the appellant company had accepted the fault on its own. What is disputed is that the third respondent issued a demand notice on 23.10.2007 requiring the appellant to remit a sum of Rs.94,27,334/- towards interest under Section 7Q of the Act for the belated remittances made from December 1998 to April 2006. Thus, the demand notice manifestly has been issued in exercise of power under Section 7Q of the Act and is an independent action and against such an order or issue of demand no appeal could have been filed. [Para 19] [386-D-H; 387-A]

Maharashtra State Cooperative Bank Limited vs. Assistant provident Fund Commissioner and Ors. **(2009) 10 SCC 123: 2009 (15) SCR 1 – referred to.**

2.1. The legislature always intended that when hearing takes place for determination of the money due, the component of interest would be computed and in that backdrop the affected person will have opportunity of hearing. But in reality when an independent order is passed under Section 7Q which can also be done as has been done in the present case, the affected person, should have the right to file an objection, if he intends to do. When a demand of this nature is made, it can not be said that no prejudice is caused. It is highlighted by the respondents that once the amount due is determined, the levy of interest is automatic. The rate of interest is stipulated at 12 per cent or at a higher rate if so is provided in the scheme. Despite this, there can be errors with regard to the period and the calculation. It is a statut[illegible]s

exercised by the competent authority under the Act. Once the said authority takes recourse to the measure for computation and sends a bald order, definitely the affected person can ask for clarification and when computation sheet is provided to him he can file an objection. Though, the area of delineation would be extremely limited yet the said opportunity cannot be denied to the affected person. [Para 24] [390-G-H; 391-A-D]

2.2. The principles of natural justice should neither be treated with absolute rigidity nor should they be imprisoned in a straight-jacket. The *maxim audi alteram partem* cannot be invoked if the import of such maxim would have the effect of paralyzing the administrative process or where the need for promptitude or the urgency so demands. The approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential. The concept of natural justice sometimes requires flexibility in the application of the rule. What is required to be seen is the ultimate weighing on the balance of fairness. The requirements of natural justice depend upon the circumstances of the case. [Para 25] [391-D-G]

Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Ors. **(2005) 7 SCC 764: 2005 (3) Suppl. SCR 314 – relied on.**

2.3. Natural justice has many facets. Sometimes, the said doctrine is applied in a broad way, sometimes in a limited or narrow manner. Therefore, there has to be a limited enquiry only to the realm of computation which is statutorily provided regard being had to the range of delay. Beyond that nothing is permissible. When an independent order is passed making a demand, the employer cannot be totally remediless and would have no right even to file an objection pertaining to

computation. Hence, an objection can be filed challenging the computation in a limited spectrum which shall be dealt with in a summary manner by the Competent Authority. [Para 28] [393-C-E]

2.4. In the present case, it is manifest from the record that the appellant had already deposited a sum of Rs.34,00,000/- before the Competent Authority and sought for supply of the calculation sheet, the basis on which the computation had been made so that it could reconcile the accounts. It would be appropriate to direct that the computation sheets shall be provided to the appellant and it shall file its objection and thereafter the Competent Authority shall fix a date for reconciliation of the accounts. However, regard being had to the fact that the Act is a piece of social welfare legislation, the appellant is directed to deposit a further sum of Rs.16,00,000/-. [Para 29] [393-E-G]

C.B. Gautam vs. Union of India and Ors. **(1993) 1 SCC 78: 1992 (3) Suppl. SCR 12 – followed.**

Union of India and Anr. vs. Col. J. N. Sinha and Anr. **(1970) 2 SCC 458: 1971 (1) SCR 791;** *Olga Tellis vs. Bombay Municipal Corporation* **(1985) 3 SCC 545: 1985 (2) Suppl. SCR 51;** *Regional Provident Fund Commissioner vs. S.D. College, Hoshiarpur and Ors.* **(1997) 1 SCC 241: 1996 (8) Suppl. SCR 27;** *Regional Provident Fund Commissioner vs. Hooghly Mills Company Limited and Ors.* **(2012) 2 SCC 489: 2012 (1) SCR 363;** *Natwar Singh vs. Director of Enforcement and Anr.* **(2010) 13 SCC 255: 2010 (13) SCR 99;** *Kesar Enterprises Limited vs. State of Uttar Praesh and Ors.* **(2011) 13 SCC 733: 2011 (9) SCR 19;** *Swadeshi Cotton Mills vs. Union of India* **(1981) 1 SCC 664: 1981 (2) SCR 533;** *Canara Bank vs. V.K. Awasthy* **(2005) 6 SCC 321: 2005 (3) SCR 81;** *Sahara India (Firm) vs. CIT* **(2008) 14 SCC 151: 2008 (6) SCR 427 – referred to.**

Case Law Reference:

2009 (15) SCR 1	**referred to**	**Para 12**
1980 (1) SCR 61	**relied on**	**Para 15**
1974 (3) SCR 882	**relied on**	**Para 17**
1999 (2) SCR 895	**relied on**	**Para 17**
2000 (3) Suppl. SCR 185	**relied on**	**Para 17**
2009 (14) SCR 627	**relied on**	**Para 17**
2010 (4) SCR 608	**relied on**	**Para 17**
2010 (11) SCR 112	**relied on**	**Para 17**
1992 (3) Suppl. SCR 12	**followed**	**Para 21**
1971 (1) SCR 791	**referred to**	**Para 21**
1985 (2) Suppl. SCR 51	**referred to**	**Para 21**
1996 (8) Suppl. SCR 27	**referred to**	**Para 23**
2012 (1) SCR 363	**referred to**	**Para 23**
2005 (3) Suppl. SCR 314	**relied on**	**Para 25**
2010 (13) SCR 99	**referred to**	**Para 26**
2011 (9) SCR 19	**referred to**	**Para 27**
1981 (2) SCR 533	**referred to**	**Para 27**
2005 (3) SCR 81	**referred to**	**Para 27**
2008 (6) SCR 427	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9488 of 2013.

From the Judgment & Order dated 19.12.2011 of the High Court of Judicature at Madras in Writ Appeal No. 2230 of 2011.

Nikhil Nayyar, T.V.S. Radhavendra Sreyas for the Appellant.

S.L. Gupta, Chander Shekhar Ashri, Aparna Bhat for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 19.12.2011 passed by the High Court of Judicature at Madras in W.A. No. 2230 of 2011 whereby the Division Bench has concurred with the judgment and order dated 21.4.2011 passed in W.P. No. 7046 of 2008 by the learned single Judge holding that the order passed by the Assistant Provident Fund Commissioner under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("for brevity "the Act") requiring the appellant to remit a sum of Rs.94,27,334/- towards interest under Section 7Q of the Act for belated remittances, was to be assailed in appeal before the Employees' Provident Funds Appellate Tribunal (for short "the tribunal") and, therefore, it was appropriate on the part of the appellant to take recourse to the alternative remedy and not to approach the High Court under Article 226 of the Constitution of India.

3. The facts giving rise to the present appeal, bereft of unnecessary details, are that the appellant-company has a textile factory at Kallakurichi and it was established in the year 1964 and with passage of time it took steps for modernization but it suffered a setback in the year 1997 due to slump in the cotton industry affecting the industrial base in South India. The financial constraints compelled the company to make a reference to the Board for Industrial and Financial Reconstruction (BIFR) under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 and the BIFR by order dated 4.5.1999 declared the appellant-company as a sick industrial company and appointed Indus[illegible]k

of India (IDBI) as the Operating Agency. Because of the prevalent situation, the appellant-company defaulted in making contributions towards the Provident Fund and delay occurred in remitting the dues under the Act. On 3.10.2007, the appellant had paid a sum of Rs.83,01,037.80 (Rupees eighty three lacs one thousand thirty seven and eighty paise) being arrears of the Provident Fund contribution to the Regional Provident Fund Commissioner, the 1st respondent herein. A letter was also sent by the company stating that the appellant-company had become a sick industry and a scheme for rehabilitation of the company had been submitted to the BIFR and the same was pending consideration. On 23.10.2007, the Assistant provident Fund Commissioner, Trichy, the second respondent herein, issued a demand requiring the appellant to deposit a sum of Rs.94,27,334/- towards interest under Section 7Q of the Act for belated remittances. On receipt of the said letter the appellant replied that the report stated to have been annexed with the calculation had not been sent along with the notice and the same may be provided to it to reconcile the accounts. In the meantime, certain proceedings went on before the BIFR and, eventually, a joint meeting was held between the Operating Agency, the company and the employees of the establishment and it was agreed that the amount due towards the Provident Fund shall be paid in a phased manner. On 3.3.2008, an order came to be passed under Section 8F of the Act demanding the amount of interest and an order was passed by the Assistant Provident Fund Commissioner taking certain coercive measures to realize the amount.

4. Being grieved by the aforesaid action the appellant approached the High Court in WP No. 7046 of 2008. The learned single Judge, by order dated 25.3.2008, granted an interim stay subject to the appellant's depositing 25% of the interest amount within 10 days and in pursuance of the said order the appellant deposited Rs.34,00,000/- before the Competent Authority under the Act. When the writ petition came up for hearing on 21.4.2011, the learned single Judge came

to hold that it was appropriate to approach the tribunal under Section 7I of the Act and, accordingly, dismissed the writ petition.

5. The said order of the learned single Judge was assailed before the Division Bench which concurred with the view expressed by the learned single Judge opining that the order impugned charging interest on the belated payment of Provident Fund is appealable and, accordingly, granted liberty to the appellant to move the appellate authority. The said order is the subject-matter of challenge in this appeal by special leave.

6. We have heard Mr. Nikhil Nayyar, learned counsel appearing for the appellant, Ms. Aparna Bhat, learned counsel appearing for respondent Nos. 1 to 3 and Mr. C.S. Ashri, learned counsel for respondent No. 6.

7. At the outset, it obligatory to state that when this matter came up on 20.4.2012, this Court had passed the following order: -

> "One of the contentions urged by learned counsel appearing for the petitioner is that despite specific request, the detailed working of interest, amount to Rs.94,27,334/- on account of delay in remission of the statutory dues under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 had not been provided by the Assistant Provident Fund Commissioner. It is further submitted that in fact an amount of Rs.34 lakhs has already been deposited by the petitioner towards the interest under Section 7Q of the said Act. In view of the submission, issue notice."

8. After so stating, the Court restrained the respondents from taking any further action in terms of public notice dated 21.3.2012 fixing the date for auction of the appellant-company's property.

9. Mr. Nikhil Nayyar, learned counsel appearing for the appellant has raised two contentions, namely, (i) the learned single Judge as well as the Division Bench erred by expressing the view that an appeal would lie to the tribunal under Section 7I of the Act when the said provision does not so envisage, and (ii) when the appellant asked for the documents relating to computation, it was obligatory on the part of the third respondent to provide the same so that the accounts could be reconciled and a proper view could be taken as regards the computation but the same having not been acceded to the action taken is vitiated being violative of the principles of natural justice.

10. Ms. Aparna Bhat, learned counsel appearing for respondent Nos. 1 to 3, supporting the order passed by the High Court, submitted that when the statute commands levy of interest and no discretion is left to the authority, there is no warrant for interference with the impugned order.

11. First we shall deal with the maintainability of an appeal against an order passed under Section 7Q of the Act. To address the said controversy it is necessary to appreciate the scheme of the Act. Section 1(3) stipulates that subject to the provisions contained in Section 16 the Act shall apply to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employees and to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf. Sub-section (4) of Section 1 provides that where it appears to the Central Provident Fund Commissioner, whether on an application made in this behalf or otherwise that the employer and the majority of employees in relation to any establishment have agreed that the provisions of this Act should be made applicable to the establishment, he may, by notification in the Official Gazette, apply the provisions of this Act to that establishment on and from the date of such

agreement or from any subsequent date specified in that agreement. Section 3 confers power on the Central Government to issue notification directing that the provisions of the Act could apply to such other establishment which has a common Provident Fund with other establishments. Section 7A(1) provides for determination of moneys due from employers. Section 7B deals with review of orders passed under Section 7A. Section 7C deals with determination of escaped amount. Section 8 provides for mode of recovery of moneys due from employer. The said provision stipulates that the arrears can be recovered in the manner specified in section 8B to 8G. Section 8B provides for issue of certificate by the authorised officer in respect of the amount due to the recovery officer so as to unable him to recover the amount by way of attachment and sale of movable and immovable property of the establishment or the employer or take such coercive measurers as provided therein. Section 11 gives a statutory priority of payment of contributions over other debts. Section 11 (2) contains non-obstante clause which prescribes for if any amount is due from employer the said amount shall be deemed to be the first charge on the assets of the establishment. Section 14B confers power on the Competent Authority under the Act to recover damages. Section 17 provides for power to exempt.

12. This court in *Maharashtra State Cooperative Bank Limited v. Assistant provident Fund Commissioner and others*[1] while interpreting the expression " any amount due from an employer" has opined as follows:-

> "The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-b and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case

1. (2009) 10 SCC 123.

the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages."

13. We have referred to the aforesaid decision only for the purpose of the levy of interest under Section 7Q is a part of the sum recoverable under Section 11 (2) of the Act, and it is an insegregable part of the total amount due from employer.

14. At this juncture, it is relevant to state that the tribunal was constituted at a later stage. Section 7I provides for appeals to the tribunal. The said provision reads as follows:-

"**7I. Appeals to Tribunal.** – (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B except an order rejecting an application for review referred to in sub-section (5) thereof, or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

15. On a perusal of the aforesaid provision it is evident that an appeal to the tribunal lies in respect of certain action of the Central Government or order passed by the Central Government or any authority on certain provisions of the Act. We have scanned the anatomy of the said provisions before. On a studied scrutiny, it is quite vivid that though an appeal lies

against recovery of damages under Section 14B of the Act, no appeal is provided for against imposition of interest as stipulated under Section 7Q. It is seemly to note here that Section 14B has been enacted to penalize the defaulting employers as also to provide reparation for the amount of loss suffered by the employees. It is not only a warning to employers in general not to commit a breach of the statutory requirements but at the same time it is meant to provide compensation or redress to the beneficiaries, i.e., to recompense the employees for the loss sustained by them. The entire amount of damages awarded under Section 14B except for the amount relatable to administrative charges is to be transferred to the Employees' Provident Fund. (see *Organo Chemical Industries and another v. Union of India and others*[2])

16. Presently we shall refer to 7Q of the Act. It is as follows:-

"7Q. **Interest payable by the employer.-** The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

17. Ms. Aparna Bhat, learned counsel for the respondent Nos. 1 to 3 would contend that the payment of interest by the employer in case of belated payment is statutorily leviable and a specified rate having been provided, the authority has no discretion and, therefore, it is only a matter of computation and there cannot be any challenge to it. Be it noted, it was canvassed by the said respondents before the High Court that

2. AIR 1979 SC 1803.

an appeal would lie against an order passed under 7Q. On a scrutiny of Section 7I, we notice that the language is clear and unambiguous and it does not provide for an appeal against the determination made under 7Q. It is well settled in law that right of appeal is a creature of statute, for the right of appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. This being the position a provision providing for appeal should neither be construed too strictly nor too liberally, for if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. Needless to say, a right of appeal cannot be assumed to exist unless expressly provided for by the statute and a remedy of appeal must be legitimately traceable to the statutory provisions. If the express words employed in a provision do not provide an appeal from a particular order, the court is bound to follow the express words. To put it otherwise, an appeal for its maintainability must have the clear authority of law and that explains why the right of appeal is described as a creature of statute. (See: *Ganga Bai v. Vijay Kumar and others*[3]*, Gujarat Agro Industries Co. Ltd. v. Muncipal Corporation of the City of Ahmedabad and Ors.*[4]*, State of Haryana v. Maruti Udyog Ltd. and others*[5]*, Super Cassettes Industries Limited v. State of U.P. and another*[6]*, Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and another*[7]*, Competition Commission of India v. Steel Authority of India Limited and another*[8])

18. At this stage, it is necessary to clarify the position of law which do arise in certain situations. The competent authority

3. (1974) 2 SCC 393.
4. (1999) 4 SCC 468
5. (2000) 7 SCC 348.
6. (2009) 10 SCC 531.
7. (2010) 4 SCC 772.
8. (2010) 10 SCC 744.

under the Act while determining the moneys due from the employee shall be required to conduct an inquiry and pass an order. An order under Section 7A is an order that determines the liability of the employer under the provisions of the Act and while determining the liability the competent authority offers an opportunity of hearing to the concerned establishment. At that stage, the delay in payment of the dues and component of interest are determined. It is a composite order. To elaborate, it is an order passed under Section 7A and 7Q together. Such an order shall be amenable to appeal under Section 7I. The same is true of any composite order a facet of which is amenable to appeal and Section 7I of the Act. But, if for some reason when the authority chooses to pass an independent order under Section 7Q the same is not appealable.

19. Coming to the case at hand, it is evident that the appellant had sent a communication dated 3.10.2007 to the Regional Provident Fund Commissioner submitting that that establishment could not pay the provision fund dues from 1998 due to financial crisis, etc. and it was remitting Rs.83,01,037.80 (Rupees eighty three lacs one thousand thirty seven and eighty paise only) from 1998 to April 2006. Under these circumstances, there was no adjudication with regard to liability as the appellant company had accepted the fault on its own. As it appears the respondent does not have any cavil with regard to the dues payable towards the provident fund by the appellant to the company. What is disputed is that the third respondent issued a demand notice on 23.10.2007 requiring the appellant to remit a sum of Rs.94,27,334/- towards interest under Section 7Q of the Act for the belated remittances made from December 1998 to April 2006. The letter stated a computation sheet was attached to said demand notice which was rebutted by the petitioner by sending a communication stating that it was not sent and it may be provided so that they may reconcile the accounts. The demand notice manifestly has been issued in exercise of power under Section 7Q of the Act and is an independent action and aga or

issue of demand no appeal could have been filed. Therefore, the conclusion of the learned Single Judge as well as by the Division Bench on the said score is not sustainable.

20. The next issue that arises for consideration is when in independent exercise of power under Section 7Q a demand comes into existence, whether the principle of natural justice would get attracted or not. Section 7A (3) provides that no order shall be made under sub-Section (1) unless the employer concerned is given a reasonable opportunity of representing his case. Section 14B which provides for recovery of damages stipulates that before levying and recovery of such damages, the employer shall be given a reasonable opportunity of being heard. Learned counsel for the respondent Nos. 1 to 3 would submit that the first one is the initial determination and, therefore, an opportunity of hearing is given and the second one which relates to imposition of damages there is discretion on the part of the authorities but as far as the levy of interest is component is concerned, it being only an arithmetical calculation the question of affording an opportunity to the employer does not arise. Learned counsel for the respondent has stressed upon the fact that when interest payable by the employer is automatic and the competent authority has no discretion to waive the interest or reduce the interest or limit the interest otherwise, the question of affording of an opportunity of hearing to the employer is not warranted.

21. To appreciate the said submission we may refer to the Constitution Bench decision in *C.B. Gautam v. Union of India and others*[9]. In the said case, the Constitution Bench was dealing with the validity of provision of chapter XX-C inserted in the Income Tax Act, 1961 by the Finance Act of 1986. A contention was advanced by virtue of incorporation of the provision the appropriate authority had been conferred powers of compulsory purchase of immovable property which was punitive in nature. It was submitted on behalf of the Union of

9. (1993) 1 SCC 78.

India that the said Chapter had been introduced to curb the large-scale evasion of income-tax and to counter the modes of tax evasion adopted by various assesses which deprive the Government of its legitimate tax deals. Section 269–UD provided for order by appropriate authority for purchase of immovable property by Central Government. The larger Bench adverted to the issue of natural justice as a contention was raised that there was no provision for giving an opportunity of being heard before an order was passed under the provision of sub-Section 269-UD occurring in the said chapter. The Court referred to the pronouncements in *Union Union of India and another v. Col. J. N. Sinha and another*[10] and *Olga Tellis v. Bombay Municipal Corporation*[11] and opined thus:-

> "It must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity.
>
> 29. It is true that the time frame within which the order for compulsory purchase has to be made is a fairly tight one but in our view the urgency is not such as would preclude a reasonable opportunity of being heard or to show cause being given to the parties likely to be adversely affected by an order of purchase under Section 269-UD(1). The enquiry pursuant to the explanation given by the intending purchaser or the intending seller might be a somewhat limited one or a summary one but we decline to accept the submission that the time-limit provided is so short as to preclude an enquiry or show cause altogether."

[Emphasis supplied]

10. (1970) 2 SCC 458.

11. (1985) 3 SCC 545.

22. After so stating the Constitution Bench proceeded to lay down that the requirement of a reasonable opportunity being given to the concerned parties, particularly, the intending purchaser and the intending seller must be read into the provisions of Chapter XX-C. In that context, the Constitution Bench observed thus:-

> "The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under Section 269-UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269-UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice."

23. Presently we shall address to the nature of the lis that can arise under this provision. There cannot be any dispute that the Act in question is a beneficial social legislation to ensure health and other benefits of the employees and the employer under the Act is under statutory obligation to make the deposit that is due from him. In the event of default committed by the employer Section 14-B steps in and calls upon the employer to pay the damages. (See: *Regional Provident Fund Commissioner v. S.D. College, Hoshiarpur and others*[12]). Section 7Q which provides for interest for belated payment is basically a compensation for payment of interest to the affected employees. This provision has been made to secure just and humane conditions of work as has been opined in *Regional Provident Fund Commissioner v. Hooghly Mills Company*

12. (1997) 1 SCC 241.

Limited and others.[13] The language employed in Section 7Q provides for levy of interest on delayed payment and the rates have been stipulated. When a composite order is passed or order imposing interest becomes a part of the order or levy in any of the provisions of the Act the authority grants a reasonable opportunity of hearing to the employer/affected party.

24. The issue that falls for consideration in this case when the employer volunteers may be after long delay to pay the dues, can he claim any right to object pertaining to the interest component. On certain occasions the authority on its own may issue a demand notice under Section 7Q after long lapse of time by computing the delay committed by the employer in payment of the dues. We repeat at the cost of repetition that it is a matter of computation but sometimes computation is done when the main order is passed and at times an interest component is demanded separately by the competent authority. To say that there cannot be any error at any point of time will be an absolute proposition. There can be errors in computation. It is difficult to hold that when a demand of this nature is made in a unilateral manner and the affected person is visited with some adverse consequences no prejudice is caused. Learned counsel for the respondent would contend that the natural justice has been impliedly excluded and for the said purpose she would emphasise upon the scheme and the purpose of the Act. There is no cavil for the fact that it is social welfare legislation to meet the constitutional requirement to protect the employees. That is why the legislature has provided for imposition of damages, levy of interest and penalty. It is contended that it is luminous that the legislature always intended that when hearing takes place for determination of the money due, the component of interest would be computed and in that backdrop the affected person will have opportunity of hearing. But in reality when an independent order is passed under Section 7Q which can also be done as has been done in the

13. (2012) 2 SCC 489.

present case the affected person, we are inclined to think, should have the right to file an objection if he intends to do. We are disposed to think so, when a demand of this nature is made, it can not be said that no prejudice is caused. It is highlighted by the respondents that once the amount due is determined the levy of interest is automatic. The rate of interest is stipulated at 12 per cent or at a higher rate if so is provided in the scheme. Despite this, there can be errors with regard to the period and the calculation. It is a statutory power which is exercised by the competent authority under the Act. Once the said authority takes recourse to the measure for computation and sends a bald order definitely the affected person can ask for clarification and when computation sheet is provided to him he can file an objection. Though, the area of delineation would be extremely limited yet the said opportunity cannot be denied to the affected person.

25. We may state with profit that principles of natural justice should neither be treated with absolute rigidity nor should they be imprisoned in a straight-jacket. It has been held in *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Others*[14] that the maxim *audi alteram partem* cannot be invoked if the import of such maxim would have the effect of paralyzing the administrative process or where the need for promptitude or the urgency so demands. It has been stated therein that the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential. The concept of natural justice sometimes requires flexibility in the application of the rule. What is required to be seen the ultimate weighing on the balance of fairness. The requirements of natural justice depend upon the circumstances of the case.

26. In *Natwar Singh v. Director of Enforcement and*

14. (2005) 7 SCC 764.

Another,[15] this Court while discussing about the applicability of the rule had reproduced the following passage:-

> "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter:" [*see R. v. Gaming Board for Great Britain, ex p Benaim and Khaida*[16] at QB p. 430 C], observed Lord Denning, M.R.
>
> ... Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case."

27. In this context, we may fruitfully refer to the verdict in *Kesar Enterprises Limited v. State of Uttar Praesh and Others*[17] wherein the Court was considering the applicability of principles of natural justice to Rule 633(7) of the Uttar Pradesh Excise Manual. The said Rule provided that if certificate was not received within the time mentioned in the bond or pass, or if the condition of bond was infringed, the Collector of the exporting district or the Excise Inspector who granted the pass shall take necessary steps to recover from executant or his surety the penalty due under the bond. A two-Judge Bench referred to the decisions in *Swadeshi Cotton Mills v. Union of India*[18], *Canara Bank v. V.K. Awasthy*[19] and *Sahara India (Firm) v. CIT*[20] and came to hold as follows:-

> "30. ... we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7)

15. (2010) 13 SCC 255.
16. (1970) 2 QB 417.
17. (2011) 13 SCC 733.
18. (1981) 1 SCC 664.
19. (2005) 6 SCC 321.
20. (2008) 14 SCC 151.

of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard."

28. Regard being had to the discussions made and the law stated in the field, we are of the considered opinion that natural justice has many facets. Sometimes, the said doctrine applied in a broad way, sometimes in a limited or narrow manner. Therefore, there has to be a limited enquiry only to the realm of computation which is statutorily provided regard being had to the range of delay. Beyond that nothing is permissible. We are disposed to think so, for when an independent order is passed making a demand, the employer cannot be totally remediless and would have no right even to file an objection pertaining to computation. Hence, we hold that an objection can be filed challenging the computation in a limited spectrum which shall be dealt with in a summary manner by the Competent Authority.

29. In the present case, it is manifest from the record that the appellant had already deposited a sum of Rs.34,00,000/- before the Competent Authority and sought for supply of the calculation sheet the basis on which the computation had been made so that it could reconcile the accounts. We think it appropriate to direct that the computation sheets shall be provided to the appellant within three weeks and it shall file its objection within two weeks therefrom and thereafter the Competent Authority shall fix a date for reconciliation of the accounts. However, regard being had to the fact that the Act is a piece of social welfare legislation, we direct the appellant to deposit a further sum of Rs.16,00,000/- within a period of four weeks from today. If the amount is not deposited within the time stipulated hereinabove, the entire amount would be leviable and the right to file objection shall stand extinguished.

30. Consequently, the appeal is allowed to the aforesaid extent and the judgment and order passed by the Division Bench and that of the learned single Judge of the High Court are set aside. In the facts and circumstances of the case, there shall be no order as to costs.

K.K.T. Appeal partly allowed.

REGISTRAR GENERAL HIGH COURT OF GUJARAT & ANR.

v.

JAYSHREE CHAMANLAL BUDDHBHATTI

(Civil Appeal No. 9346 of 2013)

OCTOBER 22, 2013

[H.L. GOKHALE AND DIPAK MISRA, JJ.]

Service Law:

Judicial service – Subordinate judicial officer – Termination of service – During probation period – Without affording opportunity of hearing – Termination order set aside by High Court on the ground that it was in breach of Art.311 of the Constitution – Held: If the inquiry is conducted to assess the suitability of the probationer, it cannot be faulted – But if in the course of inquiry any allegations are made against the probationer, which results into a stigma, the probationer ought to be afforded protection u/Art. 311(2) – In the present case no opportunity was afforded to the officer – The facts of the case, also do not establish her unsuitability to the post – Constitution of India, 1950 – Article 311(2).

Judiciary – Subordinate judiciary – Protection of – It is duty of the High Court to protect judicial officers against unjustified allegations and to see that hostile work environment for junior judicial officers is eliminated, in order to encourage them to put in good judicial work without fear or favour.

The respondent, obtained a high rank in the selection for judicial service. She was given an independent posting as a Civil Judge, Junior Division. During her probation, discreet inquiry was conducted and thereafter preliminary inquiry was conducted. On the basis of the

report of the preliminary inquiry, the services of the respondent were terminated. She challenged the termination order by filing writ petition. The High Court allowed the petition and set aside the termination order and directed her reinstatement with back wages, on the ground that the termination was in breach of Article 311 of the Constitution, inasmuch as she was not informed of the charges against her, nor was she given the opportunity of being heard in respect thereof. Hence the present appeal.

The question for consideration was whether the present case was a case of termination simplicitor of the services of a probationer on account of her unsuitability for the post that she was holding, or whether it was a termination of her services after holding an inquiry behind her back and without giving her an opportunity to defend.

Dismissing the appeal, the Court

HELD: 1.1. If a finding against a probationer is arrived at behind his back on the basis of the inquiry conducted into the allegations made against him, and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. If it is a case of deciding the suitability of a probationer, and for that limited purpose any inquiry is conducted, the same cannot be faulted as such. However, if during the course of such an inquiry any allegations are made against the person concerned, which result into a stigma, he ought to be afforded the minimum protection which is contemplated under Article 311 (2) of the Constitution of India even though he may be a probationer. The protection is very limited viz. to inform the person concerned about the charges against him, and to give him a reasonable opportunity of being heard. [Paras 27 and 28] [421-F-G; 422-B-C]

1.2. The facts of the present case indicate that apart from the fact that no opportunity was afforded to the respondent, even the material placed on record did not establish any such aspect which would lead to a conclusion of unsuitability. The disposal of the respondent was very good, and the complaints by the subordinate staff were clearly motivated. There was no involvement of the respondent in the suicide by the wife of another judicial officer, and all that the High Court administration could lay hand on was the telephonic conversations which the respondent had with the judicial officer. The inference of unsuitability drawn by the High Court administration was therefore totally uncalled for. The impugned judgment setting aside the termination order issued on the ground of unsuitability is, therefore, fully justified. [Para 31] [424-C-F]

1.3. High Court administration had first conducted a discreet inquiry against the respondent, and thereafter another inquiry called as preliminary inquiry. The initial discreet inquiry was conducted by the then District Judge, whereas the subsequent inquiry, was conducted by the then Registrar (Vigilance). The Registrar (Vigilance) was earlier the District Judge, to whom the respondent had made initial complaints about the behaviour of her subordinate staff that they were not working properly, and he had not taken any action on those complaints. Instead, he made certain adverse remarks on the personal characteristics of the respondent, with respect to politeness and courtesy that it required improvement. Therefore, in view of his association with the controversy at an earlier stage as the District Judge, the minimum that was expected of him was to recuse himself from the preliminary inquiry. [Para 16] [412-G-H; 413-A-C]

1.4. It is also material to note that during the preliminary inquiry, the Registrar (Vigilance) did not call

those persons to give evidence who had given statements in favour of the respondent during the discreet inquiry. This included her peon and senior staff members. The staff member of the respondent who did not get along with the respondent, had also given a statement in support of her during the course of the discreet inquiry. Not less than 38 advocates had given a statement in her favour, and pointed out that her performance was in fact good, and also that there were no behavioral problems with respect to her functioning. If this information was available to the Registrar (Vigilance), through the report of the discreet inquiry, which was conducted by the then District Judge, it was expected of him to verify that material by calling the persons concerned, and recording their statements. The impugned judgment has noted this one-sided approach of the Registrar (Vigilance), and called it as biased. [Para 16] [413-C-G]

1.5. The respondent is held to have completed her probation satisfactorily. The appellants are directed to reinstate the respondent in her service with continuity and all consequential benefits. She will be entitled to her seniority as if she was never terminated from her service. She will be entitled to the backwages. However, the backwages payable to her are restricted to the period subsequent to the decision of the High Court dated 15.5.2009. She will be given a fitment in salary on the basis of her continuity in services, and the backwages will be calculated and paid accordingly. [Para 35] [426-E-G]

Parshotam Lal Dhingra vs. Union of India **AIR 1958 SC 36; 1958 SCR 828;** *Shamsher Singh vs. State of Punjab and Anr.* **1974 (2) SCC 831: 1975 (1) SCR 814 – followed.**

State of Bihar and Ors. vs. Shiva Bhikshuk Mishra **1970 (2) SCC 871: 1971 (2) SCR 191;** *Anoop Jaiswal vs. Govt. of*

India **1984 (2) SCC 369: 1984 (2) SCR 453;** *Chandra Prakash Shahi vs. State of U.P. and Ors.* **2000 (5) SCC 152: 2000 (3) SCR 529;** *Union of India and Ors. vs. Mahaveer C. Singhvi* **2010 (8) SCC 220: 2010 (9) SCR 246;** *Shamsher Singh vs. State of Punjab and Anr.* **1974 (2) SCC 831: 1975 (1) SCR 814 – relied on.**

High Court of Judicature at Bombay vs. Sashikant S. Patil and Anr. **2000 (1) SCC 416: 1999 (4) Suppl. SCR 205 – distinguished.**

Oswal Pressure Die Casting Industry vs. Presiding Officer **1998 (3) SCC 225;** *Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd.* **1999 (2) SCC 21: 1998 (3) Suppl. SCR 558 – referred to.**

2.1. The Subordinate Judges are under the care and custody of the High Court. This custody and care certainly requires the High Court to afford the Subordinate Judges the minimum opportunity which is otherwise available to every other civil servant under Article 311 (2). In the present case instead of protecting the respondent, an investigation was conducted against her without affording her any opportunity, though it contained allegations against her character, and the investigation was sought to be justified as determination of her suitability for the post which she was holding. [Paras 28 and 34] [422-E-F; 425-H; 426-A-B]

Shamsher Singh vs. State of Punjab and Anr. **1974 (2) SCC 831: 1975 (1) SCR 814 – relied on.**

2.2. The High Courts must see to it that the hostile work environment for junior judicial officers, particularly the lady officers, is eliminated. This is necessary to encourage the young officers to put in good judicial work without fear or favour. In the present case, the High Court administration has clearly failed in this behalf. [Para 34] [426-B-C]

Ishwar Chand Jain vs. High Court of Punjab and Haryana and Ors. **1988 (3) SCC 370: 1988 (1) Suppl. SCR 396 – relied on.**

Case Law Reference:

1998 (3) SCC 225	**referred to**	**Para 21**
1998 (3) Suppl. SCR 558	**referred to**	**Para 21**
1999 (4) Suppl. SCR 205	**relied on**	**Para 22**
1958 SCR 828	**followed**	**Para 23**
1971 (2) SCR 191	**relied on**	**Para 24**
1975 (1) SCR 814	**followed**	**Para 24**
1984 (2) SCR 453	**relied on**	**Para 25**
2000 (3) SCR 529	**relied on**	**Para 26**
2010 (9) SCR 246	**relied on**	**Para 27**
1975 (1) SCR 814	**relied on**	**Para 28**
1988 (1) Suppl. SCR 396	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9346 of 2013.

From the Judgment & Order dated 15.05.2009 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 2880 of 2008.

