GULAM SARBAR
v.
STATE OF BIHAR (NOW JHARKHAND)
(Criminal Appeal No. 1316 of 2012 etc.)

OCTOBER 7, 2013

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

Penal Code, 1860:

s.302 r/w s.120-B - Murder committed with criminal conspiracy - conviction and sentence of life imprisonment - Upheld by High Court - Held: The manner in which the crime was committed indicates that it was a pre-planned murder -- There was no material contradiction, embellishment or improvement in the deposition of eye-witness -- High Court reappreciated the evidence and upheld the findings of fact recorded by trial court observing that ocular evidence was in conformity with medical evidence and it was a clear case of conspiracy - In the facts and circumstances of the case, findings recorded by courts below do not warrant interference.

s.120-B - Criminal conspiracy - Ingredients of - Explained.

Evidence Act, 1872:

s.134 - Number of witnesses - Held: In the matter of appreciation of evidence, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under law of evidence that particular number of witnesses is to be examined to prove/disprove a fact - Conviction can be based on the testimony of a sole eye-witness -- The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy.

Evidence:

Arrest -- Recovery of vehicles used in crime - Witness of arrest memo and panch witness of recovery of vehicles not examined - Held: In the absence of putting such an issue to Investigating Officer, appellants cannot seek any benefit of such omission or error by prosecution in conducting of trial -- If prosecution had not examined Panchnama witnesses and witnesses to the arrest memos, appellants could have examined them in their defence.

The appellants and other accused persons were prosecuted for committing murder with criminal conspiracy. The prosecution case was that at about 8.00 P.M. on 6.9.1996, when the informant/complainant (PW-7) was going with the deceased on a motorcycle, six persons including the appellants stopped them and appellant 'D' and accused 'Y' pointing their pistols towards deceased asked him as to why he was disturbing the working of the institute of accused 'BK'. During altercation accused 'A' stabbed the deceased and told his companions to complete the task for which they had come. Accused 'Y' shot at the deceased at point blank range causing his death. The trial court convicted both the appellants alongwith other accused persons u/s 302 read with s.120-B IPC and sentenced them to imprisonment for life. The High Court dismissed their appeals.

In the instant appeals, it was contended for the appellants that there was nothing on record to prove existence of conspiracy to kill the deceased and none of the appellants were involved in the affairs of the institute for which there was dispute between the deceased and accused 'BK'; and that neither the witnesses of memo of arrest of the appellants nor the punch witnesses of recovery of the motorcycle and scooter were examined.

Dismissing the appeals, the Court

HELD: 1.1 The essential ingredients of criminal conspiracy are (i) an agreement between two or more persons; (ii) agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them between the parties. Agreement is essential. The offence takes place with the meeting of minds even if nothing further is done. It is an offence independent of other offences and punishable separately. Thus, the prosecution is required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of proving criminal misconduct on the part of an accused. Criminal conspiracy is generally hatched in secrecy thus direct evidence is difficult to obtain or access. The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. [para 5] [12-F-H; 13-A-C]

Kehar Singh & Ors. v. State (Delhi Admn.), **1988 (2) Suppl. SCR 24 = AIR 1988 SC 1883;** *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* **2005 (2) Suppl. SCR79 = AIR 2005 SC 3820;** *Mir Nagvi Askari v. CBI,* **2009 (13) SCR 124 = AIR 2010 SC 528;** *Baldev Singh v. State of Punjab,* **2009 (7) SCR 855 = (2009) 6 SCC 564;** *State of M.P. v. Sheetla Sahai & Ors.* **2009(12) SCR 1048 = (2009) 8 SCC 617;** *R. Venkatkrishnan v. CBI,* **2009 (12) SCR 762 = AIR 2010 SC 1812; and** *S. Arul Raja v. State of T.N.,* **2010 (9) SCR 356 = (2010) 8 SCC 233;** *Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh & Anr. v.* **2008 (16) SCR 155 = CBI (2008) 15 SCC 49;** *Vikram Singh & Ors. v. State of Punjab,* **2010 (2) SCR 22 =AIR 2010 SC 1007 - referred to.**

1.2 The evidence on record and, particularly, the deposition of PW.7 clearly depicts the conspiracy from the manner in which the appellants and other accused were present at the place of occurrence. Admittedly, there was rivalry and ill-will between accused 'BK' and the deceased as they had separated their business of running of educational institution and the latter did not like the illicit relationship between accused and a clerk in the institute, and also revealed this fact to 'BK's wife, who began living separately. Therefore, relations between accused 'BK' and the deceased had been strained. Both the appellants and other accused were acquainted with accused 'BK' as well as the deceased and were also known to PW.7. [para 7-8] [13-H; 14-A-E]

1.3 The names of the appellants and other accused had been mentioned in the FIR. The Scooter used in the crime was seized in the presence of independent witnesses. The seizure memo was prepared on which both the said panch witnesses put their signatures. The same was marked as Exhibit 6-1 and was proved by PW.8, Investigating Officer. The arrest of appellants 'GS' and 'D' was proved by PW-8. As regards the plea that neither the witness of arrest memo of either of the appellants nor the panch witness of the recovery of scooter and motor cycle used in the crime has been examined by the prosecution, no such question was put to Investigating Officer [PW-8] and, therefore, the appellants cannot seek any benefit of such omission or error by the prosecution in conducting of trial. [para 9, 11-12] [14-G-H; 15-A

Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (Dead) Thr. L.Rs. & Ors., **2013 (1) SCR 632 = AIR 2013 SC 1204;** *Ravinder Kumar Sharma v. State of Assam & Ors.,* **1999 (2) Suppl. SCR 339 = AIR 1999 SC 3571;** *Ghasita Sahu v. State of Madhya Pradesh,* **2008 (2) SCR 95 = AIR 2008 SC 1425;** *Rohtash Kumar v. State of Haryana,* **JT 2013 (8) SC 181; and** *Gian Chand & Ors. v. State of Haryana,* **JT 2013 (10) SC 515 - referred to.**

1.4 In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by s.134 of the Evidence Act. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. If the prosecution had not examined the Panchnama witnesses and witnesses to the arrest memos of the appellants, the appellants could have examined them in their defence. [para 14-15] [17-D-G; 18-B]

Vadivelu Thevar & Anr. v. State of Madras; **1957 SCR 981 =AIR 1957 SC 614;** *Kunju @ Balachandran v. State of Tamil Nadu,* **2008 (1) SCR 781=AIR 2008 SC 1381;** *Bipin Kumar Mondal v. State of West Bengal* **2010 (8) SCR 1036 = AIR 2010 SC 3638;** *Mahesh & Anr. v. State of Madhya Pradesh* **2011 (11) SCR 377 = (2011) 9 SCC 626;** *Prithipal Singh & Ors. v. State of Punjab & Anr.* **2012 (14) SCR 862 = (2012) 1 SCC 10; and** *Kishan Chand v. State of Haryana* **JT 2013(1) SC 222 - referred to.**

1.5 The Trial Court held that a conspiracy was hatched by accused 'BK' as the deceased had created problems in his family life as well as in his business. The manner in which the crime was committed indicates that it was a pre-planned murder. There was no material contradiction, embellishment or improvement in the deposition of PW.7. [para 17] [18-G-H; 19-A]

1.6 The prosecution has successfully established the involvement of the appellants in the crime and the manner in which the crime has been committed establishes the conspiracy. The appellants in their statement u/s 313 Cr.P.C. did not furnish any satisfactory explanation of the circumstances under which they were present at the place of occurrence. More so, the manner in which they fled away after the commission of the crime clearly indicates their involvement in the offence to conduct a conspiracy. PW.7 has no enmity with either of the appellants and there was no reason for him to involve them falsely in such a heinous crime. The trial court after appreciating the evidence recorded the findings of fact regarding the presence of the appellants as well as PW.7 at the place of occurrence. PW-7 had seen accused 'BK' gathering all other accused at the place of occurrence. [para 16-17] [18-C-F]

1.7 The High Court reappreciated the evidence and upheld the findings of facts recorded by the trial court observing that the ocular evidence was in consonance and in conformity with the medical evidence and it was a clear case of conspiracy. There is no reason for the prosecution witnesses to have deposed falsely to implicate the appellants. In view of the facts and circumstances of the case, the findings recorded by the courts below do not warrant interference. [para 18-20] [19-C, E-F]

Case Law Reference:

1988 (2) Suppl. SCR 24	**referred to**	**para 5**
2005 (2) Suppl. SCR 79	**referred to**	**para 5**
2009 (13) SCR 124	**referred to**	**para 5**
2009 (7) SCR 855	**referred to**	**para 5**
2009 (12) SCR 1048	**referred to**	**para 5**
2009 (12) SCR 762	**referred to**	**para 5**
2010 (9) SCR 356	**referred to**	**para 5**
2008 (16) SCR 155	**referred to**	**para 6**
2010 (2) SCR 22	**referred to**	**Para 6**
2013 (1) SCR 632	**referred to**	**Para 13**
1999 (2) Suppl. SCR 339	**referred to**	**Para 13**
2008 (2) SCR 95	**referred to**	**Para 13**
JT 2013 (8) SC 181	**referred to**	**Para 13**
2013 (10) SC 515	**referred to**	**Para 13**
1957 SCR 981	**referred to**	**Para 14**
2008 (1) SCR 781	**referred to**	**Para 14**
2010 (8) SCR 1036	**referred to**	**Para 14**
2011 (11) SCR 377	**referred to**	**Para 14**
2012 (14) SCR 862	**referred to**	**Para 14**
JT 2013(1) SC 222	**referred to**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1316 of 2012.

From the Judgment and Order dated 22.03.2012 of the High Court of Jharkhand at Ranchi in Criminal Appeal (D/B) No. 273 of 1998 (R).

WITH

Crl. A. No. 1967 of 2012.

Amrendra Sharan, Awanish Sinha, Ashok Srivastava, Ardhendumauli Kumar Prasad, Pawan Kumar Ray for the Appellant.

Ratan Kumar Choudhuri, Krishnanand Pandeya, Amrendra Kr., for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 22.3.2012 passed by the High Court of Jharkhand at Ranchi in Criminal Appeals (DB) Nos. 273 of 1998 (R) and 262 of 1998 (R) affirming the judgment and order of conviction and sentence dated 26.8.1998 and 31.8.1998 respectively passed by the 3rd Additional Sessions Judge, Dhanbad in Sessions Trial No. 112 of 1997, by which and whereunder, the appellants in both these appeals stood convicted alongwith others, namely, Binod Kumar, Asgar Mian @ Asgar Ansari, Paiki Ramm @ Poki Ramm and Mantu Das under Sections 302 read with 120-B of Indian Penal Code, 1860 (hereinafter referred to as the `IPC') and sentenced to undergo RI for life.