Preetesh Kapur, Hemantika Wahi, Subhada Deshpande for the Appellants.

R.P. Bhatt, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Taruna Singh, Charu Mathur for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted.

2. This appeal by Special Leave seeks to challenge the judgment and order rendered by a Division Bench of Gujarat High Court dated 15.5.2009, allowing the Special Civil Application No.2880 of 2008, filed by the respondent herein.

3. The appeal raises the question with respect to the disputed termination of services of the respondent herein as a Civil Judge, Junior Division, in the Gujarat Judiciary. The impugned judgment has accepted the contention of the respondent that the termination of her services was a stigmatic one, and she was removed from her services after an inquiry in which she was not informed of the charges against her, nor was she given the opportunity of being heard in respect of those charges, which are the minimum requirements under Article 311 (2) of the Constitution of India. As against that, the contention of the appellants has been that the respondent's service was discontinued during the period of her probation, since she was not found suitable for the post she was holding, and it was not a stigmatic termination to attract Article 311 (2) of the Constitution of India.

Facts leading to this appeal are this wise:-

4. The respondent appeared for the selection for the post of a Civil Judge, Junior Division, in the year 2003, and obtained 7th rank out of 84 candidates, and was appointed as a Civil Judge on 2.3.2005. To begin with, she was placed on probation for a period of two years. Her initial posting was at Rajkot to undergo the training alongwith the District Judge. Subsequent thereto, she was given a full-fledged posting as a Civil Judge and Judicial Magistrate First Class, at Kodinar District Junagadh, by the order of the High Court dated 30.12.2005. She took the charge of the said post on 7.1.2006.

5. It is her case that she was discharging her duties faithfully and sincerely, but in the course of her work she found that some of her subordinate staff members were not conducting themselves properly, and were involved in taking the

court papers outside the court premises, which was something that could not be permitted. She wrote letters to the then District Judge, Junagadh Mr. B.U. Joshi, on 16.5.2006 and 19.5.2006, with respect to the difficulties faced by her, due to the behavior of the subordinate staff, and amongst other things she recorded this particular conduct on their part. There was no response to these letters, but she received adverse remarks, vide the letter dated 19.9.2006, addressed by the Registrar (Administration) of the High Court of Gujarat. The said letter read as follows:-

"Confidential

J.C. Upadhyay
Registrar (Administration)
High Court of Gujarat, at Sola
Ahmedabad-380 060

No. A. 0722/82
Dated 19.9.2006

To
Miss J.C. Buddhabhatti,
Principal Civil Judge and
Judicial Magistrate,
First Class, Kodinar

Through: The Principal District Judge, Junagadh

Subject: Adverse remark- Communication of …

Madam,

With reference to the subject noted above, I am directed by the Hon'ble the Acting Chief Justice and Judges, to state that the following remarks have been passed in the Confidential Report in Form No. III in respect of you:-

(4) Personal characteristics:
(8) Politeness and courtesy *Required improvement*

(5) The District Judge's Assessm[illegible]*e*

regarding his/her-

(x) Attitude towards the public and the bar	*Requires improvement*

I am, therefore, directed by their Lordships to request you to be so good as to try to show improvement in these respects in future.

Yours faithfully
Sd/-
Registrar (Admn.)"

6. The respondent replied to the said communication by her letter dated 14.11.2006, in which she pointed out that the disposal of cases by her had been good. She had disposed of 509 Civil and 1619 Criminal cases totaling to 2128 cases during the period January 2006 to October 2006. She stated in her letter that it would not have been possible to do so without her good attitude, and also without the cooperation of the bar and public. In any event, she assured in her reply that she will try to improve politeness and courtesy, and also improve her attitude towards the public and the bar.

7. Thereafter, the respondent received a letter dated 25.7.2007 from the Registrar Administration, High Court of Gujarat communicating adverse remarks for the subsequent period. This letter reads as follows:-

"No.A.0722/82
Date: 25-7-2007

To

Miss J.C. Buddhabhatti
Principal Civil Judge and
Judicial Magistrate, First Class,
Kodinar.

Through : The Principal District Judge, Junagadh.

Subject: Adverse remarks- Communication of…

Madam,

With reference to the subject noted above, I am directed by the Honourable the Chief Justice and Judges to state that, the following remarks have been passed in the Confidential Report in Form No.IV in respect of you:-

(3)	***Character**:*	
(c)	Whether she mixes in *such company as she should not.*	Yes, it is heard so.
(d)	*Whether she maintains Judicial aloofness*	*No, it is heard so. By limited contact.*
(4)	***Personal characteristics***	*:*
(4)	*Clarity of thought and expression in correspondence and discussion*	*Required improvement*
(8)	*Politeness and courtesy*	*Required improvement*
(5)	*The District Judge's Assessment of the Civil Judge regarding his / her*	
(i)	*Ability*	*Now appears, not able for independent station.*
(vi)	*Judicial qualities*	*Now appears it required Improvement*

(vii) (A) Administrative capacity, Knowledge of administrative work and office routine	*Now appears inadequate*
(x) Attitude towards the public And the Bar	*Required improvement*
(xi) Any other remarks	*She has threatened the Staff in the name of District Judge. Hence She is not reliable and Hence it is not possible For the D.J. to enter in Her Chamber without third person.*

I am, therefore, directed by Their Lordships to request you to be so good as to show improvement in these respects in future.

Yours faithfully,
Registrar (Admn.)

8. The respondent replied the said letter on 24.8.2007 and her reply reads as follows:-

"Confidential

No.24/2007
Principal Civil Court
Kodinar.
Dt. 24-08-2007

From
Miss J.C. Buddhbhatti,
Principal Civil Judge and
Judicial Magistrate, First Class,
Kodinar.

To,
The Hon'ble Registrar (Administration)
High Court of Gujarat, at Sola
Ahmedabad- 380060.

Through: The Principal District Judge, Junagadh

Subject: Clarification in respect of communication of Adverse Remarks.

Ref: Your Honour's Letter No.A.0722/82,Dt.27/7/07

Respected Sir,

With reference to the subject noted above, I have honour to submit my reply as under, kindly consider the same.

(1) The remarks in respect of my characters as shown 3(c)(d), are based on hearsay because as a judicial officer I maintain judicial aloofness and I am not keeping any relation or company with any person which should not.

(2) The remarks in respect of my personal characteristic as shown in para-4 – I will follow the instructions and will improve the requirement as shown in said remarks.

(3) With reference to remarks shown in para-5(i) – I have to state that I have disposed of total cases3317 (834+2483) Civil as well as criminal case during my tenure in independent station and tried to minimize the arrears. So I believe that I am able to work in independent station. Further, I will try to improve judicial qualities as mentioned in para-5(vi).

(4) In respect of remarks mentioned in para-5(vii)(a). I submit that I am fresh recruited and require experience in respect of administrative work even though I am trying to see that office routine work sho[illegible] I

am confident in near future I will able to achieve perfect administrative capacity and knowledge of administrative work and office routine work.

(5) In respect of remarks in para-(x), I have disposed total 3317 (834+2483) civil as well as criminal cases during my tenure. It is not easy to do so without my good attitude and also without the co-operation of Bar and Public. My relation with public and Bar is cordial. Further Bar Association has no complaint against me.

(6) With reference to remarks in para-5(xi). I submit that some of the staff members including Registrar, criminal clerk and senior clerk were mischievous and tried to hamper administrative works. I complained against the criminal clerk and Registrar and account clerk to the District Jude in writing. Some of the staff members were impolite and uncontrollable and did not maintain the dignity of a lady Judge. I have not threatened them in the name of District Judge but most of the male staff members from Junagadh and working in Kodinar Court, they threatened me in the name of District Judge. Those members of the staff are already transferred from this station and senior clerk Mr. M.H. Tanna, was convicted for offence punishable under Section 302 of Indian Penal Code. So at present relationship between the presiding officer and staff members are quite good and administrative work runs smoothly. I have every respect for my District Judge and never shown any disregard for him. During my tenure District Judge Shree B.U. Joshi Saheb and Shree R.D. Kothari Saheb has periodically visited my court and I behaved politely with them and have not shown disregard for them so as superior officer naturally. District Judge Saheb can enter in my Chamber during the visit. Further I have never been instructed by my superior officers in any occasion during their visit for any untoward incident.

Further I assure I will try to do my level best to comply the suggestions for improvement as per your Honours desire.

Thanking you,

Yours Faithfully,

(Miss J.C. Buddhbhatti)
Principal Civil Judge and
J.M.F.C. Kodinar."

9. Then followed the termination of the service of the respondent vide a notification No.CJM/102004/340/D (Part) dated 14.12.2007. The termination letter reads as follows:-

"GOVERNMENT OF GUJARAT
LEGAL DEPARTMENT
Sachivalaya, Gandhinagar
Dated : 14th December, 2007
NOTIFICATION NO.CJM/102004/340/D (Part)

Miss J.C. Buddhabhati, Principal Judge and JMFC, Kodinar was appointed in cadre of Civil Judge (JD) by this department Notification No.CJM-102004-340-D (Part) dated 2.3.2005 on probation for two years.

The Hon'ble High Court, on the strength of material on record relating to period of probation of Miss J.C. Buddhabhati, Civil Judge and JMFC, has found that her performance is not good and satisfactory and that she is not suitable for the post she holds, and therefore recommended to terminate her probation period immediately and she should not be continued to officiate for long term.

The Government of Gujarat accordingly accepts the recommendation of Hon'ble High Court and terminates appointment on probation period of Miss J.c.

Buddhabhatti, Principal Civil Judge and JMFC, Kodinar with immediate effect.

By order and in the name of the Governor of Gujarat.

(V.K. PUJARA)
Deputy Secretary to Government
Legal Department"

10. The respondent was naturally shocked to receive this order, and made a representation on this termination letter on 4.1.2008, in which she pointed out that if she was given an opportunity of being heard, she could have clarified the position with respect to whatever material that was there on record, relating to her probation period, and on the basis of which her performance was held not to be good and satisfactory. As far as her merit is concerned, she submitted that during her tenure she had rendered 271 judgments in civil matters, and 523 judgments in criminal cases. She was one of the very few candidates who were given independent postings at the beginning of their career. She pointed out that as per the norms of disposal, an average judicial officer holding an independent charge was supposed to decide six civil matters and eight criminal matters in a month, and her disposal was far more than the required average. Her performance was rated as very good for the period from 7.4.2006 till 31.12.2006, and also during the year 2007. She added that to the best of her information 115 Judges were appointed during her time which included some 80 Judges of her batch, and none of them had given as many judgments as she had, both on civil as well as on criminal side. She further stated that as per her information only 25 of her judgments were carried in appeal to the appellate court, and one up to the High Court which got confirmed.

11. The respondent thereafter pointed out that as Principal Civil Judge and JMFC, she was supposed to conduct some Miscellaneous cases (such as concerning liquor prohibition) alongwith civil and criminal matters. When she joined as a Judge, some 835 Misc. cases were pending in her court, out

of which she disposed of 613 cases in the year 2007. She pointed out in her representation that because of her industry and integrity, some of her subordinate staff members who were otherwise dishonest, started behaving in an uncouth, uncivilized and non-chivalrous manner. She was therefore, constrained to record in her letters dated 7.9.2006 and 30.9.2006 to the then District Judge of Junagadh, Mr. B.U. Joshi, with respect to the misconduct of Mr. D.R. Weghela, clerk in charge of criminal matters, and C.O C. Mr. R. R. Sewak. She had also given an oral complaint against another clerk, one Mr. M.H. Tanna, to the District Judge regarding his misconduct, since he had demanded alcohol from an accused, and remained drunk while he was on duty. She also recorded that Mr. Tanna threatened her that she was on probation, and if she did not toe his line, she would not be confirmed. She recorded that this very person was an accused in another case under Section 302 of I.P.C, and at that time he was enlarged on bail, but subsequently had come to be convicted by judgment and order dated 4.9.2006 passed by the Sessions Judge, Junagadh.

12. Thereafter, the respondent recorded in that letter, that she had reported to the then District Judge, Mr. B.U. Joshi that despite her warning time and again, the above referred three persons used to come in a drunken state to the court premises, and used to threaten her by calling names in vulgar Gujarati slang. She had given a written complaint, dated 3.2.2007, against Mr. R.R. Sevak and night watch-man Mr. V.B. Solanki, to the District Judge who succeeded Mr. B.U. Joshi. In view of her complaint, the said Mr. Solanki was transferred from the post of night watchman, but still at night time he used to come without her permission outside her residence in a drunken state along with some advocates. The advocates also used to send their clients in a drunken state to her residence. Having been made to face such hostility from a few members of the bar and the criminal elements in the staff, she asked: *'In the face of such hostile members of the bar and the criminal members (of the staff) can an unmarried woman be safe* n

no protection despite all these hardships, and yet she continued to do her best, but in return had been served with the order of termination. She specifically stated that the vigilance officer of the High Court Mr. B.U. Joshi, who was the earlier District Judge of Junagadh, had protected and encouraged the staff members against whom she had made complaints, and had therefore, made adverse remarks in the year 2006. In any case, she pointed out that those adverse remarks were contrary to the material on record.

13. By the time of sending of this reply, the respondent had come to know that the officer conducting the inquiry, had given credence to an allegation of her being involved with one Mr. N.P. Thakkar, who was also a trainee Judge alongwith her at Rajkot. Hence, by way of caution, sensing that the action against her had perhaps been taken due to those allegations, she explained her position in that behalf. She accepted that sometimes she did discuss legal problems with her senior judges and co-trainee judges like Mr. Thakker. Sometimes such discussions lasted for some longer time, but that was all. After her joining as Civil Judge, at Kodinar she had never met Mr. Thakker, who was posted as the Civil Judge and JMFC, at Jetpur. Unfortunately, it so happened that the wife of Mr. Thakker committed suicide on 1.1.2007, and her mother lodged an F.I.R at Jetpur against Mr. Thakker, for the offences under Section 498 A, 306, 114 of I.P.C read with Section 3 & 7 of the Dowry Prohibition Act, 1961. In that F.I.R, a doubt was raised regarding the involvement of Mr. Thakker with another woman. The name of the respondent was not mentioned therein but the local daily newspapers of Saurashtra blamed the respondent for the incident, and damaged her reputation, as if she was responsible for that incident. Thereafter, the respondent specifically stated in her reply that Vigilance Officer had made a one-sided report, and had not heard her, as well as majority of the members of the bar, regarding the allegations against her. It is on the basis of such a prejudiced report that her probation period was being terminated.

14. In her letter the respondent specifically asserted as follows and it is relevant to quote:-

> "*I have proved my mettle and potential in the face of hostile staff and some members of the Bar, and in the face of hostile male dominant society, and in the face of dishonest yellow journalism.*"

The respondent therefore, requested that her case be reviewed, and sought reinstatement with continuity, backwages, and consequential benefits.

15. The aforesaid representation was however not considered, and that led her to file a Writ Petition in the High Court. The appellants filed a reply and vigorously contested the Writ Petition. The High Court on the judicial side however held that the termination of the respondent was in breach of Article 311, inasmuch as she was not informed of the charges against her, nor was she given the opportunity of being heard in respect thereof. The Court held that, this was not a case of termination simpliciter of a probationary officer, and therefore, set-aside the termination of her services, and directed her reinstatement with backwages. It is this order which is under challenge in the present matter. Mr. Preetesh Kapur, learned counsel has appeared for the appellants, and Mr. R.P. Bhatt learned senior counsel has appeared for the respondent.

Consideration of the material on record:-

16. When we go through the record, one thing is clear that the High Court administration first conducted a discreet inquiry against the respondent, and thereafter another inquiry called as preliminary inquiry. The initial discreet inquiry was conducted by the then District Judge, Junagadh, Mr. Kothari, whereas the subsequent inquiry, was conducted by Mr. B.U. Joshi, who had by that time become the then Registrar (Vigilance). It is material to note that same Mr. B.U. Joshi was the District Judge when the respondent made her initial complai[illegible]r

of her subordinate staff that they were not working properly, and Mr. Joshi had not taken any action on those complaints. Instead, he made certain adverse remarks on her personal characteristics with respect to politeness and courtesy that it required improvement. Therefore, in view of his association with the controversy at an earlier stage as the District Judge, the minimum that was expected of Mr. B.U. Joshi was to recuse himself from the preliminary inquiry. The impugned judgment has, therefore, characterized him, in para 12.16 thereof, as being prejudiced even before the initiation of the preliminary inquiry. It is the report of this preliminary inquiry which has led to the termination of the probation period of the respondent as unsatisfactory. It is also material to note that during this preliminary inquiry, Mr. B.U Joshi, in his capacity as the Registrar (Vigilance), did not call those persons to give evidence who had given statements in favour of the respondent during the discreet inquiry. This included her peon and senior staff members. What is quite relevant to note is that the earlier mentioned Mr. Sewak, who did not get along with the respondent, had given a statement in support of her during the course of the discreet inquiry. Not less than 38 advocates had given a statement in her favour, and pointed out that her performance was in fact good, and also that there were no behavioral problems with respect to her functioning. If this information was available to Mr. B.U. Joshi as the Registrar (Vigilance), through the report of the discreet inquiry, which was conducted by the then District Judge Mr. Kothari, it was expected of him to verify that material by calling the persons concerned, and recording their statements. The impugned judgment has noted this one-sided approach of the Registrar (Vigilance), and called it as biased. The preliminary inquiry laid an emphasis on the fact that the respondent used to talk to the aforementioned Mr. Thakker on telephone, and that those talks had crossed the prescribed limit. The impugned judgment records that it is not uncommon for a colleague to talk to another colleague, and merely because one colleague is male and the other is female, it is no reason to suspect that

permissible lines had been crossed and then to draw an adverse inference against the character of the lady Judge.

17. What is most significant to note is that the inquiry report, has referred to the suicide by the wife of Mr. Thakker, and it contains certain observations involving the respondent as follows:-

> "*Thereafter, it was respectfully submitted by the Registrar (Inspection) to the Hon'ble the Chief Justice and the Hon'ble Mr. Justice A.M. Kapadia that, in connection with the suicide committed by Smt. Archana w/o Mr. N.P. Thakker, Addl. Civil Judge & JMFC, Jetpur, the mother of the deceased has lodged the complaint bearing C.R. No.I/9/07 with Jetpur City Police Station against Mr. N.P. Thakker and his family members. It is alleged in the said complaint that due to illicit relations between Mr. N.P. Thakkar and Ms. JC Buddhabhatti Smt. Archana has committed suicide."*

18. What is rather disturbing is that no such material was produced before the High Court involving the name of the respondent. On the other hand, Shri R.P. Bhatt, learned senior counsel appearing for the respondent, has drawn our attention to the deposition of the mother of the deceased in the Criminal Case concerning the death of the wife of Mr. N.P. Thakker. She has not named the respondent therein.

19. The question, therefore, comes for consideration, as stated earlier, as to whether this is a case of termination simpliciter of the services of a probationer on account of her unsuitability for the post that she was holding, or whether it is a termination of her services after holding an inquiry behind her back, and without giving her an opportunity to defend.

20. The legal position in this behalf has evolved over the years, and there are numerous judgments which govern this kind of a situation in the light of A e

Constitution, which have been pronounced from time to time over the years. The learned counsel for the appellants as well as for the respondent have drawn our attention to the relevant judgments holding the field, and we shall refer to the salient ones amongst them.

Legal submissions of behalf of the appellants:-

21. The principal submission on behalf of the appellants has been that this is a case of termination simpliciter of the services of a probationer during the extended period of probation, without any stigma attached, and therefore, the High Court, on the judicial side, had no reason to interfere. The initial discreet inquiry, and the subsequent preliminary inquiry were both for the purpose of ascertaining the suitability of the respondent, and not for establishing any allegations against her. If that is so, they submit, that there was no reason for the High Court on the judicial side to interfere in the decision arrived at by the High Court administration, to discontinue the services of the respondent on the ground of unsuitability. The appellants thus relied upon a judgment of this Court in *Oswal Pressure Die Casting Industry v. Presiding Officer* reported in 1998 (3) SCC 225. In that matter, it was held that once it was found that the assessment made by the employer was supported by some material and was not mala-fide, it was not proper for the High Court to substitute its satisfaction in place of that of the employer. Reliance was also placed on the judgment in *Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd.* reported in 1999 (2) SCC 21, which is a case wherein it is held that if a regular departmental inquiry is started, a charge memo is issued, reply obtained, and an inquiry officer is appointed, and thereafter also if the inquiry is dropped and a simple notice of termination is issued, even than the action will not be held to be punitive.

22. Lastly, the judgment of this Court in *High Court of Judicature at Bombay v. Sashikant S. Patil and Anr.* reported in AIR 2000 SC 22 (equivalent to 2000 (1) SCC 416), was

relied on, where this Court has held that when a constitutional function was exercised on the administrative side of the High Court, any judicial review thereof, should be made with great care and circumspection, and confining strictly to the parameters set by this Court in the decisions holding the field.

Submissions of behalf of the respondent:-

23. The respondent relied upon the law laid down from *Parshotam Lal Dhingra v. Union of India* reported in AIR 1958 SC 36 onwards. In that case it was held by the constitution bench that if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may choose to punish the servant, and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment, and the requirements of Article 311 must be complied with.

24. The next judgment cited is one of three Judges of this Court in *State of Bihar and Ors. v. Shiva Bhikshuk Mishra* reported in 1970 (2) SCC 871 wherein it is observed as follows:-

> "*5. ..... So far as we are aware no such rigid principle has ever been laid down by this court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment.....*"

These judgments have been followed by a bench of seven Judges in *Shamsher Singh v. State of I*

in AIR 1974 SC 2192 (equivalent to 1974 (2) SCC 831), where this Court was concerned with the termination of the services of a probationary judicial officer on the basis of a vigilance inquiry, which was conducted by the State Government on the request of the High Court. The Court held the termination to be bad, and while doing so laid down the law in this behalf in no uncertain terms in paragraphs 63 to 66 (of the SCC report) which read as follows:-

> *"**63.** No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.*
>
> ***64.** Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on*

> *charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In Gopi Kishore Prasad v. Union of India*[1] *it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.*
>
> ***65.** The fact of holding an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment (see State of Orissa v. Ram Narayan Das*[2]*). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal v. State of Punjab*[3]*). In R.C. Lacy v. State of Bihar*[4] *it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2) (see R.C. Banerjee v. Union of India*[5]*). A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 (see Champaklal G.*

1. AIR 1960 SC 689: (1960) 2 SCR 982: (1960) 1 Lab LJ 262
2. (1961) 1 SCR 606: AIR 1961 SC 177: (1961) 1 SCJ 209
3. (1963) 3 SCR 716: AIR 1963 SC 531: (1963) 2 SCJ 185
4. Civil Appeal No. 590 of 1962, decided on October 23, 1963
5. (1964) 2 SCR 135: AIR 1963 SC 1552: (1964

Shah v. Union of India[6]*). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see Jagdish Mitter v. Union of India*[7]*).*

66. *If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive. (see K.H. Phadnis v. State of Maharashtra*[8]*)"*

25. These propositions have been reiterated in a number of judgments thereafter, and the counsel for the respondent referred to *Anoop Jaiswal v. Govt. of India* reported in 1984 (2) SCC 369, where this Court held that, the Court can go behind the formal order of discharge to find out the real cause of action. In that matter, the order of discharge of the probationer on the ground of unsuitability was actually based upon the report/recommendation of the concerned authority indicating commission of an alleged misconduct by the probationer. The Court held that the order was punitive in nature, and in the absence of any proper inquiry it amounted to violation to Article 311 (2) of the Constitution of India.

At the end of paragraph 13 of the judgment this Court observed as follows:-

"13……..*Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the*

6. (1964) 5 SCR 190: AIR 1964 SC 1854: (1964) 1 Lab LJ 752
7. AIR 1964 SC 449: (1964) 1 Lab LJ 418
8. 1971 Supp SCR 118: (1971) 1 SCC 790

order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311 (2) of the Constitution."

26. The propositions in this behalf, as to what constitutes a motive, and what constitutes a foundation for the action were once again crystallized in the judgment of this Court in *Chandra Prakash Shahi Vs. State of U.P. & Ors.* reported in 2000 (5) SCC 152, where in paragraph 28 and 29 of the judgment of this Court laid down the relevant propositions which are as follows:-

*"**28.** The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a n*

29. *"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."*

27. Our attention was drawn to a judgment of a Bench of three Judges of this Court in *Union of India & Ors. v. Mahaveer C. Singhvi* reported in 2010 (8) SCC 220, where a probationer was discharged from his services. The findings were arrived at against him behind his back as recorded in paragraph 46 of the judgment, and although the termination was claimed to be a termination simpliciter, the High Court had found that it was a camouflage for the real intention of the petitioners. This Court upheld the judgment of the High Court, following the law laid down from time to time as aforesaid, and held that if a finding against a probationer is arrived at behind his back on the basis of the inquiry conducted into the allegations made against him, and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand if no inquiry was held or contemplated, and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. The facts of that case were held as not falling under the latter category, and it is submitted that the present case also does not fall under that category.

Consideration of the legal submissions:-

28. Having gone through the salient judgments on the issue in hand, one thing which emerges very clearly is that, if it is a case of deciding the suitability of a probationer, and for that limited purpose any inquiry is conducted, the same cannot be faulted as such. However, if during the course of such an inquiry any allegations are made against the person concerned, which result into a stigma, he ought to be afforded the minimum protection which is contemplated under Article 311 (2) of the Constitution of India even though he may be a probationer. The protection is very limited viz. to inform the person concerned about the charges against him, and to give him a reasonable opportunity of being heard. Having noted the facts as they have emerged on the record, can the preliminary inquiry conducted against the respondent in the present case be said to be an innocent one only to assess her suitability? Is it not apparent that certain aspersions were cast on the character of the respondent during the course of the conduct of this inquiry on her suitability? If that was so, was it not expected from a High judicial institution like the High Court to afford her the minimum opportunity to defend herself? In *Shamsher Singh* (supra) this Court has observed that the Subordinate Judges are under the care and custody of the High Court. This custody and care certainly requires the High Court to afford the Subordinate Judges the minimum opportunity which is otherwise available to every other civil servant under Article 311 (2).

29. Having noted the aforesaid legal position, we must pay heed to the lament of this Court as expressed in the case of *Ishwar Chand Jain v. High Court of Punjab & Haryana and Ors.* reported in 1988 (3) SCC 370. In that matter, the probationary service of an Additional District and Sessions Judge was terminated on the basis of High Court's conclusion regarding suitability. This Court, however, found that the action taken against the appellant was basically because of some grievances made by the members of t[illegible]s

no justifiable material available on the record of the Court. The members of the Bar Association had passed a resolution condemning him on a trifling matter, as observed by this court. This Court observed in the end of paragraph 7 in following words:-

> *"**7.** …….If the members of the Bar Association pass resolution against the presiding officers working in subordinate courts without there being any justifiable cause it would be difficult for judicial officers to perform their judicial functions and discharge their responsibilities in an objective and unbiased manner. We are distressed to find that the High Court instead of protecting the appellant took this incident into consideration in assessing the appellant's work and conduct."*

In this matter, the Bar Association passed a resolution against the Additional Sessions Judge for not detaining a witness on the request of the counsel for the party to enable him to bring summons for effecting service on him, without there being any requisition from the court of the Chief Judicial Magistrate. This Court noted that if such resolutions are passed, it will be difficult for the judicial officers to perform their function in an objective and unbiased manner. This Court was constrained to observe that the High Court had failed to protect the appellant. What had distressed this Court was that the High Court, instead of protecting the appellant had taken into account the unjustified allegation made by the bar, while assessing the work and conduct leading to discontinuation of his probation services. The same appears to be the situation in the present case.

30. *Shashikant Patil* (supra) was altogether a different case. That was a matter where a full-fledged departmental inquiry was conducted against the respondent. It is true that the inquiry report had exonerated the respondent, and the disciplinary committee had reversed that decision. The High Court on the judicial side had interfered with the decision of the disciplinary committee. It is this decision of the High Court which

came to be upturned in this case, and it was in this context that this Court observed: *"when such a constitutional function was exercised by the administrative side of the High Court, any judicial review thereon should have been made not only with great care and circumspection, but confining strictly to the parameters set by this Court."* The present case can not be said to be one where the High Court on judicial side has erred as in *Shashikant Patil* (supra) in exercising its powers as claimed by the appellants.

31. As held by this Court time and again, it is the responsibility of the High Court to protect honest judicial officers. As the facts in this case indicate, apart from the fact that no opportunity was afforded to the respondent, even the material placed on record did not establish any such aspect which would lead to a conclusion of unsuitability. The disposal of the respondent was very good, and the complaints by the subordinate staff were clearly motivated. There was no involvement of the respondent in the suicide by the wife of Shri N.P. Thakker, and all that the High Court administration could lay hand on was the telephonic conversations which the respondent had with Mr. Thakker. The inference of unsuitability drawn by the High Court administration was therefore totally uncalled for. The impugned judgment setting aside the termination order dated 14th December 2007 issued on the ground of unsuitability is, therefore, fully justified.

32. One of the submissions which was advanced on behalf of the appellants was that, in such a situation the High Court, on its judicial side, ought to have given a further opportunity to the High Court administration to conduct a further inquiry against the respondent. In our view, keeping in mind the material on record, such a further exercise was not called for, and in any case certainly no more. The services of the respondent have been terminated way back in 2007. Six long years have gone thereafter, and for no fault of hers, the respondent has suffered. Directing any further inquiry would add

conclusion arrived at by the High Court administration that the performance of the respondent was not good and satisfactory, and that she was not suitable for the post she was holding was on the face of it for extraneous reasons. Consequently with a view to do complete justice, the Respondent will have to be held as having completed her probation satisfactorily, and that she was entitled to continue in the post that she was holding.

33. We may however, note that in spite of this position, Mr. R.P. Bhatt, learned senior counsel appearing for the respondent has stated that though the decision of the High Court administration has seriously affected her personal life, the respondent is basically interested in vindicating her position. He has, therefore, fairly made a statement, on instructions, that the respondent is confining her prayer for backwages to the period subsequent to her being vindicated by the judgment of the High Court, dated 15.5.2009 pronouncing that the termination of her services was unjustified, and bad in law.

34. Before we conclude, we must once again reflect on the facts that have emerged in the present case. As noted earlier, the respondent was a candidate who had obtained a high rank in the selection for the judicial service, and was given an independent posting in a rural area, where she was living all alone. Her disposal of cases had been very good to say the least. The complaints made by her, regarding the misbehaviour of the staff, and the harassment to her by a section of the bar, were not heeded by the then District Judge, leave aside making an attempt to understand the difficulties faced by her. Instead, certain unjustified adverse remarks were made against her. Subsequently, the then District Judge conducted the preliminary inquiry against her, in his capacity as the vigilance officer, wherein without any justification he tried to connect her with the death of the wife of another judicial officer. It is the duty of the District Judge and also of the High Court to protect the judicial officers against unjustified allegations. However, what we find in the present case is that instead of doing the same,

an investigation was conducted against the respondent without affording her any opportunity, though it contained allegations against her character, and the investigation was sought to be justified as determination of her suitability for the post which she was holding. We would like to take this opportunity to emphasise that the High Courts must see to it that the hostile work environment for junior judicial officers, particularly the lady officers, is eliminated. This is necessary to encourage the young officers to put in good judicial work without fear or favour. We are constrained to say that in the present case the High Court administration has clearly failed in this behalf. In the circumstances, we have no reason to interfere in the judgment and order of High Court and we confirm the same.

35. Hence, we pass the following order:-

(i) The appeal is dismissed without any order as to the costs.

(ii) The respondent is held to have completed her probation satisfactorily. The appellants are directed to reinstate the respondent in her service with continuity and all consequential benefits. She will be entitled to her seniority as if she was never terminated from her service. The order of reinstatement and posting will be issued within four weeks from today.

(iii) The respondent will be entitled to the backwages. However, the backwages payable to her are restricted to the period subsequent to the decision of the High Court dated 15.5.2009. She will be given a fitment in salary on the basis of her continuity in services, and the backwages will be calculated and paid accordingly.

(iv) We direct the appellants to make the fitment in salary and calculate and pay the backwages within 8 weeks hereafter.

K.K.T.

SHOBHA SINHA

v.

THE STATE OF BIHAR & ORS.

(Civil Appeal No. 9366 of 2013)

OCTOBER 23, 2013

[SURINDER SINGH NIJJAR AND A.K.SIKRI, JJ.]

Service Law – Misconduct – Dereliction of duty – Allegation of – Departmental Inquiry – Dismissal of appellant – She filed writ petition – Petition allowed by Single Judge of High Court – Review Committee constituted to review the case of appellant in terms of the directions given by the Single Judge – Review Committee virtually exonerated the appellant from the charges leveled against her except a mild adverse comment – On that basis, as per the direction of the Single Judge, the Government was required to pass fresh order of punishment – However, the State Government filed LPA – Order of the Single Judge set aside by the Division Bench – On appeal, held: The Review Committee had categorically stated that only "sign in respect of lack of duty appears" and the enquiry officer had not undertaken deep perusal and analysis of evidentiary documents while conducting the enquiry – On the basis of this element of charge only having been proved, even as per the departmental authorities, the punishment of dismissal was totally unwarranted – It was not a case of lack of devotion to duty or any financial irregularities on the part of the appellant – More importantly, the Review Committee, in clear terms, accepted the plea of the appellant that she had put up the proposal in a routine manner and that the main responsibility was that of another person – On the report of the Review Committee, appropriate penalty order was to be passed by the State Government which it failed to do after the receipt of the said report – Direction given to respondent-Government to pass penalty order on the basis

of Review Committee report and also the observations of the Single Judge that it was the first case in her entire service career where the appellant faced departmental proceedings – Since the punishment to be awarded would not be dismissal, removal or compulsory retirement, but lesser punishment, appellant directed to be reinstated in service forthwith – Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 – r.24.

Letters Patent – Letters Patent Appeal – Maintainability – Appellant dismissed from service on charges of misconduct – She filed writ petition – Review Committee constituted to review the case of appellant in terms of the directions given by Single Judge of High Court – Review Committee virtually exonerated the appellant from the charges leveled against her except a mild adverse comment – On that basis, as per the direction of the Single Judge, the Government was required to pass fresh order of punishment – However, the State Government filed LPA – Plea raised by appellant regarding maintainability of the LPA – Held: If the State Government was not satisfied with the course of action adopted by the writ court (Single Judge), proper course was to challenge the order by filing appeal thereagainst – However, it chose to implement the direction passed by the Single Judge and Review Committee, as contemplated under Rule 24 (2) of the CCA Rules, was constituted – But finding that report of the Review Committee was not palatable to the Government, it decided to challenge the order of the Single Judge – It was too late in the day to do so, after deciding not only to accept the judgment of the Single Judge but even implementing the direction contained therein by constituting the Review Committee and allowing the Review Committee to accomplish its task – In this backdrop, LPA filed by the State Government should not have been entertained – Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 – r.24.

The appellant, an Assistant in the State Government, allegedly in her notings made a proposal for allotment of Bitumen to a business firm for around 1600 Metric Tonnes without disclosing the factum of misappropriation of 500 Metric Tonnes of Bitumen earlier allotted to the said firm and that an investigation was pending against the conduct of the firm. It was alleged that the acts of commission and omission of the appellant amounted to lack of bona fide and lack of devotion to duty on account of which the State Government had suffered a heavy loss. On the basis of departmental enquiry conducted against the appellant, in which the charges leveled against her were allegedly proved, the appellant was dismissed from service. She filed Writ Petition challenging the dismissal raising various grounds. The Writ Petition was allowed by the Single Judge of the High Court on the ground that enquiry conducted was not proper inasmuch as the State Government had not supplied her the documents and also not examined the witnesses. Furthermore, according to the Single Judge, even the penalty of dismissal was disproportionate to the charges proved. Noting that there was a scope for review, as provided under Rule 24(2) of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 ("CCA Rules"), the Single Judge referred the matter back to the State Government for passing order afresh so far as punishment is concerned.

The State Government did not challenge the order of the Single Judge immediately thereafter or within the stipulated period of limitation. Subsequently, a Review Committee was constituted to review the case of the appellant in terms of directions given by the Single Judge. The Review Committee virtually exonerated the appellant from the charges leveled against her except hinting that "sign in respect of lack of duty appears". On that basis, as per the direction of the Single Judge, the

Government was required to pass fresh order of punishment. However, the State Government filed LPA challenging the order of the Single Judge.

The Division Bench, by the impugned judgment, did not see any merit in the contention questioning the maintainability of the LPA and then set aside the order of the Single Judge, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1. The Division Bench of the High Court was wrong in brushing aside the contention of the appellant regarding the maintainability of the LPA. If the State Government was not satisfied with the course of action adopted by the writ court (Single Judge), proper course was to challenge the order by filing appeal there against. However, it chose to implement the direction passed by the Single Judge and Review Committee, as contemplated under Rule 24 (2) of the CCA Rules, was constituted. This Review Committee consisting of three very senior officials went into the entire gamut of the matter and made some very pertinent observations in favour of the appellant. It is a departmental remedy provided under the Rules and the Review Committee was empowered to go into the length and breadth of the entire enquiry proceedings as well as the merits of the findings recorded by the conducting officer (i.e. Enquiring Officer). The findings of the said Review Committee would reflect that at the most it was a case where there was "sign in respect of lack of duty" and in any case "absence of devotion to duty" , "lack of faithful service towards work" cannot be assumed to be proved from this fully. Such a report of the Review Committee, which was empowered to undertake this exercise in terms of Rule 24, finding hardly any serious charge made out against the appellant, deserved serious consideration at the hands of the State Government. It was duty

to what appropriate penalty should be imposed upon the appellant, in lieu of punishment of dismissal awarded to her earlier. However, finding that report of the Review Committee was not palatable to the Government, it turned turtle and taking summersault, decided to challenge the order of the Single Judge. It was too late in the day to do so, after deciding not only to accept that judgment but even implementing the direction contained therein by constituting the Review Committee and allowing the Review Committee to accomplish its task. In this backdrop, LPA filed by the State Government should not have been entertained. [Paras 13, 14] [440-F; 441-B-H; 442-A]

Union of India & Ors. v. Carpenter Workers Union & Ors. **(2006) 12 SCC 435: 2006 (9) Suppl. SCR 904 – relied on.**

2.1. On merits, even if one proceeds on the basis that there is some kind of dereliction of duty in making the notings by the appellant made on 28th October 1993 and 17th January 1994, the more pertinent and important issue is as to what kind of charge and to what extent it is proved. That is already reflected in the report of the Review Committee which could not be ignored or glossed over. The Review Committee discharged its functions, as statutorily authorized. It was bounden duty of the Government to consider the same, taking it to logical conclusion. [Paras 15, 17] [443-B-C; 444-G]

2.2. While exercising power under Rule 24 (2) of the CCA Rules, the Review Committee has categorically stated that only "sign in respect of lack of duty appears" and the enquiry officer has not undertaken deep perusal and analysis of evidentiary documents while conducting the enquiry. On the basis of this element of charge only having been proved even as per the departmental authorities, the punishment of dismissal is totally

unwarranted. It is not a case of lack of devotion to duty or any financial irregularities on the part of the appellant. More importantly, the Review Committee, in clear terms, accepted the plea of the appellant that she had put up the proposal in a routine manner and that the main responsibility was that the Executive Engineer. On the report of the Review Committee appropriate penalty order was to be passed by the State Government which it failed to do after the receipt of the said report. The respondents have not given any satisfactory explanation whatsoever as to why there was no consideration of the said report and whether there were any valid or cogent reason to ignore the same. In the absence thereof, the Government is supposed to proceed further and act on the basis of the said report. [Paras 18, 19] [444-G-H; 445-A-D]

State of Uttar Pradesh & Ors. v. V.Saroj Kumar Sinha **(2010) 2 SCC 772: 2010 (2) SCR 326 – referred to.**

3. Direction is given to the respondent-Government to pass penalty order on the basis of Review Committee report and also the observations of the Single Judge that it is the first case in her entire service career where the appellant has faced the departmental proceedings. The appellant is going to attain the age of superannuation by the end of this month. Since the punishment which is to be awarded would not be dismissal, removal or compulsory retirement, but lesser punishment, the appellant shall be reinstated in service forthwith. [Paras 20, 21] [445-D-G]

Case Law Reference:

2006 (9) Suppl. SCR 904	**relied on**	**Para 14**
2010 (2) SCR 326	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9366 of 2013.

From the Judgment & Order dated 04.10.2012 of the High Court of Judicature at Patna in LPA No. 124 of 2011.

Ajit Kumar Sinha, Ashwarya Sinha, Ambhoj Kumar Sinha for the Appellant.

Nagendra Rai, Ardhendumauli Kumar Prasad for the Respondents.

The Judgment of the Court was delivered by

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

2. On the basis of departmental enquiry conducted against the appellant, herein in which the charges leveled against her were allegedly proved, the appellant was dismissed from service. She filed the Writ Petition challenging the dismissal raising various grounds on which the legality of the procedure adopted in the departmental enquiry as well as the punishment imposed as a consequence thereto was questioned by her. This Writ Petition was allowed by the learned Single Judge on the ground that enquiry conducted was not proper inasmuch as the State Government had not supplied her the documents and also not examined the witnesses. Furthermore, according to the learned Single Judge, even the penalty of dismissal was disproportionate to the charges proved. This order of the learned Single Judge was taken in appeal before the Division Bench of the High Court by the Government in which the State Government succeeded, as the order of the learned Single Judge has been upset by the Division Bench. This is how the present appeal arises against the judgment of the High Court.

3. To traverse the essential factual matrix of the case, it be noted that the appellant was charged on the allegation that she had made a proposal on 17th January 1994 for allotment of Bitumen to one M/s. Cosmo Transport Private Limited (hereinafter referred to as "M/s. Cosmo Transport") for around 1600 Metric Tonnes without disclosing the factum of

misappropriation of 500 Metric Tonnes of Bitumen earlier allotted to the M/s. Cosmo Transport and that an investigation was pending against the conduct of the M/s. Cosmo Transport. It was alleged that the delinquent had, under her notings dated 28th October 1993, reported the illegality committed by the M/s. Cosmo Transport in respect of the allotment of 500 Metric Tonnes of Bitumen and had suggested a criminal prosecution against M/s. Cosmo Transport. However, she did not disclose so in her notings. The acts of commission and omission of the delinquent amounted to lack of bona fide and lack of devotion to duty. On account of the said acts of the delinquent, the State Government had suffered a heavy loss.

4. The defence of the appellant was that she had merely submitted a draft proposal to the higher authorities, which was approved by the higher authorities, and therefore she was nowhere responsible for the alleged acts of omission and commission. Her reply was not found satisfactory and a regular departmental enquiry was ordered. The Enquiry Officer in his report dated 9th April 2007 concluded that the appellant was guilty of charges framed against her. On the basis of this report Government Resolution dated 10th April, 2009 was passed whereby the appellant was dismissed from service.

5. In the Writ Petition filed by the appellant, the appellant challenged the dismissal on various grounds. She pleaded that without any application of mind and simply at the dictates of the CBI, the charge sheet was served upon her even when her conduct was without blemish. Her submission was that being an Assistant in the department, when she received order from superior officer like Director(Purchase) of the department, she chose to put up for sanction or release order of the Bitumen. She acted according to the directions given by her superior officers, being lowest rank officer. It was also pleaded that not a single witness was examined to prove the charges and even the onus was wrongly shifted to prove her innocence which vitiated the sanctity and propriety of the

not even supplied the documents, particularly enquiry report of the review committee on which the punishment was awarded to her. In any case, for such a charge, that too vague, punishment of dismissal from service was totally disproportionate.

6. The learned Single Judge while accepting the aforesaid submission and allowing the Writ Petition, took note of the fact that in the counter affidavit filed on behalf of the State it had been admitted that no witness was examined and no documents were provided to the appellant. The impugned order of dismissal was sought to be justified by the Court on the ground that without assessing the requirement of Bitumen and availability of fund to purchase the same, the appellant had given a noting for further purchase. Moreover, the appellant was aware of several complaints pending against the Cosmo Transport but still she did not mention this fact in her noting for purchase of Bitumen and due to this failure, serious loss had been caused to the Government. The learned Single Judge took the view that this justification of the department could not be countenanced in the wake of admission of non-supply of material documents as well as non-examination of any witnesses. Above all, onus could not be shifted on the appellant to prove her innocence and it was for the department to prove the charges.

7. The writ court also noted that there was a scope for review, as provided under Rule 24(2) of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as the "CCA Rules"). Thus, after setting aside the dismissal order, the writ court referred the matter back to the Secretary, Personnel and Administrative Reforms Department, Government of Bihar, for passing order afresh so far as punishment is concerned. Such an order was directed to be passed within 4 weeks.

8. The State Government did not challenge the aforesaid order of the writ court immediately thereafter or within the

stipulated period of limitation. On the contrary, the Order No. 3026 dated 29th July 2010 was passed by the Department of General Administration constituting the Review Committee to review the case of the appellant in terms of directions given by the learned Single Judge. It was a three Member Committee consisting of Special Secretary, Joint Secretary and Deputy Secretary. The Committee held couple of meetings and undertook the exercise of reviewing the case of the appellant. For this purpose, the Committee had also called for a representation from the appellant which was submitted by her. After examining the entire record, including representation of the appellant and giving "deep consideration" to the entire matter, the Review Committee submitted its report, as recorded in the proceedings of the meeting dated 25.2.2010. A perusal thereof would show that as per the Review Committee, the enquiry officer was not right in his assessment that charges against the appellant were proved. Since this is the exercise done by the Review Committee itself in exercise of its statutory function under Rule 24 of the CCA Rules, we would like to reproduce the relevant portion of the said discussion hereinbelow:

> "Review of the points mentioned in the representation of the charged officer was done with the evidentiary documents from which the following facts appears:-
>
> (i) The conducting officer of the departmental proceeding without deeply evaluating the evidence/documents against the charged officer assumed to be proved both the charges on the basis of doubts.
>
> There are two points in the first charge, first is non-mentioning of requirement of bitumen and availability of fund and non-mentioning of implementation of earlier supply of bitumen, while putting proposal.
>
> From perusal of notes portion y

order put up by the charged (page – 216/c and 215/c in file no.16/Jt.cadre -2 – 17/05) it is clear that order was given in the margin of letter no.38 dated 16.1.2004 of the Executive Engineer by the Director (Purchase) for 1000 MT. Bul. Prior to the aforesaid letter in respect of allotted 500 M.T. of Bulk bitumen, it has been mentioned that the same was not lifted by nominated transporter Messes Ansari and was transferred to other division. The quantity of supply was fixed in the margin by senior official, otherwise for want of any specific order in mentioning facts it would have been better to mention such facts therefore it should not be necessary to again to be estimated by the Assistant.

(ii) Prior allotment of bitumen has been mentioned in the letter of the Executive Engineer, Kishanganj, hence it was not necessary to bring it in her noting. With respect to availability of fund, from perusal of available evidence circular letter no. 8361 dated 30.12.85 page no. 314/c of the main file no.-16 Jt. Cadre -2-17/05 it is clear that payment of the required fund against the order will be made by Book Transfer. It is the responsibility of the Engineer –In-Chief to provide equivalent amount against the value of supply order issued by his Director (Purchase) with the advice of the Finance Department to the Accountant General. There is another wing of special officer, communication for availability of fund and provision in the budget and such work is performed through Budget section.

Hence it was not very necessary to mention about the availability of fund in notings, of the Assistant.

The fact is clear in respect of financial charge that the responsibility for carriage of bitumen mentioned in the supply order was that of the Executive Engineer, Kishanganj. There is no mention of carriage contractor Cosmo Transport company anywhere in the supply order.

Prior to the issuance of the questioned supply order Proposal to file FIR and blacklisting Cosmo Transport company was put up by the charged Assistant and for this Executive Engineer, Supaul and Chief Engineer, North Bihar and other were written.

Findings of the committee

From the facts mentioned aforesaid the committee has come to the conclusion that it in putting up proposal for supply order the charged Assistant has put up it in routine nature. The charged Assistant should have mentioned all these facts in her notings also. But absence of devotion to duty lack of faithful service towards work cannot be assumed to the proved from this fully, although sign in respect of lack of duty appears. The conducting officer should have confirmed the charges only after deep perusal and analysis of evidentiary documents."

9. It is manifest from the reading of the above extracted portion of the Report that the Review Committee in no certain terms concluded that financial charges against the appellant were not proved as it was the responsibility of the Executive Engineer, Kishanganj. Further, proposal for supply order was put up by the appellant, as Assistant, in a routine manner. No doubt, she was required to mention all these facts in the notings as well, but in no case absence of devotion of duty or lack of faithful service towards work could be attributed to her and the same could not be assumed to be proved fully, though there are signs in respect of lack of duty. Adversely commenting on the enquiry officer, the Review Committee stated that he should have confirmed the charges only after deep perusal and analysis of evidentiary documents.

10. It is thus clear that Review Committee virtually exonerated the appellant from the charges leveled against her except hinting that "sign in respect of lack of duty appears". On that basis, as per the direction of the lea e

Government was required to pass fresh order of punishment. However, after maintaining complete silence on the said Review Committee report, the State Government chose to challenge the order of the writ court and LPA was filed before the Division Bench of the High Court sometime in the year 2011.

11. The appellant herein took objections of the maintainability of the said LPA on the ground that the direction given by the learned Single Judge in his order had been complied with by the State Government by constituting the Review Committee and getting the exercise done through the said Review Committee. Thereafter, it was not open to the Government to challenge the order and file the appeal.

12. The Division Bench, however, did not see any merit in the aforesaid contention questioning the maintainability of the LPA. Thereafter, the order of the learned Single Judge is examined on merits. In the opinion of the writ appeal court, since the appellant had not denied the factum of her making the notings dated 28th October 1993 and 17th January 1994 which notings were supplied to her along with charge-sheet, and further that she had not denied that she was aware of the misdeed of the Cosmo Transport, charge was proved against her. According to the Division Bench, the appellant only tried to throw burden on the superior officers and asserted her right under Rule 17 of the CCA Rules and Article 311(2) of the Constitution of India. The Division Bench also took the view even when Rule 17 sets out a detailed procedure for conducting the departmental enquiry for imposing a major penalty, it cannot be read to mean that in all cases charges have to be proved by examining the witnesses. In the preset case, the charge was sought to be proved on the basis of documentary evidence alone and it was within the discretion of the State Government, whether or not to examine any witness in support of the charge. As far as non-supply of documents demanded by the appellant is concerned, the impugned judgment states that none of the said documents

were required by the appellant for effective defence or that any such documents even existed. The position in this behalf is explained by the High Court is as under:

> "In our opinion, the delinquent having not denied the factum of her making notings on 29th October 1993 and 17th January 1994; she having not denied the knowledge of the misdeeds of the aforesaid M/s.Cosmo Transport; nothing else was required to be proved. The lack of bona fide and lack of devotion to duty cannot be proved or disproved by documentary or oral evidence. These are the matters to be inferred from the conduct of the delinquent. The challenge on the principle of equality is not maintainable. The principle of equality does not apply in the matter of disciplinary proceedings. Suffice that the imputation of charge made against the delinquent is proved. Further, although it is not answered on affidavit, learned counsel Mr. P.K. Verma, has at the bar, submitted that the rest of the officers involved in the incidence were prosecuted by the CBI. It was in respect of the delinquent alone that the departmental proceeding was recommended."

13. After hearing the learned senior counsel for the parties on either side, we are of the opinion that the impugned judgment of the High Court is unsustainable in law, which is liable to be set aside and this appeal warrants to be allowed. In the first instance, the High Court was wrong in brushing aside the contention of the appellant regarding the maintainability of the LPA. As noted in detail above, the writ court had found loopholes in the conduct of the enquiry inasmuch as neither any document was supplied nor any witnesses were examined and on the contrary burden was shifted on the appellant to prove her innocence. The learned Single Judge, however, did not direct denovo enquiry and instead opined that it was not a case where punishment of dismissal from service should have been imposed upon the appellant as the sam[illegible]e

to the charge framed. Accordingly, having regard to the provision under Rule 24 (2) of the CCA Rules, the matter was remitted back for passing order fresh so far as punishment is concerned. It was also observed that while passing the penalty order, this fact shall be taken into consideration that it was the first occasion that the appellant was facing the departmental proceedings.

14. If the State Government was not satisfied with the course of action adopted by the writ court and the aforesaid direction, proper course was to challenge the order by filing appeal there against. However, it chose to implement the direction and Review Committee, as contemplated under Rule 24 (2) of the CCA Rules, was constituted. This Review Committee consisting of three very senior officials went into the entire gamut of the matter and made some very pertinent observations in favour of the appellant. It is a departmental remedy provided under the Rules and the Review Committee was empowered to go into the length and breadth of the entire enquiry proceedings as well as the merits of the findings recorded by the conducting officer (i.e. Enquiring Officer). The findings of the said Review Committee, as reproduced above, would reflect that at the most it was a case where there was "sign in respect of lack of duty" and in any case "absence of devotion to duty" , "lack of faithful service towards work" cannot be assumed to be proved from this fully. Such a report of the Review Committee, which was empowered to undertake this exercise in terms of Rule 24, finding hardly any serious charge made out against the appellant, deserved serious consideration at the hands of the State Government. It was duty bound to decide as to what appropriate penalty should be imposed upon the appellant, in lieu of punishment of dismissal awarded to her earlier. However, finding that report of the Review Committee was not palatable to the Government, it turned turtle and taking summersault, decided to challenge the order of the learned Single Judge. It was too late in the day to do so, after deciding not only to accept that judgment but even implementing the

direction contained therein by constituting the Review Committee and allowing the Review Committee to accomplish its task. We are of the view that in this backdrop, LPA filed by the State Government should not have been entertained and this contention of the appellant, the Division Bench has failed to appreciate which has been turned down by simply stating that "if the State Government has, no doubt, de hors to the direction by the court constituting a Review Committee and if such committee has made its report, the State Government would not forfeit right to prefer appeal". What is missed in the process is that acceptance is shown of the order of the learned Single Judge by going ahead with the implementation thereof. More importantly, the High Court failed to take cognizance of the report of the Review Committee which had virtually exonerated the appellant of all serious charges; except a mild adverse comment. Though no authority is needed for the proposition delineated by us on the facts of the case, our view finds some support from the judgment of this Court in *Union of India & Ors. V. Carpenter Workers Union & Ors.* (2006) 12 SCC 435.

15. Coming to the merits of the decision of the Division Bench, there was a heated debate before us about the validity of the observations of the Division Bench for non-supply of the documents and whether non-supply prejudiced the case of the appellant or not, Mr. Sinha, learned senior counsel for the appellant had referred to the judgment authored by one of us (S.S.Nijjar,J.) in the case of *State of Uttar Pradesh & Ors. v. V.Saroj Kumar Sinha* (2010) 2 SCC 772, wherein the departmental enquiry was set aside on finding that there was non-supply of essential documents to the delinquent. The court observed that when a departmental enquiry is conducted against the Government servant, it cannot be treated as a casual exercise and procedural fairness is to be shown while conducting the enquiry. Learned senior counsel for the respondents, on the other hand, had attempted to argue the non-supply of documents had not preju e

appellant and the Division Bench was right in holding that the charge against the appellant was proved in view of her own notings. Though, we may make tentative observation that non-supply of documents could still be necessary for the appellant to give justification and explain the circumstances in which she had made the notings in question, it is not necessary to go any further to deal with this argument as this exercise is already undertaken by the Review Committee itself. Even if we proceed on the basis that there is some kind of dereliction of duty in making the notings by the appellant made on 28th October 1993 and 17th January 1994, the more pertinent and important issue is as to what kind of charge and to what extent it is proved. That is already reflected in the report of the Review Committee in exercise which could not be ignored or glossed over by the High Court.

16. At this juncture, we would like to refer to the provisions of departmental appeal and review power contained in CCA Rules. As already noticed, Rule 24 of the CCA Rules is relevant in this regard. Rule 23 along with Rule 24 are reproduced below:

> **"23.Orders against which appeal lies: -** a government servant may prefer an appeal against order of suspension or order of punishment.
>
> **24.Appellate Authorities**: (1) A government servant, including a person who has ceased to be in government service, may prefer an appeal against the orders specified in rule 23 to the authority specified in this behalf by a general or special order of the Government or, where no such authority is specified.
>
> (i) where such government servant is or was a member of Civil Service, Group-A or Group-B or holder of Civil Post, Group-A or Group-B,
>
> (a) to the appointing authority, where the order appealed against is made by an authority subordinate to it, or

> (b) to the Government where such order is made by any other authority;
>
> (ii) where such government servant is or was a member of a Civil Service, Group-C or Group-D, to the authority to which the authority making the order appealed against is immediately subordinate.
>
> (2) There shall be no appeal against the orders of the Government, however review petitions may be filed in the form of Memorials.
>
> (3) Where the person, who made the order appealed against becomes by virtue of his subsequent appointment or otherwise, the appellate authority in respect of such order, an appeal against such order shall lie to the authority to which such person is immediately subordinate or to an authority specially authorized for this purpose by the Government."

17. Rule 23 gives right to a Government servant to prefer an appeal against the order of punishment. However, where the order is passed by the Government itself, though no appeal is provided. Still, remedy of review is accorded to such an officer who may file the same in the form of Memorial. Keeping in mind this provision, the learned Single Judge had referred the matter back to the Government and pursuant to those directions, the appellant had filed his representation/Memorial before the Review Committee which was specifically constituted for this purpose. The Review Committee thus discharged its functions, as statutorily authorized. It was bounden duty of the Government to consider the same, taking it to logical conclusion.

18. While exercising this power under Rule 24 (2) of the CCA Rules, the said Committee has categorically stated that only " sign in respect of lack of duty appears" and the enquiry officer has not undertaken deep perusal and analysis of evidentiary documents while conducti[illegible]e

basis of this element of charge only having been proved even as per the departmental authorities, the punishment of dismissal is totally unwarranted. It is not a case of lack of devotion to duty or any financial irregularities on the part of the appellant. More importantly, the Review Committee, in clear terms, accepted the plea of the appellant that she had put up the proposal in a routine manner and that the main responsibility was thatof Executive Engineer, Kishanganj.

19. In this conspectus, we are of the view that on the report of the Review Committee appropriate penalty order was to be passed by the State Government which it failed to do after the receipt of the said report. The respondents have not given any satisfactory explanation whatsoever as to why there was no consideration of the said report and whether there were any valid or cogent reason to ignore the same. In the absence thereof, we are of the view that Government is supposed to proceed further and act on the basis of the said report.

20. We, thus, allow this appeal and set aside the order of the Division Bench. Direction is given to the respondent-Government to pass penalty order on the basis of Review Committee report and also the observations of the learned Single Judge that it is the first case in her entire service career where the appellant has faced the departmental proceedings.

21. During the course of hearing, we were also informed that appellant is going to attain the age of superannuation by the end of this month. Since the punishment which is to be awarded would not be dismissal, removal or compulsory retirement, but lesser punishment, the appellant shall be reinstated in service forthwith. The order shall be passed by the State Government within 2 weeks.

22. Appeal is allowed in the aforesaid terms. No costs.

B.B.B. Appeal allowed.

JOGINDER SINGH
v
STATE OF HARYANA
(Criminal Appeal No. 1148 of 2007)

OCTOBER 24, 2013

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

Penal Code, 1860 – ss. 302 and 307 r/w. s. 34 – Arms Act, 1959 – ss. 25 and 27 – Prosecution under – Of three accused including appellant-accused – Acquittal of all the accused by trial court giving them benefit of doubt – High Court convicted the appellant-accused while maintaining the acquittal order in respect of other accused – Held: The High Court has unsettled the reasonable findings of trial court in a cryptic manner – Trial court has rightly acquitted the accused in view of the material contradiction in oral evidence and ballistic report, non-examination of material witnesses including injured witnesses – Conviction set aside.

Appeal – Appeal against acquittal – Scope of jurisdiction of appellate court – Discussed.

Appellant-accused alongwith other two accused were prosecuted for the offences u/ss. 302 and 307 r/w. s. 34 IPC and u/ss. 25 and 27 of Arms Act, 1959. As per the prosecution case accused persons attacked the victim party with firearms resulting in death of one and injuries to three persons. PWs 1, 2 and 3 were the eye-witnesses to the incident. The accused in their statements denied the incriminating evidence and stated that it were the people belonging to Harijan community who came to their house armed with firearms and fired at them indiscriminately and that they did not use any firearm. The trial court giving benefit of doubt acquitted all the accused of all the charges. The high Court relying

on the evidence of eye-witnesses convicted the appellant-accused, while acquitted the other accused persons giving them benefit of doubt. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. [Para 13] [461-D-E]

1.2. In the present case, the High Court has compartmentalized the reasons ascribed by the trial Judge and thereafter dislodged the same one by one. The approach of the High Court in this regard cannot be flawed, but a pregnant one, it is required to be examined whether the High Court while dislodging the reasons and substituting the findings has appositely reappreciated the oral and documentary evidence brought on record to come to the conclusion that the view taken by the trial Judge is neither a plausible nor a reasonable one. [Para 16] [463-F-H]

Sheo Swarup and Ors. vs. King Emperor **AIR 1934 PC 227;** *Balbir Singh vs. State of Punjab* **AIR 1957 SC 216;** *Khedu Mohton and Ors. vs. State of Bihar Ganesh Bhavan Patel and Anr. vs. State of Maharashtra* **(1978) 4 SCC 371: 1979 (2) SCR 94;** *Awadhesh and Anr. vs. State of Madhya Pradesh* **(1988) 2 SCC 557: 1988 (3) SCR 513;** *Ram Kumar vs. State of Haryana* **1995 Supp (1) SCC 248: 1994 (4) Suppl. SCR 335;** *Bhagwan Singh and Ors. vs. State of M.P.*

(2002) 4 SCC 85; *State of Goa vs. Sanjay Thakran and Anr.* **(2007) 3 SCC 755: 2007 (3) SCR 507;** *Puran Singh vs. State of Uttaranchal* **(2008) 3 SCC 795: 2008 (1) SCR 491;** *Shivasharanappa and Ors. vs. State of Karnataka* **(2013) 5 SCC 705;** *State of Rajasthan through Secretary, Home Department vs. Abdul Mannan* **(2011) 8 SCC 65: 2011 (7) SCR 1099;** *Murugesan S/o Muthu and Ors. vs. State through Inspector of Police* **2012 (10) SCALE 378 – relied on.**

2.1. Though there has been compartmentalization of the reasoning, basically there are aspects which require scrutiny. The trial Judge had not accepted the credibility of the prosecution witnesses about the involvement of the accused in firing as a result of which the deceased and the injured persons sustained injuries. For supporting the same he had given emphasis on certain discrepancies. The trial Judge had recorded the discrepancies and referred to the ballistic report to support his conclusion that the prosecution had not established the case and in all possibility had tried to protect the real assailants. On a perusal of the ballistic report, it is manifest that they were not fired from the weapon, Ext.-15, seized from the house of the accused-appellant. The trial Judge had taken note of the fact that the pellets marks were there on the walls of the house of the appellant, which were visible from the photographs, Ext.-DA to DC. These aspects show that there were also other persons present at the spot who had come with arms. It is demonstrable from the material brought on record that there were people from the Harijan community who had come to the disputed land and fired at the house of the accused persons. The said conclusion is buttressed from the fact that the empties found from the spot were not fired from the gun of the accused. The High Court while lancinating the finding of the trial Judge on this score has only given a cryptic opinion without any reason that it does not create a dent on the prosecution c[illegible]g

of a reasonable finding in a cryptic manner is not acceptable. It creates a grave dent on the version advanced by the prosecution. [Para 17 and 18] [465-D-H; 466-A-C, D-E]

2.2. The trial Judge on the analysis of the material on record had not accepted the prosecution version that the accused persons forcibly entered upon the land and installed the combine harvester. In fact, as the evidence would reveal, the combine harvester was installed much prior to the date of occurrence. The view taken by the trial Judge in this regard for the aforesaid limited purpose is a plausible one. The said finding by itself is of no consequence but it has been recorded to support and sustain the finding that the accused-appellant and his relations did not by force enter upon the disputed land and put the combine harvester. The trial Judge, on the aforesaid base, had held that there was no intention on the part of the accused persons and the High Court has opined that the question of motive or intention is inconsequential when there is direct evidence on record. It is settled in law that when there is direct evidence, the proof of intention is not necessary. However, the analysis of the trial Judge would go a long way to show that he had meticulously scrutinized the evidence relating to factum of possession of the land to highlight that the accused persons had no intention to forcibly enter upon the land and assert their right. As is evincible from the deposition of the witnesses that the combine harvester was there on the disputed land and the accused persons had not encroached upon the land to assert their possession. To that extent the finding of the trial Judge cannot be found fault with. [Para 16] [464-E-H; 465-A-D]

2.3. The trial Judge has disbelieved the version of the prosecution relating to firing by the appellant on the deceased and other injured persons on two counts,

namely, the range from which it was fired on the deceased and there was no material on record to connect the injuries with the seized fired arms. As far as the facet of the distance is concerned, the opinion of the High Court seems to be sound. But the fact remains that there is no material on record to connect that the gunshot injuries suffered by the deceased are due to the shots fired from the gun of the appellant. It is also discernible that though the pellets were recovered but the same have not been connected with the weapon. Thus, there is a material contradiction in the oral evidence adduced by the prosecution on one hand and the ballistic report on the other. [Para 19] [466-E-H; 467-A]

Brijpal Singh vs. State of Madhya Pradesh **(2003) 11 SCC 219 – relied on.**

2.4. In the present case, the ballistic report, Ext. P.UU, though refers to the mutilated pellets stated to have been recovered from the body of the deceased and also the two different leads pellets from the body of another injured person, but is not definite that .12 bore DBBL gun, Ext. W/1, that was seized from the appellant, was used for firing such gunshots. This fact has been totally ignored by the High Court in an extremely cryptic manner. [Para 21] [468-B-C]

2.5. The prosecution has not examined husband of the deceased, a relevant eye witness and three other injured witnesses. Non-examination of the material witness is 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. [Para 22] [468-D-F]

State of H.P. vs. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Takhaji Hiraji vs. Thakore Kubersing Chamansing* **(2001) 6 SCC 145;** *Manjit Singh and Anr. vs. State of Punjab and Anr.* **JT 2013 (11) SCALE 394 – relied on.**

2.6. In the present case, non-examination of the material witnesses is of significance. It is so because PW-11 is really an interested witness though the High Court has not agreed with the same. It appears from the material brought on record that he had an axe to grind against the appellant. That apart, husband of the deceased, who was present from the beginning, would have been in a position to disclose more clearly about the genesis of the occurrence. There is no reason why the prosecution had withheld the said witness. Similarly, the other three witnesses who are said to be injured witnesses, when available, should have come and deposed. Therefore, in the obtaining factual matrix that their non-examination gains significance. [Para 25] [470-C-D]

2.7. The case of the prosecution was that accused 'M'had snatched away the gun and fired at two persons. The trial Judge disbelieving the prosecution version had acquitted him. The High Court has given him benefit of doubt. Regard being had to the totality of evidence, both oral and documentary, there was no reason not to extend the said benefit of doubt to the appellant. The High Court has fallen into error on that score. [Para 26] [470-E-F]

Chandu vs. State of Maharashtra **(2002) 9 SCC 408;** *Rathinam @ Rathinam vs. State of Tamilnadu and Anr.* **(2011) 11 SCC 140: 2010 (11) SCR 871;** *Ram Narain Singh vs. State of Punjab* **(1975) 4 SCC 497: 1976 (1) SCR 27;** *Mahendra Pratap Singh vs. State of Uttar Pradesh* **(2009) 11 SCC 334: 2009 (2) SCR 1033;** *Ram Bali vs. State of Uttar*

Pradesh **AIR 2004 SC 2329: 2004 (1) Suppl. SCR 195 – referred to.**

Case Law Reference:

(2002) 9 SCC 408	referred to	Para 11
2010 (11) SCR 871	referred to	Para 11
1976 (1) SCR 27	referred to	Para 11
2009 (2) SCR 1033	referred to	Para 11
2004 (1) Suppl. SCR 195	referred to	Para 12
AIR 1934 PC 227	relied on	Para 13
AIR 1957 SC 216	relied on	Para 14
1979 (2) SCR 94	relied on	Para 14
1988 (3) SCR 513	relied on	Para 14
1994 (4) Suppl. SCR 335	relied on	Para 14
(2002) 4 SCC 85	relied on	Para 14
2007 (3) SCR 507	relied on	Para 14
2008 (1) SCR 491	relied on	Para 14
(2013) 5 SCC 705	relied on	Para 14
2012 (10) SCALE 378	relied on	Para 15
2011 (7) SCR 1099	relied on	Para 15
(2003) 11 SCC 219	relied on	Para 20
2001 (3) SCR 247	relied on	Para 22
(2001) 6 SCC 145	relied on	Para 23
JT 2013 (11) SCALE 394	relied on	Para 24

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1148 of 2007.

From the Judgment & Order dated 09.05.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 702-DBA of 1997.

Neeraj Jain, Akshat Goel, Shree Pal Singh for the Appellant.

Rajeev Gaur 'Naseem', Naresh Bakshi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal under Section 379 of the Code of Criminal Procedure, 1973 (for short "CrPC") is directed against the judgment of conviction and order of sentence dated 9.5.2007 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 702-DBA of 1997 whereby the High Court has partly reversed the judgment of acquittal dated 9.6.1997 recorded by the learned Additional Sessions Judge, Kaithal in Sessions Trial No. 15 of 1993 instituted for offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code (IPC) and under Sections 25 and 27 of the Arms Act against the appellant and two others and convicted the appellant alone under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life.