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

A. As per the case of the prosecution, Dr. Gopal Prasad Sinha (PW.7), informant/complainant was going alongwith Sant Kumar Sinha (deceased), to Rajganj, Dhanbad on his motorcycle at about 8.00 P.M. on 6.9.1996. When they reached near Sant Nirankari Chowk, they saw a scooter and a motorcycle parked at the side of the road and six persons including the appellants were standing [illegible]y

thereof, and they signalled the complainant to stop. The complainant stopped his motorcycle and enquired as to why they were waiting. But within no time, Yakub Ansari and Dhiren Mahto - appellant took out their pistols from their waist and pointed towards them and asked why Sant Kumar Sinha (deceased) was disturbing the working of the institute run by Binod Kumar. They threatened Sant Kumar Sinha (deceased) to remain away from the institute. Sant Kumar Sinha (deceased) asked the accused persons how they were related to running the affairs of the institute, which led to an exchange of hot words between the deceased and the accused persons. Accused Asgar started inflicting blows by means of a knife and told his companions to complete the task for which they had come. Immediately, Yakub opened fire at point blank range from his revolver on the left side of the neck of Sant Kumar Sinha (deceased) due to which the deceased collapsed and died immediately. The informant/complainant being scared ran away from the place of occurrence, leaving his motorcycle at the spot. He met a police party to whom he narrated the incident. On the basis of the Fardbeyan of the informant, a case under Sections 302/120-B/379 IPC and Section 27 of the Arms Act, 1959 (hereinafter referred to as the 'Arms Act') against the accused, including both the appellants, was registered vide FIR No. 175 of 1996. Thus, the investigation ensued accordingly.

B. After the conclusion of the investigation, a charge sheet was filed against all the accused, showing Yakub @ Ayub as an absconder. Accordingly, the trial vide S.T. No. 112 of 1997 commenced. The co-accused Yakub @ Ayub was apprehended later and was tried separately vide S.T. No. 405 of 1998.

C. In order to prove its case, the prosecution examined eight witnesses including Mithilesh Kumar Sinha (PW.1) - real brother of the deceased, Arvind Kumar (PW.2) - cousin of deceased, Dr. Dhiraj (PW.6), who conducted the post-mortem examination, Dr. Gopal Prasad Sinha (PW.7), informant/

complainant and brother of deceased and Jagdish Prasad (PW.8), the Investigating Officer.

D. The defence also examined three witnesses. Gurpreet Singh Mittal (DW.1), was examined only to prove that there was no light in Sant Nirankari Bhawan at the relevant point of time, and further to show that Nirankari Chowk was at a distance of about 200-250 feet away from Nirankari Bhawan. Vijay Kumar Singh (DW.2) and Suresh Dass (DW.3) were merely formal witnesses.

E. As per the case of the prosecution, Gulam Sarbar, appellant ran away on Yakub's motorcycle after the incident. He was chased by the police and arrested at a short distance from the place of occurrence after he jumped a police barricade.

F. Similarly, Dhiren Mahto left the place of occurrence on LML Vespa Scooter alongwith Asgar Mian. So far as Dhiren Mahto (appellant) is concerned, he was arrested after a few days on secret information of his presence at Naya Bazar. At the time of raid, the said appellant tried to run away on the scooter after seeing the police but was chased and captured near Bartad.

G. In his statement under Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as `Cr.P.C.'), Gulam Sarbar simply denied all allegations against him and even denied his presence at the place of occurrence. Dhirendra Chandra Mahto denied his involvement by any means in the murder of Sant Kumar Sinha (deceased) stating that he had nothing to do with the main accused Binod Kumar. He was a small contractor, however, he did not deny his presence at the place of occurrence nor that he had run away on the scooter taking away Asgar Ansari as pillion rider.

H. After considering the material on record, the trial court vide its judgment and order dated 31.8.1998 convicted both the appellants under Sections 302 and 120

accused and sentenced as referred to hereinabove but acquitted Dhirendra Chandra Mahto of the charge under Section 27 of the Arms Act.

I. Aggrieved, they preferred appeals alongwith others before the High Court which stood dismissed by the impugned judgment and order dated 22.3.2012.

Hence, these appeals.

3. Shri Amarendra Sharan, learned senior counsel appearing on behalf of Gulam Sarbar and Shri Ashok K. Srivastava, learned senior counsel appearing on behalf of Dhiren Mahto, have submitted that there is no material on record to prove the existence of a conspiracy to kill Sant Kumar Sinha (deceased); none of these appellants was involved in the affairs of the institute for which there was some dispute between Sant Kumar Sinha (deceased) and Binod Kumar (accused). In fact, both of them had been running a institute jointly and one Shipra Sen Choudhery was working as a clerk in the institute with whom Binod Kumar (accused) developed illicit relationship which was not liked by Sant Kumar Sinha (deceased), who tried to persuade Binod Kumar (accused) not to continue that relationship but he was not willing to give up the same. Sant Kumar Sinha (deceased) also informed the wife of Binod Kumar (accused) about this relationship and there was a quarrel between Shipra Sen Choudhery and Binod Kumar's wife over the same. Earlier, Binod Kumar had opened a new institute and made Shipra Sen Choudhery its Director. However, none of these appellants were involved in the entire episode. Even the arrest of Gulam Sarbar from a place near to the place of incident is doubtful. Had it been so, the FIR which was registered after the arrest of Gulam Sarbar, would contain such facts. Even the general diary did not mention what the distance was between the police station and the place from where Gulam Sarbar, appellant, was arrested. The investigation had not been conducted properly and fairly. The witnesses, particularly, Mithilesh Kumar Sinha (PW.1) and Arvind Kumar (PW.2) not

being eye-witnesses could not be relied upon. No independent witness was examined by the prosecution to prove the arrest of any of the appellants nor to prove alleged recoveries of the motor cycle and the scooter in the case. The prosecution case is based on speculation and conjecture thus, the appeals deserve to be allowed and the judgment and order of the courts below are liable to be set aside.

4. Per contra, Shri Ratan Kumar Choudhuri and Shri Krishnanand Pandeya, learned counsel appearing on behalf of the State, opposed both these appeals contending that there are concurrent findings of facts and that both accused persons were well acquainted with Binod Kumar, the main accused, and had been seen by the witnesses and particularly by Dr. Gopal Prasad Sinha (PW.7) in the institute owned by Binod Kumar, accused, prior to the incident. Their presence on the spot and the manner in which they had parked their vehicles and stopped the motorcycle on which the complainant and deceased were travelling is enough to prove the conspiracy. There is no improvement or embellishment in the case of the prosecution against any individual accused. The evidence has rightly been appreciated by the courts below and ocular evidence is corroborated by the medical evidence. Thus, the appeals lack merit and are liable to be dismissed.

5. The essential ingredients of Criminal Conspiracy are (i) an agreement between two or more persons; (ii) agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence.

The offence takes place with the meeting of minds even if nothing further is done. It is an offence independent of other offences and punishable separately. Th[illegible]s

required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of proving criminal misconduct on the part of an accused. Criminal conspiracy is generally hatched in secrecy thus direct evidence is difficult to obtain or access. The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them between the parties. Agreement is essential. (Vide: *Kehar Singh & Ors. v. State (Delhi Admn.),* AIR 1988 SC 1883; *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru,* AIR 2005 SC 3820; *Mir Nagvi Askari v. CBI,* AIR 2010 SC 528; *Baldev Singh v. State of Punjab,* (2009) 6 SCC 564; *State of M.P. v. Sheetla Sahai & Ors.,* (2009) 8 SCC 617; *R. Venkatkrishnan v. CBI,* AIR 2010 SC 1812; and *S.Arul Raja v. State of T.N.,* (2010) 8 SCC 233).

6. In *Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh & Anr. v. CBI,* (2008) 15 SCC 49, it was held that in order to come under this provision it is not necessary for the accused to know the detailed stages of conspiracy; mere knowledge of main object/ purpose of the conspiracy would suffice for this Section.

Similarly, in *Vikram Singh & Ors. v. State of Punjab,* AIR 2010 SC 1007, this Court dealt with a case where the accused had purchased fortwin injection and chloroform. Thus, it was held that since the purchase of these materials was an initial step towards commission of offence, the presence of co-accused Sonia, though not referred to by the witnesses at the time of actual kidnapping would not imply that she was not privy to conspiracy and conviction of the accused under Section 120-B IPC was upheld.

7. The evidence on record and particularly the deposition

of Dr. Gopal Prasad Sinha (PW.7) clearly depicts the conspiracy from the manner in which the appellants and other accused were present on the crossing and stopped the complainant and the deceased. Admittedly, there was rivalry and ill-will between Binod Kumar (accused) and Sant Kumar Sinha (deceased) as they had separated their business of running of educational institution and Sant Kumar Sinha did not like the illicit relationship between Binod Kumar (accused) and Shipra Sen Choudhery, Clerk. Sant Kumar Sinha (deceased) tried to persuade Binod Kumar (accused) to desist from the said illicit relationship and Sant Kumar Sinha (deceased) also revealed this fact to the wife of Binod Kumar (accused) and there was not only a verbal fight between the wife of Binod Kumar and Shipra Sen Choudhery but also a scuffle between them on this issue and, subsequently, the wife of Binod Kumar began living separately. Therefore, relations between Binod Kumar (accused) and Sant Kumar Sinha (deceased) had definitely been strained.

8. Both these appellants and other accused were acquainted with Binod Kumar (accused) as well as Sant Kumar Sinha (deceased) and were also known to Dr. Gopal Prasad Sinha (PW.7). They had been seen earlier in the institute with Binod Kumar (accused).

9. The evidence of Dr. Gopal Prasad Sinha (PW.7) that Gulam Sarbar had run away with the accused Yakub @ Ayub on black coloured Kawasaki motorcycle and had been arrested within a close vicinity of the place of incident, though Yakub successfully escaped, inspires confidence. The names of the appellants and other accused had been mentioned in the FIR. In such a fact-situation, not mentioning that Gulam Sarbar had been arrested in the FIR is of no significance. The LML Vespa Scooter BR17-B-4455 used in the crime was seized in the presence of independent witnesses, namely, Sunil Mandal and Santosh Vikral. The seizure memo was prepared on which both the said panch witnesses put their sign s

marked as Exhibit 6-1 and was proved by Jagdish Prasad (PW.8), Investigating Officer. In respect of the arrest of Gulam Sarbar, Jagdish Prasad (PW.8) has clearly deposed that he was inspecting small vehicles in front of the police station alongwith Constable Badre Alam at about 20.05 hrs., when he saw two persons on one black coloured Kawasaki motorcycle crossing the barrier at a very high speed. They were given signal to stop but they did not stop. On the contrary, they pushed the barrier and fled away on which Jagdish Prasad (PW.8) and Constable Badre Alam chased them. Gulam Sarbar jumped from the motorcycle near Bartand Pulia and tried to flee but was controlled and captured by them and upon interrogation, he revealed that Yakub was the person who had run away on the motorcycle. Jagdish Prasad (PW.8) I.O. received secret information that the motorcycle used in the crime had been hidden in the house of Yakub (accused). A search was conducted of his house in presence of two independent witnesses, namely, Muslim Ansari and Bhagirath Razak and the same was recovered. A seizure memo was prepared and was signed by the said two witnesses. The said seizure memo was marked as Exhibit - 6 and proved by Jagdish Prasad (PW.8), Investigating Officer.