2. Filtering the unnecessary details the broad essential facts, as put forth by the prosecution, are that there was a dispute about the vacant plot of shamlat land where the complainant and his family members used to store their respective kurris (heap of rubbish). The said land was given to Guru Ravidass Mandir by the Gram Panchayat vide resolution dated 22.03.1989. Accused Joginder Singh and Mohinder Singh, both real brothers kept on asserting their ownership over the said land and were not prepared to surrender it. Both the accused were booked twice under sections 107 and 151 of

CrPC relating to the said land. On 15.11.1991 about 4:00 pm., Joginder Singh parked his combine harvester on the disputed land which was objected to by deceased Kamla wife of Chander, Murti, wife of Dharambir, Bala, daughter of Sita Ram and other ladies present at that time. But Joginder Singh did not pay any heed to the objection raised by the women, and abused them. In the meantime Chander, Dharambir, PW-3, and Mithan Singh, PW-2, came outside and asked accused Joginder Singh not to park his combine harvester on the disputed land. At that juncture, Mohinder Singh and Anokh Singh, nephew of the accused, arrived at the scene and all of them started abusing the complainant and other women. The initial altercation took a violent turn and both the parties grappled with each other. During the fight accused persons ran away to their houses and returned with weapons. Joginder Singh came armed with a DBBL .12 bore gun while the other two accused did not bring any weapon. As the prosecution story proceeds, both of them raised a 'lalkara' in filthy language to kill the members of other side. Accused Joginder Singh fired two shots from his gun pellets of which hit in the chest of Kamla and Bala and also in the chest and mouth of Mithan Singh, PW-2. Accused Mohinder Singh snatched the gun from Joginder Singh and fired two shots that hit the back of Bimla and the stomach region and thigh of Murti. The injured persons fell down on the ground on receipt of gunshot injuries. After hearing the gunshot number of villagers came to the place of occurrence whereafter the accused persons took to their heels. Kamla succumbed to her injuries on the spot and her husband was asked to stay back to guard the dead body of his wife. Pritam Singh, PW-1, Karambir, Mamu Ram and others took the other injured persons in a vehicle to Civil Hospital, Kaithal. Pritam Singh went to Police Station to lodge the FIR and his statement was recorded by the Inspector of Police, Prem Chand, PW-16, and an FIR was registered at 8:30 pm.

3. After the criminal law was set in motion, the investigating agency commenced the investigati of

investigation, Prem Chand, PW-16, prepared the inquest report, got the site plan done, collected the blood-stained earth and the pellets lying at the spot, sent the dead body for the post mortem and forwarded the articles to the Forensic Science Laboratory for examination, arrested the accused persons, recovered DBBL .12 bore gun and live cartridges, recorded the statements of other witnesses and after completing all other formalities laid the charge sheet for the offences punishable under Sections 302 and 307 read with Section 34 IPC and Sections 25 and 27 of the Arms Act before the competent court which, in turn, committed the same to the Court of Session. The accused persons pleaded not guilty to the charges and claimed to be tried.

4. To substantiate the charges the prosecution examined as many as 16 witnesses. The main witnesses are Pritam Singh, PW-1, the complainant, Mithan Singh, PW-2, Dharambir, PW-3, the eye witnesses to the occurrence, Dr. B.B. Kakkar, PW-4, who examined the injured, Dr. A.K. Leel, PW-8, who had conducted the post-mortem and also had examined the other injured witnesses; Zile Singh, PW-11, Sarpanch of the Gram Panchayat and Inspector Prem Chand, PW-16, the investigating officer of the case. The prosecution had exhibited number of documents which included the report of the Chemical Examiner, Ex. P.TT and report of Serology, Ex. P.TT/1 and report of Ballistic Expert, Ex. P.UU.

5. The accused in their statements recorded under Section 313 CrPC denied the incriminating evidence appearing against them. They admitted that Joginder Singh and Mohinder Singh are real brothers and Anokh Singh is their sister's son. Accused Joginder Singh took the plea that he had been using the land where the combine harvester was installed since long and the Harijan community wanted to forcibly occupy the said land. On the date of occurrence, people belonging to Harijan Community, both men and women, armed with fire-arms and other weapons came to his house and fired and he was compelled to hide

himself in his house to save his life. Persons of Harijan community started firing indiscriminately at his house where he was hiding. In that process the injured and deceased received injuries. He did not use his gun at all nor was his gun taken by Mohinder Singh at any time. Accused Mohinder Singh and Anokh Singh took the plea that they had no concern with the land or with the combine harvester and they were not present at the spot.

6. Learned Addl. Sessions Judge, Kaithal, considering the evidence brought on record, acquitted all the accused of the charges under sections 302 and 307 read with Section 34 IPC and Sections 25 and 27 of the Arms Act on the ground that the prosecution had failed to prove its case against the accused beyond all reasonable doubt. To come to such a conclusion the learned trial Judge, after due perusal of the evidence and material brought on record, took note of various aspects, namely, a litigation was pending as regards the possession between the Guru Ravidass Mandir Sabha and the accused persons and the complainant had nothing to do with the land; that there had been dispute between Joginder Singh on one hand and Harijan community on the other with regard to the plot which is situate in front of the house of Joginder where the alleged occurrence had taken place; that after coming from Pakistan the father of the accused Joginder Singh had settled in the village at the very site; that a Civil Suit No. 191 of 1990 titled as "Guru Ravidass Sabha Sangan vs. Joginder Singh and Mohinder Singh" was filed in the Court of Civil Judge, Senior Division, Kaithal and an interim order of stay was passed in favour of the Sabha which was vacated by order dated 15.3.1991 directing the parties to maintain status quo till the decision of the suit and, eventually, the suit was dismissed on 24.10.1994 for want of prosecution; that though some resolutions were passed by the Gram Panchayat in favour of the Guru Ravidass Sabha, yet the land was in possession of Joginder Singh and there was no record that Panchayat had delivered possession to anyone; that th[illegible]n

Singh, PW-1, was concealing the truth from the court inasmuch as he denied the obvious fact reflectible at a mere glance of the photographs, Exts. DA to DC, to the effect that there were pellets marks on the wall of the house of the accused; that Mithan Lal, PW-2, who had stated that he had received injury on his left eye and had lost his eye sight though was able to identify other things yet expressed his inability to identify the photographs Exts. DA to DC that show the house of the accused; that Zile Singh, PW-11, was an interested witness as Joginder Singh had got an enquiry conducted against him while Zile Singh was the Sarpanch of the village and he had deliberately not identified the house of the accused in the photographs, Exts. DA to DC, on the ground that his eye sight was weak. These findings were recorded to highlight that the accused-appellant was in possession of the land in dispute and the members of the Harijan community came armed with weapons to forcibly take possession.

7. The learned trial Judge thereafter addressed to the injuries sustained by various injured persons and found that the case that was put forth initially by the prosecution and the medical report were different and he did not think it prudent to believe such evidence. He also noticed that there were irreconcilable discrepancies between the weapon used and the injuries sustained. He also noticed that Dr. Leel, PW-8, had sent a report, Ext. P2 by which he had sent two pellets recovered from the body of Murti in a sealed parcel to the SHO, Police Station, Sadar, but the serology report Ext. P.TT/1 showed that there was no blood on the pellets and further the said witness had deposed that he had not put any identification mark on the pellets.

8. Thereafter, the learned trial Judge, relying on the ballistic report, Ext. P.UU, opined that the .12 bore fired cartridges cases C1 to C4 were fired from a fire-arm but not from DBBB gun W/1, Ext 15, the weapon that was seized from the custody of the accused Joginder Singh. He also took note of the fact

that the ballistic report though referred to the mutilated pellets that had hit the deceased, yet did not give any opinion. These findings were recorded to form an opinion that the members of Harijan community armed with weapons were present at the spot and the injuries inflicted upon the deceased occurred in a different way than the one projected by the prosecution. Being of this view he found that the prosecution had failed to establish its case beyond reasonable doubt against the main accused Joginder Singh and resultantly against the other accused persons also and, accordingly, acquitted all of them.

9. The High Court, in appeal, enumerated the reasons of acquittal given by the learned trial Judge and thereafter came to hold that rejection of the version of the eye witnesses was not valid; that factum of motive was of no significance as there was direct evidence on record; that the discrepancies which were taken note of by the learned trial Judge were incorrect; that the learned trial Judge had misdirected himself by relying on the medical opinion when the account of the eye witnesses was credible and trustworthy; that the learned trial Judge had not kept himself alive to the principle that while appreciating the evidence that injuries when caused by fire-arms there can be variety of wounds depending upon the nature of fire-arm used, distance, direction, manner and other factors; that the trial Judge had also erroneously appreciated the nature of gunshot injuries, for such appreciation is contrary to the medical jurisprudence; that there was a serious dispute with regard to possession and the trial court had wrongly presumed the factum of possession; that the reason given that when the accused persons had left the place of occurrence it is a normal conduct of a person to go back to his house is contrary to the acceptable norms of appreciation of evidence; that the pellet marks on the wall shown in the photographs do not improbablise the version of the prosecution, more so, when none of the accused persons were injured; that the discrepancy noted in the injuries sustained by Pritam Singh, PW-1, was inconsequential; that there was no jus[illegible]e

testimony of Zile Singh, PW-11, on the ground that he was inimically disposed towards the accused; that the nature of injuries sustained by Dharambir, PW-3, should not have been disbelieved on the ground that the nature of weapon described was different; that the report of ballistic expert showed that the cartridges were fired from the same weapon but not from W-1, would not belie the prosecution version; and that the discrepancy of range of gun and distance of the injured as found by the learned Judge was not material. After unsettling the said reasons the High Court opined that the view expressed by the learned trial Judge was not a plausible one and the case of the prosecution stood fully established against the appellant, as far as causing the death of Kamla is concerned and, accordingly, convicted him under Section 302 IPC and sentenced him to suffer life imprisonment and also to pay a fine of Rs.5000/-, in default of payment of fine, to further undergo rigorous imprisonment for one year. However, the High Court gave benefit of doubt to Mohinder Singh and Anokh Singh.

10. We have Heard Mr. Neeraj Jain, learned senior counsel appearing for the appellant and Mr. Rajeev Gaur 'Naseem', learned counsel appearing for the State of Haryana.

11. Mr. Neeraj Jain, learned counsel for the appellant, has submitted that the High Court has fallen into grave error by opining that the view expressed by the learned trial Judge was perverse and not a plausible one though the learned trial Judge has scrutinized the evidence in a detailed manner and the opinion expressed is a well reasoned one. It is urged by him that though the High Court has enumerated the reasons given by the trial court and thereafter unsettled them, yet the reasons ascribed by the High Court for taking a different view is not sound inasmuch as there has been really no proper consideration of the evidence which is obligatory on the part of the appellate court to do while dislodging the findings recorded by the trial court. It is urged that the major discrepancies in the statement of three star witnesses of the prosecution, namely, Pritam Singh, PW-1, Mithan Singh, PW-

2, and Dharambir, PW-3, with regard to the genesis of occurrence has been overlooked by the High Court. He has further put forth that the photographs of the site plan were taken by the investigating agency and nothing had come on record that the accused persons had caused the pellet marks and, therefore, when the witnesses deliberately did not identify the photographs despite being proven and brought on record makes the version of the defence that the complainant party was also armed with weapons and attacked on the house of the accused-person cannot be ignored. The learned counsel would emphatically argue that the High Court has cryptically ignored the ballistic report which clearly showed that the empty cartridges recovered from the spot were found not to have been fired from the gun of the accused-appellant which fortifies the defence version that the accused never fired. That apart, submitted Mr. Jain, that the ballistic report has not been discussed by the High Court, for the said report does not connect the mutilated pellets found from the body of the deceased with the weapon seized from the appellant. He also canvassed that an important aspect has not been taken note of by the High Court, as is evincible from the evidence of Inspector Prem Chand, PW-16, the Investigating Officer, that he was pressurized to proceed against the appellant and his relations and it is further obvious as the prosecution has not examined Chander, husband of the deceased, and three other women, namely, Bala, Murti and Bimla who were alleged to have sustained injuries in the occurrence. To bolster his contentions, he has commended us to the decisions rendered in *Sheo Swarup & others v. King Emperor,*[1] *Chandu v. State of Maharashtra,*[2] *Murugesan S/o Muthu and others v. State through Inspector of Police*[3]*, Rathinam @Rathinam v. State of Tamilnadu and another,*[4] *Ram Narain Singh v. State of*

1. AIR 1934 PC 227.
2. (2002) 9 SCC 408.
3. 2012 (10) SCALE 378.
4. (2011) 11 SCC 140.

Punjab[5], *Brijpal Singh v. State of Madhya Pradesh*[6] and *Mahendra Pratap Singh v. State of Uttar Pradesh.*[7]

12. Mr. Rajeev Gaur 'Naseem', learned counsel appearing for the State, supporting the judgment of the High Court, submitted that though there is a discrepancy in the ballistic report, yet the substantive evidence of the three eye witnesses, including one injured eye witness, cannot be rejected. He has relied on the authority in *Ram Bali v. State of Uttar Pradesh*[8]. It is his further submission that the High Court has correctly opined that the judgment of acquittal rendered by the learned trial Judge was perverse and deserved to be interfered with.

13. Before we proceed to consider the rivalised contentions raised at the bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law enunciated by this Court pertaining to an appeal against acquittal. In *Sheo Swarup* (supra), it has been stated that the High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Lord Russel, authoring the judgment for the Prevy Council, opined thus: -

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code.

5. (1975) 4 SCC 497.
6. (2003) 11 SCC 219.
7. (2009) 11 SCC 334.
8. AIR 2004 SC 2329.

> But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

14. The said principle has been followed in subsequent pronouncements in *Balbir Singh v. State of Punjab*[9], *Khedu Mohton and others v. State of Bihar*[10], *Ram Narain Singh* (supra), *Ganesh Bhavan Patel and another v. State of Maharashtra*[11], *Awadhesh and another v. State of Madhya Pradesh*[12], *Ram Kumar v. State of Haryana*[13], *Bhagwan Singh and others v. State of M.P.*[14], *State of Goa v. Sanjay Thakran and another*[15], *Puran Singh v. State of Uttaranchal*[16], *Mahendra Pratap Singh (supra), Murugesan C/o Muthu (supra) and Shivasharanappa and others v. State of Karnataka*[17].

9. AIR 1957 SC 216.
10. (1970) 2 SCC 450.
11. (1978) 4 SCC 371.
12. (1988) 2 SCC 557.
13. 1995 Supp (1) SCC 248.
14. (2002) 4 SCC 85.
15. (2007) 3 SCC 755.
16. (2008) 3 SCC 795.
17. (2013) 5 SCC 705.

15. It is also worth noticing that in *Murugesan's* case the Court referred to the decision in *State of Rajasthan through Secretary, Home Department v. Abdul Mannan*[18] wherein distinction between the statutory appeal and the legislative intent was dealt with. The subsequent Division Bench reproduced a passage from *Abdul Mannan's* case which is extracted below:-

> "12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court."

16. In the case at hand, it is noticeable that the High Court has compartmentalized the reasons ascribed by the learned trial Judge and thereafter dislodged the same one by one. The approach of the High Court in this regard cannot be flawed, but a pregnant one, it is required to be examined whether the High Court while dislodging the reasons and substituting the findings has appositely reappreciated the oral and documentary evidence brought on record to come to the conclusion that the view taken by the learned trial Judge is neither a plausible nor a reasonable one. The learned trial Judge, analyzing the

18. (2011) 8 SCC 65.

evidence on record, had recorded a finding that neither the complainant nor his family members nor the members of the Harijan community had any right on the land inasmuch as the controversy in the civil suit was between Guru Ravidass Mandir Sabha and the accused persons. The trial court had observed that no document was brought on record to show that possession of the disputed land was handed over to the complainant or his family members in pursuance of the alleged resolution of the Gram Panchayat. The learned trial Judge had also observed that the plea of the accused persons that they had settled there since the time of their predecessors-in-interest who had migrated from Pakistan was acceptable. Thus, the learned trial Judge returned a finding in favour of the accused persons. This finding, needless to say, has been arrived only to nullify the allegation of the prosecution that the accused persons forcibly put their combine harvester on the disputed land. The High Court, as is perceptible, has observed that there is a serious dispute with regard to possession. The High Court has failed to appreciate that on earlier occasion there was an order of injunction which was vacated and the suit stood dismissed. It may be noted that even if there was a serious dispute relating to possession, the learned trial Judge on the analysis of the material on record had not accepted the prosecution version that the accused persons forcibly entered upon the land and installed the combine harvester. In fact, as the evidence would reveal, the combine harvester was installed much prior to the date of occurrence. The view taken by the learned trial Judge in this regard for the aforesaid limited purpose is a plausible one. The said finding by itself is of no consequence but it has been recorded to support and sustain the finding that the accused-appellant and his relations did not by force enter upon the disputed land and put the combine harvester. The learned trial Judge, on the aforesaid base, had held that there was no intention on the part of the accused persons and the High Court has opined that the question of motive or intention is inconsequential when there is direct evidence on record. It is settled in law th

evidence, the proof of intention is not necessary. However, the analysis of the learned trial Judge would go a long way to show that he had meticulously scrutinized the evidence relating to factum of possession to highlight that the accused persons had no intention to forcibly enter upon the land and assert their right. True it is, it has come on record that both the parties were fighting over possession, the complainant and others, on the ground that it was given to them by Guru Ravidass Mandir Sabha to construct a temple thereon and the accused persons were resisting the construction of temple. The said controversy was the subject-matter of the civil lis. As is evincible from the deposition of the witnesses that the combine harvester was there on the disputed land and the accused persons had not encroached upon the land to assert their possession. To that extent the finding of the learned trial Judge cannot be found fault with.

17. At this juncture, we are obliged to state that though there has been compartmentalization of the reasoning, basically there are three aspects which require scrutiny. The learned trial Judge had not accepted the credibility of the prosecution witnesses about the involvement of the accused in firing as a result of which the deceased and the injured persons sustained injuries. For supporting the same he had given emphasis on certain discrepancies, which the learned counsel for the State would submit, are absolutely minor in nature. It is worthy to note that the learned trial Judge had recorded the discrepancies and referred to the ballistic report to support his conclusion that the prosecution had not established the case and in all possibility had tried to protect the real assailants. To test the justifiability of the said finding and the ultimate conclusion it is necessary to evaluate the evidence brought on record. PW-16, the investigating officer, had clearly deposed that he had seized four empty cartridges – C-1 to C-4 from the spot where he arrived in quite promptitude. On a perusal of the ballistic report, it is manifest that]they were not fired from the weapon, Ext.-15, seized from the house of the accused-appellant. The

learned trial Judge had taken note of the fact that the pellets marks were there on the walls of the house of the appellant, which were visible from the photographs, Ext.-DA to DC. These aspects show that there were also other persons present at the spot who had come with arms. It is demonstrable from the material brought on record that there were people from the Harijan community who had come to the disputed land and fired at the house of the accused persons. The said conclusion is buttressed from the fact that the empties found from the spot were not fired from the gun of the accused.

18. Quite apart from the above, cross-examination of the eye-witnesses it is also clear that the members of the Harijan community had licensed guns and they hearing the shout had gathered at the spot. The High Court while lancinating the finding of the learned trial Judge on this score has only given a cryptic opinion without any reason that it does not create a dent on the prosecution case. In our considered opinion, such unsettling of a reasonable finding in a cryptic manner is not acceptable. We are of the considered view that it creates a grave dent on the version advanced by the prosecution.

19. Another aspect needs to be addressed. The learned trial Judge has disbelieved the version of the prosecution relating to firing by the appellant on deceased Kamla and other injured persons on two counts, namely, the range from which it was fired on deceased Kamla, and there is no material on record to connect the injuries with the seized fired arms. The High Court has overturned the distance part but has not really dwelled upon the other aspect. As far as the facet of the distance is concerned, the opinion of the High Court seems to be sound. But the fact remains that there is no material on record to connect that the gunshot injuries suffered by the deceased are due to the shots fired from the gun of the appellant. It is also discernible that though the pellets were recovered but the same have not been connected with the weapon. Thus, we find there is a material contradiction in the oral evidence adduced by the prosecuti[illegible]e

ballistic report on the other.

20. In *Brijpal Singh's* case, the High Court had affirmed the conviction of the appellant therein. It was the case of the prosecution that A-1 at the exhortation of A-3 shot the deceased from point plank range on the head of the deceased from a mouser gun which shattered the right side of the head causing death on the spot. This Court, after examining the ballistic report, opined that on a perusal of the said report it was clear that the weapon alleged to have been used in causing the fatal injury would not have been the mouser gun carried by A-1 because the definite report of the ballistic expert that the discharged empties of cartridge found near the dead body were not that fired from the mouser gun. The Court also took note of the fact that A-2 therein who had fired which missed him but got embedded in the wall of the house, according to the ballistic report the embedded cartridges could have been fired from the mouser gun and not from a .12 bore gun which was used for firing. This was treated as a serious contradiction between the oral evidence and the ballistic report. Be it noted, a contention was advanced by the learned counsel for the State that if the oral evidence is found to be acceptable by the court any contradiction to the ballistic reports, the acceptable oral evidence should always be preferred. Dealing with the contention the court agreed with the argument by stating that normally, if the eye witness's evidence is acceptable, the argument of the State would be accepted but as the factual position revealed the witnesses were interested persons and independent witnesses had not been examined and further there was inter se contradiction in the evidence of certain eye witnesses. Eventually, the Court while acquitting the appellant therein observed thus: -

> "Then, we notice the prosecution has not bothered to clarify the report of the ballistic expert even though the same was contradictory to the oral evidence which creates a very serious doubt in our mind as to the presence of eye-witnesses at the place of incident. Keeping in mind the partisan nature of eye-witnesses and contradictions in their evidence, we think this appellant is also entitled to benefit of doubt."

21. In the instant case, the ballistic report, Ext. P.UU, though refers to the mutilated pellets stated to have been recovered from the body of the deceased Kamla and also the two different leads pellets from the body of Murti, but is not definite that .12 bore DBBL gun, Ext. W/1, that was seized from the appellant, was used for firing such gunshots. This fact has been totally ignored by the High Court in an extremely cryptic manner.

22. At this juncture, we may note with profit another aspect that has been highlighted by the learned counsel for the respondent. The prosecution has not examined Chander, husband of the deceased, a relevant eye witness, Bala, Murti and Bimla, three other injured witnesses. No explanation has been given by the prosecution. Though there have been certain suggestions to PW-16 in the cross-examination, but his answer is evasive. It is well settled in law that non-examination of the material witness is 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. (See: *State of H.P. v. Gian Chand*[19])

23. In this context, we may also note with profit a passage from *Takhaji Hiraji v. Thakore Kubersing Chamansing*[20]*: -*

> "19… 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

19. (2001) 6 SCC 71.

20. (2001) 6 SCC 145.

otherwise, or where there is a gap of 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 scrutinize 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."

24. Recently in *Manjit Singh and Anr. v. State of Punjab and Anr.,*[21] this Court, after referring to earlier decisions, has opined thus: -

"…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

21. JT 2013 (11) SCALE 394.

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*[22])."

25. In the case at hand, non-examination of the material witnesses is of significance. It is so because PW-11 is really an interested witness though the High Court has not agreed with the same. It appears from the material brought on record that he had an axe to grind against the appellant. That apart, Chander, who was present from the beginning, would have been in a position to disclose more clearly about the genesis of the occurrence. He is the husband of the deceased and we find no reason why the prosecution had withheld the said witness. Similarly, the other three witnesses who are said to be injured witnesses when available should have come and deposed. Therefore, in the obtaining factual matrix that their non-examination gains significance.

26. In this regard, another aspect requires to be taken note of. The case of the prosecution was that Mohinder Singh had snatched away the gun and fired at Mithan Singh and Bimla. The learned trial Judge disbelieving the prosecution version had acquitted him. The High Court has given him benefit of doubt. We are of the considered opinion that regard being had to the totality of evidence, both oral and documentary, there was no reason not to extend the said benefit of doubt to the appellant. The High Court has fallen into error on that score.

27. In view of the aforesaid analysis, the appeal is allowed, the judgment passed by the High Court is set aside and that of the learned trial Judge is restored. As the appellant is in custody, he be set at liberty forthwith unless his detention is required in connection with any other case.

K.K.T. Appeal allowed.

22. (1973) 1 SCC 512.

VINOD KUMAR
v.
STATE OF HARYANA & ORS.
(Civil Appeal No. 392 of 2008)

OCTOBER 24, 2013

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

Service Law:

Annual confidential Report – Adverse entry – Representation against – Rejection of – Second representation against the adverse entry after substantial lapse of time, after having exhausted all the departmental remedies unsuccessfully – Expunction of the remarks – Restoration of adverse remark on the ground that second representation not permissible – Held: Second representation was not maintainable – It was against the Office Policy Instructions of the year 1962 and Standing Order of the year 1999 and also made after lapse of substantial time – Restoration of adverse remarks was correct.

Annual Confidential Report – Adverse entry – Representation against – Rejection of – Review against – Before higher authority – Expunction of adverse remarks – Restoration of adverse remarks on the ground that second representation against the remarks not maintainable – Held: Restoration of adverse remarks were not correct, as there was no second representation to the same authority – In fact, it was review to higher authority within statutorily prescribed period which is permissible under the Service Rules – Dismissal of the official on the basis of the adverse remarks is also not tenable.

Disciplinary proceeding – Penalty imposed on the

officials – Revoked on their moving mercy petition, which was moved by them after exhausting all the departmental remedies – Restoration of penalty – Held: The penalty was rightly restored – Under disciplinary rules, no remedy is available after revision petition – In the present cases, after dismissal of revision petition, another petition raising plea of mercy would not be permissible – The mercy petition was also not filed within time – Punjab Police Rules, 1934 – r. 16.32.

Administrative Law:

Administrative order – Judicial Review – Scope of – Held: Interference with the order of administrative authority is permissible, if it is irrational, unreasonable or there is procedural impropriety.

Administrative decision – Scope of – Held: Administrative decision must be related to the purpose of enabling provisions of Rules or Statutes – The authority has to act within the limits of the Rules framed delineating the powers of the authority as well as the procedure to be followed.

Administrative decision – Decision of predecessor officer – Overturning of – By the successor officer – Held: The successor officer is not entitled to review and reopen the cases decided by his predecessor, unless the order is without jurisdiction, or ultra vires or was exfacie an act of favouratism.

Administrative review – Held: Illegal or ultra vires decisions which fall within scope of judicial review, can be undone by the administrative authorities themselves by review of such orders, by following principles of natural justice.

The present Appeals/Petitions are categorized in three groups on factual basis.

<u>First Group</u>

In the first group of cases, adver

e

in the Annual Confidential Reports of the police officials in question. The said adverse remarks were expunged after substantial lapse of time after obtaining fresh representation, even after all the departmental remedies had been exhausted unsuccessfully. After issuing notice to the officials concerned, the earlier orders were restored. These orders were challenged by the officials concerned, by filing writ petition. The same were dismissed by High Court. Hence Civil Appeal Nos. 392/2008, 393/2008, 395/2008, 402/2008, 405/2008 and SLP(C) No. 5080/2008 were filed.

Second Group:

In this group of cases, the order rejecting the representation questioning adverse entries, were challenged in revision to the higher authority immediately thereafter. The authority expunged the adverse remarks. In these cases also order giving adverse remarks were restored after issuing show cause notice, on the ground that no second representation lied against adverse remarks. Writ petitions (of the appellants/petitioners in C.A. Nos. 396/2008, 400/2008 and SLP Nos. 32653/2011 and 3932/2008) challenging the orders were dismissed by High Court holding that second representation was not acceptable. The writ petitions of the officials (the appellants in C.A. Nos. 459/2009 and 592/2009) were allowed by High Court.

One of the police officials in this group, i.e. the appellant in C.A. No. 396/2008, was compulsorily retired on the basis of the adverse remarks. He challenged the order of compulsory retirement, which was dismissed by the High Court, against which order he has filed SLP (C) No. 32653/2008. Hence Civil Appeal Nos. 396/2008, 400/2008 and Special Leave Petititon Nos. 32653/2011 and 3932/2008 were filed by police officials and C.A. Nos. 459/2009 and 592/2009 were filed by the State.

Third Group:

In this group of cases penalty were imposed on the police officials as a result of disciplinary proceedings. The officials, after exhausting all the departmental remedies filed mercy petition, whereby the penalty imposed were set aside. Later, after issuing show cause notice, penalty orders were restored on the ground that there was no provision in the Rules for entertaining Mercy Petition by the DGP without new material, once revision petition of the official had already been considered and rejected. Writ petition challenging the order was dismissed by High Court. Hence the Civil Appeal Nos. 1721/2008 and 1811/2008 were filed by the aggrieved police officials.

Dismissing the appeals in the first group; allowing the appeals/petitions of the police officials in the second group; dismissing the State appeals in second group, and dismissing the appeals in the third group of cases, the Court

HELD:

1st Group Cases:

C.A. No. 392 of 2008:

1.1. The second representation preferred by the appellant, in which the ACRs were expunged was not permissible. It was not only contrary to Policy Instructions dated 28.8.1962 and Standing Order No.65/1998 dated 8.2.1999, but was made after 9 ½ years from the date when first representation against the ACR was rejected. [Para 16] [491-H; 492-A]

1.2. The general principle is that merely because there is a change in the regime or when the successor assumes the office, he would not l

and reopen the cases decided by his predecessor. This proposition applies in a situation where order of the predecessor resulted in legal, binding and conclusive decision. However, the position would be different when it is found that the order of the predecessor was without jurisdiction or when a palpably illegal order was passed disregarding all the cannons of administrative law viz. when the predecessor's decision was without jurisdiction or *ultra vires* or when it was *exfacie* an act of favoritism. [Para 17] [492-B-E]

1.3. In the present case not only the order passed by earlier DGP, was *ultra vires*, as that was not backed by any authority vested in it under the Rules as the representation/ mercy petition was not maintainable, even while exercising its discretion in passing that order, the alleged reasons are abhorrent to the good administration/ governance and in fact there was no valid reason or justification shown in exercise of the non-existent power. It was, thus, not a case of mere discretion which the DGP was empowered to exercise or the exercise of power on rational basis. Undue sympathy, that too without stating any such sympathetic grounds would be anathema to fairness. There has to be fairness in the administrative action and it should be free from vice of arbitrariness. [Para 17] [492-E-H]

Roberts vs. Hopwood; **1925 All E.R. 24 – referred to.**

1.4. No doubt, the scope of judicial review is limited and the courts do not go into the merits of the decision taken by the administrative authorities but are concerned with the decision making process. Interference with the order of the administrative authority is permissible when it is found to be irrational, unreasonable or there is procedural impropriety. However, where reasonable conduct is expected, the criterion of reasonableness is not subjective but objective; albeit the onus of

establishment of unreasonableness rests upon the person challenging the validity of the acts. It is also trite that while exercising limited power of judicial review, the court can examine whether administrative decisions in exercise of powers, even if conferred in subjective terms are made in good faith and on relevant considerations. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or facts in a material respect. [Para 18] [493-D-G]

M.A.Rasheed and Ors. vs. The State of Kerala; **(1974) 2 SCC 687: 1975 (2) SCR 96 – relied on.**

1.5. The decision of the administrative authority must be related to the purpose of the enabling provisions of Rules or Statutes, as the case may be. If they are manifestly unjust or outrageous or directed to an unauthorized end, such decisions can be set aside as arbitrary and unreasonable. Likewise, when action taken is *ultra vires*, such action/decision has no legal basis and can be set aside on that ground. When there are Rules framed delineating the powers of the authority as well as the procedure to be followed while exercising those powers, the authority has to act within the limits defined by those Rules. A repository of power acts *ultra vires* either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. [Para 18] [493-G-H; 494-A-C]

Shri Sitaram Sugar Co.Ltd. vs. Union of India **(1990) 3 SCC 223: 1990 (1) SCR 909 – relied on.**

1.6. Thus, if wrong and illegal acts, applying the parameters of judicial review can be set aside by the courts, obviously the same mischie y

the administrative authorities themselves by reviewing such an order if found to be ultra vires. Of course, it is to be done after following the principles of natural justice. This is precisely the position in the instant case and it was open to the respondents to take corrective measures by annulling the palpably illegal order of the earlier DGP. [Para 19] [496-A-B]

C.A. No. 393 of 2008

2. In this case also not only second representation was made after more than 7 years, but there was no new material or facts as well which were given in the second representation. Furthermore, the reasons given for expunging the remarks on "corruption" and substituting the same by "good remarks" is shocking and untenable. Simply because the appellant allegedly showed improvement and earned good entries in the subsequent years cannot be a ground to erase the earlier remarks recorded 7 years ago thereby treating him as a good officer even for the earlier period i.e. 25.4.1994 to 31.3.1995. The petition of the appellant was thus, rightly dismissed by the High Court. [Para 22] [496-H; 497-A-B]

CA No. 395 of 2008

3. A mercy petition, in the form of 4th representation, at the hands of DGP, Haryana was impermissible in law. The writ petition of the appellant was, therefore, rightly dismissed. [Para 28] [499-C-D]

C.A. No. 402 of 2008

4. In this case also fresh representation was made after a lapse of more than 4 years, and the adverse remarks were expunged. This case is thus, on the same footing as in C.A. No. 392/2008. [Para 29] [499-E-F]

C.A. No. 405 of 2008

5. The appellant had earlier exhausted the remedy of first representation before the immediate officer and second representation to the higher officer namely DGP. Thereafter, DGP could not entertain any further representation or review except on "new facts". Record reveals that no such new facts were pleaded. [Para 30] [500-B-C]

2nd Group Cases

C.A. No. 396 of 2008 & SLP(C)No. 32653 of 2011.