10. Jagdish Prasad (PW.8) deposed that he received secret information about the whereabouts of the appellant Dhiren Mahto and he conducted raid at Naya Bazar alongwith other police officials and Constable Badre Alam. Though he tried to escape, he was apprehended and arrested and LML Vespa Scooter BR 17-B-4455 was recovered. The arrest memo and recovery memo of the scooter was prepared in the presence of independent witnesses namely, Sunil Mandal and Santosh Vikral and the seizure memo was signed by the said witnesses. The same was marked as Exhibit 6-1 and was proved by him.

It was at a later stage that the other accused were arrested.

11. Learned senior counsel appearing on behalf of the

appellants have submitted that neither the witness of arrest memo of either of the appellants nor the panch witness of the recovery of scooter and motor cycle used in the crime has been examined by the prosecution. Even the police Constable Badre Alam who accompanied Jagdish Prasad (PW.8) I.O. at the time of arrest of Gulam Sarbar has not been examined. Therefore, the case of arrest of the appellants as well as the recovery of the vehicles is not worth acceptance and the whole case of the prosecution becomes doubtful.

12. We had been taken through the entire deposition of Jagdish Prasad (PW.8), Investigating Officer, however, no such question was put to him as to why those witnesses were not examined. In the absence of putting such an issue to Jagdish Prasad (PW.8), Investigating Officer, the appellants cannot seek any benefit of such omission or error by the prosecution in conducting of trial.

13. This Court in *Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (Dead) Thr. L.Rs. & Ors.,* AIR 2013 SC 1204 dealt with the issue raised herein observing as under:

"31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Therea[illegible]d

part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses."

(See also: *Ravinder Kumar Sharma v. State of Assam & Ors.,* AIR 1999 SC 3571; *Ghasita Sahu v. State of Madhya Pradesh,* AIR 2008 SC 1425; *Rohtash Kumar v. State of Haryana,* JT 2013 (8) SC 181; and *Gian Chand & Ors. v. State of Haryana,* JT 2013 (10) SC 515).

14. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. (Vide: *Vadivelu Thevar & Anr. v. State of Madras;* AIR 1957 SC 614; *Kunju @ Balachandran v. State of Tamil Nadu,* AIR 2008 SC 1381; *Bipin Kumar Mondal v.*

State of West Bengal AIR 2010 SC 3638; *Mahesh & Anr. v. State of Madhya Pradesh* (2011) 9 SCC 626; *Prithipal Singh & Ors. v. State of Punjab & Anr.,* (2012) 1 SCC 10; and *Kishan Chand v. State of Haryana* JT 2013(1) SC 222).

15. If the prosecution had not examined the Panchnama witnesses and witnesses to the arrest memos of the appellants, the appellants could have examined them in their defence.

16. The prosecution has successfully established the involvement of the appellants in the crime and the manner in which the crime has been committed establishes the conspiracy. The appellants in their statement under Section 313 Cr.P.C. did not furnish any satisfactory explanation of the circumstances under which they were present at the place of occurrence. More so, the manner in which they fled away after the commission of the crime clearly indicates their involvement in the offence to conduct a conspiracy. Gopal Prasad Sinha (PW.7) has no enmity with either of the appellants and there was no reason for him to involve them falsely in such a heinous crime.

17. Thus, the trial court after appreciating the evidence recorded the findings of fact regarding the presence of the appellants at the place of occurrence as well as the presence of Dr. Gopal Prasad Sinha (PW.7). The said witness was well acquainted with all the accused and particularly the appellants. He had seen them alongwith Binod Kumar (accused) gathering all the accused at the place of occurrence. Some of the accused persons particularly Gulam Sarbar engaged and used to sit together in a gumti and have tea there. A conspiracy was hatched by Binod Kumar (accused) as Sant Kumar Sinha (deceased) had created problems in his family life as well as in his business because the deceased did not like the illicit relationship between Binod Kumar (accused) and Shipra Sen Choudhery. The manner in which the crime was committed it seems that it was a pre-planned murder. There was sufficient light in the nearby building Nirankari [illegible] of

commission of the offence. There was no material contradiction, embellishment or improvement in the deposition of Dr. Gopal Prasad Sinha (PW.7). The defence though examined three witnesses but none of them was relevant for their purpose.

The trial court acquitted Dhiren Mahto of the charges under Section 27 of the Arms Act giving cogent reasons.

18. The High Court reappreciated the evidence and upheld the findings of facts recorded by the trial court observing that the ocular evidence was in consonance and in conformity with the medical evidence and it was a clear cut case of conspiracy. The High Court rightly observed that normally the perpetrator of crime in a case of conspiracy does not take part in the execution rather such conspirator hires some criminal directly or indirectly to execute the evil design planned by him. There may be circumstances where the conspirator remains vigilant to conceal his identity and would not disclose the actual motive behind the conspiracy.

19. Thus, we do not see any reason for interfering that the prosecution witnesses have deposed falsely to implicate the appellants.

20. Thus, in view of the above, the facts and circumstances of these appeals do not warrant interference. The appeals lack merit and are dismissed accordingly.

R.P. Appeals dismissed.

STATE OF RAJASTHAN
v.
UCCHAB LAL CHHANWAL
(Civil Appeal No. 9544 of 2013 etc.)

OCTOBER 22, 2013

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

PRACTICE AND PROCEDURE:

Promotion - Challenged before High Court in writ petition - Persons junior to respondents, but promoted, not arrayed as parties in writ petition filed by respondents - Writ petition allowed by High Court - Held: Once respondents are promoted, the persons who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them as that would go against the basic tenet of principles of natural justice -- On this singular ground, judgments of single Judge and Division Bench of High Court are set aside - However, the finding of High Court holding that circular dated 26.7.2006 was not applicable as the controversy relating to promotion pertained to the year 1996-97, is unexceptionable and is concurred with - Service law - Government of Rajasthan Circular dated 26.7.2006 - Rajasthan Police Service Rules, 1954.

Party - Non-joinder of affected party - Effect of.

The writ petition of the respondent in C.A. No.9544 of 2013 challenging the order dated 1.12.1992 awarding him punishment of censure and on that basis denying him promotion by order dated 22.8.1997 was allowed by single Judge of the High Court who quashed the order dated 1.12.1992 and held that the writ petitioner was entitled to promotion to the senior scale. The Division

Bench of the High Court dismissed the writ appeal filed by the department.

Allowing the appeals in part, the Court

HELD: 1.1 The dispute relates to promotion which will have impact on inter se seniority. There were specific averments in the writ petition that juniors placed at serial numbers 9, 10 and 11 in gradation list had been promoted by order dated 20.8.1997. [para 11 and 15] [26-D-E; 28-D]

1.2 Once the respondents are promoted, the persons who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them, as that would go against the basic tenet of the principles of natural justice. On this singular ground, the orders of the writ court as well as the Division Bench pertaining to grant of promotion to the respondents are set aside. [para 15-16] [28-E-G; 29-B]

Vijay Kumar Kaul and Others v. Union of India and Others **2012 (6) SCR 128 = 2012 (7) SCC 610** *Indu Shekhar Singh v. State of U.P.* **2006 (1) Suppl. SCR 497 = 2006 (8) SCC 129;** *Public Service Commission v. Mamta Bisht* **2010 (7) SCR 289 = 2010 (12) SCC 204;** *J.S. Yadav v. State of Uttar Pradesh and Another* **2011 (5) SCR 460 = 2011 (6) SCC 570 - relied on.**

2. As far as the conclusion of the High Court that the circular dated 26.7.2006 was not applicable as the controversy relating to promotion pertained to the year 1996-97, it is unexceptionable and is concurred with. [para 6 and 15] [24-G; 25-A; 29-A]

B.V. Sivaiah and Others v. K. Addanki Babu and Others **1998 (3) SCR 782 = 1998 (6) SCC 720;** *K. Samantaray v. National Insurance Co. Ltd.* **2003 (3) Suppl. SCR 669 = 2004**

(9) SCC 286; *Shankar Lal Balai v. State of Rajasthan and Others* **2009 (Raj.) unreported cases page 777,** *Satyamani Tiwari v. State of Rajasthan and Others* **S.B.C.W.P.No. 2878/ 2003 decided on 11.8.2006 - cited.**

Case Law Reference:

1998 (3) SCR 782	**cited**	**para 5**
2003 (3) Suppl. SCR 669	**cited**	**para 6**
2009 (Raj.) unreported cases page 777 S.B.C.W.P.No. 2878/2003	**cited**	**para 6**
decided on 11.8.2006	**cited**	**para 6**
2012 (6) SCR 128	**relied on**	**para 11**
2006 (1) Suppl. SCR 497	**relied on**	**para 12**
2010 (7) SCR 289	**relied on**	**para 13**
2011 (5) SCR 460	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9544 of 2013.

From the Judgment and Order dated 11.11.2010 of the High Court of Judicature for Rajasthan at Jaipur Bench in D.B. Civil Special Appeal (Writ) No. 08449 of 2010 in S.B. Civil Writ Petition No. 6574 of 1997.

WITH

C.A. No. 9545 of 2013.

Dr. Manish Singhvi, AAG, Amit Lubhaya, Irshad Ahmad for the Appellant.

Sandhya Goswami, Santosh Mishra for the Respondent

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in both the special leave petitions.

2. Regard being had to the identic issue involved in both the appeals they were heard together and are disposed of by a common judgment. For the sake of convenience the facts from the appeal arising out of S.L.P. (C) No. 21202 of 2011 are adumbrated herein.

3. The respondent was appointed in Rajasthan Police Service (Junior Scale) after his selection through Rajasthan Public Service Commission (for short "the Commission") vide order dated 19.10.1989. As stipulated in Rajasthan Police Service Rules, 1954 (for short "the Rules") the R.P.S. cadre is divided into four categories and the lowest category is in the junior scale. The persons from the junior Scale are promoted to senior scale and thereafter to super time scale. The Rules provide that the person who has six years experience in junior scale becomes eligible for consideration to senior scale. A seniority list was published on 19.8.1997 wherein the name of the respondent found place at serial number 51 in junior scale. In respect of vacancies in the promotional posts arising against the quota of 1996-97 a Departmental Promotion Committee (DPC) was convened and on the basis of recommendations of the DPC persons junior to the respondent were promoted. It is apt to mention here that the criterion for promotion was seniority-cum-merit.

4. Be it noted, the DPC though considered the case of the respondent, yet his case was not recommended for promotion for the vacancy occurring in 1996-97 as he was imposed with the punishment of censure on 1.12.1992. However, he was promoted thereafter in the year 1998. In this backdrop the respondent approached the High Court by way of filing S.B. Civil Writ Petition No. 6574 of 1997 for quashing of the penalty of censure imposed on him on 1.12.1992 and further for setting

aside the order dated 22.8.1997 whereby he had been superseded and his juniors had been promoted. A prayer was made for issue of a direction to consider his candidature for promotion to the post of senior scale in Rajasthan Police Service and, if he was found suitable, to promote him with all consequential benefits.

5. The writ court vide order dated 5.3.2010 came to hold that the promotion of the respondent could not have been deferred as the seniority was required to be given more weightage over the merit as per the decision rendered in *B.V. Sivaiah and Others v. K. Addanki Babu and Others*[1]. Being of this view the writ court allowed the writ petition and quashed the order dated 1.12.1992 as far as it denied promotion to the respondent to the senior scale against the vacancies of the year 1996-97 and directed that he was entitled to promotion to the senior scale against the vacancy of the year 1996-97 with all consequential benefits.

6. Being dissatisfied with the aforesaid order the State of Rajasthan preferred D.B. Civil Special Appeal (Writ) No. 08449 of 2010. In the appeal circular dated 26.7.2006 which sets out certain guidelines relating to the types of punishments and their impact/effect on promotion of a personnel as per which the respondent was found unfit to be promoted was pressed into service. The Division Bench vide judgment and order dated 11.11.2010 placing reliance on *B.V. Sivaiah* (supra) and *K. Samantaray v. National Insurance Co. Ltd.*[2] and the decisions of the High Court of Rajasthan in *Shankar Lal Balai v. State of Rajasthan and Others*[3], *Satyamani Tiwari v. State of Rajasthan and Others*[4] and various other pronouncements of the High Court came to hold that the circular dated 26.7.2006

1. (1998) 6 SCC 720.
2. (2004) 9 SCC 286.
3. 2009 (Raj.) unreported cases page 777.
4. S.B.C.W.P.No. 2878/2003 decided on 11.8.2

was not applicable as the controversy relating to promotion pertained to the year 1996-97. The High Court further observed that in case of promotion based on seniority-cum-merit the person who had been inflicted with the penalty of censure which is a minor penalty, cannot be denied promotion without being considered and, in any case, it could not have taken into consideration in respect of the year 1996-97. Being of this view the Division Bench affirmed the order passed by the learned single Judge.

7. We have heard Dr. Manish Singhvi, learned counsel appearing for the appellant in both the appeals, Ms. Sandhya Goswami, learned counsel for the respondent in appeal arising out of S.L.P. (C) No. 21202 of 2011, and Mr. Santosh Mishra, learned counsel for the respondent in appeal arising out of S.L.P. (C) No. 21201 of 2011.

8. It is submitted by Dr. Manish Singhvi, learned counsel for the appellant, that though the respondent was entitled to be considered for promotion but the principle relating to seniority-cum-merit would come into play when he is compared with other persons and in that event the punishment of censure has to be taken note of. It is his further contention that the punishment does not stand wiped off unless the Rules/ instructions so provide. The learned counsel for the State has criticized the approach of the writ court and that of the Division Bench on the ground that there has been incorrect appreciation of facts and the view expressed ignoring the distinction between consideration for promotion and suitability for promotion is legally unsustainable.

9. Learned counsel for the respondents in both the appeals submitted that censure which is a minor punishment cannot be an impediment for the entire service career and it has to be restricted to a specified period of time and when there is consideration on the base of seniority-cum-merit, seniority has to be given due weightage. For the aforesaid purpose they pressed into service the decisions which have been relied

upon by the High Court. It is also canvassed by them that the High Court has correctly opined that the circular cannot be made applicable retrospectively having been issued in the year 2006 to a promotional matter pertaining to the year 1996-97.

10. There can be no scintilla of doubt that the finding recorded by the High Court pertaining to the circular is absolutely correct and unassailable. The said circular could not have been placed reliance upon by the State to contend that the respondents could have been deprived of promotion. However, the said circular is totally inconsequential for the present case, for what we are going to hold.

11. Though some argument was canvassed with regard to the relevance of the punishment of censure, yet the said aspect need not be adverted to. On a perusal of the writ petition, the order of the writ court and that of the Division Bench we notice that there were specific averments that juniors placed at serial numbers 9, 10 and 11 in gradation list had been promoted vide order dated 20.8.1997. They have not been arrayed as parties. Needless to emphasize, in the event the order passed by the High Court is affirmed, the persons who are seniors to the respondents in the promotional cadre are bound to become junior regard being had to their seniority position in the feeder cadre. It is well settled in law that no order can be passed behind the back of the person that shall adversely affect him. In this context, we may refer with profit to the decision in *Vijay Kumar Kaul and Others v. Union of India and Others*[5] wherein it has been held thus: -

> "Another aspect needs to be highlighted. Neither before the Tribunal nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of

5. (2012) 7 SCC 610.

seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant."

12. After so stating this Court referred to the decision in *Indu Shekhar Singh v. State of U.P.*[6] wherein it has been held thus: -

"56. There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of inter se seniority."

13. In *Public Service Commission v. Mamta Bisht*[7] this Court while dealing with the concept of necessary parties and the effect of non-impleadment of such a party in the matter when the selection process is assailed observed thus: (SCC pp. 207-08, paras 9-10)

"9. … in *Udit Narain Singh Malpaharia v. Board of Revenue*[8], wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called 'CPC') provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh v. State of Gujarat*[9], *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot*[10] and *Sarguja Transport Service v. STAT*[11].)

6. (2006) 8 SCC 129.
7. (2010) 12 SCC 204.
8. AIR 1963 SC 786.
9. AIR 1965 SC 1153.

10. In *Prabodh Verma v. State of U.P.*[12] *and Tridip Kumar Dingal v. State of W.B.*[13], it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties."

14. In *J.S. Yadav v. State of Uttar Pradesh and Another*[14] it has been held as follows:-

"No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice."

15. In the case at hand the dispute relates to promotion which will have impact on inter se seniority. The learned counsel for the respondents assiduously endeavoured to convince us that they are agitating the grievance with regard to their promotion and it has nothing to do with the persons junior to them who had been promoted. Despite the indefatigable effort, we are not persuaded to accept the aforesaid proponement, for once the respondents are promoted, the juniors who have been promoted earlier would become juniors in the promotional cadre, and they being not arrayed as parties in the lis, an adverse order cannot be passed against them as that would go against the basic tenet of the principles of natural justice. On this singular ground the directions issued by the writ court as well as the Division bench pertaining to grant of promotion to the respondents are quashed. To elaborate, as far as the

10. (1974) 2 SCC 706.
11. (1987) 1 SCC 5.
12. (1984) 4 SCC 251.
13. (2009) 1 SCC 768.
14. (2011) 6 SCC 570.

conclusion of the High Court relating the circular is concerned, it is unexceptionable and we concur with the same.

16. Consequently, the appeals are allowed in part and the order passed by the Division Bench as well as by the writ court is set aside to the extent directions have been issued granting benefit of promotion to the respondents. In the facts and circumstances of the case, there shall be no order as to costs.

R.P. Appeals partly allowed.

DR. BALRAM PRASAD

v.

DR. KUNAL SAHA & ORS.

(Civil Appeal No. 2867 of 2012 etc.)

OCTOBER 24, 2013

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

CONSUMER PROTECTION ACT, 1986:

Complaint - Medical negligence - Contributory negligence - Death of an US based patient in hospital in India - National Commission holding the hospital and doctors liable for medical negligence as also the husband of deceased liable for contributory negligence and, as such, deducting 10% towards contributory negligence from compensation, awarding Rs. 1,55,58,750 to claimant - Held: Appellant-Hospital is vicariously liable for its doctors and is, therefore, directed to pay total amount of compensation amounting to Rs.6,08,00,550/-, under various heads as detailed in judgment, after deducting Rs.25 lakhs payable by appellants-doctors - National Commission erred in holding that claimant had contributed to negligence of appellant-doctors and Hospital which resulted in death of his wife when Supreme Court had clearly absolved the claimant of such liability and remanded the matter back to National Commission only for determining the quantum of compensation - Finding of National Commission in this regard is set aside and it is re-emphasized that claimant did not contribute to negligence of appellants-doctors and Hospital which resulted in death of his wife - Consumer Protection Rules, 1987 - r.14(c).

Enhancement of compensation by complainant subsequent to filing of claim petition - Claimant making

additional claims by way of affidavit before National Commission - Held: Claim for enhancement of compensation by claimant is justified - Claimant is entitled for enhanced compensation under certain items in additional claim preferred before National Commission - Further, claim of claimant having remained pending for 15 years, value of money has devalued to a great extent - Therefore, inflation should be considered while deciding the quantum of compensation - It is wholly untenable in law for the Hospital and the doctors to plead that without there being an amendment to the claim petition, the claimant is not entitled to seek the additional claims by way of affidavit, and that the claim is barred by limitation -- Supreme Court has got the power under Art. 136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the affected claimant - Code of Civil Procedure, 1908 - Constitution of India, 1950 - Art.136.

Just and fair compensation - Held: Status, future prospects and educational qualification of deceased must be judged for deciding adequate, just and fair compensation - Principle of just and reasonable compensation is based on 'restitutio in integrum', i.e., claimant must receive the sum of money which would put him in the same position as he would have been if he had not sustained the wrong - Court is duty bound and entitled to award 'just compensation' irrespective of the fact whether any plea in that behalf was raised by claimant or not.

Future prospects of income - Held, 'Future loss of income' is different from 'future prospects of income' in terms of potential of victim - In awarding just and reasonable compensation, future prospects of deceased must have been reasonably judged by the National Commission.

Medical negligence - Compensation -- Multiplier method - Held: Just, fair and reasonable compensation has to be

determined on the basis of the income of deceased at the time of death of the victim and other related claims on account of the death - Therefore, the plea to apply the multiplier method in determination of compensation, does not inspire confidence.

Medical negligence - Death of patient - Compensation towards loss of income of deceased - Held: While determining the income of deceased, evidence on record has to be relied on - Further, 30% added towards future loss of income of deceased - 1/3 of total income is required to be deducted towards personal expenditure of deceased - Estimating the life expectancy of a healthy person as 70 years, compensation to be awarded by multiplying the total loss of income by 30.

Medical negligence - Death of patient - Claim by husband under the heads loss of income for missed work, travel expenses and legal expenses - Held: Claim towards missed work cannot be allowed as the same has no direct nexus with the negligence of appellant-doctors and hospital - - However, claim towards travel expenses and legal expenses, partly allowed.

Other pecuniary damages - Medical negligence - Death of patient -- Expenses incurred by claimant towards treatment, travel and hotel expenses in this regard, allowed.

Non-pecuniary damages -Medical negligence - Death of patient -- Compensation under the head 'pain and suffering of patient during the course of treatment', allowed - Loss of consortium, allowed -- However, under the head, 'emotional distress, pain and suffering for claimant himself', no compensation can be awarded since this claim bears no direct link with negligence of hospital and doctors in treating claimant's wife.