6.1. As per the policy instructions dated 28.8.1962, once a representation is rejected by the immediate superior officer, one more representation is permissible and allowed to be made to the next higher authority. This precisely happened in the instant case. First representation was to the Inspector-General of Police which was rejected on 10.3.2003 and within few days, the appellant made second representation which was allowed on 2.5.2003. Thus, not only this representation was made within stipulated period prescribed under the Rules namely six months, which is prescribed in the Standing Order, it was made to the higher authority as well. [Para 38] [502-F-H]

6.2. Once, it is found that the revision or second representation to the higher authority was made within prescribed period and such a representation to the higher authority was permissible, it cannot be said in this case that the order of the DGP, was without jurisdiction i.e. on a representation "which was not permissible" in law. Therefore, three years thereafter, the case could not be re-opened and order dated 25.2003 could be interdicted by the successor. [Para 39] [503-B-C]

7.1. The adverse remarks for the period in question no longer remain in the service rec[illegible]t

and for this period his rating now is "good" to which he was upgraded vide orders dated 2.5.2003. In so far as award of "warning" is concerned, "warning" is not a punishment prescribed under the Rules. It was not given to him after holding any inquiry. Therefore, such a warning recorded administratively in a service record cannot be the sole basis of compulsory retirement. [Para 43] [504-B-D]

7.2. The appellant shall be reinstated in service in the same position on which he was working as on the date of compulsory retirement with consequential benefits in case he has not already attained the age of superannuation. However, if he has already attained the age of superannuation, he shall be treated as deemed to be in service throughout, as if no compulsory retirement orders were passed and will be given consequential benefits including pay for the intervening period and pensionary benefits on that basis. [Para 44] [504-E-F]

C.A. Nos. 400 of 2008 459/2009, 592/2009 and SLP (C) No. 3932/2008:

8. The aggrieved police officials in these appeals/ petitions are also identically situated as the appellant in C.A. No. 396 of 2008. It was not a case of second representation to the same authority. Another representation to the higher authority was made which is permissible under the Rules and that too immediately after their first representation by the IGP was rejected. Second representation to a higher authority was clearly maintainable. [Paras 45, 47 and 49] [505-C, G-H; 506-A; 507-D]

3rd Group Cases:

C.A. No. 1721 of 2008:

9.1. Under Rule 16.32 of Punjab Police Rules, 1934

an employee can seek Revision either on the ground of material irregularity in the proceedings or on provision of fresh evidence. In the alternative he can submit Revision Petition raising a plea for mercy. When the Revision Petition is earlier rejected on merits, another revision petition raising the plea for mercy would not be permissible. Moreover, no grounds for mercy are stated except showing that lenient view be taken. [Para 61] [511-B-C]

9.2. In the present case, the mercy petition was not filed within one month. Further, it was not filed on the ground of material irregularity in the proceedings or by producing any fresh evidence. On the contrary, the DGP while allowing the mercy petition specifically recorded that there was no irregularity in the conduct of departmental proceedings. In spite thereof, he cancelled the order of penalty without giving any cogent reasons. Such an order was palpably illegal and was rightly set right departmentally. [Para 62] [511-C-E]

C.A. No. 1811 of 2008

10. In the present case, also such a mercy petition was not maintainable which was not only filed belatedly but no fresh material was also furnished. [Para 64] [512-B]

Case Law Reference:

1925 All E.R. 24	**referred to**	**Para 17**
1975 (2) SCR 96	**relied on**	**Para 18**
1990 (1) SCR 909	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 392 of 2008.

From the Judgment & Order dated 04.04.2007 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 9805 of 2006.

WITH

C.A. Nos. 393, 396, 405, 395, 400, 402, 1811, 1721, 459 of 2008 & 592 of 2009, SLP(C)No. 5080 of 2008, C.A. 9455 & 9456 of 2013.

P.S. Patwalia, Manjit Singh, Addl. Adv. S. Ranjit Kumar, Ashok K. Mahajan, Prem Malhotra, Pradeep Dahiya, S.K. Sabharwal, Kamal Mohan Gupta, Dr. Sukhdev Sharma, Neeraj Srivastava, Urvashi Arora, Dr. Kailash Chand, Arunabh Chowdhury, Anupam Lal Das, V. Tomar Naveen Sehrawat, Aftab Ali Khan, Daya Krishan Sharma, Nupur Choudhary, Vinay Kuhar, Hitesh Malik, Naresh Bakshi for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Though all these appeals were directed to be heard together, during the course of hearing, it transpired that on facts all these cases are not identical or of similar nature. At the same time these appeals can be categorized in three groups. These appeals have arisen from the judgments of Punjab and Haryana High Court. First judgment in point is dated 4.4.2007, which is the main judgment, passed by the High Court in batch of writ petitions with CWP No. 9805 of 2006 as the lead case. Appeal in the said case is C.A. No. 392 of 2008. Therefore, we propose to start from this appeal so that the veracity or the legality of the main judgment is discussed. Some of other appeals fall in this group and discussions in other groups of appeals would also flow from this case. In this manner, we would be in a position to proceed systematically and coherently.

Ist Group Cases

C.A. No. 392 of 2008

2. The appellant in this appeal was recruited into the police service in the State of Haryana as a Constable in the year 1971. He got promotion to higher ranks from time to time and

became Inspector of Police in the year 2002. During the course of his employment, an adverse entry was recorded in his Annual Confidential Report (hereinafter to be referred as 'ACR') for the period 11.10.1989 to 31.3.1990. Though the exact report was not placed on record either before the High Court or this Court, it is a common case of the parties that the ACR for this period related to adverse comments on his "integrity". It was acknowledged by the appellant's counsel before the High Court that the said adverse remarks pertained to his character and antecedents.

3. These remarks were recorded by the then Superintendent of Police, Hisar Range, Hisar. As he wanted these remarks to be expunged, the appellant made a representation to the Deputy Inspector-General of Police, Hisar. His representation was rejected on 26.5.1993. Initially, there was a stoic silence on the part of the appellant who did not pursue the matter further for quite some time. However, he woke up from slumber and after almost 9 years, he made another representation to the Director General of Police, Haryana. This was accepted by the DGP vide orders dated 15.7.2002 and the aforesaid remarks were expunged. The operative part of the order of the DGP, Haryana, in this behalf, is as under:-

> "Mercy Petition of ASI Vinod Kumar NO. 345/SR5S (now SI No. 56/H) against the adverse remarks in the matter of integrity recorded his ACR for the period from 14.11.89 to 31.3.1990, has been considered on the basis of available record. The departmental enquiry was conducted on the charges of carelessness and indiscipline in which he was awarded a punishment of censure. No advice/ warning was awarded to him in the matter of integrity. But the reporting officer has doubted his integrity. Thus, the adverse remarks are uncalled for and without any basis and will not stand scrutiny of the judiciary. The mercy petition is accepted and adverse remarks are expunged in the interest of principles of natural justice. The representationist may be informed

4. As would be seen in almost all these appeals before us, the DGP had expunged adverse remarks of many such police officials during this period namely from 1999-2002. After the change of regime when new Director General of Police took over the charge, he noticed this phenomena where the adverse remarks were expunged after substantial lapse of time and/ or for no valid reasons and in some cases even after all the departmental remedies had been exhausted by those officials, unsuccessfully. The new DGP, therefore, issued Instructions dated 9.6.2005 to all Range Inspector General of Police, Railways and Technical Services, Haryana and the Inspector General of Haryana Armed Police, Madhuban. In these Instructions, it was stated that he had come across some old cases where remarks related to integrity were expunged after obtaining fresh representations, despite the fact that their earlier representation/ mercy petition/ memorial/ writ petitions had been rejected/ dismissed by the competent authority/ State Government or Courts. Many such cases were even accepted after a lapse of 10/ 12 years. Opinion of the Legal Remembrancer, Haryana was taken who had opined out that in such cases expunction of remarks of the concerned employees was wrongful and the adverse remarks recorded earlier should be reconstructed, after issuing show-cause notice to these officials. Vide these Instructions, the DGP ordered a review of all such cases.

5. Show cause notice was issued to the appellant. He submitted his reply dated 22.5.2006. After considering the same, DGP, Haryana passed the orders dated 21.6.2006 restoring/ reconstructing the earlier adverse remarks and recalled orders dated 15.7.2002 of the DGP, Haryana vide which the aforesaid remarks were expunged.

6. The appellant filed petition challenging the aforesaid Orders dated 21.6.2006. This petition was heard alongwith some other cases where similar orders were passed and vide common judgment dated 4.4.2007, the writ petition of the appellant has been dismissed.

7. Since this is the main judgment giving detailed reasons for dismissing the writ petitions, it would be apt to traverse through the same to find out the grounds of challenge laid by the appellant and other writ petitions before the High Court as well as the reasons given by the High Court while rejecting those submissions.

JUDGMENT OF THE HIGH COURT

8. The argument of the appellant before the High Court was that second representation was permissible having regard to the instructions contained in Standing Order No. 65/ 1998 dated 8.2.1999 issued by the DGP, Haryana. These instructions referred to the earlier policy instructions issued by the State Government dated 28.8.1962 which lays down procedures for the guidance of all departments for entertaining the representations against the adverse remarks. In the Government's Instructions dated 28.8.1962, it was emphasized that in the absence of specified procedure for entertaining the representations against ACR, the authorities had noted that whenever any officer in a key position is transferred, certain government servants think that it is a good opportunity to re-open finally settled cases connected with their conditions of service or disciplinary matters, which may be even several years old. There was also a tendency of sending advance copies of representations to all the higher authorities which was leading to unnecessary work at all levels. At the same time, it was also necessary to ensure a fair chance of representation to the government employee. Going by these considerations the detailed procedure was laid down in those Instructions dated 28.8.1962. It *inter alia* provided that if a government servant wishes to press his claim or to seek redress of his grievance, the proper course was to address his immediate official superior, or the head of office or such other authority at the lowest level, who is competent to deal with the matter. Once that authority decides the case, one representation be allowed to the next higher authority. When the low

is the Government itself, one representation is allowed asking for a review of Government orders. These instructions also categorically stipulate that no further representations are allowed except in those cases where new facts have come to light and representation on such ground would be considered by the original deciding authority. Period of six months is provided for making such a representation. There is also a provision for allowing one memorial which is to be decided at Government level in terms of Instructions dated 12.2.1952. Second memorial is permissible if it furnishes new material grounds requiring re-consideration. Relevant portions of these Instructions, stating the aforesaid position, is extracted below:

" After Careful consideration the following procedure is laid down for the guidance of all departments:-

(a) Whenever in any matter connected with his service rights or conditions, a government servant wishes to press his claim or to seek redress of a grievance, the proper course for him is to address his immediateofficial superior, or the Head of Office or such other authority at the lowest level, as it competent to deal with the matter. When a case has thus been decidedby the lowest competent authority one representation should be allowed to the next higher authority. Where the lowest competent authority is government itself, one representation should be allowed, asking for a review or government orders.

(b) If an official sends up a representation in addition to those permitted under (a) above, on the ground that certain new facts have come to light, that representation will be considered by the origianl deciding authority, who will be competent to withhold it and reject it if findsthat in fact no new data has been given which wouldprovide any material grounds for reconsideration."

9. In nut-shell as per Policy Instructions dated 28.8.1962, representations can be made, if it is a case of adverse remarks, in the following manner:

1. Representation to immediate official superior, or the headof office or such other authority at the lowest level who iscompetent to deal with the matter.

2. If it is rejected by the lowest authority one more representation is allowed to the next higher authority.

OR

If the lowest competent authority is the Government itselfthen representation by way of review is allowed to theGovernment.

3. No further representation is to be entertained except on theground that certain new facts have come to light. If it isfound by the competent authority that no new fact has beengiven he would be competent to reject it.

4. After the representations are made in the manner statedabove, one memorial is allowed which is to be decided atGovernment level.

5. Second memorial is allowed only on furnishing new material grounds.

10. As already pointed above, Instructions dated 28.8.1962 were referred to in Standing Order No. 65/1998 dated 8.2.1999. In these Instructions, reliance was placed on the earlier Standing Order. It reiterated the tendency to entertain belated representations qua seniority or seeking ante-dated promotion or expunction of adverse remarks in A st

punishments after lapse of number of years that too whenever any officer in key position is transferred. It condemned and deprecated this practice in strong words. It also highlighted that entertainment of such representations after long lapse of time is not only in contravention of Rules and settled legal position on the subject but it also creates unnecessary complications/ litigations and unsettles the settled *inter se* relativities. Apart from issuing mandate to the effect that such delayed representations qua seniority, promotion, ACR's etc. be not entertained , following instructions were specifically issued, which are relevant in the context of entertaining representations against ACR:-

1. If any personnel is not satisfied with the decision of the competent authority or next higher authority, he may approach next higher authority to get justice as per settled law within six months.

2. No competent authority shall consider any representation against an order, if the order against which the personnel is aggrieved is more than 5 years old.

11. It was argued before the High Court, which was the submission before us as well, that these instructions were applicable only in those cases which were not covered or governed by the Punishment and Appeal Rules. It was argued that a representation was permitted to an employee in addition to the prescribed representations as per para (b) of the Policy Instructions dated 28.8.62 and the second representation of the appellant which was accepted by the DGP was thus, permissible. However, this argument was brushed aside by the High Court, and rightly so, taking note of the fact that as per clause (b), further representation could be made only on the ground that certain new facts have come to light. Further, whereas the period specified for making this representation as per 1962 Instructions was six months, the appellant had made

the second representation almost after nine years which was clearly not permissible as reiterated even in 1999 instructions. In fact, it is this mischief of re-opening the settled cases, by making belated representations which these government instructions aimed curbing at. The High Court in the impugned judgment, in this behalf, aptly remarked as under:

> "Although, the contention of the learned counsel for the petitioner seems to be attractive on first blush, however, a perusal of clause (c) takes the wind out of the aforesaid contention. It is clearly and emphatically pointed out, that any such representation permitted to be made under the 1962 instructions, has to be made within a period of six months. It is not the case of the petitioner, that the representation made by him was within the ambit of the instructions of 1962. In fact, from the facts narrated hereinabove, it is apparent, that after the first representation made by the petitioner was rejected on 26.5.1993, whereafter the second representation was allegedly made by the petitioner only on 25.2.2002 i.e. after almost nine years."

12. It is manifest that after the change of guards, the appellant took a chance by making another representation to the new DGP and got favourable orders.

13. Even the punishment under Appeal Rules are of no help to the appellant. Reliance was placed on Rules 16.28 and 16.32 of Punjab Police Rules, 1934. These Rules read as under:

> **"16.28.** Powers to review proceedings.—
>
> (1) The Inspector-General, a Deputy Inspector-General, and a superintendent of Police may call for the records of awards made by their subordinates and confirm, enhance, modify or annul

the same, or make further investigation or direct such to be made before passing orders.

(2) If an award of dismissal is annulled, the officer annulling it shall state whether it is to be regarded as suspension followed by reinstatement, or not. The order should also state whether service previous to dismissal should count for pension or not.

(3) In all cases in which officers propose to enhance an award theyshall, before passing final orders, give the defaulterconcerned an opportunity of showing cause, eitherpersonally or in writing, why his punishment should not be enhanced.

16.32. Review.- An officer whose appeal has been rejected is prohibited from applying for a fresh scrutiny of the evidence. Such officer may, however, apply, within a month of the date of despatch of appellate orders to him, to the authority next above the prescribed appellate authority for revision on grounds of material irregularity in the proceedings or on production of fresh evidence, and may submit to the same authority a plea for mercy: provided that no application for the revision of an order by the Inspector-General will be entertained. An officer whose appeal has been heard by the Inspector-General may, however, submit to the Inspector-General a plea for mercy or may apply to the Inspector-General for a review of his appellate order only on the ground that fresh evidence has become available since the appellate order has been pronounced. This Rule does not affect the provisions of Rule 16.28. Such application or plea must be in English".

14. However, these are part of Rule 16 which falls in

Chapter XVI relating to "punishment". This Rule 16 prescribes the procedure for conducting departmental inquiries and imposition of penalties consequent thereto. It has nothing to do with the confidential reports. In fact, provision relating to Confidential Reports is contained in Rule 13.17 of the aforesaid Rules. Relevant portion of Rule 13.17 reads as under:-

"13.17. Annual Confidential Reports.—

(1) Superintendents shall prepare and submit annually to the Deputy Inspector-General, after obtaining the District Magistrate's remarks thereon, reports in form 13.17 on the working of all Upper Subordinates serving under them. These reports shall be submitted to reach the Deputy Inspector-General on or before 15th April.

Deputy Inspectors-General and Assistant Inspector-General, Government Railway Police, will add their own remarks and retain reports on Assistant Sub-Inspectors and Sub-Inspectors who are not on list 'F' and Sergeants will be forwarded by Deputy Inspectors-General and Assistant Inspector-General, Government Railway Police, so as to reach the Inspector-General on or before the 15th May. In the cases of Indian Inspectors of the General Line, Sub-Inspectors on list 'F' and all Sergeants, Deputy Inspectors-General and Assistant Inspector-General, Government Railway Police, will attach with each report so submitted a duplicate copy thereof. Any remarks recorded by the Inspector-General on the original report will be copied in his office on the duplicate prior to the return of the latter report for record with the duplicate personal file maintained in accordance with Rule 12.38 (1).

(2) Reports shall be of three kinds, A, B and C, and shall be marked as such:—

A reports.— Reports in which for special reasons it is recommended that promotion be given irrespective of seniority.

B reports.— Reports in which it is recommended that promotion be given in the ordinary course of seniority.

C reports.— Reports in which it is recommended that the officer be passed over for promotion or that the taking of departmental action on general grounds of inefficiency or unsatisfactory conduct be considered.

15. This Rule only states the manner in which ACR is to be written. We also have Rule 14.7 which may be relevant to the context and is reproduced below:-

"14.7 Comments on remarks of superior officer.—

A police officer shall not record comments on the remarksmade by a superior officer. If a police officer considers thatan erroneous view has been taken of his conduct or of anymatter affecting his administration he may refer thequestion in a temperate manner through the proper channel."

16. Thus, these Rules only pertain to recording of ACRs. There is no provision in the Rules containing any procedure for dealing with representations against the ACRs. That is provided in 1962 and 1999 Instructions, already taken note of above. Therefore, the High Court rightly rejected the contention of the appellant predicated on these Rules. Thus, we find that on the face of it, the second representation preferred by the appellant, in which the ACRs were expunged was not permissible. It was not only contrary to 1962 and 1999

Instructions, but was made after 9 ½ years from the date when first representation against the ACR was rejected.

17. We would like to make certain comments, at this juncture, on the powers of the successor DGP, Haryana in over turning the decision of his predecessor who had accepted the representation and expunged the adverse remarks in a petition which was not maintainable and wholly unwarranted. The general principle is that merely because there is a change in the regime or when the successor assumes the office, he would not be entitled to review and reopen the cases decided by his predecessor. That would apply in those cases where the predecessor had passed the orders which he was empowered to pass under the Rules and had exercised his discretion in taking a particular view. Therefore, this proposition applies in a situation where order of the predecessor resulted in legal, binding and conclusive decision. However, the position would be different when it is found that the order of the predecessor was without jurisdiction or when a palpably illegal order was passed disregarding all the cannons of administrative law viz. when the predecessor's decision was without jurisdiction or ultra vires or when it was exfacie an act of favoritism. In the present case we find that not only the order passed by earlier DGP, Haryana was ultra vires, as that was not backed by any authority vested in it under the Rules as the representation/ mercy petition was not maintainable, even while exercising its discretion in passing that order, the alleged reasons are abhorrent to the good administration/ governance and in fact there was no valid reason or justification shown in exercise of the non existent power. It was, thus, not a case of mere discretion which the DGP was empowered to exercise or the exercise of power on rational basis. Undue sympathy, that too without stating any such sympathetic grounds would be anathema to fairness. There has to be fairness in the administrative action and it should be free from vice of arbitrariness. We may usefully refer to the judgment of the English Court in the case of *Roberts v. H*

24 laying down the law in the following terms:

> "..... A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what her likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably....."

18. The matter can be looked into from another angle as well. In those cases where Courts are concerned with the judicial review of the administrative action, the parameters within which administrative action can be reviewed by the courts are well settled. No doubt, the scope of judicial review is limited and the courts do not go into the merits of the decision taken by the administrative authorities but are concerned with the decision making process. Interference with the order of the administrative authority is permissible when it is found to be irrational, unreasonable or there is procedural impropriety. However, where reasonable conduct is expected, the criterion of reasonableness is not subjective but objective; albeit the onus of establishment of unreasonableness rests upon the person challenging the validity of the acts. It is also trite that while exercising limited power of judicial review on the grounds mentioned above, the court can examine whether administrative decisions in exercise of powers, even if conferred in subjective terms are made in good faith and on relevant considerations. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or facts in a material respect.(See: *M.A.Rasheed & Ors. v. The State of Kerala;* (1974) 2 SCC 687). The decision of the administrative authority must be related to the purpose of the enabling provisions of Rules or Statutes, as the case may be. If they are manifestly unjust or outrageous or directed to an unauthorized end, such decisions can be set aside as arbitrary

and unreasonable. Likewise, when action taken is ultra vires, such action/decision has no legal basis and can be set aside on that ground. When there are Rules framed delineating the powers of the authority as well as the procedure to be followed while exercising those powers, the authority has to act within the limits defined by those Rules. A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. This was so explained in *Shri Sitaram Sugar Co.Ltd. v. Union of India* (1990) 3 SCC 223 in the following manner:

> "A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223.* In the words of *Lord Macnaghten in Westminster Corporation v. London and North Western Railway, [1905] AC 426*:
>
> > "...It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first...."

In *Barium Chemicals Ltd. and Anr. v. The Company Law Board and Ors*., : [1966] Supp. SCR 311, this Court states:

> "...Even if (the statutory or

faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts."

In *Renusagar,* AIR1988SC1737 , Mukharji, J., as he then was, states:

"The exercise of power whether legislative or administrative will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Similarly, if the power has been exercised on a non-consideration or non-application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated".

The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

19. Thus, if wrong and illegal acts, applying the aforesaid parameters of judicial review can be set aside by the courts, obviously the same mischief can be undone by the administrative authorities themselves by reviewing such an order if found to be ultra vires. Of course, it is to be done after following the principles of natural justice. This is precisely the position in the instant case and we are of the considered opinion that it was open to the respondents to take corrective measures by annulling the palpably illegal order of the earlier DGP, Haryana.

20. We, therefore, do not find any merit in this appeal which is accordingly, dismissed.

C.A. No. 393 of 2008

21. This appeal arises out of decision in Civil Writ 9805 of 2006 which was decided by the common judgment dated 4.4.2007 already taken a note of above. In this case, ACR is for the period 25.4.1994 – 31.3.1995. It was *inter alia* recorded that there was report of corruption against this officer. The appellant made the representation which was rejected in the year 1995 itself. After a lapse of almost 7 years, the appellant gave another representation in the year 2002 which was accepted by the DGP, Haryana who expunged the adverse remarks, giving following reasons:

"Representation of SI Swantanter Singh No. 225/H has been examined in depth. Keeping in view the improvement shown by the SI especially in view of good entries against major punishment nil, adverse remarks so recorded in his ACR for the period from 25.4.1994 to 31.3.1995, are hereby expunged and upgraded as "Good". The representations may be informed accordingly."

22. Thus, in this case also not only second representation was made after more than 7 years, but there was no new material or facts as well which were

representation. Furthermore, the reasons given for expunging the remarks on "corruption" and substituting the same by "good remarks" is shocking and untenable to say the least. Simply because the appellant allegedly showed improvement and earned good entries in the subsequent years cannot be a ground to erase the earlier remarks recorded 7 years ago thereby treating him as a good officer even for the earlier period i.e. 25.4.1994 to 31.3.1995. The petition of the appellant was thus, rightly dismissed by the High Court. Present appeal is totally bereft of any merits and is accordingly dismissed.

CA No. 395 of 2008

23. The petitioner was communicated adverse annual confidential remarks for the period from 24.4.1998 to 31.3.1998. Relevant extract thereof is reproduced hereunder:-

1.	Discipline	Poor
2.	Integrity	Poor
3.	Reliability	Poor
4.	Moral Character	Deserves Improvement
5.	General Remarks	He was placed under suspension due to misbehaviour with Smt. Dhano Devi, DC/FTB was requested to accord sanction under PPR 16.38 for DE. But DC/ FTB refused to accord sanction.

24. Dissatisfied with the aforesaid annual confidential remarks communicated to the petitioner, the petitioner made his first representation for the expunction thereof, on 13.12.1999. The aforesaid representation made by the petitioner was partly accepted by an order dated 22.6.2000 inasmuch as the general remarks recorded in the annual

confidential report extracted hereinabove at Serial No. 5 were expunged.

25. The petitioner submitted a second representation for the expunction of his other adverse remarks on 13.7.2000. The second representation made by the petitioner was also rejected on 27.12.2000. Dissatisfied with the aforesaid rejection, the petitioner moved a mercy petition i.e. the 3rd representation in his series of representations, on 9.8.2001. This mercy petition was rejected by the authorities on 22.11.2001. The petitioner, then made a 4th representation for the expunction of annual confidential remarks communicated to him for the period 24.4.1998 to 31.3.1999. This representation of the petitioner was accepted by an order dated 12.6.2002 (14.6.2002). Relevant extract thereof is being reproduced hereunder:-

> "The representation dated 1.1.2002of H.C. Ram Kumar No. 26/ Fatehabad against adverse remarks has been considered and accepted. The adverse remarks recorded in his A.C.R. For the period from 24.4.98 to 31.3.99 have been expunged. He may please be informed accordingly."

26. The respondents, having arrived at the conclusion, that only one representation was competent at the hands of the petitioner for the expunction of adverse annual confidential remarks, acceptance of 4th representation made at the hands of the petitioner on 1.1.2002 by an order dated 12.6.2002 was impermissible in law. Therefore, a show cause notice dated 4.7.2006 was issued to the petitioner. After the petitioner submitted his reply thereto, an order dated 23.8.2006 was passed whereby the order expunging the adverse annual confidential remarks dated 12.6.2002 was set aside and the annual confidential remarks for the period 24.4.1998 to 31.3.1999, as originally recorded, subject to the modification vide order dated 22.6.2000, was reconstructed.

27. Vide judgment dated 18.4.200 h

dismissed the appellant's challenge to the orders dated 23.8.2006 relying upon the legal position expressed in Vinod Kumar's Case (supra). At the same time, the Court clarified that the remarks in the ACR for the period from 24.4.1998 to 31.3.1999, which relate to the allegation of misbehaviour based on his conduct with Smt. Dhano Devi, were actually and factually expunged (since a regular inquiry was conducted in this behalf in which he was exonerated) while deciding his first representation which was partly accepted on 22.6.2000.

28. In so far as other remarks are concerned, in view of our detailed discussion above, it is clear that such a mercy petition, in the form of 4th representation, at the hands of DGP, Haryana was impermissible in law. The writ petition of the appellant was, therefore, rightly dismissed. This appeal also stands dismissed accordingly.

C.A. No. 402 of 2008

29. From the facts of this case also it is apparent that the representation against the ACR for the period 1992-1993 was rejected on 7.5.1996 and thereafter when fresh representation dated 20.6.2000 was made after a lapse of more than 4 years. It was accepted vide orders dated 12.7.2000 and the adverse remarks were expunged. This case is thus, on the same footing as Vinod Kumar's case. The appeal is accordingly dismissed.

C.A. No. 405 of 2008

30. The appeal arises out of C.W.P. NO. 20401 of 2006 which was part of batch petitions decided vide common judgment dated 4.4.2007 with lead matter in the case of Vinod Kumar. Without stating the facts in detail, suffice is to mention that adverse reports is for the period 1.4.2001 to 31.3.2002 which was communicated to him on 2.7.2002. His first representation was rejected by IGP on 30.9.2002, he filed second representation to the higher authority namely DGP which was rejected on 28.1.2003. Thereafter, he made another

representation (purported to be a review) before the DGP in July, 2003 which was allowed on 30.9.2003 by expunging the adverse remarks. After issuance of show cause notice, orders dated 19.10.2006 were passed recalling earlier order dated 30.9.2003 and reconstructing the ACR by restoring earlier adverse remarks. As is clear from the above, the appellant had earlier exhausted the remedy of first representation before the immediate officer and second representation to the higher officer namely DGP. Thereafter, DGP could not entertain any further representation or review except on "new facts". Record reveals that no such new facts were pleaded. Thus, we do not find any merit in this appeal as well and dismiss the same.

SLP(C)No. 5080 of 2008

31. No one appeared in this matter to address the petition at the time of hearing. Dismissed.

2nd Group Cases

C.A. No. 396 of 2008 & SLP(C)No. 32653 of 2011.

32. This appeal and SLP are filed by the same appellant H.C. Shiv Kumar. Leave granted in SLP.

33. On the basis of those adverse remarks, the appellant was compulsorily retired from service. Vide orders dated 17.3.2011, his writ petition challenging the compulsory retirement has been dismissed against which SLP(C)No. 32653/2011 is preferred. Thus, the outcome of this SLP depends upon the result of C.A. No. 396 of 2008.

34. Coming to C.A. No. 396 of 2008, in the case of the appellant, adverse remarks relate to the period 1.4.2001 to 2.10.2001 which were communicated to him on 2.7.2002. He made the representation dated 24.8.2002 for expunction of these remarks to the Inspector-General of Police which was rejected on 10.3.2003. Immediately thereafter, in the month of March itself he filed the revision petition

2.5.2003 expunging the adverse remarks in toto and replacing the same with 'good' rating.

35. The appellant was also issued show cause notice dated 30.6.2006, in a similar manner as in other cases, stating that as per Government's Instructions dated 28.8.1962, no second representation lies against the adverse remarks. Therefore, it was proposed to re-construct the original adverse remarks recorded in his ACR for the period in question. The appellant submitted his detailed reply to the aforesaid show cause notice running into almost 20 pages. However, his reply did not cut any ice with the authorities and vide orders dated 25.10.2006, DGP, Haryana recalled earlier order dated 2.5.2003 and directed re-construction of the ACR by restoring the remarks recorded earlier for the period in question i.e. 1.4.2001 to 2.10.2001. His Writ Petition against the said orders dated 25.10.2006 has met the same fate at the hands of the High Court which has dismissed a Writ Petition, following *Vinod Kumar's* Case (supra), and holding that second representation submitted by a employee is not acceptable in law.

36. We would like to point out, at this stage, that it was also the contention of the appellant before the High Court that on the same set of allegations on the basis of which the adverse remarks were communicated to him, a regular departmental inquiry was conducted against the appellant and the appellant had been exonerated in the said inquiry. It was argued that for this reason adverse remarks could not remain in his service record and the order of restoring those remarks was illegal on this ground as well. The High Court however, rejected this contention recording a finding that the charge sheet in which the inquiry was held, was dated 13.3.2001, which naturally referred to the allegations preceding the date of charge sheet. On the other hand, the adverse remarks were relatable to the subsequent period and, therefore, in the opinion of the High Court, this contention of the appellant was untenable.

37. Mr. Patwalia, learned Senior Counsel appearing for the appellant, after drawing our attention to the chronology of events from the date of recording the adverse remarks to that of expunction thereof, made a fervent plea that the case was not covered by the principle laid down by the High Court in its earlier judgment in *Vinod Kumar's* Case (supra) and there was an apparent error in applying that judgment in the present case as well. His first submission in this behalf was that it was not a case where the "second representation" was made after long lapse of time. Secondly, his first representation was to the Inspector-General which was rejected and the purported "second representation" was in fact in the nature of representation given to the higher authority namely DGP which was permissible under the Rules. He, thus, argued that the High Court wrongly treated the same as second representation to the same authority which became the cause of error on the part of the High Court. He referred to the judgment of the High Court in the case of Vinod Kumar itself where such cases as that of the appellant, were saved after interpreting the relevant Instructions.

38. We find the aforesaid contention of Mr. Patwalia to be meritorious. While discussing C.A. No. 392/2008, we have already taken note of the relevant government instructions as well as Rules on the subject. In para 9 above, we have summarised the position contained in the policy instructions dated 28.8.1962 as per which, once a representation is rejected by the immediate superior officer, one more representation is permissible and allowed to be made to the next higher authority. This precisely happened in the instant case. First representation was to the Inspector-General of Police which was rejected on 10.3.2003 and within few days, the appellant made second representation which was allowed on 2.5.2003. Thus, not only this representation was made within stipulated period prescribed under the Rules namely six months, which is prescribed in the Standing Order, it was made to the higher authority as well. It seems

between the appellant's case from the fact situation in Vinod Kumar's Case has been overlooked by the High Court.

39. Once, we find that the revision or second representation to the higher authority was made within prescribed period (in fact within few days of the rejection of representation by the IGP) and such a representation to the higher authority was permissible, it cannot be said in this case that the order of the DGP, Haryana was without jurisdiction i.e. on a representation "which was not permissible" in law. Once, we find this to be the factual position, we are constrained to hold that three years thereafter, the case could not be re-opened and order dated 25.2003 could be interdicted by the successor.

40. As a result, this appeal is allowed and the order of the High Court is set aside. Result would be to allow the writ petition filed by the appellant before the High Court and quash the orders dated 25.10.2006 passed by the DGP, Haryana.

41. The appellant was given show cause notice dated 24.10.2010 proposing compulsory retirement. The ground on which the action proposed was attached to the show cause notice. On perusal thereof reveals that the material sought to be put up against the appellant was as under:

1. Adverse remarks for the period 1.4.2001 to 2.10.2001.

2. Award of punishment of "warning" vide SP/AMB/OB/218/08 for showing negligence in investigation in case FIR NO. 121 dated 9.7.2008 under Section 279/ 304 A IPC, PS Narayan.

42. In reply, the appellant had submitted that his appeal No. 396/08 is pending against the judgment of the High Court in so far as ACR's for the period 1.4.2001 to 2.10.2001 is concerned and, therefore, notice in question be withdrawn. However, this plea of the appellant was not accepted and vide

orders dated 17.3.2011, appellant was ordered to be compulsory retired from service with immediate effect. In this order also, same two grounds namely, ACR for the period 1.4.2001 to 2.10.2001 and award of punishment of warning in every case, are mentioned.

43. Since, we have allowed C.A. No. 396 of 2008, the effect thereof is that adverse remarks for the period in question no longer remain in the service record of the appellant and for this period his rating now is "good" to which he was upgraded vide orders dated 2.5.2003. In so far as award of "warning" is concerned, leaned Counsel for the State could not dispute that "warning" is not a punishment prescribed under the Rules. It was not given to him after holding any inquiry. Therefore, such a warning recorded administratively in a service record cannot be the sole basis of compulsory retirement.

44. The appellant's writ petition has been dismissed by the High Court vide orders dated 26.12.2011. We, thus allow this appeal and set aside the impugned judgment of the High Court. As a consequence, the appellant shall be reinstated in service in the same position on which he was working as on the date of compulsorily retirement with consequential benefits in case he has not already attained the age of superannuation. However, if he has already attained the age of superannuation, he shall be treated as deemed to be in service throughout as if no compulsory retirement orders were passed and will be given consequential benefits including pay for the intervening period and pensionary benefits on that basis.

C.A. No. 400 of 2008

45. The ACR for the appellant pertains to 3.11.2002 to 31.3.2003 which were adverse in nature. These remarks were conveyed to him vide memo dated 8.6.2003, the appellant made representation against those adverse remarks vide his communication dated **30.10.2003** which was rejected by the Inspector-General of Police, Hisar R[illegible]d

"appeal" thereagainst to the Director General of Police within a few days thereafter i.e. 30.10.2003 which was accepted by the DGP. Adverse remarks were expunged and his ACR was upgraded to 'good'. He was given show cause notice for reversal of the good rating and re-construction of old ACR on 15.8.2006 and order to this effect was passed, after eliciting his reply, on 18.10.2006 on the ground that his adverse remarks were expunged on his "second representation" which was not permissible in law. The aforesaid facts would demonstrate that the appellant herein is also identically situated as the appellant in C.A. No. 396 of 2008. For the reasons given therein, this appeal is also allowed and the order of the High Court is set aside. As a consequence, writ petition of the appellant stands allowed and the orders dated 18.10.2006 of DGP, Haryana are hereby quashed.