Medical negligence - Interest on *nt*

- Held: Not awarding interest by National Commission on compensation amount from the date of filing of original complaint up to the date of payment is most unreasonable and is opposed to provisions of Interest Act - Therefore, 6% interest is awarded on the compensation finally determined from date of the petition till payment - Interest Act, 1978.

Medical Negligence -- Liability of nursing homes, hospitals and doctors - Need of an appropriate legislation - Held: Doctors, hospitals and nursing homes and other connected establishments are required to be dealt with strictly if they are found to be negligent with patients and do not take their responsibility seriously - Central and State Governments may consider enacting laws wherever there is absence of one, for effective functioning of private hospitals and nursing homes.

The wife of the claimant-respondent no. 1(C.A. No. 692/2012) died while she was undergoing treatment in the appellant Hospital. Respondent no. 1 filed a claim petition. Initially the claim was filed for Rs.77,07,45,000/- and later the same was amended by claiming a further sum of Rs.20,00,00,000/-. After the case of *Malay Kumar Ganguly*[1] was remanded by Supreme Court, the National Consumer Disputes Redressal Commission awarded the compensation holding the hospital and the four doctors guilty of medical negligence. The four doctors who had treated the deceased were directed to pay Rs.25,00,000/- each besides the cost of litigation. The National Commission deducted 10% of the compensation towards the contributory negligence of the claimant holding that he had interfered with the treatment, and awarded Rs.1,55,58,750/- as compensation payable to the claimant. One of the doctors died subsequently. The decision of the National Commission was challenged in the instant appeals by the Hospital, the doctors as also by the claimant.

The rival submissions of the parties were but before this Court and the following issues were to be considered by the Court:

"1) Whether the claim of the claimant for enhancement of compensation in his appeal is justified. If it is so, for what compensation he is entitled to?

2) While making additional claim by way of affidavit before the National Commission when amending the claim petition, whether the claimant is entitled for compensation on the enhanced claim preferred before the National Commission?

3(a) Whether the claimant seeking to amend the claim of compensation under certain heads in the original claim petition has forfeited his right of claim under Order II Rule 2 of CPC as pleaded by the Hospital?

3(b) Whether the claimant is justified in claiming additional amount for compensation under different heads without following the procedure contemplated under the provisions of the Consumer Protection Act and the Rules?

4) Whether the National Commission is justified in adopting the multiplier method to determine the compensation and to award the compensation in favour of the claimant?

5) Whether the claimant is entitled to pecuniary damages under the heads of loss of employment, loss of his property and his traveling expenses from U.S.A. to India to conduct the proceedings in his claim petition?

6) Whether the claimant is entitled to the interest on the compensation that would be awarded?

7) Whether the compensation awarded in the

impugned judgment and the apportionment of the compensation amount fastened upon the doctors and the hospital requires interference and whether the claimant is liable for contributory negligence and deduction of compensation under this head?

8) To what Order and Award the claimant is entitled to in these appeals?"

Disposing of the appeals, the Court

HELD:

Answer to Point nos. 1, 2 and 3

1.1 The claim for enhancement of compensation by the claimant in his appeal is justified for the following reasons:

The National Commission has rejected the claim of the claimant for "inflation" made by him without assigning any reason whatsoever. It is an undisputed fact that the claim of the complainant has been pending before the National Commission and this Court for the last 15 years. The value of money that was claimed in 1998 has been devalued to a great extent. This Court has repeatedly affirmed that inflation of money should be considered while deciding the quantum of compensation. [para 81] [102-E-G]

Reshma Kumari v. Madan Mohan **2009 (11) SCR 305 = (2009) 13 SCC 422** *Govind Yadav Vs. New India Insurance Co. Ltd.* **(2011) 10 SCC 683,** *Ibrahim Vs. Raju* **(2011) 10 SCC 634 - relied on.**

1.2 Using the C.I.I. as published by the Government of India, the original claim of Rs.77.7 crores preferred by the claimant in 1998 would be equivalent to Rs.188.6 crores as of 2013 and, therefore, the enhanced claim preferred by the claimant before the National

Commission and before this Court is legally justifiable as this Court is required to determine the just, fair and reasonable compensation. Therefore, this Court is required to consider the relevant aspect of the matter, namely, that there has been steady inflation over the period of 15 years and that money has been devalued greatly. Therefore, the decision of the National Commission in confining the grant of compensation to the original claim of Rs.77.7 crores preferred by the claimant under different heads and awarding meager compensation in the impugned judgment, is wholly unsustainable in law as the same is contrary to the legal principles laid down by this Court. Therefore, the claim for enhancement of compensation is allowed. [para 82] [105-A-B, D-F]

2. As regards the claim for additional compensation of about Rs.20 crores in addition to the initial claim, made in 2011, the rejection of the additional claims by the National Commission without consideration on the assumption that the claims made by the claimant before it cannot be changed or modified without pleadings under any condition is contrary to the decisions of this Court. The finding of fact on the basis of which the National Commission rejected the claim is based on untenable reasons. The claim of the claimant for additional compensation is accepted as it is supported by the decisions of this Court and the same is well founded in law. It is the duty of Tribunals, Commissions and Courts to consider relevant facts and evidence in respect of facts and circumstances of each and every case for awarding just and reasonable compensation. Therefore, this Court is of the view that the claimant is entitled for enhanced compensation under certain items made by the claimant in additional claim preferred by him before the National Commission. [para 83-84] [105-G; 106-F-G; 109-E-H; 110-A]

Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors. **(2009) 9 SCR 313 = (2009) 6 SCC 1;** *Oriental Insurance Company Ltd. Vs. Jashuben & Ors.* **2008 (2) SCR 930 = (2008) 4 SCC 162;** *R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd. & Ors.* **1995 (1) SCR 75 = (1995) 1 SCC 551;** *Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee* **(2009) 13 SCR 1 = (2009) 9 SCC 221;** *Raj Rani & Ors Vs. Oriental Insurance Company Ltd. & Ors.* **(2009) 7 SCR 1168 = (2009) 13 SCC 654 - relied on.**

3.1 Status, future prospects and educational qualification of the deceased must be judged for deciding adequate, just and fair compensation. Further, it is an undisputed fact that the victim was a graduate in psychology from a highly prestigious school in New York. She had a brilliant future. However, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt showing a paltry income of only $30,000 per year which she was earning as a graduate student. Therefore, the National Commission has committed grave error in taking that figure to determine compensation under the head of loss of dependency and the same is contrary to the observations made by this Court. [para 84-85] [110-F-H; 111-A]

R.K. Malik Vs. Kiran Pal **2009 (10) SCR 87= (2009) 14 SCC 1;** *Arvind Kumar Mishra Vs. New India Assurance Co.* **2010 (11) SCR 857 = (2010) 10 SCC 254;** *G.M.,Kerala SRTC v. Susamma Thomas,* **(1994) 2 SCC 176 - relied on.**

Govind Yadav Vs. New India Insurance Co. Ltd. **(2011) (10) SCC 683,** *Sri Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance* **2011 (9) SCR 922 = (2011) 13 SCC 236,** *Laxman @ Laxman Mourya Vs. Divisional Manager Vs. Oriental Insurance Co. Ltd. & Anr.* **(2011) 10 SCC 756;** *Kavita Vs. Dipak & Ors.* **(2012) 8 SCC 604;** *Ibrahim Vs. Raju.* **(2011) 10 SCC 634;** *Kavita Vs. Dipak & Ors.* **(2012) 8 SCC 604 - held inapplicable.**

3.2 'Future loss of income' is different from 'future prospects of income' in terms of the potential of the victim. In view of the law laid down by this Court, the Commission, in awarding just and reasonable compensation, ought to have taken into consideration the future prospects of the deceased even in the absence of any expert opinion, and reasonably judged the same, based on the income of the deceased and her future potential in U.S.A. However, in the instant case, the calculation of the future prospect of income of the deceased has also been scientifically done by economic expert. The claimant is entitled to enhanced compensation under the heading of loss of future prospects of income of the victim. [para 86, 88 and 89] [111-G-H; 112-F-G; 113-C-D]

Santosh Devi v. National Insurance Co. Ltd., **(2012) 6 SCC 421 - relied on.**

3.3 With respect to the fundamental principle for awarding just and reasonable compensation, this Court in Malay Kumar Ganguly's case has categorically stated, while remanding this case back to the National Commission, that the principle for just and reasonable compensation is based on 'restitutio in integrum' that is, the claimant must receive sum of money which would put him in the same position as he would have been if he had not sustained the wrong. The Court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. [para 91-92] [116-B-D]

Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee **(2009) 13 SCR 1 = (2009) 9 SCC 221** *Ningamma and Anr. Vs. United India Insurance Company Ltd.* **2009 (8) SCR 683 = (2009) 13 SCC 710 - relied on.**

3.4 While remanding the matter [illegible] Commission only for determina[illegible]

compensation for medical negligence, this Court has observed that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss "already suffered or likely to be suffered in future". The claimant has also rightly asserted that when the original claim petition was filed soon after the death of his wife in 1998, it would be impossible to file a claim for "just compensation". The claimant has suffered in the course of the 15 years long trial. [para 93] [116-G-H; 117-A-B]

Oriental Insurance Company Ltd. Vs. Jashuben & Ors. **(2008) 2 SCR 930 = (2008) 4 SCC 1621;** *R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd. & Ors.* **(1995) 1 SCR 75 = 1995 (1) SCC 551;** *Raj Rani & Ors Vs. Oriental Insurance Company Ltd. & Ors.* **(2009) 7 SCR 1168 = (2009) 13 SCC 654,** *Laxman @ Laxman Mourya Vs. Divisional Manager Vs. Oriental Insurance Co. Ltd. & Anr.* **(2011) 10 SCC 756** *Ibrahim Vs. Raju* **(2011) 10 SCC 634 - referred to.**

3.5 This Court has got the power under Art. 136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the affected claimant. It is wholly untenable in law for the Hospital and the doctors to plead that without there being an amendment to the claim petition, the claimant is not entitled to seek the additional claims by way of affidavit, and that the claim is barred by limitation. The claimant is justified in claiming additional claim for determining just and reasonable compensation under different heads. Accordingly, the point Nos. 1, 2, and 3 are answered in favour of the claimant and against the appellant-doctors and the Hospital. [para 93-94] [117-D-E; F-G]

Answer to point no. 4

4.1 It would not be proper to use a strait jacket multiplier method for determining the quantum of

compensation in medical negligence claims. On the contrary, this Court has chosen to deviate from the standard multiplier method to avoid over-compensation and also relied upon the quantum of multiplicand to choose the appropriate multiplier. [para 97] [121-B-C]

4.2 The National Commission or this Court requires to determine just, fair and reasonable compensation on the basis of the income that was being earned by the deceased at the time of her death and other related claims on account of her death. Accordingly, this Court holds that the plea to apply the multiplier method in determination of compensation does not inspire confidence and the same cannot be accepted. Point no. 4 is answered in favour of the claimant and against the appellants-doctors and the Hospital. [para 97] [121-C-D, E-G]

Indian Medical Association Vs. V.P. Shantha & Ors. **1995 (5) Suppl. SCR 110 = (1995) 6 SCC 651;** *Spring Meadows Hospital & Anr Vs. Harjol Ahluwalia* **(1998) 2 SCR 428 = (1998) 4 SCC 39;,** *Charan Singh Vs. Healing Touch Hospital and Ors.* **2000 (3) Suppl. SCR 337 = (2000) 7 SCC 668,** *Savita Garg Vs. Director National Heart Institute* **2004 (5) Suppl. SCR 359 = (2004) 8 SCC 56,** *State of Punjab Vs. Shiv Ram & Ors.* **(2005) 2 Suppl. SCR 991 = (2005) 7 SCC 1;** *Samira Kohli Vs. Dr. Prabha Manchanda & Anr.* **(2008) 1 SCR 719 = (2008) 2 SCC 1;** *P.G. Institute of Medical Sciences Vs. Jaspal Singh & Ors.* **(2009) 9 SCR 889 = 2009 (7) SCC 330;** *Nizam Institute Vs. Prasant Dhananka Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors.* **(2009) 9 SCR 313 = (2009) 6 SCC 1;** *Malay Kumar Ganguly Vs. Sukumar Mukherjee & Ors. Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee* **(2009) 13 SCR 1 = 2009 (9) SCC 221; and** *V. Kishan Rao Vs. Nikhil Superspeciality Hospital & Anr.* **(2010) 5 SCR 1 = (2010) 5 SCC 513 - referred to.**

Sarla Verma v. Delhi Transport **(**

SCR 1098 = (2009) 6 SCC 121 *Reshma Kumari v. Madan Mohan* **2009 (11) SCR 305 = (2009) 13 SCC 422 - held inapplicable.**

Answer to Point no. 5

5.1 The claim of Rs.1,12,50,000/- made by the claimant under the head of loss of income for missed work, cannot be allowed by this Court since, the same has no direct nexus with the negligence of the appellant-doctors and the Hospital. [para 99] [122-D-E]

5.2 As regards the claim under the head of 'Travel expenses over the past 12 years' at Rs.70,00,000/-, the claimant did not produce any record of plane fare to prove his travel expenditure from U.S.A. to India to attend the proceedings. However, it is an undisputed fact that the claimant is a citizen of U.S.A. and had been living there. It cannot be denied that he had to incur travel expenses to come to India to attend the proceedings. Therefore, on an average, this Court awards a compensation of Rs.10 lakhs under the head of 'Travel expenses over the past twelve years'. [para 99] [122-E-F]

5.3 The claim of the claimant that he has spent Rs.1,65,00,000/- towards litigation over the past 12 years while seeking compensation under this head, is on the higher side, considering that the claimant who is a doctor by profession, appeared in person before this Court to argue his case. However, he might have required rigorous assistance of lawyers to prepare his case and produce evidence in order. Therefore, a compensation of Rs.1,50,000/- is granted under the head of 'legal expenses'. Therefore, a total amount of Rs. 11,50,000/- is granted to the claimant under the head of 'cost of litigation'. [para 99] [122-G-H; 123-A]

Answer to Point no. 6

6. The National Commission did not grant any

interest for the long period of 15 years when the case remained pending before the National Commission and this Court. Not awarding interest by the National Commission on the compensation amount from the date of filing of the original complaint up to the date of payment of entire compensation by the appellant-doctors and the Hospital to the claimant is most unreasonable and the same is opposed to the provision of the Interest Act, 1978. Therefore, interest is awarded on the compensation determined by this Court at the rate of 6% from the date of complaint till the date of payment. [para 100 and 102] [123-C-D. 126-D-F]

Thazhathe Purayil Sarabi & Ors. Vs. Union of India & Anr. **2009 (10) SCR 70 = 2009 (7) SCC 372 - relied on.**

Kemp and Kemp **on Quantum of Damages (Special Edn., 1986) - referred to.**

Answer to point no. 7

7.1 The liability of the doctors in causing the death of claimant's wife has already been established by the Court in Malay Kumar Ganguly's case. The decision in the instant appeals is confined to determine the extent to which the appellant-doctors and the Hospital are liable to pay compensation awarded to the claimant for their acts of negligence in giving treatment to the deceased wife of the claimant. [para 103] [127-A-C]

Liability of the Hospital:

7.2 This Court in Malay Kumar Ganguly's has stated that the bulk of the proportion of compensation is to be paid by the hospital and the rest by Dr. 'SM'. None of the other doctors involved were imposed with cost though they were found guilty of medical negligence.[para 105] [128-C-E]

7.3 It has to be inferred that the appellant Hospital is vicariously liable for its doctors. The appellant-Hospital is, therefore, directed to pay the total amount of compensation with interest awarded in the appeal of the claimant which remains due, after deducting the total amount of Rs.25 lakhs payable by the appellants-doctors as per the Order passed by this Court while answering the point no. 7. [para 109] [133-E-F]

Liability of Dr. 'SM'

7.4 It is imperative to mention that the quantum of compensation to be paid by the appellant-doctors and the Hospital is not premised on their culpability u/s 304-A of IPC but on the basis of their act of negligence as doctors in treating the deceased wife of the claimant. The findings of this Court regarding the liability of Dr. 'SM' in Malay Kumar Ganguly's case are, therefore, reiterated. [para 111] [134-G-H; 135-A]

7.5 It is also important to highlight in this judgment that the manner in which Dr. 'SM' attempted to shirk from his individual responsibility both in the criminal and civil cases made against him on the death of the claimant's wife is very much unbecoming of a doctor as renowned and revered as he is. He is a senior doctor who was in charge of the treatment of the deceased, but he has shown utmost disrespect to his profession by being so casual in his approach in treating his patient. Moreover, on being charged with the liability, he attempted to shift the blame on other doctors. Therefore, in the light of the facts and circumstances, he is directed to pay a compensation of Rs.10 lakhs to the claimant in lieu of his negligence and it is hoped that he upholds his integrity as a doctor in future and would not be casual about his patient's lives. [para 112-113] [135-G-H; 136-A-H; 137-A-B]

Liability of Dr.BH:

7.6 Like appellant Dr. 'SM', appellant Dr. 'BH' is also a senior doctor of high repute. However, according to the findings of this Court in Malay Kumar Ganguly's case, he had conducted himself with utmost callousness in giving treatment to the claimant's wife which led to her unfortunate demise. He too made every attempt to shift the blame to the other doctors thereby tainting the medical profession. This Court directs him to pay Rs.10 lakhs as compensation to the claimant in lieu of his negligence in treating the wife of the claimant. [para 115] [139-A-C]

Liability of Dr 'BP':

7.8 This Court in Malay Kumar Ganguly abhorred the shifting of blames by the senior doctor on the attending physician appellant 'BP' even though the Court held him guilty of negligence. He was a junior doctor and might have acted on the direction of senior doctors who undertook the treatment of the claimant's wife in the Hospital. However, the fact cannot be lost sight of that the appellant was an independent medical practitioner with a post graduate degree. He still stood as a second fiddle and perpetuated the negligence in giving treatment to the claimant's wife. This Court in Malay Kumar Ganguly's case found him negligent in treating the claimant's wife in spite of being the attending physician of the Hospital. But since he is a junior doctor whose contribution to the negligence is far less than the senior doctors involved, therefore, this Court directs him to pay a compensation of Rs. 5 lakhs to the claimant. This compensation acts as a reminder and deterrent to him against being casual and passive in treating his patients in his formative years of medical profession. [para 121 & 122] [142-B, E-H; 143-A]

Liability of the claimant

7.9 The National Commission erred in holding that the claimant had contributed to the negligence of the appellant-doctors and the Hospital which resulted in the death of his wife when this Court had clearly absolved the claimant of such liability and remanded the matter back to the National Commission only for the purpose of determining the quantum of compensation. Therefore, the finding of the National Commission is set aside and the finding of this Court is re-emphasized that the claimant did not contribute to the negligence of the appellants-doctors and the Hospital which resulted in the death of his wife. [para 127] [146-A-C]

Answer to point no. 8

8.1 This Court, while remanding the matter back to the National Commission, has categorically stated that the pecuniary and non-pecuniary losses sustained by the claimant and future losses up to the date of trial must be considered for the quantum of compensation. That has not been done in the instant case by the National Commission. Therefore, the claimant is entitled for enhancement of compensation on the said heads as he has incurred huge amount of expenses in the court of more than 15 years long trial in the instant case. The updated break-up of the total claim has not been considered by the National Commission keeping in view the claim and legal evidence and observations made and directions issued by this Court in Malay Kumar Ganguly's case to determine just and reasonable compensation. Therefore, the claimant is entitled for enhanced compensation as mentioned under different heads in this judgment. The National Commission has also not taken into consideration the observations made by this Court while remanding the case for determining the quantum of compensation with regard to the status of treating doctors and the Hospital. [para 128-129] [146-D-E, F-H; 147-A-B]

Loss of income of the deceased:

8.2 The National Commission did not consider the substantial and legal evidence adduced on record by the claimant regarding the income that was being earned by his wife even though he has examined the U.S.A. based economic expert through video conferencing. As per the evidence on record, the deceased was earning $ 30,000 per annum at the time of her death. The appellant-doctors and the Hospital could not produce any evidence to rebut the claims of the claimant regarding the qualification of his wife. Further, the expert witness testified that the deceased could have earned much more in future given her present prospect. But relying upon the principle laid down by this Court, the estimate of the witness cannot be taken to be the income of the deceased. However, $30,000 per annum earned by the deceased during the time of her death was not from a regular source of income and she would have earned lot more had it been a regular source of income, having regard to her qualification and the job for which she was entitled to. Therefore, while determining the income of the deceased, the evidence on record has to be relied on for the purpose of determining the just, fair and reasonable compensation in favour of the claimant. It would be just and proper to take her earning at $40,000 per annum on a regular job, and 30% should be added towards the future loss of income of the deceased. However, 1/3rd of the total income is required to be deducted under the head of personal expenditure of the deceased to arrive at the multiplicand. Therefore, estimating the life expectancy of a healthy person as 70 years, compensation is to be awarded by multiplying the total loss of income by 30. [para 131-133] [148-B-C, 149-B-G; 150-A-B]

8.3 Further, the claimant has rightly pointed out that the value of Indian currency has gone down since the time when these legal proceedings [illegible]s country. Therefore, it will be pruden[illegible]t

value of Indian Rupee at a stable rate of Rs.55/- per 1$. Therefore, under the head of 'loss of income of the deceased' the claimant is entitled to an amount of Rs.5,72,00,550/-, as calculated in the judgment. [para 134] [150-B-D]