SLP(C)No. 3932 of 2008

46. Leave granted.

47. The appeal arises out of C.W.P. No. 1249 of 2007 which was part of batch petitions decided vide common judgment dated 4.4.2007 with lead matter in the case of Vinod Kumar. Adverse remarks in the case of this petitioner are for the period 1.4.2001 to 31.3.2002. His representation dated 18.7.2002 was rejected. On 30.4.2003, he filed revision/ representation against order dated 30.4.2003 to the higher authority namely DGP which was by the DGP vide orders dated 6.10.2003 and the adverse remarks were expunged. He was given show cause notice dated 8.9.2006 whereafter orders dated 3.12.2006 were passed reviewing the earlier order dated 6.10.2003 and reconstructing the ACR by maintaining earlier adverse report which was communicated to him in the beginning. From the aforesaid facts it becomes clear that it was not a case of second representation to the same authority. Another representation to the higher authority was made which is permissible under the Rules and that too immediately after

his first representation by the IGP was rejected. His case is thus *para materia* with C.A. No. 396 of 2008.

48. The impugned order of the High Court qua the appellant is accordingly set aside and appeal is accordingly allowed.

C.A. No. 459 of 2009

49. This appeal is filed by the State of Haryana against the judgment of the High Court in the writ petition filed by the respondent. The respondent was communicated adverse ACR for the period 5.11.00 to 31.3.2001. On 13.11.2001 he submitted his representation dated 18.12.2001 which was rejected on 14.8.2002. Thereafter he filed the revision petition dated 4.10.2002 which was allowed on 13.2.2003. However, this order was recalled vide orders dated 18.1.2007 after giving show-cause notice dated 21.11.2006. From the aforesaid, it is clear that second representation to a higher authority was clearly maintainable and this aspect has been discussed in detail by us while dealing with CA 396 OF 2008.

50. Additionally, we find that on the same allegations on which ACR's were recorded, the respondent was also issued charge sheet but was completely exonerated therein. The High Court in these circumstances rightly allowed the writ petition following its earlier judgment in the case of R*andhir Singh, ASI vs. State of Haryana & Ors.* (C.W.P. No. 867 of 2007 decided on 29.3.2007) in the following manner:-

> "In our view, the claim of the petitioner was liable to be adjudicated upon its merits based on the judgment and decree dated 24.5.1999. in this behalf, it would be pertinent to mention, that the annual confidential report for the period 1.4.1995 to 2.7.1995 (which has been extracted herein above), clearly reveals that the same was based on the allegation, wherein in a departmental enquiry was conducted against the petitioner, [illegible]d

been found guilty, and inflicted with the punishment of stoppage of two annual increments with cumulative effect. So far as the aforesaid factual position is concerned, there was no difference of opinion between learned counsel representing the rival parties. However, the aforesaid factual position underwent a change, with the passing of the judgment and decree at the hands of the civil judge at Sirsa dated 24.5.1999. The findings recorded int eh departmental enquiry which constituted the foundation and the basis of the annual confidential report dated 30.9.1995 were set aside in the judgment and decree dated 24.5.1999. In sum and substance, therefore, the very basis on which the annual confidential report (under reference) was recorded, had been annulled by the judgment and decree dated 24.5.1999. Not only that, although liberty was given by the trial Court o the respondents to hold a fresh enquiry, yet, after a conscious application of mind, the Government by its order dated 11.7.2002 decided to file the matter. That being so, we have no doubt in our min, that the allegation contained in the charge sheet were considered to be unjustified by the respondents themselves. Since, the basis of the aforesaid charge sheet was treated as unjustified by the State Government itself, it is apparent, that the adverse remarks recorded thereon were wholly unjustified in the facts and circumstances of this case. We are, therefore satisfied, that the former Director General of Poki8ce, was fully justified in passing the order dated 26.8.2003, by which he ordered the expunction of remarks communicated to the petitioner on 30.9.1995."

51. We thus, do not find any merit in these appeal and is dismissed.

C.A. No. 592 of 2009

52. This appeal is also preferred by State of Haryana. The

factual position in this case is same as in C.A. No. 459 of 2008. For same reasons, this appeal also stands dismissed.

3rd Group Cases

C.A. No. 1721 of 2008

53. In this appeal, subject matter is not the annual confidential report but the departmental inquiry. Though the orders are shadowed by same set of circumstances, here the penalty imposed as a result of disciplinary proceedings was set aside on the basis of mercy petition filed by the appellant, that too after exhausting all the departmental remedies. It happened in the following circumstances:

The appellant was charge sheeted and departmental inquiry conducted against him related to conduct of investigation in a case wherein he had implicated innocent persons in false cases getting the accused free from police custody and misusing his post for ulterior motives. Charges were proved in the inquiry on the basis of which Superintendent of Police, Faridabad as a disciplinary authority imposed the penalty of stoppage of three future annual increments on permanent basis vide order dated 17.1.1999. The appellant filed appeal against the said order which was rejected by the DGP on 1.3.1999. He filed revision on 20.6.2000 which was also rejected on 13.2.2001. Under the disciplinary Rules, there is no further departmental remedy provided. However, the appellant has preferred mercy petition dated 12.5.2001 to the Secretary, Home, Government of Haryana, through proper channel. On this mercy petition, order dated 9.7.2001 was passed by DGP, Haryana accepting the said petition thereby setting aside the penalty imposed upon the appellant.

54. A perusal of the orders dated 9.7.2001 would show that the DGP took note of the facts of the case and holding of the inquiry. He also referred to the departmental remedy of appeal and revision filed by the appe[illegible]s

mentioned that being satisfied with the order passed in revision the appellant had "preferred the instant mercy petition". Curiously, after examining the records, the DGP also held the view that departmental inquiry was properly conducted. Inspite thereof, without giving any reasons and simply "taking a lenient view", the punishment is set aside as is clear from the following paras of the said order.

> "And whereas, I have carefully gone through the revision petition, departmental enquiry file and the relevant records. The instant departmental enquiry has been conducted as per prescribed Rules and procedure and does not suffer from any legal infirmity various pleas taken by the revisionist have been examined and could to be devoid of any merit.
>
> Now, therefore, keeping in view the please of mercy made by the revisionist after taking a lenient view, the punishment of stoppage of three future annual increments with permanent effect is hereby set aside".

55. When this fact came to light, show-cause notice dated 25.8.2006 was issued stating that there was no provision in the Rules for entertaining another petition (Mercy Petition) by the DGP without new material, once revision petition of the appellant had already been considered and rejected. It was, therefore, proposed to restore the penalty orders and the appellant was asked to show-cause against the proposed action. The appellant submitted his reply and on consideration thereof the orders dated 22.10.2006 were passed restoring the earlier penalty order finding no merit in the lease taken by the appellant.

56. Writ petition of the appellant challenging the said order has been dismissed by the High Court. However the High Court has directed the respondent not to make any recovery from the appellant as he did not play any fraud or made any mis-representation.

57. While dealing with C.A. No. 392 of 2008, we have already reproduced extract of the relevant Rules i.e. Rule 16.28 and 16.32 of the Punjab Police Rules, 1934. Rule 16.28 relates to the review which had already been exhausted by the appellant. As per Rule 16.32 such an officer is prohibited from applying from a fresh scrutiny of an appliance. He could however apply, within a month of the appellate order, to the authority next above the prescribed appellate authority for revision on grounds of material irregularity in the proceedings.

58. Thus, such a review under Rule 16.32 is admissible only if some material irregularity in the proceedings is found or some fresh evidence is surfaced.

59. Rule 16.28 is in Chapter XVI which deals with "punishments" and various sub rules of Rule 16 in this Chapter cover all the aspects of punishment which include the nature of punishments that can be imposed and the circumstances under which such punishments can be imposed viz. either on the basis of conviction in a judicial case or after conducting departmental inquiry into the misconduct. These provisions also deal with suspension, subsistence grants etc.. Rule 16.24 deals with the procedure which is to be adopted in departmental inquiries. Thereafter, relevant provision is Rule 16.28 which deals with "powers to review proceedings". Next Rule is Rule 16.29 which gives "right of appeal" to the delinquent employee. Rule 16.30 relates to the manner of dealing with these appeals and Rule 16.31 enumerates the orders on appeals by prescribing that every order shall contain the reasons. Thereafter, comes Rule 16.32 which again deals with revision.

60. In the scheme of things, as provided, it is clear that Rule 16.28 is different from Rule 16.32. While Rule 16.28 deals with Review, Rule 16.32 deals with Revision which is permissible under certain specified circumstances, after the appeal is rejected. It is this provision in Rule 16.32 which talks of Revision on certain grounds namely (a) material irregularity in the proceedings or (b) on provision of fresh

61. It also stipulates that mercy petition may be submitted to the same authority. There is no separate or other provision for mercy petition which is contained in Rule 16.32 itself. Thus, under Rule 16.32 an employee can seek Revision either on the ground of material irregularity in the proceedings or on provision of fresh evidence. In the alternative he can submit Revision Petition raising a plea for mercy. We are ,therefore, of the opinion that when the Revision Petition is earlier rejected on merits, another revision petition raising the plea for mercy would not permissible. Moreover, no grounds for mercy are stated except showing that lenient view be taken.

62. In the present case, we also find that the mercy petition was not filed within one month. Further, it was not filed on the ground of material irregularity in the proceedings or by producing any fresh evidence. On the contrary, as pointed out above, the DGP while allowing the mercy petition specifically recorded that there was no irregularity in the conduct of departmental proceedings. In spite thereof, he cancelled the order of penalty without giving any cogent reasons. Such a order was palpably illegal and was rightly set right departmentally. We thus do not find any merit in this appeal which is accordingly dismissed.

C.A. No. 1811 of 2008

63. This is also a case of departmental inquiry which was held against the appellant and culminated an order of dismissal from service on 2.2.1999. His appeal was rejected by DIG on 1.7.1999. Thereafter, revision was rejected by the IGP ON 3.9.1999. More than 1 ½ years, thereafter he preferred mercy petition which was allowed by DGP, Haryana and the punishment of dismissal was reduced to stoppage of 5 increments. This order was also recalled after giving show-cause notice, vide orders dated 16.10.2006. Appellant challenged this order by filing writ petition in the High Court which has been dismissed by the High Court on 21.8.2007.

Order fo the High Court is the subject matter of the present appeal.

64. In view of our discussion in C.A. No. 1721 of 2008, we find that here also such a mercy petition was not maintainable which was not only filed belatedly but no fresh material was also furnished.

65. Thus, we are of the view that the order allowing the mercy petition without reason was clearly untenable and was rightly recalled. We thus, do not find any merit in this appeal either which is accordingly dismissed.

K.K.T. Appeals disposed of.

CH. CUM MAN. DIRECTOR MAHANADI COALFIELD LTD.
v.
RABINDRANATH CHOUBEY
(Civil Appeal No. 9693 OF 2013)

OCTOBER 29 , 2013

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

*Payment of Gratuity Act, 1972 – s.4(6)(a) and (b) – Employer's right to withhold gratuity pending departmental enquiry – Held: A three Judge Bench judgment of Supreme Court passed in *Ram Lal Bhaskar's case is contrary to the dicta laid down in **Jaswant Singh's case passed by a Division Bench of Supreme Court which laid down that employer does not have right to withhold gratuity pending departmental enquiry – Hence matter referred to larger Bench.*

The question for consideration, in the present appeal was whether gratuity can be withheld in the wake of r. 34 of Conduct, Disciple and Appeal Rules, 1978 of the appellant-employer, when examined in juxtaposition with the provisions of Payment of Gratuity Act, 1972.

Referring the appeal to larger Bench, the Court

HELD: In **Jaswant Singh Gill's case, a Two Judge Bench of Supreme Court directly answered the question that gratuity has to be necessarily released to the concerned employee on his retirement even if departmental proceeding are pending against him. The said judgment proceeds on the basis that after the retirement of an employee, penalty of dismissal cannot be imposed upon the retired employee. However, in *Ram Lal Bhaskar's case, penalty of dismissal, even after the retirement, was upheld by Three Judge Bench of Supreme Court. This goes contrary to the dicta laid down

in **Jaswant Singh Gill's case which took the view that no major penalty is permissible after retirement. If the view laid down in **Jaswant Singh Gill's case is not correct and the imposition of penalty of dismissal is still permissible, employer will get the right to forfeit the gratuity of such an employee in the eventualities provided u/ss. 4(1) & 4 (6) of the Payment of Gratuity Act. [Paras 22 and 23] [526-B-C, D-F]

2. For invoking s. 4(6) (a) and (b) of Payment of Gratuity Act, necessary pre-condition is the termination of service on the basis of departmental enquiry or conviction in a criminal case. This provision would not get triggered if there is no termination of services. It is the case of the appellant that in the charge-sheet served upon the respondent, there are very serious allegations of misconduct alleging dishonestly causing coal stock shortage amounting to Rs. 31.65 crores, and thereby causing substantial loss to the employer. If such a charge is proved and punishment of dismissal is given thereupon, the provisions of s. 4(6) of the Payment of Gratuity would naturally get attracted and it would be within the discretion of the appellant to forfeit the gratuity payable to the respondent. As a corollary, one can say that the employer has right to withhold the gratuity pending departmental inquiry. However, this course of action is available only if disciplinary authority has necessary powers to impose the penalty of dismissal upon the respondent even after his retirement. Therefore, the issue needs to be considered authoritatively by a larger Bench. Hence, the appeal needs to be decided by a Bench of three Judges. [Paras 24 and 25] [528-B-F]

***Jaswant Singh Gill vs. Bharat Coking Coal Ltd. and Ors.* **(2007) 1 SCC 663: 2006 (8) Suppl. SCR 1064;** **State Bank of India vs. Ram lal Bhaskar and Anr.* **2011(10) SCC 249:**

2011 (12) SCR 1036; *UCO Bank and Anr. vs. Rajinder Lal Capoor* **2007 (6) SCC 694: 2007 (7) SCR 543 – referred to.**

Case Law Reference:

2006 (8) Suppl. SCR 1064	**referred to**	**Para 13**
2011 (12) SCR 1036	**referred to**	**Para 14**
2007 (7) SCR 543	**referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9693 of 2013.

From the Judgment & Order dated 17.07.2013 of the High Court of Orissa, Cuttack in W.A. No. 115 of 2012.

Mahabir Singh, Gp. Capt. Karan Singh Bhati, Monika Sharma, Ayushi Mittal for the Appellant.

Anukul Chand Pradhan, Kamal Baid, Saurabh Mishra for the Respondent.

The Judgment of the Court was delivered by

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

2. The respondent was working as Chief General Manager (Production) since 17.2.2006 at Rajmahal area under Mahanadi Coalfields Ltd., the appellant herein. A memo containing articles of charge was issued to him on 1.10.2007 alleging that there was shortage of stock of coal in Rajmahal Group of mines which was under his management and enquiry was proposed to be conducted under Rule 29 of the Conduct, Discipline & Appeal Rules.

3. During the pendency of the departmental proceeding, the Respondent was allowed to retire on 31.7.2010 on attaining the age of superannuation. The Respondent submitted an application on 21.9.2010 to the Director (Personnel) for payment of gratuity. On the same date, he also submitted an

application before the Controlling Authority under Payment of Gratuity Act cum-Regional Labour Commissioner for payment of gratuity.

4. Notice was issued to the Appellant to appear. The appellant appeared and stated that the payment of gratuity was withheld due to reason that disciplinary case is pending against him. The controlling authority held that the claim of the Respondent was pre-mature.

5. The respondent challenged the order by filing the writ petition. The single Judge dismissed the writ petition holding that in view of the existence of an appellate forum against the order passed by the Authority, the Respondent may file an appeal before the Appellate Authority within 21 days from the date of passing of the impugned order.

6. The Respondent then filed Intra Court Writ Appeal. The Division Bench of the High Court has held that writ petition was maintainable. On merits, it ruled that the disciplinary proceedings against the respondent were initiated prior to attaining the age of superannuation. The respondent retired from service on superannuation and hence the question of imposing a major penalty of removal or dismissal from service would not arise as per the decision of the Supreme Court in *Jaswant Singh Gill vs. Bharat Coking Coal Ltd. & Ors*. (2007) 1 SCC 663. The High Court has further held that the power to withhold payment of gratuity as contained in Rule 34(3) of the Rules, 1978 shall be subject to the provisions of the Payment of Gratuity Act, 1972. Therefore, the statutory right accrued to the Respondent to get gratuity cannot be impaired by reason of the Rules framed by the Coal India Ltd. which do not have the force of a statute. On that basis, direction is given to the appellant to release the amount of gratuity payable to the respondent.

7. In the aforesaid circumstances, the question which falls for consideration is as to whether it is

the appellant to withhold the payment of gratuity to the respondent, even after his superannuation from service, because of the pendency of disciplinary proceedings against him.

8. Before we proceed to answer this question in the light of arguments advanced by Counsel on either side, we would like to point out that the question of maintainability of the writ petition against the order of the Controlling Authority under the Payment Gratuity Act was not raised before us by the learned Counsel for the appellant. Thus, the learned Counsel did not challenge the approach of the writ appeal Court in entertaining the writ appeal on merits by giving the reason that it was so doing to avoid confusion and ambiguity, more so when there were no disputed facts involved and the issue involved was pure question of law. We are, therefore, not called upon to decide as to whether the approach of the Division Bench in entertaining the writ appeal on merits was erroneous or not.

9. Reverting to the issue framed above, before we examine the same, we would also like to narrate some more facts for clear understanding of the issue involved. The appellant- Ch.-cum-Man. Director Mahanadi Coalfield Limited (CIL) has framed the Conduct Discipline and Appeal Rules, 1978 (hereinafter to be referred as 'CDA Rules'). These are applicable to the employees of the appellant company as well.

10. Rule 27 of these CDA Rules mentions the authorities who are empowered to impose various punishments which are specified in column III of the Schedule attached to these Rules. Rule 29 enlists the procedure for imposing major penalties for misconduct and misbehaviour. The CDA Rules are not statutory in nature. However, they govern the employees of the appellant.

11. When the respondent was served with charge sheet dated 1.10.2007, he was posted as Chief General Manager, Rajmahal, Group of Mines, ECL. Shortly, after the service of charge sheet, respondent was made to join as Chief General

Manager, Mining in M-3 Grade on transfer and was posted as Chief General Manager, Production, MCL. On 9.2.2008, he was suspended from service under Rule 24.1. of the CDA Rules, pending departmental inquiry against him. This suspension, however, was revoked from 27.2.2009 without prejudice to the departmental inquiry. On completion of 60 years of age, the respondent was superannuated with effect from 31.7.2010 for which notice for retirement on superannuation was given by the appellant to the respondent vide letter dated 8.2.2010.

12. It would also be pertinent to mention that the inquiry against the respondent was concluded on 25.3.2009. However, thereafter nothing has been heard by the respondent. It is not known as to whether the Inquiry Officer has submitted the report on the said inquiry and if a report is submitted whether he has exonerated the respondent or held him guilty of the charges. Be as it may even if there is any report, no further action has been taken on the said report by the disciplinary authority till date and more than 4 ½ years have lapsed in the meantime.

13. On the aforesaid facts, the case of the respondent before the courts below was that his statutory rights to receive the gratuity could not be interdicted and as per the provisions of Payment of Gratuity Act he was entitled to have the payment of gratuity on his superannuation. Since, the appellant had referred to the Rules framed under which gratuity could be withheld pending inquiry, this position was sought to be countered by the respondent with a submission that such Rules which were non-statutory in nature could not thwart the right of the respondent to claim the gratuity which was statutorily recognised in his favour under the Payment of Gratuity Act, 1972. As noted above, while giving brief narration of facts, the High Court has accepted the aforesaid plea of the respondent and while doing so it has referred to the judgment of this Court in the case of *Jaswant Singh Gill* v. *Bharat Coking Coal Ltd. and Ors. (supra)*. Some of the judgment

before the High Court, which would be referred to at a later stage, have been distinguished by the High Court holding that they are not applicable.

14. The arguments of the learned Counsel for the respondent were same which were addressed before the High Court. Likewise, learned Counsel for the appellant also made the very same submissions. He argued that in view of Rule 34 of the CDA Rules, the management had a right to withhold payment of gratuity. He also submitted that this rule was not contrary to any provisions of the Payment of Gratuity Act. The submission in this behalf was that in Payment of Gratuity Act there is no provision that gratuity has to be released even when departmental proceedings are pending against an employee. The learned Senior Counsel for the appellant placed strong reliance on the judgment of this Court in *State Bank of India vs. Ram Lal Bhaskar and Anr*. ; 2011(11)SCALE 589; 2011(10)SCC249.

15. In so far as rule position is concerned, it is not in doubt that Rule 34 permits the management to withhold the gratuity during the pendency of the disciplinary proceedings. Rule 34.2 and 34.3 of the CDA Rules are relevant in this behalf which make the following reading:

> "34.2. Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.
>
> 34.3. During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovering from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/ misconduct as mentioned in Sub-

> section (6) of Section 4 of the payment of gratuity act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act 1972 should be kept in view in the event of delayed payment in the case the employee is fully exonerated."

16. The bone of contention is as to whether this rule is contrary to the provisions of the Payment of Gratuity Act and, therefore, this rule being non-statutory is to be ignored and the provisions of the Gratuity Act are to be preferred. In this behalf we will have to examine the scheme of the Gratuity Act to find whether as per the Gratuity Act, such a person like the respondent, would become entitled to receive the gratuity under this Act.

17. It is because of the reason that a statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature.

18. It would be of interest to note that the inter play of these **very** CDA Rules, 1978 of CIL and the Provisions of Gratuity Act came for consideration in the case of *Jaswant Singh Gill* (supra) and this Court explained the legal position of CDA Rules vis-a-vis Gratuity Act/ gratuity of an employee in the following manner:-

> "The Act was enacted with a view to provide for a scheme for payment of gratuity to employees engaged inter alia in mines. Section 3 of the Act provides for appointment of an officer to be the controlling authority. Controlling authority is to be responsible for administration of the act. Different authorities, however, may be appointed for different areas. Section 4 of the Ac

to gratuity after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub-Section (6) of Section 4 contains a non-obstante clause stating:

> (a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;
>
> (b) the gratuity payable to an employee may be wholly or partially forfeited
>
> (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act or violence on his part, or
>
> (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

9. The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent No. 1. The provisions of the Act, therefore, must prevail over the Rules. Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule

34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed. Power to withhold penalty contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefore is rendition of five years continuous service. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrial benefits or gratuity.

10. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, Sub-section (6) of Section 4 of the Act contains a non- obstante clause vis. Sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to Respondent No. 1 was

of gratuity payable to the appellant. Clause (b) of Sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied. Termination of services for any of the causes enumerated in Sub-section (6) of Section 4 of the Act, therefore, is imperative."

19. The principles which are laid down in the aforesaid judgment are recapitulated below:-

(i) No doubt, Rule 34.2 of CDA Rules provides for continuation of disciplinary proceedings despite retirement of an employee if the same was initiated before his retirement However, after his retirement, major penalty in terms of Rule 27 cannot be imposed. We may state here that rule 27 of CDA Rules provides for the nature of penalties including 'recovery from pay or gratuity of the whole part of any back loss cause to the company by negligence or breach of orders for trust'. Major penalties which are prescribed under Rule 27 are reduction to a lower grade, compulsory retirement, removal from service and dismissal. The Court thus, held that these major penalties cannot be imposed upon a retired employee.

(ii) Gratuity Act gives right to an employee to receive gratuity on rendition of 5 years continuous service. Gratuity become payable as soon as the employee retires. This statutory right which accrues to an employee cannot be impaired by reason of a rule which does not have the force of a statute. Therefore, Rule 34.3 of the CDA Rules, which is

non-statutory in nature, is contrary to the provisions of the Gratuity Act. As such, gratuity cannot be withheld on the retirement of an employee even if departmental proceedings were initiated against him before his retirement and are pending at the time of retirement.

20. *Jaswant Singh Gill* (supra) was a judgment delivered by two judge Bench. Mr. Mahavir Singh, learned senior counsel has placed strong reliance to a three Bench judgment of this Court which is later in point of time. This case is known as *State Bank of India* vs. *Ram lal Bhaskar and Anr*. **2011(10)SCC249**. In that case, Rule 19(3) of the State Bank of India Officers Service Rules, 1992 came up for interpretation which was *para materia* with rule 13.42 of the CDA Rules. Said rule 19(3) of SBI Officers Service Rules also permits disciplinary proceedings to continue even after the retirement of an employee if those were instituted when the delinquent employee was in service. Then for the purpose of such proceedings the otherwise retired employee is deemed to be in service and those proceedings shall be continued and concluded as if the employee had continued in service. Thus, such an employee is deemed to be in service for limited and specified purpose only viz. for the purposes of continuance and conclusion of the proceedings. In that case, charge sheet was served upon the respondent before his retirement. The proceedings continued after his retirement and were conducted in accordance with relevant rules wherein charges were proved. On that basis punishment of dismissal was imposed. After exhausting the departmental remedies, the respondent filed the writ petition in the High Court which was allowed and order of dismissal was quashed. This Court reversed the said decision of the High Court. However, we find that there is no direct discussion, in the said judgment, on the issue as to whether it is permissible for the disciplinary authority to impose the penalty of dismissal of service after the retirement of the employee. In fact the Court had dealt with two aspects. One

deliberated was as to whether inquiry could continue after the retirement of the respondent from service. This question was answered in the affirmative having regard to Rule 19(3) of the SBI Officers Service Rules. The Court distinguished another judgment in *UCO Bank & Anr. vs. Rajinder Lal Capoor;* 2007(6)SCC694 on a ground that in the said case the delinquent officer had already been superannuated and the charge sheet was served after his retirement. In these circumstances the court had taken the view in Rajinder Lal Capoor's case that when an employee is allowed to superannuate, no inquiry can be initiated against him thereafter. However, if charge sheet is served before the retirement enquiry can continue even after the retirement as per Rule 19(3). This proposition thus stands settled viz. if the Rules permit, enquiry can continue even after the retirement of the employee.

21. Other aspect which was dealt with was as to whether the High Court could interdict the findings of disciplinary authority and arrive at its conclusion that the findings recorded by the Inquiry Officer was not substantiated by any officer on record on the basis of evidence produced. This Court held that so long the findings of the disciplinary authority are supported by some evidence, the High Court is not empowered to re-appreciate the evidence as an appellate authority and came to a different and independent findings on the basis of that evidence. This is not the issue before us in the instant case.

22. It is thus, clear that the question as to whether penalty of dismissal could be imposed after a retirement was not categorically raised or dealt with. No doubt, penalty of dismissal was inflicted upon the employee in that case. But it was not specifically on in clear terms contended that such a penalty could not be imposed on an employee who is already permitted to retire. At the same time, innuendo, the judgment gives a semblance of indication that such a penalty is permissible because of the reason that as per the rules, for the purposes of enquiry, the employee shall be deemed to be in service. As

a sequittor, one can deduce the principle that when the Rules, by creating fiction, treat the officer still in service, albeit for the limited purpose of the continuance and conclusion of such proceedings, then any of the prescribed penalties, including dismissal, can be imposed. However, as we have pointed out above, the issue of permissibility of penalty of dismissal on such a retired official was neither raised nor any direct discussion followed thereupon. At the same time, fact remains that penalty of dismissal, even after the retirement, was upheld. This goes contrary to the dicta laid down in *Jaswant Singh Gill* (supra) which took the view that no major penalty is permissible after retirement was not even referred to.

23. The issue which confronts us in the instant appeal is as to whether gratuity can be withheld in the wake of Rule 34 of CDA Rules when examined in juxtaposition with the provisions of the Gratuity Act. To put it otherwise, whether in the scheme of Gratuity Act, gratuity has to be necessarily released to the concerned employee on his retirement even if departmental proceedings are pending against him. We find that Jaswant Singh Gill's case directly answers this question, that too in the context of these very CDA Rules. However, it is because of the reason that the said judgment proceeds on the basis that after the retirement of an employee, penalty of dismissal cannot be imposed upon the retired employee. If this view is not correct and the imposition of penalty of dismissal is still permissible, employer will get the right to forfeit the gratuity of such an employee in the eventualities provided under Sections 4(1) & 4 (6) of the Payment of Gratuity Act which reads as under:-

Section 4 - Payment of gratuity

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to hi m shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation.—For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(6) Notwithstanding anything contained in sub-section (1),—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer' shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited]—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by hi m in the course of his employment.

24. Thus for invoking Clause (a) or (b) of sub-section 6 of Section 4 necessary pre-condition is the termination of service on the basis of departmental enquiry or conviction in a criminal case. This provision would not get triggered if there is no termination of services.

25. It is the case of the appellant that in the charge sheet served upon the respondent herein, there are very serious allegations of misconduct alleging dishonestly causing coal stock shortage amounting to Rs. 31.65 crores, and thereby causing substantial loss to the employer. If such a charge is proved and punishment of dismissal is given thereupon, the provisions of Section 4(6) of the Payment of Gratuity would naturally get attracted and it would be within the discretion of the appellant to forfeit the gratuity payable to the respondent. As a corollary one can safely say that the employer has right to withhold the gratuity pending departmental inquiry. However, as explained above, this course of action is available only if disciplinary authority has necessary powers to impose the penalty of dismissal upon the respondent even after his retirement. Having regard to our discussion above of *Jaswant Singh Gill* (supra) and *Ram Lal Bhaskar* (supra), this issue needs to be considered authoritatively by a larger Bench. We, therefore, are of the opinion that present appeal be decided by a Bench of three Judges.

26. We accordingly direct the Registry to place the matter before Hon'ble the Chief Justice for constituting a larger Bench to hear this appeal.

K.K.T. Appeal referred to Larger Bench.

STATE OF HARYANA AND ORS.
v.
SITA RAM AND ORS.
(Civil Appeal Nos. 5411-5430 of 2009)

OCTOBER 29, 2013

[G.S. SINGHVI AND C. NAGAPPAN, JJ.]

Service Law:

Haryana Civil Services (Assured Career Progression) Rules, 1998 – r.5(1) and (2) – Benefit under – Whether can be granted by treating the work charge service as regular service – Held: Cannot be granted, because as per rules, a service can be treated as regular service only if there is regular recruitment in accordance with the prescribed procedure or rules – This is in total contrast with work-charge service.

The respondent-employees of the appellant-State approached the High Court seeking benefit under Haryana Civil Services (Assured Career Progression) Rules, 1998, by counting their work charge service as regular service. The same was granted by High Court. Hence the present appeals by the State.

Allowing the appeals, the Court

HELD: The Division Benches of the High Court committed an error by directing the appellants to treat work charge service of the respondents as part of regular service for the purpose of Rule 5(1) and (2) of the Haryana Civil Services (Assured Career Progression) Rules, 1998. The reasons recorded by the Division Bench of the High Court for granting relief to the respondents are legally untenable, and the same are based on erroneous

interpretation of the expression "regular satisfactory service" used in Rule 5(1) and (2) of the 1998 Rules. The note appearing below Rule 5(2) makes it clear that the expression "regular satisfactory service" means continuous service counting towards seniority under Haryana Government, including continuous service in Punjab Government, before reorganization, commencing from the date on which the Government servant joins service after being recruited through the prescribed procedure or rules, etc., for regular recruitment in the particular cadre. It is, thus, evident that the rule making authority has laid emphasis on regular recruitment in accordance with the prescribed procedure or rules as a condition for treating the particular service as regular service. This is in total contrast to work charge service which is always in work charge establishment and is not preceded by regular selection made in accordance with any set of rules framed under proviso to Article 309 of the Constitution or executive instructions. It is also not incumbent upon the competent authority to advertise the availability of work/post in the work charge establishment or send requisition to the employment exchange as per the requirement of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. Not only this, the conditions of appointment of work charge employees are altogether different from those who are regularly recruited in accordance with the rules framed under proviso to Article 309 or executive instructions issued by the State under Article 162 of the Constitution and whose service is treated as regular service. [Paras 11 and 18] [545-H; 546-A-G]

State of Rajasthan vs. Kunji Raman **(1997) 2 SCC 517: 1996 (10) Suppl. SCR 255;** *State of Haryana vs. Haryana Veterinary and AHTS Association* **(2000) 8 SCC 4: 2000 (3) Suppl. SCR 322;** *Punjab State Electricity Board vs. Jagjiwan Ram* **(2009) 3 SCC 661: 2009 (3) SC** *d*

vs. State of Punjab, Recent Service Judgments **(1950-1988) Vol.1 433 – relied on.**

Jaswant Singh vs. Union of India **(1979) 4 SCC 440: 1980 (1) SCR 420;** *State of Punjab vs. Ishar Singh* **(2002) 10 SCC 674 – referred to.**

Case Law Reference:

1996 (10) Suppl. SCR 255	**relied on**	**Para 7**
2000 (3) Suppl. SCR 322	**relied on**	**Para 7**
2009 (3) SCR 209	**relied on**	**Para 7**
(1950-1988) Vol.1 433	**relied on**	**Para 8**
1980 (1) SCR 420	**referred to**	**Para 13**
(2002) 10 SCC 674	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5411-5430 of 2009.

From the Judgment & Order dated 08.07.2004 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. Nos. 12497, 13299, 17222, 17525, 17526, 17527, 18096, 15318, 15330, 15517, 15563, 16354, 16317, 16316, 16121, 12702 of 2002, 3157, 3442, 3564 & 4266 of 2003.

WITH

C.A. Nos. 5431-5441, 5442-5459, 5460-5479, 5480-5499, 5500-5516, 5517, 5518-5537, 5538, 5539, 5541, 5543, 5544, 5545 of 2009 & 912 of 2010.

Neeraj Jain, Anubha Agarwal, Ambuj Agarwal for the Appellants.

Dinesh Kumar Garg, Ajay K. Singh, Sanjeev K. Saroha, Vikas Batra, R.C. Kaushik, Naresh Kaushik, Lalita Kaushik, Varinder Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the work charge service of the respondents can be treated as regular service for the purpose of grant of benefit under the Haryana Civil Services (Assured Career Progression) Rules, 1998 (for short, 'the 1998 Rules') is the question which arises for consideration in these appeals filed against the orders passed by the Division Benches of the Punjab and Haryana High Court.

2. The respondents in all the appeals except Civil Appeal No.5544 of 2009, which has been filed by Haryana Urban Development Authority, were engaged as work charge employees in different branches of the Public Works Department of the Government of Haryana between 1966 and 1984. Their conditions of employment were governed by the provisions contained in PWD Code, paragraphs 1.129 and 1.132 of which are reproduced below:

"II-Work-Charged Establishment

1.129. Works establishment will include such establishment as is employed upon the actual execution, as distinct from the general supervision, of a specific work, of or sub-works of a specific project, or upon the subordinate supervision of departmental labour, stores and machinery in connection with such work or sub-works, provided that as an exception to the above, mistries and mates employed in the interests of Government on the technical supervision of contractors work and khalasis attached to subordinates for assisting them on works will be treated a work-charged establishment. When employees borne on the temporary-establishment are employed on work of this nature, their pay should, for the time being be charged direct, to the work.

(2) Works establishment does not include Clerks, Draftsman, Subordinate or extra es d

for the Divisional or Sub-Divisional Offices, such being properly chargeable to Temporary Establishment, but where Dak Runners are employed solely for a particular work of a temporary nature, for a period not exceeding six months, they may be treated as work-charged establishment.

(3) The Chief Engineer and Superintending Engineers are empowered to classify as "Works" or "Temporary" those classes of establishment about whose correct definition there is doubt, subject to the concurrence of the Audit Officer and to the proviso the general principles for entertainment of such establishment are not infringed.

(4) Chief and Superintending Engineer are authorized to waive the rule which requires that works establishments must be employed on a specific work and to determine, in such cases the properties in which the cost of such establishment shall be allocated between the works concerned.

Note - As an exception to the general rule, the cost of Khalasis attached to subordinate may be charged to annual maintenance and Repairs and other estimates in such provision for it has been made with the sanction of the Superintending Engineer, or the Chief Engineer, Electricity Branch, as the case may be.

(5) The cost of the works establishment must be shown as a separate sub-head of the estimate for a work.

(6) All pay bill for work-charged establishment shall be pre-audited by the Divisional Accountant and approved by the Divisional Officer before payment. Before a member of the work-charged establishment, whose services have been dispensed with, is settled up under paragraph 303 of the Pubic Works Account code, the Sub-Divisional Officer should invariably ascertain from the Divisional Office if

there are any out standings against the man.

(7) Members of the work-charged establishment, other than Road Inspectors, who are engaged on the footing of monthly services will be subject to discharge at 10 days' notice except in the case of serious misconduct or gross inefficiency (when no notice will be given) or on payment of pay for 10 days or for such period up to this extent as may be due to them in lieu of notice. Should they desire to resign will be required to give 10 days notice or forfeit pay for this period or for such period up to this extent as may be due to them in lieu of notice.

1.130 to 1.131 xxx xxx xxx

1.132. A work-charged employee is not entitled to any pension, leave or travelling or other allowances except in the following cases :-

(i) (a) Short casual leave upto a limit not exceeding 15 days in calendar year, subject to a maximum of 10 days at any one time, on full pay at the discretion of the Sub-Divisional Officer and under ordinary rules for casual leave to ordinary-establishment. This leaves will not be cumulative and will not be given in combination with leave without pay. This leave will be calculated on basis of the calendar year, but where an appointment is made during the course of a year, the amount of leave admissible will be calculated proportionately for the broken period.

(b) Holidays to the community for whom a particular day is held sacred, restricted to five days, in a calendar year in the case of each community, the employees concerned being allowed to select the religious festivals on which they would like to enjoy the concession; provided that not more than half of gang employed on roads should be absent at one time.

(c) Alternate Sundays not mo e

establishment to be absent on any one Sunday. The above concessions do not apply to casual labour on daily wages.

(ii) At the discretion of the Divisional Officer, actual travelling expenses not exceeding a single railway fare of the class, to which regular Government servants drawing the same pay are entitled, in case of places connected by rail and actual travelling expenses duly supported by original bus tickets, in case in places not connected by rail, for journeys, performed within the Punjab or to a bordering State or settlement in the interest of the work on which he is employed.

"Halting allowance should be allowed to work-charged Establishment at the same rates as are admissible to his counterpart in the regular establishment when a, person spends the night away from his headquarters. No daily allowance will be admissible in case the person returns to his headquarters and does not spend the night out."

(iii) Transfer travelling allowance, i.e., single railway fare or actual travelling including the cost of carriage of personal effects to Road Inspectors, Road Roller Drivers and Fireman, Mistries (including Electric Mistries), Electric Mechanics and employees on the work-charged establishment in the Public Health Circle for themselves and dependent members of their families who are not males of over 18 years of age on the occasion of their transfer in cases of sheer necessity in the public interest, subject to the following conditions: -

(a) the limits of travelling allowances relating to the cost of carriage of personal effects and the class of railway accommodation admissible to regular Government servants of the same grades are not exceeded;

(b) the grant of travelling allowance will be at the discretion of the Divisional Officer;

(c) the transfer is from one place to another, except in the case of Road Roller Drivers and Firemen when travelling allowance will only be allowed for transfer from one division to another;

(d) the journey performed is in the interest of work on which the man is employed and not as a disciplinary measure.

(iv) Wound and other extraordinary pensions and gratuities in certain cases;

(v) Grain compensation allowance;

(vi) Compensation under Workmen's Compensation Act, 1923 and ex-gratia payment of the amount which would have been statutorily payable if the accident had occurred in British India in respect of accidents which happen to the Punjab Public Works Department employees of the Irrigation and Buildings and Roads Branches in the tracts to which the Act has not yet been-applicable.

Note (1) — This rule does not apply to members of the temporary establishment whose pay is charged to works under paragraph 1.131 of this Code. The leave salaries, travelling and other allowances of such establishment are regulated by the rules applicable to temporary establishment.

Note (2) — Rules for the recovery of rent from work-charged establishment are contained in paragraph 3.28."

3. With a view to give relief to the employees, who were stagnating on their posts due to non-availability of promotional avenues, the Government of Haryana framed scheme dated 14.5.1991 for grant of additional increments to all Grade 'C' and 'D' employees on completion of 10 and 20 years service. Another scheme was introduced on 7.8.1992 for grant of additional increments to Group 'C' and 'D' em[illegible]n

of 8 and 18 years service. Yet another scheme was introduced by the State Government on 8.2.1994 for grant of higher standard pay scales to Group 'C' and 'D' employees on completion of 10 years or more and 20 years or more regular satisfactory service. After 4 years, the Governor of Haryana framed the 1998 Rules. Rules 1, 3(b), 3(d), 3(e), 3(q), 3(r) and 5 of those rules read as under:

"**1. Short title, commencement and objective:-** (1) These rules may be called the Haryana Civil Services (Assured Career Progression) Rules 1998.

(2) They shall be deemed to have come into force on the first day of January, 1996, unless otherwise provided by the Government for any class or category of persons.

(3) The objective of these rules is to provide such of Government servants who fall within the scope of these rules, at least two financial upgradations, including the financial upgradation, if any, availed by such Government servants as a consequence of the functional promotion, within the corresponding prescribed period of length of service during his entire career, as may be specified under these rules or by the Government from time to time within these rules, with reference to the functional pay scale of the post on which he joined the Government service as a direct recruited fresh entrant.

3. DEFINITIONS:- In these rules, unless the context otherwise requires –

(b) **"direct recruited fresh entrant"** with reference to a post or a Government servant means the post on which such Government servant was recruited as a regular and direct recruitee in the Government service and is in continuous employment of Government since such recruitment;

(d) **"functional pay scale"** in relation to a Government servant means the pay scale which is prescribed for the post held by the Government servant. It does not mean any other pay scale in which the Government servant is drawing his pay as a personal measure to him with any other justification like based on length of service, or on higher/ additional qualification or on upgradation of pay scale due to any other reason.

(e) **"first assured career progression scale"** with reference to -

(i) Government servant means the revised scale as mentioned in column 3 of Part I of Schedule I against the name of post(s) in column 2 of Part I of Schedule I, on which the Government servant was recruited as a direct recruited fresh entrant in the Government service,

(ii) all other Government servants not covered in sub-clause (i) above but on whom these rules apply, the pay scale as mentioned in column 3 of Part II of Schedule I against the pay scale mentioned in column 2 of Part II of Schedule I, as the corresponding existing scale prescribed for the post against which such Government servant was recruited as a direct recruited fresh entrant in the Government service.

Provided that the First Assured Career Progression scale may also be referred to as 1st ACP scale or ACP-I scale.

(q) **"second assured career progression scale"** with reference to -

(i) Government servant means the revised scale as mentioned in column 4 of Pa[illegible]st

the name of post(s) in column 2 of part I of schedule I, on which the Government servant was recruited as a direct recruited fresh entrant in the Government service;

(ii) all other Government servants not covered in sub-clause (i) above but on whom these rules apply, the pay scale as mentioned in column 4 of Part II of Schedule I against the pay scale mentioned in column 2 of Part II of Schedule I, as the corresponding existing pay scale prescribed for the post against which such Government servant was recruited as a direct recruited fresh entrant in the Government service:

Provided that the Second Assured Career Progression Scale may also be referred to as 2nd ACP scale or ACP-II scale.

(r) **"standard pay scale"** (as it is or with the prefix "First" or "Second", as the case may be) with respect to any Government servant means the scale of pay, other than the existing pay-scale prescribed for the post on which such Government servant is working, in which the Government servant was drawing his pay prior to 31.12.1995 and also any pay scale granted to him for the purposes of drawing his pay as "pay scale as a personal measure to him" as defined under these rules through any other order/ notification of the Government or with any other reason;

5. Eligibility for Grant of ACP Scales:- (1) Every Government servant who, after a regular satisfactory service for a minimum period of 10 years, if the minimum period is not otherwise prescribed to be different than 10 years either in these rules or by the Government for any class or categories of Government servant from time to time, has not got any financial upgradation in terms of grant of a pay scale higher than the functional pay scale

prescribed for the post as on 31.12.1995, on which he was recruited as a direct recruited fresh entrant:-

(a) either as a consequence of his functional promotion in the hierarchy, or

(b) as a consequence of the revision of pay scale for the same post, or

(c) as a consequence of any other event through which the functional pay scale of the post has been upgraded, with respect to the functional pay scale prescribed for the post as on 31.12.1995,

shall for the purposes of drawal of pay, be eligible for placement into the First ACP scale with reference to him.

(2) Every Government servant who, after a regular satisfactory service for a minimum period of 20 years, if the minimum period is not otherwise prescribed to be different than 20 years either in these rules or by the Government for any class or categories of Government servant from time to time, has not got more than one financial upgradation in terms of grant of a pay scale higher than the functional pay scale prescribed for the post as on 31.12.1995 on which he was recruited as a direct recruited fresh entrant:-

(a) either as a consequence of his functional promotion in the hierarchy, or

(b) as a consequence of the revision of pay scale for the same post, or

(c) as a consequence of any other event through which the functional pay scale of the post has been upgraded, with respect to the functional pay scale prescribed for the post as on 31.12.1995,

shall for the purposes of drawal of pay, be eligible for placement into the Second ACP scale with reference to him;

Provided that grant of ACP scale shall also be considered financial upgradation for the purposes of this rule.

Note: For the purposes of these rules, "regular satisfactory service" would mean continuous service counting towards seniority under Haryana Government, including continuous service in Punjab Government before re-organisation, commencing from the date on which the Government servant joined his service after being recruited through the prescribed procedure or rules etc. for regular recruitment, in the cadre in which he is working at the time of being considered his eligibility for grant of ACP scales under these rules and further fulfilling all the requirements prescribed for determining the suitability of grant of ACP scales.

EXPLANATION: The ACP scale upgradation will come into play only if due to functional promotion or upgradation of scale for the same post as specified above, the Government servant has not got the benefit of at least one pay scale upgradation within the prescribed period of 10 years or any other prescribed period for the grant of 1st ACP scale or two such financial upgradations within a period of 20 years or within the period otherwise specified for grant of second ACP scale. If within 10 years of service or within the prescribed period of service for the grant of 1st ACP, the employee has already got at least one financial upgradation or within 20 years of service, as the case may be, or otherwise prescribed period of service for the grant of second ACP scale, the Government servant has already got at least two financial upgradations, benefit of these rules will not be extended to such employees save if otherwise provided in these rules.

(3) For determining the eligibility of grant of ACP Scale, following conditions must also be fulfilled by the Government servant:-

(a) After completing the respective prescribed period for eligibility for the grant of ACP scales the Government servant should be fit to be promoted to the next higher post in the functional hierarchy in his cadre, but could not be functionally promoted due to lack of vacancy in the promotional post in the hierarchy to which he is eligible to be promoted;

(b) If such promotion involves test of any departmental post or other test etc. such condition should also be fulfilled by such Government servant.

(4) The eligibility for grant of the ACP scales shall further be subject to any other restriction as may be prescribed by the Government from time to time including the restriction of the number of Government servant to be granted the respective ACP scales in terms of percentage of posts in the cadre to which such ACP placements shall be limited;

Provided that till the time such restrictions are not imposed by the Government -

(a) there shall be no restriction on the number of Government servants to be granted the first or second ACP scales with reference to the Government servants covered in sub-rule (2) of rule 4.

(b) for the Government servants covered in sub-rule (1) of rule 4, there shall be no restriction on the number of Government servants for grant of first ACP scale. However, the grant of the second ACP scale for such Government servants as covered in

sub-rule (1) of rule 4 shall be limited to 20% of the total posts in the cadre."

4. Since there was a lot of confusion on the issue of counting of work charge / ad-hoc service of the employees for the purpose of grant of ACP scales, increments, etc., the State Government issued office memorandums dated 15.3.2002 and 27.6.2002 and clarified that the ad-hoc and work charge service cannot be equated with regular service for the purpose of grant of additional increments or benefit of ACP scales.

5. Some of the work charge employees filed writ petitions before the High Court for grant of benefit under the 1998 Rules. The Division Bench of the Punjab and Haryana High Court dismissed CWP Nos. 18444/2002 Prem *Chand and others v. State of Haryana and others* and CWP No.18578/2002 *Ved Pal and others v. State of Haryana* by observing that Rule 5(1) of the 1998 Rules talks of regular satisfactory service which cannot possibly include work charge service. However, another Division Bench of the High Court allowed a batch of writ petitions vide order dated 8.7.2004, the operative portion of which reads as under:

"For the reasons afore-stated we allow these Writ Petitions and direct the State Government to consider the cases of the Petitioners in CWP Nos. 14400 of 2001, 1235 of 2002 and 13749 of 2003 for payment of additional increments under public policies of 1992 and 1994. Further, we also direct the State Government to consider and grant to the petitioners in other Writ Petitions the ACP first and second scales in accordance with Rules and after counting the services rendered by them on work charge basis. Thus, we also quash the show cause notices issued by the Respondents for reduction of scales of the Petitioners and/ or the orders passed after service of show cause notice reducing the pay scales of the Petitioners as well as the recoveries made in furtherance thereto."

6. By relying upon the aforesaid order, other Division Benches of the High Court allowed similar petitions vide orders dated 28.4.2005, 25.8.2005, 13.9.2005, 29.11.2005 and 7.12.2006.

7. Shri Neeraj Jain, learned senior counsel for the appellants argued that the impugned orders are liable to be set aside because the same are contrary to the law laid down by this Court in *State of Rajasthan v. Kunji Raman* (1997) 2 SCC 517, *State of Haryana v. Haryana Veterinary and AHTS Association* (2000) 8 SCC 4 and *Punjab State Electricity Board v. Jagjiwan Ram* (2009) 3 SCC 661. Learned senior counsel argued that work charge service cannot be treated as part of regular service because there is a marked distinction between appointments made on work charge basis and regular basis. He pointed out that work charge employee is engaged without any selection whereas regular appointment is always preceded by regular selection made in accordance with the relevant rules or administrative instructions after issuing appropriate advertisement and sending requisition to the employment exchange. Shri Jain submitted that the directions given by the Division Benches of the High Court are legally unsustainable because while entertaining the claim of work charge employees for grant of benefit under the 1998 Rules, they completely overlooked the distinction between two types of services. Learned senior counsel distinguished order dated 31.10.2000 passed by this Court in Civil Appeal Nos.5740-5741/1997 State of Haryana and others v. Ravinder Kumar and others by pointing out that the said order was not based on the interpretation of Rule 5 of the 1998 Rules.

8. Shri Dinesh Kumar Garg, learned counsel for the respondents argued that the order passed in Ravinder Kumar's case has direct bearing on the respondents' case and the High Court rightly relied upon the same for declaring that work charge service should be treated as regular service for the purpose of ACP scales. Shri Garg also relied upo[illegible]e

Punjab Civil Services Rules Vol.II, the judgment of the Full Bench of the High Court in Kesar Chand v. State of Punjab, Recent Service Judgments (1950-1988) Vol.I, 433 and argued that once work charge service is treated as part of qualifying service for the purpose of grant of retiral benefits, there can be no rationale or justification not to count that service for the purpose of grant of ACP scales.

9. We have considered the respective arguments. A careful reading of order dated 8.7.2004, which is under challenge in Civil Appeal Nos.5411-5430/2009 and batch shows that after taking cognizance of the judgment of the Full Bench in Kesar Chand's case, the Division Bench observed as under:

> "In the light of the above observations of the Full Bench of this Court we are of the considered view that these work charged employees have been serving for a considerable period in their respective departments. They were getting the regular pay scales as provided under the Rules. This class of employees was also exposed to hostility of stagnation. Thus, to decline the benefit of providing increments under the schemes would patently be unfair and unjust. The physical reality that emerges in the recent time is that these employees are also the regular employees of the State of Haryana and have been continuously serving the State for more than the prescribed period. The mere fact that some part of their service is on work-charged basis, though under the conditions stipulated in the code, would not divest them of a legitimate right which otherwise accrues in their favour."

10. The Division Bench then relied upon the order passed by this Court in Ravinder Kumar's case and held that the writ petitioners are entitled to relief in similar terms.

11. In our opinion, the reasons recorded by the Division Bench of the High Court for granting relief to the respondents

are legally untenable and the impugned orders are liable to be set aside because the same are based on erroneous interpretation of the expression "regular satisfactory service" used in Rule 5(1) and (2) of the 1998 Rules. The note appearing below Rule 5(2) makes it clear that the expression "regular satisfactory service" means continuous service counting towards seniority under Haryana Government, including continuous service in Punjab Government, before reorganization, commencing from the date on which the Government servant joins service after being recruited through the prescribed procedure or rules, etc., for regular recruitment in the particular cadre. It is, thus, evident that the rule making authority has laid emphasis on regular recruitment in accordance with the prescribed procedure or rules as a condition for treating the particular service as regular service. This is in total contrast to work charge service which is always in work charge establishment and is not preceded by regular selection made in accordance with any set of rules framed under proviso to Article 309 of the Constitution or executive instructions. It is also not incumbent upon the competent authority to advertise the availability of work/post in the work charge establishment or send requisition to the employment exchange as per the requirement of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. Not only this, the conditions of appointment of work charge employees are altogether different from those who are regularly recruited in accordance with the rules framed under proviso to Article 309 or executive instructions issued by the State under Article 162 of the Constitution and whose service is treated as regular service.

12. The distinction between work charge establishment and regular establishment was aptly highlighted in Kunji Raman's case in the following words:

> "A work-charged establishment as pointed out by this Court in *Jaswant Singh v. Union*

440 broadly means an establishment of which the expenses, including the wages and allowances of the staff, are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works. The work-charged employees are engaged on a temporary basis and their appointments are made for the execution of a specified work. From the very nature of their employment, their services automatically come to an end on the completion of the works for the sole purpose of which they are employed. Thus a work-charged establishment is materially and qualitatively different from a regular establishment.

A work-charged establishment thus differs from a regular establishment which is permanent in nature. Setting up and continuance of a work-charged establishment is dependent upon the Government undertaking a project or a scheme or a "work" and availability of funds for executing it. So far as employees engaged in work-charged establishments are concerned, not only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. A regular establishment and a work-charged establishment are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged in the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government."

(emphasis added)

13. In *Punjab State Electricity Board v. Jagjiwan Ram* (supra), this Court considered whether work charge service is synonymous with regular service and whether two services can be clubbed for grant of time bound promotional scale/increment etc., referred to the judgments in *Jaswant Singh v. Union of India* (1979) 4 SCC 440, *Kunji Raman's* case and observed:

"Generally speaking, a work-charged establishment is an establishment of which the expenses are chargeable to works. The pay and allowances of the employees who are engaged on a work-charged establishment are usually shown under a specified sub-head of the estimated cost of works. The work-charged employees are engaged for execution of a specified work or project and their engagement comes to an end on completion of the work or project. The source and mode of engagement/ recruitment of work-charged employees, their pay and conditions of employment are altogether different from the persons appointed in the regular establishment against sanctioned posts after following the procedure prescribed under the relevant Act or rules and their duties and responsibilities are also substantially different than those of regular employees.

The work-charged employees can claim protection under the Industrial Disputes Act or the rights flowing from any particular statute but they cannot be treated on a par with the employees of regular establishment. They can neither claim regularisation of service as of right nor can they claim pay scales and other financial benefits on a par with regular employees. If the service of a work-charged employee is regularised under any statute or a scheme framed by the employer, then he becomes member of regular establishment from the date of regularisation. His service in the work-charged establishment cannot be clubbed with service in a regular establishment unless a specific provision to that effect is made [illegible]t

statute or the scheme of regularisation. In other words, if the statute or scheme under which service of work-charged employee is regularised does not provide for counting of past service, the work-charged employee cannot claim benefit of such service for the purpose of fixation of seniority in the regular cadre, promotion to the higher posts, fixation of pay in the higher scales, grant of increments, etc."

(emphasis added)

14. We may now advert to the judgment in *State of Haryana v. Haryana Veterinary and AHTS Association* (supra). The facts of that case were that one Rakesh Kumar Singla, who joined service as Assistant Engineer on ad-hoc basis on 4.1.1980, was appointed on regular basis with effect from 29.8.1982 after selection by the Public Service Commission. He represented to the Government for grant of selection grade on completion of 12 years' service commencing from 4.1.1980. Having failed to convince the competent authority to accept his plea, Rakesh Kumar Singla filed a writ petition in the High Court. The Division Bench, which heard the matter was of the view that the service rendered by the appellant on the basis of an ad-hoc appointment cannot be counted as part of regular service. However, keeping in view an earlier judgment in which a contrary view was expressed, the Division Bench made a reference to a three Judge Bench. By a majority judgment, the larger Bench held that the service rendered by an employee on the basis of ad-hoc appointment must be clubbed with his regular service for the purpose of grant of selection grade in terms of the policy framed by the State Government. This Court reversed the judgment of the majority and observed:

"Coming to the Circular dated 2-6-1989, issued by the Financial Commissioner and Secretary to the Government of Haryana, Finance Department, it appears that the aforesaid circular had been issued for removal of

anomalies in the pay scale of Doctors, Deputy Superintendents and Engineers, and so far as Engineers are concerned, which are in Class I and Class II, it was unequivocally indicated that the revised pay scale of Rs 3000 to Rs 4500 can be given after completion of 5 years of regular service and Rs 4100 to Rs 5300 after completion of 12 years of regular service. The said Financial Commissioner had issued yet another Circular dated 16-5-1990, in view of certain demands made by officers of different departments. The aforesaid circular was issued after reconsideration by the Government modifying to some extent the earlier Circular of 2-6-1989, and even in this circular it was categorically indicated that so far as Engineers are concerned, they would get Rs 3000 to Rs 4500 after 5 years of regular and satisfactory service and selection grade in the scale of pay of Rs 4100 to Rs 5300, which is limited to the extent of 20% of the cadre post should be given after 12 years of regular and satisfactory service. The aforesaid two circulars are unambiguous and unequivocally indicate that a government servant would be entitled to the higher scale indicated therein only on completion of 5 years or 12 years of regular service and further the number of persons to be entitled to get the selection grade is limited to 20% of the cadre post. This being the position, we fail to understand how services rendered by Rakesh Kumar from 1980 to 1982, which was purely on ad hoc basis, and was not in accordance with the statutory rules can be taken into account for computation of the period of 12 years indicated in the circular. The majority judgment of the High Court committed serious error by equating expression 'regular service' with 'continuous service'. In our considered opinion under the terms and conditions of the Circulars dated 2-6-1989 and 16-5-1990, the respondent Rakesh Kumar would be entitled for being considered to have the selection grade on completion of 12 years from 29-1-1982 on which date he was duly appointe[illegible]y

post of Assistant Engineer on being selected by the Public Service Commission and not from any earlier point of time. The conclusion of the majority judgment in favour of Rakesh Kumar, therefore, cannot be sustained."

(emphasis added)

The Court then referred to the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970 and held:

"A combined reading of the aforesaid provisions of the Recruitment Rules puts the controversy beyond any doubt and the only conclusion which could be drawn from the aforesaid Rules is that the services rendered either on an ad hoc basis or as a stopgap arrangement, as in the case in hand from 1980 to 1982, cannot be held to be regular service for getting the benefits of the revised scale of pay or of the selection grade under the Government Memorandum dated 2-6-1989 and 16-5-1990, and therefore, the majority judgment of the High Court must be held to be contrary to the aforesaid provisions of the Recruitment Rules, consequently cannot be sustained. The initial letter of appointment dated 6-12-1979 pursuant to which respondent Rakesh Kumar joined as an Assistant Engineer on an ad hoc basis in 1980 was also placed before us. The said appointment letter unequivocally indicates that the offer of appointment as Assistant Engineer was on ad hoc basis and Clauses 1 to 4 of the said letter further provides that the appointment will be on an ad hoc basis for a period of 6 months from the date of joining and the salary was a fixed salary of Rs 400 p.m. in the scale of Rs 400 to Rs 1100 and the services were liable to be terminated without any notice and at any time without assigning any reason and that the appointment will not enable the appointee any seniority or any other benefit under the Service Rules for the time being in force and will not count towards increment in the time scale. In view of

the aforesaid stipulations in the offer of appointment itself we really fail to understand as to how the aforesaid period of service rendered on ad hoc basis can be held to be service on regular basis. The conclusion of the High Court is contrary to the very terms and conditions stipulated in the offer of appointment and, therefore, the same cannot be sustained. The regular letter of appointment dated 29-1-1982 in favour of Rakesh Kumar was also produced before us and that letter indicates that the respondent Rakesh Kumar along with others had applied to the Secretary, Haryana Public Service Commission for being appointed as an Assistant Engineer and the Service Commission after selecting the number of persons prepared a list and appointment letters were issued by the Government from the said list on the basis of the merit position of different candidates. Thus the appointment of respondent Rakesh Kumar was a fresh appointment in accordance with the statutory rules after the Public Service Commission adjudged their suitability and the regular service of the respondent Rakesh Kumar must be counted from the date he joined the post pursuant to the offer of appointment dated 29-1-1982 and the prior service rendered by him on ad hoc basis cannot be held to be regular service nor can it be tagged on to the later service for earning the benefit under the Government Circular dated 2-6-1989 as well as the clarificatory Circular dated 16-5-1990. The conclusion of the majority judgment of the High Court, therefore, is wholly erroneous and cannot be sustained."

15. *Ravinder Kumar's* case, which was earlier tagged with *State of Haryana v. Haryana Veterinary and AHTS Association's* case, was de-linked from the main batch of the matters and was disposed of in the following terms:

"Delay condoned in SLPs.

These batch of cases were delinked while hearing an another batch of appeals from the same State, which were disposed of by us by Judgment dated 19th Sept. 2000. It is conceded by the Ld. Counsel appearing for the State that in these cases we are concerned with employees who had been engaged initially on work charge basis and later on they were regularised and brought into the cadre of the service. It is also not disputed by the Ld. Counsel appearing for the State that this period which the employees has rendered as work charge basis count for the purpose of the increment in the cadre as well as the qualifying service for the pension. We, therefore, see no justification in not counting their period for the purpose of giving additional increment on completion of 8 and 18 years of service as well as 10 and 20 years of service for getting higher scale as per the Govt, circular, which obviously are intended to avoid stagnation in a particular grade. In that view of the matter, we see no justification for our interference with the impugned order of the Punjab and Haryana High Court. These appeals and SLPs, accordingly stand dismissed."

It is admitted before us that after the above order, the State filed review application before the Hon'ble Apex Court against this order dated 31.10.2000 which was also dismissed by the Hon'ble Apex Court.

Further, it will be useful to notice that another Division Bench of this Court following the above Full Bench is Kesar Chand's case (supra) granted relief to the Petitioners similarly places like the Petitioners of the present case and directed the Respondents to consider their service on work-charge basis towards computing total service of 8/18 years for grant of benefit under these schemes. The order passed by the Division Bench in CWP No. 18429 of 1996 titled as Banta Ram and others Versus State of Haryana and others, decided on 6.2.1997, attained finality.

Similar relief was also granted by a Division Bench of this Court following Banta Ram's case in the case of Babu Ram Versus State of Haryana, CWP No. 2225 of 1997, decided on 29.4.1997, and the Special Leave Petition preferred by the State in the case of Babu Ram was also dismissed by the Hon'ble Apex Court on 21.1.2002. In view of the above settled position of law, thus, we conclude that the Respondents are obliged to count the service rendered by the Petitioners no work-charge basis under the State itself if the said service is otherwise satisfactory. Consequently, we answer submissions no. 1 and 3 aforenoticed, against the State."

16. In *Punjab State Electricity Board v. Jagjiwan Ram* (supra), this Court considered a question substantially similar to the one raised in these appeals. The Punjab State Electricity Board introduced a scheme for giving time bound promotional scales/increments on completion of 9/16/23 years of regular service. The scheme was circulated vide office order dated 23.4.1990. The respondents, who were engaged as work charge employees between 1971 and 1993 and were appointed on regular basis between 1979 and 1999, filed writ petitions for grant of promotional scales/increments by contending that their work charge service should be added to the regular service. The Division Bench of the High Court accepted their plea by relying upon the order passed in *State of Haryana v. Ravinder Kumar.* After noticing distinction between work charge establishment and regular establishment as also the judgments in *State of Haryana v. Haryana Veterinary and AHTS Association* (supra) and *State of Punjab v. Ishar Singh* (2002) 10 SCC 674, the Division Bench observed:

"A reading of the scheme framed by the Board makes it clear that the benefit of time-bound promotional scales was to be given to the employees only on their completing 9/16 years' regular service. Like[illegible]f

promotional increments could be given only on completion of 23 years' regular service. The use of the term "regular service" in various paragraphs of the scheme shows that service rendered by an employee after regular appointment could only be counted for computation of 9/16/23 years' service and the service of a temporary, ad hoc or work-charged employee cannot be counted for extending the benefit of time-bound promotional scales or promotional increments. If the Board intended that total service rendered by the employees irrespective of their mode of recruitment and status should be counted for the purpose of grant of time-bound promotional scales or promotional increments, then instead of using the expression "9/16 years' regular service" or "23 years' regular service", the authority concerned would have used the expression "9/16 years' service" or "23 years' service". However, the fact of the matter is that the scheme in its plainest term embodies the requirement of 9/16 years' regular service or 23 years' regular service as a condition for grant of time-bound promotional scales or promotional increments as the case may be."

The order passed in Ravinder Kumar's case was distinguished and it was held that the same cannot be treated as precedent for other cases. This is evinced from paragraph 22 of the judgment, which is extracted below:

"The order passed by this Court in Ravinder Kumar case is clearly distinguishable. In that case, counsel appearing for the State had conceded that the period during which an employee had worked on work-charged basis is counted for the purpose of grant of increment as well as for computation of qualifying service for pension. In view of his statement, the Court held that there is no reason why such service should not be counted for the purpose of giving additional increment on completion of 8/12 years' service and higher scale on completion of 10/20 years' service. The order does not contain any discussion on the issue whether the work-charged service can be equated or clubbed with regular service for grant of service benefits admissible to regular employees. Therefore, the same cannot be treated as laying down any proposition of law which can be treated as precedent for other cases."

(emphasis added)

17. We reiterate that even though *Ravinder Kumar's* case was de-linked from the batch of matters decided vide judgment in *State of Haryana v. Haryana Veterinary and AHTS Association* (supra) and was independently decided, the same cannot be relied upon for grant of benefit of ACP scales under the 1998 Rules or time bound promotional scales or additional increments by counting work charge or ad-hoc service where the rules/scheme provide that the employee must have rendered regular service for a particular period.

18. On the basis of the above discussion, we hold that the Division Benches of the High Court committed an error by directing the appellants to treat work charge service of the respondents as part of regular service for the purpose of Rule 5(1) and (2) of the 1998 Rules.

19. In the result, the appeals are allowed, the impugned orders are set aside and the writ petitions filed by the respondents are dismissed.

K.K.T. Appeals allowed.

STATE OF RAJASTHAN
v.
BALVEER @ BALLI AND ANR.
(Criminal Appeal No. 942 of 2006)

OCTOBER 31, 2013

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

Penal Code, 1860 – s. 376(2)(g) and 302/34 – Rape and murder – FIR against three accused – One of the accused examined as witness after tendering him pardon u/s. 306 Cr.P.C. – Conviction and sentence of 10 years RI and death sentence for the offences u/ss. 376(2)(g) and 302/34 respectively – High Court acquitted both the accused – Held: The prosecution case is proved by the evidence of the approver, and the same is admissible in evidence having been corroborated by direct and circumstantial independent evidence – Hence convicted u/ss.376(2)(g) and 302/34 – However, the death sentence reduced to life imprisonment as the case does not fall in the category of rarest of rare cases – Sentence of 10 years RI imposed by trial court confirmed.

Code of Criminal Procedure, 1973 – s.306 – Approver/ accomplice – Evidentiary value of – Held: For being an approver, it is not necessary that the person has to inculpate himself in the offence and has to be privy to the crime – After grant of pardon accomplice is removed from the category of co-accused and put into the category of witness, and evidence of such witness is admissible in evidence as per s. 133 of Evidence Act – However, as a rule of prudence, presumption as provided u/s. 114 Illustration (b) of Evidence Act is against the accomplice, unless he is corroborated in material particulars – Evidence Act, 1872 – ss.133 and 114 Illustration (b) .

Evidence Act, 1872:

s. 157 – Corroboration of testimony of witness – Held: In order to corroborate testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate, may be proved.

s.27 – Recovery under – On the basis of statement made by the accused while in police custody – Evidentiary value of – Held: Such recovery can be utilized against the accused, for the purpose of corroboration.