Other Pecuniary Damages:

9.1 The expenditure made by the claimant during the treatment of the deceased deserves to be duly compensated for awarding reasonable amount. The claimant has been able to produce the medical bill only to the extent of Rs.2.5 lakhs which he had paid to the Hospital in Mumbai. Assuming that he might have incurred some more expenditure, the National Commission had quantified the expenses under this head to the tune of Rs.5 lakhs. This Court still considers this amount as insufficient in the light of the fact that the deceased was treated at the Hospital as an in-patient for about a week; it would be just and proper to enhance the compensation under this head by Rs.2 lakhs thereby awarding a total amount of Rs.7 lakhs under this head. [para 135-136] [150-E-H; 151-A-B]

9.2 The claimant has sought for compensation to the tune of Rs.7 lakhs for travel and expenses for 11 days he had to stay in Mumbai for the treatment of his wife. However, he has failed to produce any bills to prove his expenditure. Since, his travel to Mumbai for the treatment of his wife is on record, the National Commission has awarded compensation of Re.1 lakh under this head. It would be fit and proper to enhance the compensation by Rs.50,000/- more considering that he had also incurred some unavoidable expenditure during his travel and stay in Mumbai at the time of treatment of the deceased. Therefore, under this head, a compensation of Rs.1,50,000/- is awarded. However, with respect to the claim made under the cost of chartered flight, a sum of

Rs.5,00,000/-has already been awarded by the National Commission which this Court would not interfere within the absence of any contrary evidence. [para 137-138] [157-C-F]

Non pecuniary damages:

10.2 It is true that the deceased had gone through immense pain, mental agony and suffering in course of her treatment which ultimately could not save her life. However, more than the conventional amount set by this Court cannot be awarded on the basis of the economic status of the deceased. Therefore, a lumpsum amount of Rs.10 lakhs is awarded to the claimant under the head of 'pain and suffering of the claimant's wife during the course of treatment'. [para 145] [162-A-C]

Arun Kumar Agarwal Vs. National Insurance Company **(2010) 9 SCC 218; and** *Rajesh & Ors. Vs. Rajvir Singh and Ors.* **2013 (6) SCALE 563;** *Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors.* **2009 (9) SCR 313 = (2009) 6 SCC 1 - referred to.**

Kemp and Kemp **on Quantum of Damages - referred to.**

10.2 Regarding claim under the head of 'Emotional distress, pain and suffering for the claimant' himself, no compensation can be awarded in this regard since this claim bears no direct link with the negligence caused by the appellant-doctors and the Hospital in treating the claimant's wife. [para 146] [162-C-D]

10.3 Further, the claimant is entitled to Rs.1,00,000/- under the head 'Loss of consortium'. [para 146] [162-F]

11. Therefore, a total amount of Rs.6,08,00,550/- is awarded as compensation to the claimant by partly modifying the award granted by the National Commission under different heads, as detailed i h

6% interest per annum from the date of application till the date of payment. [para 147] [162-G-H]

12.1 The number of medical negligence cases against doctors, Hospitals and Nursing Homes in the consumer forum are increasing day by day. The doctors, Hospitals, the Nursing Homes and other connected establishments are to be dealt with strictly if they are found to be negligent with the patients. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right. It is, therefore, hoped that this decision acts as a deterrent and a reminder to those doctors, Hospitals, the Nursing Homes and other connected establishments who do not take their responsibility seriously. [para 148-149] [163-A-B, C-E]

Paschim Banga Khet Mazdoor Samity Vs. State of West Bengal **(1996) 4 SCC 37 - referred to.**

12.2 The central and the state governments may consider enacting laws wherever there is absence of one for effective functioning of private Hospitals and Nursing Homes. Since the conduct of doctors is already regulated by the Medical Council of India, impartial and strict scrutiny is expected from the body. Finally, the institutions and individuals providing medical services to the public at large are required to educate and update themselves about any new medical discipline and rare diseases so as to avoid tragedies such as the instant case where a valuable life could have been saved with a little more awareness and wisdom on the part of the doctors and the Hospital. [para 150] [163-F-H]

New India Assurance Company Limited v. Yoges Devi, **(2012) 3 SCC 613;** *National Insurance Company Limited v. Sinitha,* **2011 (16) SCR 166 = (2012) 2 SCC 356** *Sunil*

Sharma v. Bachitar Singh, **2011 (2) SCR 576 = (2011) 11 SCC 425;** *Pushpa v. Shakuntala,* **2011 (1) SCR 334 = (2011) 2 SCC 240;** *Shyamwati Sharma v. Karam Singh,* **2010 (8) SCR 417 = (2010) 12 SCC 378;** *Rani Gupta v. United India Insurance Company Limited,* **2009 (5) SCR 721= (2009) 13 SCC 498;** *National Insurance Company Limited v. Meghji Naran Soratiya,* **2009 (3) SCR 875 = (2009) 12 SCC 796;** *Oriental Insurance Company Limited v. Angad Kol* **2009 (2) SCR 695 = (2009) 11 SCC 356;** *Usha Rajkhowa v. Paramount Industries,* **2009 (2) SCR 520 = (2009) 14 SCC 71;** *Laxmi Devi v. Mohammad. Tabbar,* **2008 (5) SCR 436 = (2008) 12 SCC 165;** *Andhra Pradesh State Road Transport Corporation v. M. Ramadevi,* **2008 (2) SCR 22 = (2008) 3 SCC 379;** *State of Punjab v. Jalour Singh* **2008 (1) SCR 922 = (2008) 2 SCC 660;** *Abati Bezbaruah v. Dy. Director General, Geological Survey of India,* **2003 (1) SCR 1229 = (2003) 3 SCC 148;** *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala,* **2001 (2) SCR 999 = (2001) 5 SCC 175;** *Sarla Dixit v. Balwant Yadav,* **1996 (3) SCR 30 = (1996) 3 SCC 179;** *National Insurance Co. Ltd. v. Swaranlata Das,* **1993 Supp (2) SCC 743;** *United India Insurance Co. Ltd. & Others Vs. Patricia Jean Mahajan & Ors.* **2002 (3) SCR 1176 = (2002) 6 SCC 281;** *Lata Wadhwa & Ors. Vs. State of Bihar* **(2001) 1 Suppl. SCR 578 = 2001 (8) SCC 197;** *M.S. Grewal & Anr. Vs. Deep Chand Sood and Ors.* **2001 (2) Suppl. SCR 156= 2001 (8) SCC 151;** *Municipal Corporation of Delhi Vs. Uphaar Tragedy Victims Association & Ors.* **2011 (16) SCR 1 = 2011 (14) SCC 481;** *National Textile Corporation Ltd. Vs. Nareshkumar Badrikumar Jagad* **2012 (14) SCR 472 = (2011) 12 SCC 695,** *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria* **2012 (3) SCR 841 = (2012) 5 SCC 370,** *A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandavana Paripalanai Sangam* **2012 (4) SCR 74 = 2012 (6) SCC 430;** *Nagappa Vs. Gurudayal Singh* **2002 (4) Suppl. SCR 499 = 2003 (2) SCC 274;** *Sanjay Batham Vs. Munnalal Parihar* **(2011) 10 SCC 655;** *Times Global*

Broadcasting Co. Ltd. & Anr. Vs. Parshuram Babaram Sawant **SLP (Civil) No(s) 29979/2011 decided on 14-11-2011;** *Raj Kumar Vs. Ajay Kumar & Anr.* **2010 (13) SCR 179 = 2011(1) SCC 343,** *Sri Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance* **2011 (9) SCR 922 = 2011 (13) SCC 236,** *Kavita Vs. Dipak & Ors.* **2012 (8) SCC 604;** *Landgraf Vs. USI Film Prods* **511 U.S. 244, 1994** *Destruction of Public and Private Properties Vs. State of A.P.* **2009 (6) SCR 439 = 2009 (5) SCC 212;** *S.P. Aggarwal Vs. Sanjay Gandhi P.G. Institute* **(FA No.478/2005) decided on 31.3.2010 - cited.**

Welch Vs. Epstein **536 S.E. 2d 408 2000;** *Dardinger Vs. Anthem Blue Cross Shield et al* **781 N.E. 2d, 2002 - cited.**

Case Law Reference:

2009 (13) SCR 1	**relied on**	**para 4**
2008 (2) SCR 930	**relied on**	**para 8**
2002 (3) SCR 1176	**cited**	**para 8**
(2012) 3 SCC 613	**cited**	**para 13**
2011 (16) SCR 166	**cited**	**para 13**
2011 (2) SCR 576	**cited**	**para 13**
2011 (1) SCR 334	**cited**	**para 13**
2010 (8) SCR 417	**cited**	**para 13**
2009 (5) SCR 721	**cited**	**para 13**
2009 (3) SCR 875	**cited**	**para 13**
2009 (2) SCR 695	**cited**	**para 13**
2009 (2) SCR 520	**cited**	**para 13**
2008 (5) SCR 436	**cited**	**para 13**

2008 (2) SCR 22	**cited**	**para 13**
2008 (1) SCR 922	**cited**	**para 13**
2003 (1) SCR 1229	**cited**	**para 13**
2001 (2) SCR 999	**cited**	**para 13**
1996 (3) SCR 30	**cited**	**para 13**
1993 (2) Suppl. SCC 743	**cited**	**para 13**
2009 (9) SCR 313	**relied on**	**para 14**
2009 (10) SCR 87	**relied on**	**para 14**
1994) 2 SCC 176	**relied on**	**para 15**
2011 (10) SCC 634	**referred to**	**para 21**
2001 (1) Suppl. SCR 578	**cited**	**para 25**
2001 (2) Suppl. SCR 156	**cited**	**para 25**
2011 (16) SCR 1	**cited**	**para 25**
2012 (14) SCR 472	**cited**	**para 28**
2012 (3) SCR 841	**cited**	**para 28**
2012 (4) SCR 74	**cited**	**para 28**
(2011) 10 SCC 655	**cited**	**para 34**
SLP (Civil) No(s) 29979/2011 decided on 14-11-2011	**cited**	**para 56**
2009 (8) SCR 683	**relied on**	**para 57**
1995 (1) SCR 75	**relied on**	**para 57**
2009 (7) SCR 1168	**relied on**	**para 57**
2011 (10) SCC 756	**held inapplicable**	**para 57**

2010 (11) SCR 857	**relied on**	**para 58**
2010 (13) SCR 179	**cited**	**para 58**
2011 (10) SCC 683	**held inapplicable**	**para 58**
2011 (9) SCR 922	**held inapplicable**	**para 58**
2012 (8) SCC 604	**held inapplicable**	**para 58**
2004 (5) Suppl. SCR 359	**referred to**	**Para 62**
2009 (10) SCR 70	**relied on**	**para 72**
511 U.S. 244, 1994	**cited**	**para 73**
2009 (6) SCR 439	**cited**	**para 73**
536 S.E. 2d 408 2000	**cited**	**para 73**
781 N.E. 2d, 2002	**cited**	**para 74**
(2012) 6 SCC 421	**relied on**	**para 88**
1995 (5) Suppl. SCR 110	**referred to**	**para 95**
1998 (2) SCR 428	**referred to**	**para 95**
2000 (3) Suppl. SCR 337	**referred to**	**para 95**
2004 (5) Suppl. SCR 359	**referred to**	**para 95**
2005 (2) Suppl. SCR 991	**referred to**	**para 95**
2008 (1) SCR 719	**referred to**	**para 95**
2009 (9) SCR 889	**referred to**	**para 95**
2010 (5) SCR 1	**referred to**	**para 95**
(1998) 4 SCC 39	**referred to**	**para 95**
2009 (5) SCR 1098	**held inapplicable**	**para 97**
2009 (11) SCR 305	**relied on**	**para 97**

(2010) 9 SCC 218	**referred to**	**para 139**
2013 (6) SCALE 563	**referred to**	**para 141**
(1996) 4 SCC 37	**referred to**	**para 148**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2867 of 2012.