Respondents-accused were prosecuted u/s. 376(2)(g) and 302 r/w s. 34 IPC. The prosecution case was that the two respondents-accused alongwith accomplice-approver (PW1) committed rape on the deceased and further the respondents committed her murder. After the incident, hearing the hue and cry of of PW-1that the respondents had killed the girl, people gathered at the place of occurrence, apprehended PW1 and informed the police over telephone. The SHO, on the basis of statement of PW1, lodged FIR against the respondents and PW1. Subsequently PW-1 was tendered pardon u/s. 306 Cr.P.C. on the condition that he would disclose the truth relating to the offence, within his knowledge. Relying on the prosecution evidence, trial court convicted the respondents-accused u/ss. 376 (2)(g) and 302/34 IPC. They were sentenced to 10 years RI for the offence u/s. 376(2)(g) and were sentenced to death for the offence u/s. 302/34 IPC. High Court in appeal, acquitted the respondents-accused of all the charges. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1.1. Section 306, Cr.P.C. provides that with a view to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence, the Magistrate may tend h

person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. [Para 15] [572-G-H; 573-A]

Suresh Chandra Bahri vs. State of Bihar **1995 Supp. (1) SCC 80: 1994 (1) Suppl. SCR 483 – relied on.**

1.2. The High Court failed to appreciate that the extent of culpability of the accomplice in an offence is not material so long as the magistrate tendering pardon believes that the accomplice was involved directly or indirectly in or was privy to the offence. The High Court also failed to appreciate that Section 133 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person and when the pardon is tendered to an accomplice under Section 306, Cr.P.C., the accomplice is removed from the category of co-accused and put into the category of witness and the evidence of such a witness as an accomplice can be the basis of conviction as provided in Section 133 of the Evidence Act. [Para 15] [573-F-G]

1.3. As a rule of prudence, however, as provided in Illustration (b) to Section 114 of the Evidence Act, the Court will presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. [Para 16] [573-H; 574-A]

1.4. Section 157 of the Indian Evidence Act states that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. The testimony of PW-1 is corroborated by the statement of PW-1 made before PW-5 the SHO and recorded in the FIR (Ext. P-12) soon after

the incident. Thus, even though the evidence given at the trial and the former statement relating to the incident is from the same tainted source of an accomplice (PW-1), the former statement of PW-1 as recorded in Ext.P-12 is legally admissible as corroborative of the evidence of PW-1 in the trial court. [Para 18] [575-C-D, F; 576-B]

Rameshwar s/o Kalyan Singh vs. The State of Rajasthan **AIR 1952 SC 54: 1952 SCR 377 – relied on.**

1.5. However, to make sure that what PW-1 has stated before the Police soon after the incident and what he has stated before the Court in the trial is true and reliable, the Court must look for corroboration from sources independent from the tainted source, i.e., PW-1 who is an accomplice. [Para 19] [576-C]

1.6. Such corroboration of the testimony of PW-1 from independent sources, viz. evidence of PW-11 and PW 16; *post mortem* report, report of the Forensic Science Laboratory (Ext.P-56); discovery of motorcycle (mentioned in FIR and by PW-1) on the disclosure statement made by one of the accused; and recovery of the bag of the deceased. Thus, there is direct and circumstantial evidence independent from the evidence of PW-1 in support of the prosecution story given out by PW-1 and to connect the respondents-accused in the offences of rape and murder. [Para 19] [576-C-D, E-G; 576-B-C]

1.7. It is correct that there were some inconsistencies between the evidence of PW-1 and PW5, between the evidence of PW-1 and PW-6 and between the evidence of PW-1 and PW-32 as well as contradictions in the statement of PW-1 recorded before the trial by the Magistrate and the evidence of PW-1 before the Court, but these inconsistencies and contradictions were not material enough to doubt the story g[illegible]t

the respondents-accused committed rape on the deceased and then killed her. [Para 20] [577-D-E]

1.8. Section 27 of the Evidence Act, states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Hence, even though the respondents-accused were in police custody, the information given by them pursuant to which the motorcycle of one of the accused and the bag of the deceased were recovered, can be utilized against the respondents-accused respectively for the purpose of corroboration of the testimony of PW-1 that they committed rape and murder of the deceased. [Para 21] [578-A-C]

1.9. It is found from the evidence of Investigation Officer (PW-32) that he had seized the black colour rexine bag from respondent-accused and this very bag was identified by the parents of the deceased (PW-6 and PW-7). The Tehsildar, who was examined as PW-30, has confirmed that besides the bag of the deceased four other bags which looked alike were placed at the time of identification and PW-7 identified the right bag. It is, thus, clear that the bag of the deceased that was seized from accused 'B' was identified as the bag of the deceased and accused 'B' has not explained in his statement under Section 313 Cr.P.C. as to how the bag of the deceased came to his possession. [Para 22] [578-E, H; 579-A-B]

1.10. Thus, the testimony of PW-1 was corroborated by material particulars qua the respondents-accused and the only possible view on the evidence on record in the present case is that both the respondents committed the rape and murder of the deceased and the trial court had

rightly convicted them under Section 376(2)(g) and Section 302 read with Section 34, IPC. The view taken by the High Court that the respondents were entitled to acquittal was not at all a possible view. The evidence on record, considered in the light of the provisions of the Evidence Act and in particular Sections 27, 114 Illustration (b), 133 and 157 thereof establish beyond reasonable doubt that the respondents were guilty of the offences under Section 376(2)(g) and Section 302 read with Section 34, IPC. [Para 23] [579-B-E]

Ramprasad vs. State of Maharashtra **1999(5) SCC 30: 1999 (3) SCR 519;** *State of Andhra Pradesh through CBI vs. M. Durga Prasad and Ors.* **AIR 2012 SC 2225;** *Haroom Haji Abdulla vs. State of Maharashtra* **AIR 1968 SC 832: 1968 SCR 641;** *State of Kerala vs. P. Sugathan and Anr.* **(2000) 8 SCC 203;** *Chandan and Anr. vs. State of Rajasthan* **(1988) 1 SCC 696: 1988 (2) SCR 599;** *Bhiva Doulu Patil vs. State of Maharashtra* **AIR 1963 SC 599: 1963 SCR 830;** *Piara Singh vs. State of Punjab* **AIR 1969 SC 961: 1969 (3) SCR 236 – referred to.**

2. The reasons given by the trial court for imposing death penalty do not make out the case to be a rarest of rare cases in which death sentence could be awarded to the respondents. For awarding death sentence, special reasons have to be recorded as provided in Section 354(3), Cr.P.C., and while recording such special reasons, the Court must pay due regard both to the crime and the criminal. In the present case, there are materials to show that the crime committed by the respondents, both rape and murder of the deceased, were cruel, but there were no materials to establish that the character of the respondents was of extreme depravity so as to make them liable for the punishment of death. Therefore, the respondents should be punished for life for the offence of murder under Section 302, IPC

Section 376(2)(g), IPC, the trial court has awarded the punishment of 10 years rigorous imprisonment which would be maintained. [Para 24] [580-A-B, D-F]

Bachan Singh vs. State of Punjab **AIR (1980) SC 898: 1980 (2) SCC 684 – followed.**

Case Law Reference:

1968 SCR 641	**referred to**	**Para 8**
(2000) 8 SCC 203	**referred to**	**Para 9**
1988 (2) SCR 599	**referred to**	**Para 12**
1963 SCR 830	**referred to**	**Para 14**
1969 (3) SCR 236	**referred to**	**Para 14**
1999 (3) SCR 519	**referred to**	**Para 14**
1994 (1) Suppl. SCR 483	**relied on**	**Para 14**
1952 SCR 377	**relied on**	**Para 18**
AIR 2012 SC 2225	**referred to**	**Para 23**
1980 (2) SCC 684	**followed**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 942 of 2006.

From the Judgment & Order dated 09.01.2006 of the High Court of Judicature for Rajasthan, Jaipur Bench at Jaipur in D.B. Criminal Death Reference No.1 of 2005, D.B. Criminal Appeal Nos. 261/2005, 347/2005 and 431/2005.

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

Ranbir Singh Yadav, Anzu K. Varkey, P. Kakra, K.B. Upadhyay, Rajesh Pathak, Pushkar Anand, S.R. Setia for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 09.01.2006 of the High Court of Rajasthan in D.B. Criminal Death Reference No. 1 of 2005 and D.B. Criminal Appeal Nos. 261 of 2005, 347 of 2005 and 431 of 2005.

Facts:

2. The facts very briefly are that on 01.11.2003 at 10.45 P.M., Prem Bahadur Singh, Station House Officer, Nadbai Police Station, received an information on telephone that a woman has been murdered in the forest of Kishanpura close to the railway track and that a person has been nabbed. The Station House Officer reached the place of occurrence at 10.55 P.M. and found 10 to 15 villagers standing there who told him that at about 10.30 P.M. they heard someone crying and they came running and saw two persons running away towards *Khedali* along the railway track on a motorcycle and the third person running towards the fields and they managed to catch this third person named Rajesh and they also found a girl in a semi-naked condition lying dead. When the Station House Officer questioned Rajesh, he told that on 01.11.2003 at about 4 to 5 O'clock in the evening, respondent- Ram Niwas and the respondent-Balveer brought the girl named Rekha on the motorcycle of Ram Niwas, bearing Registration No. RJ-29-2M-2370, along the Mandawar railway track towards *Khedali* and Ram Niwas, Balveer and Rajesh had sexual intercourse with Rekha and thereafter Ram Niwas and Balveer wanted to kill Rekha by gagging and pressing her neck, but Rajesh asked them not to do so and thereafter Rekha was made to sit on the motorcycle and brought along the railway track to the place of occurrence and Ram Niwas and Balveer killed Rekha by strangulating her with her *Chunni* (scarf) and by causing injury on her neck and feet. Rajesh also told Station House Officer that both Ram Niwas and Balveer gave Rajesh some beating, but he managed to escape and started running and shouting. Rajesh also told the Station House Officer that both Ram Niwas and Balveer escaped on the motorcycle along the railway track towards *Khedali*. The Station House Off[illegible]e

dead body of Rekha (hereinafter referred to as 'the deceased') and came back to the Police Station and registered the First Information Report (for short 'FIR') under Sections 376 and 302 read with Section 34 of the Indian Penal Code (for short 'IPC') against Rajesh, Ram Niwas and Balveer and handed over investigation to Mohan Singh, the Sub-Inspector (for short 'the I.O.').

3. On 29.12.2003, the statement of Rajesh was recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and on 16.01.2004, the I.O. submitted an application before the Chief Judicial Magistrate, Bharatpur, for making Rajesh an approver under Section 306, Cr.P.C. and on 19.01.2004, the Chief Judicial Magistrate passed an order tendering pardon to Rajesh on the grounds that he was the sole eye-witness of the incident and without the evidence of Rajesh, there was possibility of acquittal of the two respondents. The Chief Judicial Magistrate in his order dated 19.01.2004 stated that the pardon was being tendered for the purpose of obtaining the evidence of Rajesh on the condition that he shall disclose the truth about each and every information, circumstance and person (directly or indirectly connected with the incident) relating to the offence, within his knowledge. Thereafter, charges were framed against the two respondents under Section 376(2)(g), IPC, and alternatively under Sections 376, 302 and 34, IPC. Since the two respondents denied the charges, the trial was held and at the trial, as many as 32 witnesses including Rajesh (PW-1) were examined and a large number of documents and material objects were exhibited. The trial court, after examining and discussing the evidence on record and in particular the evidence of Rajesh (PW-1), convicted both the respondents under Sections 376(2)(g) and 302/34, IPC. Thereafter, the trial court heard learned counsel for the respondents on the point of sentence and sentenced both the respondents to rigorous imprisonment for ten years with fine of Rs.1,000/- each and in default of payment of fine, to undergo simple imprisonment for six months for the offence under Section 376(2)(g), IPC, and sentenced them to death with fine of Rs.1,000/- each and in

default of payment of fine, to undergo simple imprisonment for six months for the offence under Section 302/34, IPC, by order dated 05.03.2005.

4. Aggrieved, the respondents filed criminal appeals before the High Court and the sentence of death was also referred to the High Court. In the impugned judgment, the High Court found that the prosecution case was anchored in the sole testimony of the sole witness Rajesh (PW-1), but his testimony as an approver could not be accepted as he had not inculpated himself in the crime in his statement recorded under Section 164, Cr.P.C., or in his statement before the Chief Judicial Magistrate for grant of pardon under Section 306, Cr.P.C. and as he was not privy to the crime, he cannot be held to be an approver. The High Court further held that the evidence of PW-1 was not supported by other circumstantial evidence and in the absence of any corroboration of the evidence of PW-1 in material particulars, it was difficult to uphold the conviction of the respondents on the basis of such an unreliable witness. By the impugned judgment, the High Court, therefore, declined to accept the death reference and allowed the three appeals of the respondents and set aside the judgment of the trial court and acquitted the respondents of the offences under Sections 376(2)(g) and 302/34, IPC, and directed that the respondents be released forthwith. Aggrieved by the impugned judgment, the State of Rajasthan is in appeal before us.

Contentions on behalf of learned counsel for the parties

5. Dr. Manish Singhvi, learned counsel appearing on behalf of the State of Rajasthan, submitted that PW-1 is the only eye-witness to the incident and he has stated that on 01.11.2003 he was in village Pilwa and he was irrigating his field and Ram Niwas came to him and took him on a Hero Honda Splendor motorcycle to Mahua at the Jaipur bus stand and started looking for someone in the buses and around 5.30 p.m. they started proceeding on the motorcycle. He submitted that PW-1 has further stated that Ram Niwas stopped the motorcycle near a girl and made the girl to sit on the motorcycle and thereafter all the three proceeded towar[illegible]kt

to Mandawar at the by-pass road, Balveer met them and Balveer was given lift on the motorcycle and PW-1 was dropped. He further submitted that PW-1 has stated that Ram Niwas threatened him and made him sit on the motorcycle and went along the railway line till they arrived at Nadbai and stopped the motorcycle in the jungle and Ram Niwas and Balveer raped the girl and after the rape, Ram Niwas and Balveer killed the girl by tying *chunni* (scarf) around her neck and after killing the girl both of them came towards him and seeing them he ran away from there and raised alarm that the girl has been killed. He submitted that PW-1 has also stated that 8-10 villagers met him and he told the villagers that Ram Niwas and Balveer killed the girl. Dr. Singhvi submitted that this eye-witness account of PW-1 was not believed by the High Court only on the ground that as PW-1 has not inculpated himself in the crime, his evidence as an approver cannot be accepted.

6. Dr. Singhvi next submitted that the finding of the High Court that the testimony of PW-1 as an approver cannot be accepted as he has not been inculpated in the crime during evidence in the trial court is not correct in law. He referred to the provisions of Section 306 Cr. P.C. and argued that the section does not provide that an approver must be privy to the offence if his evidence is to be accepted. He submitted that an approver is in fact an accomplice and Section 133 of the Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. He submitted that Illustration (b) under Section 114 of the Indian Evidence Act, however, states that an accomplice is unworthy of credit, unless he is corroborated in material particulars and therefore the Court looks for corroboration of the testimony of the accomplice in material particulars either by some other direct or circumstantial evidence.

7. Dr. Singhvi next submitted that in this case, there is sufficient corroboration of the testimony of PW-1 that the

respondents committed rape on the deceased and thereafter killed her. He submitted that under Section 157 of the Indian Evidence Act the testimony of a witness can be corroborated by any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact. He submitted that in the present case the statement of PW-1 before the police recorded in the FIR (Ex.P-12) soon after the rape and murder of the deceased on 01.11.2003 corroborates his testimony before the Court. Hari Singh (PW-11) has also stated in his evidence that PW-1 was running towards the colony raising the alarm when a girl was killed and on his call for help, 10-15 persons gathered there and PW-1 told that two boys Ram Niwas and Balveer were killing a girl, save her and thereafter he went to the place of incident and found a dead body of a girl lying at the place of incident. He submitted that although PW-11 was declared hostile this part of evidence of PW-11 can be relied on by the prosecution to corroborate the testimony of PW-1. He submitted that Bharat Singh (PW-16) has also stated in his evidence that on 01.11.2003 in the night, he heard the boy's cry for help who was shouting "*save the girl*" and that boy told his name as Rajesh and he had told that two boys had killed a girl. He submitted that PW-16 has also deposed that he remembered the name of one of the boys as Ram Niwas, but he did not remember the name of other boy. He submitted that though PW-16 was also declared hostile, this part of his evidence can be relied on by the prosecution as corroborating the testimony of PW-1. Dr. Singhvi also referred to the evidence of the father of the deceased (PW-6) who has stated that the deceased was undergoing nursing training at Bharatpur and that she had told him that 2-3 boys used to trouble her and she had named Ram Niwas, Balveer and Rajesh (PW-1). He submitted that the evidence of PW-6 strengthens the prosecution story that Ram Niwas and Balveer were involved in the offences against the deceased. He submitted that the testimony of PW-1 was also corroborated by the FSL report (Ex.P-56), which establishes that human

semen has been detected on the underwear and private parts of the deceased confirming rape on the deceased. He submitted that the testimony of PW-1 that the deceased was strangulated is confirmed by post-mortem report (Ex.P-55). He submitted that the testimony of PW-1 is also corroborated by the recovery of the bag *vide* memo of seizure (Ex.P-46) from the possession of Balveer, which has been identified to be that of the deceased by the father of the deceased (PW-6) and the mother of the deceased (PW-7).

8. Dr. Singhvi cited the judgment of this Court in *Rameshwar s/o Kalyan Singh v. The State of Rajasthan* [AIR 1952 SC 54] in which this Court has held that the rule, which according to cases has hardened into one of law, is not that corroboration of evidence of an accomplice is essential, but that there is necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it. He submitted that in the aforesaid case this Court while holding that it would be impossible to formulate the kind of evidence which should, or would, be regarded as corroboration has laid down some of the rules regarding the nature and extent of the corroboration required of the testimony of an accomplice. He also relied on *Haroom Haji Abdulla v. State of Maharashtra* [AIR 1968 SC 832] in which this Court has held that the effect of provision of Section 133 of the Indian Evidence Act is that the Court trying an accused may legally convict him on the single evidence of an accomplice, but Illustration (b) of Section 114 of the Indian Evidence Act incorporates a rule of prudence that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. He also cited *State of Kerala v. P. Sugathan & Anr.* [(2000) 8 SCC 203] for the proposition that once an accomplice becomes an approver by a valid grant of pardon under Section 306, Cr.P.C., and withstands cross-examination, his testimony can be relied on for convicting the accused if it is corroborated in material particulars by others.

9. In reply, Mr. K.B. Upadhyay, learned counsel appearing for the respondent no.2-Ram Niwas, submitted that the

evidence of Rajesh (PW-1) cannot be believed by the Court as it is inconsistent with the evidence of other witnesses in prosecution. He submitted that while PW-1 has stated that he informed the Police by going to the Police Station, the Station House Officer of the Police Station (PW-5) has said in his evidence that someone informed him over the telephone about the incident. He submitted that while PW-1 has stated that he does not know the girl Rekha (deceased), the father of the deceased (PW-6) has clearly stated that PW-1 used to visit their house and knew the deceased and similarly the mother of the deceased (PW-7) has stated that the deceased had told her that at Bharatpur, Rajesh (PW-1) used to tease her and for this reason she did not want to return to Bharatpur. He submitted that again PW-1 has stated that the place of rape and murder of the deceased was at Nadbai, but the I.O. (PW-32) has stated that the rape and the murder took place at different places as will be evident from the site maps (Ext.P-42 and Ext.P-43). He submitted that again PW-1 has stated in his evidence that the motorcycle was driven by Ram Niwas, but in the statement recorded by the Magistrate in Ext.P-7 before the pardon was granted to PW-1, he has stated that the motorcycle was driven by Balveer. He submitted that because of these inconsistencies and contradictions, PW-1 is not reliable and the High Court has rightly discarded his evidence.

10. Mr. Upadhyay next submitted that sixteen love letters written by Nisha to Ram Niwas were seized from the room where Rekha was living in Bharatpur and these love letters show that there was love between Ram Niwas and Nisha and this is also made clear from the evidence of Anjana (PW-12) who was living adjacent to the house in which the deceased lived. He submitted that there was also evidence of PW-14, the landlady of the house in which the deceased, Anjana and Khem Kanwar (PW-13) lived, that Ram Niwas used to visit the deceased and sometimes used to stay during the night time and used to come to meet her on the motorcycle. He submitted that there was therefore an intimate relationship between Ram Niwas and the deceased and there was [illegible] Niwas to commit rape on the deceased

11. Mr. Upadhyay next submitted that two of the villagers, PW-10 and PW-11, who have been examined in the Court, have stated in their evidence that they had only seen the back light of the motorcycle in which the persons, who had committed rape and murder, had left the place of occurrence and, therefore, none of the villagers have really identified Ram Niwas and Balveer who had committed the offences. He further submitted that the incident took place on 01.11.2003 and the arrest of the respondents took place on 05.11.2003 and the respondents were in police custody on 05.11.2003, 06.11.2003, 07.11.2003 and 08.11.2003 and the recovery of the motorcycle alleged to have been used for taking the deceased was made on 09.11.2003. He argued that these recoveries made belatedly when Ram Niwas was in police custody for several days cannot be relied upon.

12. Mr. Upadhyay cited the decision of this Court in *Chandan & Anr. v. State of Rajasthan* [(1988) 1 SCC 696] in which it has been held that the approver's testimony against the accused, absolving himself and appearing unnatural, did not inspire confidence and in the absence of independent corroboration of such testimony, conviction of the accused cannot be sustained. He also cited *State of Andhra Pradesh through CBI v. M. Durga Prasad & Ors*. [AIR 2012 SC 2225] for the proposition that this Court will interfere with the order of acquittal only when it comes to the conclusion that the view taken by the High Court while acquitting the accused was not a possible view. Mr. Upadhyay submitted that in the present case the view taken by the High Court that the evidence of PW-1 was not reliable and that conviction on the testimony of PW-1 is unsafe, is a possible view in the facts and circumstances of this case and should not be interfered with by this Court in exercise of its power under Article 136 of the Constitution.

13. Mr. Ranvir Singh Yadav, learned counsel appearing for respondent No.1-Balveer, adopted the submissions of Mr. Upadhyay and further submitted that though the bag of the deceased was recovered by the seizure memo Ex.P-46 on the information and at the instance of Balveer, there was no

evidence that the deceased Rekha had that particular bag which was seized with her when she left the room at Bharatpur on 01.11.2003 for Ajmer. He submitted that the bag that was actually seized at the instance of Balveer was a rexine black bag and neither the father of the deceased (PW-6) and nor the mother of the deceased (PW-7) have described the bag of their daughter as a rexine bag.

14. Mr. Yadav cited the decision of this Court in *Bhiva Doulu Patil v. State of Maharashtra* (AIR 1963 SC 599) for the proposition that there should be corroboration of the evidence of the approver in material particulars qua each accused person. He submitted that the corroboration of the testimony of PW-1, therefore, has to be of material particulars which would connect Balveer to the offence. He also relied on the decision of this Court in *Piara Singh v. State of Punjab* (AIR 1969 SC 961) and submitted that the evidence of the accomplice must be corroborated in material particulars by other independent evidence. He further submitted that in *Ramprasad v. State of Maharashtra* [1999(5) SCC 30 = AIR 1999 SC 1969] this Court has further held that the approver's evidence must pass the test of reliability and secure adequate corroboration before the same can be acted upon. He vehemently argued that the tests laid down by this Court with regard to the reliability of the approver's evidence and the necessity of corroboration by independent evidence are not satisfied in this case.

Findings of the Court:

15. The first question that we have to decide is whether the High Court is right in coming to the conclusion that for being an approver within the meaning of Section 306, Cr.P.C., a person has to inculpate himself in the offence and has to be privy to the crime, otherwise he removes himself from the category of an accomplice and places himself as an eyewitness. Section 306, Cr.P.C. provides that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence, the Magistrate may tender a pardon to such person on condition

of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. This Court in the case of *Suresh Chandra Bahri v. State of Bihar* [1995 Supp.(1) SCC 80] explained the object of Section 306 Cr.P.C. in the following words:

> "The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence."

Thus, the High Court failed to appreciate that the extent of culpability of the accomplice in an offence is not material so long as the magistrate tendering pardon believes that the accomplice was involved directly or indirectly in or was privy to the offence. The High Court also failed to appreciate that Section 133 of the Indian Evidence Act provides that an accomplice shall be a competent witness against an accused person and when the pardon is tendered to an accomplice under Section 306, Cr.P.C., the accomplice is removed from the category of co-accused and put into the category of witness and the evidence of such a witness as an accomplice can be the basis of conviction as provided in Section 133 of the Indian Evidence Act.

16. As a rule of prudence, however, as provided in

Illustration (b) to Section 114 of the Indian Evidence Act, the Court will presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. In *Rameshwar s/o Kalyan Singh v. The State of Rajasthan* (supra), this Court laid down the kind of evidence which should, or would, be regarded as corroboration of the testimony of an accomplice and held that it is not necessary that there should be independent confirmation of every material circumstance but independent evidence must not only make it safe to believe that the crime was committed and must in some way reasonably connect the accused with the crime. In the language of this Court in the aforesaid case:

> "All that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness' story that the accused was the one, or among those, who committed the offence."

In this case, the Court also clarified that corroboration need not be by direct evidence that the accused committed the crime and it is sufficient if it is merely circumstantial evidence of the connection of the accused with the crime. In the aforesaid case, this Court also explained that unless the testimony of an accomplice is treated as evidence, many crimes which are usually committed between accomplices in secret, particularly offences with females, could otherwise never be brought to justice. With these principles with regard to the testimony of an accomplice in mind, we may now examine the testimony of PW-1 and the corroboration of such testimony by material particulars, if any, so as to connect Ram Niwas and Balveer in the offences.

17. In his testimony, PW-1 has stated that on 01.11.2003 when he was irrigating his field in village Pilwa, Ram Niwas came to him and took him on a Hero Honda Splendor motorcycle to Mahua at the Jaipur bus stand and at 5.30 p.m. they again started proceeding on the motorcycle and Ram Niwas stopped the motorcycle near the deceased and made her sit on the motorcycle and thereafter all the three proceeded towards Mandawar. He has further stated that

road, Balveer met them and Balveer was given lift on the motorcycle and thereafter they went to Nadbai. PW-1 has further deposed that they stopped the motorcycle in the jungle and Ram Niwas and Balveer raped the deceased and after the rape, Ram Niwas and Balveer killed the deceased by tying chunni (scarf) and after killing the deceased both of them came towards him and seeing them he ran away from there and raised alarm that a girl has been killed. He has also stated that 8-10 villagers met him and he told the villagers that Ram Niwas and Balveer killed a girl.

18. Section 157 of the Indian Evidence Act states that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. PW-5, the SHO of the Police Station Nadbai, has stated in his evidence that at 10.45 p.m. on 01.11.2003 someone informed him over the telephone that a woman had been murdered and her body was lying along with the railway track in the jungle of Kishanpura and one person in this connection had been nabbed and he reached the place of incident and took that person Rajesh (PW-1) into custody and on the basis of the statement made by PW-1, the First Information Report (Ext.P-12) was prepared. We have read Ext.P-12, the First Information Report in Hindi, and we find that the aforesaid testimony of PW-1 is corroborated by the statement of PW-1 made before PW-5 and recorded in the FIR (Ext. P-12) soon after the incident on 01.11.2003. In *Rameshwar s/o Kalyan Singh v. The State of Rajasthan* (supra), this Court after extracting Section 157 of the Indian Evidence Act has held:

> "The section makes no exceptions, therefore, provided the condition prescribed, that is to say "at or about the time etc." are fulfilled there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of

> two statements emanating from the same tainted source may not be high, but in view of Section 118 its legal admissibility as corroboration cannot be questioned."

Thus, even though the evidence given at the trial and the former statement relating to the incident is from the same tainted source of an accomplice (PW-1), the former statement of PW-1 as recorded in Ext.P-12 is legally admissible as corroborative of the evidence of PW-1 in the trial court.

19. However, to make sure that what PW-1 has stated before the Police soon after the incident and what he has stated before the Court in the trial is true and reliable, the Court must look for corroboration from sources independent from the tainted source, i.e., PW-1 who is an accomplice and we do find such corroboration of the testimony of PW-1 from independent sources. PW-11, who was one of the villagers of Nadbai, has stated that a boy named Rajesh was running towards the colony raising alarm that a girl is killed and he told that two boys Ram Niwas and Balveer are killing a girl, save her. PW-16, who is also a villager of Nadbai, has also stated in his evidence that they heard a boy's cry for help who was shouting "*save the girl*" and he had seen that boy who was making the noise and that boy told his name as Rajesh and also told him that two boys have killed the girl and PW-16 remembered the name of one boy as Ram Niwas, but he did not remember the name of other boy. The *post mortem* report (Ext.P-55) shows ligature mark of 2 cm width, dark brown in colour, encircling the upper part of the neck prominent on the right side of the deceased, which goes to show that the deceased had been strangulated. As per the opinion expressed in the *post mortem* report also the death was because of asphyxia due to strangulation. This corroborates the story given out by PW-1 that Ram Niwas and Balveer strangulated the deceased by a *chunni*. The report of the State Forensic Science Laboratory (Ext.P-56) states that human semen was detected in the vaginal smear, swab, *chaddi* and *salwar* of the deceased. In the FIR (Ext.P-12) prepared on the basis of the information given out by PW-1 soon

after the incident, the motorcycle of Ram Niwas was described as Hero Honda Splendor motorcycle and the number of the motorcycle is given as RJ 29/2M 2370 and the Investigating Officer (PW-32) has deposed that on 09.11.2003 in pursuance of the disclosure statement made by Ram Niwas, a Hero Honda motorcycle having the registration number RJ 29/2M 2370 was recovered *vide* memo of seizure (Ext.P-45). PW-32 has also deposed that on 09.11.2003 on the information at the instance of Balveer, the bag of the deceased was recovered *vide* memo of seizure (Ext.P-46). There is, therefore, direct and circumstantial evidence independent from the evidence of PW-1 in support of the prosecution story given out by PW-1 and to connect Ram Niwas and Balveer in the offences of rape and murder.

20. Mr. Upadhyay, learned counsel appearing for the respondent no.2-Ram Niwas, was right that there were some inconsistencies between the evidence of PW-1 and PW5, between the evidence of PW-1 and PW-6 and between the evidence of PW-1 and PW-32 as well as contradictions in the statement of PW-1 recorded before the trial by the Magistrate and the evidence of PW-1 before the Court but these inconsistencies and contradictions were not material enough to doubt the story given out by PW-1 that Ram Niwas and Balveer committed rape on the deceased and then killed her. Mr. Upadhyay is also right in his submission that there was intimate relationship between Ram Niwas and the deceased but if evidence of PW-1 corroborated in material particulars established that Ram Niwas did commit rape and murder of the deceased, we cannot discard the evidence only on the ground that there was no necessity for Ram Niwas to commit rape and murder of the deceased.

21. Mr. Upadhyay and Mr. Yadav rightly submitted that the recovery of the motorcycle at the instance of Ram Niwas and the seizure of bag of the deceased at the instance of Balveer were made belatedly on 09.11.2003, eight days after the incident on 01.11.2003 and after they had remained in custody in the police lock up on 05.11.2003, 06.11.2003, 07.11.2003

and 08.11.2003. Section 27 of the Indian Evidence Act, however, states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Hence, even though Ram Niwas and Balveer were in police custody during 05.11.2003, 06.11.2003, 07.11.2003, 08.11.2003 and 09.11.2003, the information given by Ram Niwas and Balveer pursuant to which the motorcycle of Ram Niwas and the bag of the deceased were recovered can be utilized against Ram Niwas and Balveer respectively for the purpose of corroboration of the testimony of PW-1 that Ram Niwas and Balveer committed rape and murder of the deceased.

22. Coming now to the submission of Mr. Yadav that the bag recovered at the instance of Balveer was a rexine black bag and neither the father of the deceased (PW-6) nor mother of the deceased (PW-7) have described the bag of the daughter as rexine bag, we find from the evidence of Investigation Officer (PW-32) that he had seized the black colour rexine bag from Balveer and this very bag was identified by the parents of the deceased (PW-6 and PW-7). To quote from the evidence of the mother of the deceased (PW-7):

> "SHO had told us at the police station that 4-5 bags are lying in the office of Tehsildar, go and identify. I do not know if SHO would have accompanied to the office of Tehsildar. Tehsildar had opened before us a sealed bag and took out 4-5 bags and placed the same before us on the table. Thereafter, I pointed towards one bag and said that this belong to my daughter. It was a black colour bag. I did not say to the Tehsildar that I have come to identify a black colour bag. There were other black bags also. Our black colour bag was stitched with red colour thread and other bags do not have red colour stitches."

The Tehsildar, who was examined as PW-30, has confirmed that besides the bag of the deceased [illegible]h

looked alike were placed at the time of identification and Santosh Devi (PW-7) identified the right bag. It is, thus, clear that the bag of the deceased that was seized from Balveer was identified as the bag of the deceased and Balveer has not explained in his statement under Section 313 Cr.P.C. as to how the bag of the deceased came to his possession.

23. Thus, the testimony of PW-1 was corroborated by material particulars qua Ram Niwas and Balveer and the only possible view on the evidence on record in this case is that both the respondents committed the rape and murder of the deceased on 01.11.2003 and the trial court had rightly convicted them under Section 376(2)(g) and Section 302 read with Section 34, IPC. The decision of this Court in *Andhra Pradesh through CBI v. M. Durga Prasad & Ors*. (supra) cited by Mr. Upadhyay applies only to a case where the view taken by the High Court on the evidence that the accused should be acquitted is a possible one and in such a case this Court will not interfere with the order of acquittal passed by the High Court. In the facts of the present case, however, the view taken by the High Court that the respondents were entitled to acquittal was not at all a possible view. The evidence on record, considered in the light of the provisions of the Indian Evidence Act and in particular Sections 27, 114 Illustration (b), 133 and 157 thereof establish beyond reasonable doubt that the respondents were guilty of the offences under Section 376(2)(g) and Section 302 read with Section 34, IPC.

24. For the offence under Section 302, IPC, the accused is liable to be punished with death or imprisonment for life and also liable to fine and for the offence under Section 376(2)(g), IPC, the accused are liable to be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and also liable to fine. The trial court has recorded special reasons for imposing the punishment of death on the respondents and these are that the respondents deceived and took away the deceased, turn wise committed rape on her in the darkness of night and thereafter committed her murder by throttling her by her *chunni* (scarf) and hence they

were not entitled for any leniency and should be punished with death. In our view, the reasons given by the trial court do not make out the case to be a rarest of rare cases in which death sentence could be awarded to the respondents. As has been held by the Constitution Bench of this Court in *Bachan Singh v. State of Punjab* [AIR 1980 SC 898]:

> "… As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. …"

Thus, for awarding death sentence, special reasons have to be recorded as provided in Section 354(3), Cr.P.C., and while recording such special reasons, the Court must pay due regard both to the crime and the criminal. In this case, there are materials to show that the crime committed by the respondents, both rape and murder of the deceased, were cruel, but there were no materials to establish that the character of the respondents was of extreme depravity so as to make them liable for the punishment of death. We are, thus, of the view that the respondents should be punished for life for the offence of murder under Section 302, IPC. For offence under Section 376(2)(g), IPC, the trial court has awarded the punishment of 10 years rigorous imprisonment which we would like to maintain.

25. We, accordingly, allow this appeal, set aside the impugned judgment of the High Court and hold the respondents guilty of the offences under Section 376(2)(g) and Section 302 read with Section 34, IPC, and impose the punishment of rigorous imprisonment for life for the offence under Section 302 read with Section 34, IPC and maintain the sentence of 10 years rigorous imprisonment imposed by the trial court for the offence under Section 376(2)(g), IPC.

K.K.T. Appeal allowed.