From the Judgment and order dated 21.10.2011 of the National Consumer Disputes Redressal Commission, New Delhi in W.P. No. 240 of 1999.

WITH

Civil Appeal No. 692 of 2012.

Civil Appeal No. 2866 of 2012.

Civil Appeal No. 731 of 2012.

Civil Appeal No. 858 of 2012.

Vijay Hansaria, Ramji Srinivasan, Rana Mukherjee, Daisy Hannah, Shekhar Kumar, Aseem Mehrotra, Asha Nayar, Amit Agarwal, Abhijat P. Medh, Sanjoy Kumar Ghosh, Ranjan Mukherjee, Rupali S. Ghosh, B. Sridhar, T.V. George, Rakesh Taneja, Maurya Sarkar, Dushyant Kumar for the appearing parties.

Dr. Kunal Saha (in-Person).

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. The Civil Appeal Nos.2867, 731 and 858 of 2012 are filed by the appellant-doctors, Civil Appeal No. 692 of 2012 is filed by the appellant-AMRI Hospital and Civil Appeal No. 2866 of 2012 is filed by the claimant-appellant - Dr. Kunal Saha (hereinafter referred to as 'the claimant'), questioning the correctness of the impugned judgment and order dated 21.10.2011 passed by the National

Consumer Disputes Redressal Commission (hereinafter referred to as the 'National Commission') in Original Petition No.240 of 1999.

2. The appellant-doctors are aggrieved by the quantum of compensation awarded by the National Commission and the liability fastened upon them for the negligence on their part and have prayed to set aside the same by allowing their appeals. In so far as the appellant-AMRI Hospital is concerned, it has also questioned the quantum of compensation awarded and has prayed to reduce the same by awarding just and reasonable compensation by modifying the judgment by allowing its appeal.

So far as the claimant is concerned, he is aggrieved by the said judgment and the compensation awarded which, according to him, is inadequate, as the same is contrary to the admitted facts and law laid down by this Court in catena of cases regarding awarding of compensation in relation to the proved medical negligence for the death of his wife Anuradha Saha (hereinafter referred to as the 'deceased').

3. The brief relevant facts and the grounds urged on behalf of the appellant-doctors, AMRI Hospital and the claimant in seriatim are adverted to in this common judgment for the purpose of examining the correctness of their respective legal contentions urged in their respective appeals with a view to pass common judgment and award.

4. Brief necessary and relevant facts of the case are stated hereunder:

The claimant filed Original Petition No. 240 of 1999 on 09.03.1999 before the National Commission claiming compensation for Rs.77,07,45,000/- and later the same was amended by claiming another sum of Rs.20,00,00,000/-. After the case of *Malay Kumar Ganguly Vs. Dr. Sukumar*

Mukherjee[1] was remanded by this Court to the National Commission to award just and reasonable compensation to the claimant by answering the points framed in the said case, the National Commission held the doctors and the AMRI Hospital negligent in treating the wife of the claimant on account of which she died. Therefore, this Court directed the National Commission to determine just and reasonable compensation payable to the claimant. However, the claimant, the appellant-Hospital and the doctors were aggrieved by the amount of compensation awarded by the National Commission and also the manner in which liability was apportioned amongst each of them. While the claimant was aggrieved by the inadequate amount of compensation, the appellant-doctors and the Hospital found the amount to be excessive and too harsh. They further claimed that the proportion of liability ascertained on each of them is unreasonable. Since, the appellant-Hospital and the doctors raised similar issues before the Court; we intend to produce their contentions in brief as under:

On granting the quantum of compensation based on the income of the deceased:

5. It is the claim of the learned counsel on behalf of the appellant-doctors and the Hospital that there is no pleading in the petition of the claimant that the deceased had a stable job or a stable income, except in paragraph 2A of the petition which states that the deceased was a Post-Graduate student and she had submitted her thesis. The only certificate produced by the claimant shows that she was just a graduate in Arts (English). Further, it is urged by the learned counsel that the document produced by the claimant - a computer generated sheet, does not explain for what work the remuneration, if at all was received by the deceased. Also, whether the same was a onetime payment of stipend or payment towards voluntary work, is not explained by the claimant. Further, it is stated by the learned counsel that there is no averment in the petition of the claimant

1. (2009) 9 SCC 221.

as to on what account the said payment was received by the deceased and whether she has received it as a Child Psychologist as claimed by the claimant or otherwise.

6. It is also the case of the appellant-doctors and the Hospital that the claimant had not led any oral evidence with regard to the income of the deceased and further he has not explained why just a single document discloses the payment made sometime in the month of June 1988 in support of the income of the deceased when admittedly, the couple came to India in the month of March-April, 1998. Therefore, the learned counsel for the appellant-doctors and the Hospital have urged that the said document is a vague document and no reliance could have been placed by the National Commission on the same to come to the conclusion that the deceased in fact had such an income to determine and award the compensation as has been awarded in the impugned judgment and order. From a perusal of the said document, it could be ascertained that it shows just one time payment received for some odd jobs. Therefore, it is contended by the appellant-doctors and the Hospital that the claimant has not been able to discharge his onus by adducing any positive evidence in this regard before the National Commission.

7. It is further contended by the learned counsel that the assertion of the claimant in the petition and in his evidence before the National Commission that the income of the deceased was $30,000 per annum is not substantiated by producing cogent evidence. No appointment letter of the deceased to show that she was employed in any organization in whatsoever capacity had been produced nor has the claimant produced any income certificate/salary sheet. No evidence is produced by the claimant in support of the fact that the deceased was engaged on any permanent work. No Income Tax Return has been produced by the claimant to show that she had been paying tax or had any income in U.S.A.

8. It is further submitted that even if it is assumed that the annual income of the deceased was $30,000 per annum, apart from deduction on account of tax, it is also essential for the National Commission to ascertain the personal living expenses of the deceased which was required to be deducted out of the annual income to determine the compensation payable to the claimant. The National Commission was required to first ascertain the style of living of the deceased- whether it was Spartan or Bohemian to arrive the income figure of $30,000 per annum. In India, on account of style and standard of living of a person, one-third of the gross income is required to be deducted out of the annual income as laid down in the decision of this Court in the case of *Oriental Insurance Company Ltd. Vs. Jashuben & Ors*[2].

It is further contended by the learned counsel for the appellant-doctors and the Hospital that no yardstick is available about the expenditure of the deceased in the U.S.A. The claimant has not adduced any evidence in this regard. The evidence given by the so-called expert, Prof. John F. Burke Jr. also does not say anything on this score.

Even if it is assumed that the annual income of the deceased was $30,000 per annum for which there is no evidence, 25% thereof is required to be deducted towards tax. The deduction of tax is much more as is apparent from the case reported in *United India Insurance Co. Ltd. & Others Vs. Patricia Jean Mahajan & Ors*.[3] In fact, the claimant has neither adduced any evidence in this regard nor has he produced the relevant statute from which the percentage of tax deduction can be ascertained.

The claimant was last examined by video conferencing conducted under the supervision of Justice Lokeshwar Prasad (retired Judge of Delhi High Court) as local Commissioner. The

2. (2008) 4 SCC 162.
3. (2002) 6 SCC 281.

AMRI Hospital-appellant's witness Mr. Satyabrata Upadhyay was cross-examined by the claimant.

9. The claimant filed M.A. No.1327 of 2009 before the National Commission after remand order was passed by this Court in the case of *Malay Kumar Ganguly* (supra). The claimant now claimed enhancement of compensation at Rs.78,14,00,000/- under the heads of pecuniary damages and non-pecuniary damages.

The prayer made in the application was to admit the claim for compensation along with supporting documents including the opinions of the foreign experts and further prayed for issuing direction to the appellant-doctors and the Hospital to arrange for cross-examination of the foreign experts, if they wish, through video conferencing at their expenses as directed by this Court in the remand order in *Malay Kumar Ganguly's* case (supra) and for fixing the matter for a final hearing as soon as possible on a firm and fixed date as the claimant himself want to argue his petition as was done before this Court, as he being the permanent resident of U.S.A.

10. The learned senior counsel appearing for the claimant on 9.2.2010 prayed for withdrawal of the application stating that he would file another appropriate application. Thereafter, on 22.2.2010 the claimant filed M.A. No.200 of 2010 seeking direction to the National Commission to permit him to produce affidavit of four foreign experts and their reports. The National Commission dismissed the same vide order dated 26.4.2010 against which special leave petition No.15070/2010 was filed before this Court which was withdrawn later on. Again, the claimant filed M.A. No.594 of 2010 before the National Commission for examination of four foreign experts to substantiate his claim through video conferencing at the expense of the appellant-doctors and the Hospital. The National Commission vide order dated 6.9.2010 dismissed the application of the claimant for examining foreign experts.

Against this order, the claimant preferred SLP (C) No.3173 of 2011 before this Court praying for permission to examine two foreign experts, namely, Prof. John F. Burke Jr. and Prof. John Broughton through video conferencing and he undertook to bear the expenses for such examination. The claimant had given up examination of other two foreign experts, namely, D. Joe Griffith and Ms. Angela Hill. Prof. John F. Burke Jr. was examined on 26.4.2011 as an Economics Expert to prove the loss of income of the deceased and the claimant relied upon an affidavit dated 21.9.2009 and his report dated 18.12.2009 wherein he has stated that if the deceased would have been employed through the age of 70, her net income could have been $3,750,213.00. In addition, the loss of service from a domestic prospective was an additional amount of $1,258,421.00. The said witness was cross examined by the learned counsel for the doctors and AMRI Hospital. The learned Counsel for the appellant-doctors placed reliance upon the following questions and answers elicited from the above Economics Expert witness, which are extracted hereunder:-

"Q.16. Can you tell me what was the wages of Anuradha in 1997?

A.16. May I check my file (permitted). I don't know.

Q.17. Are you aware whether Anuradha was an income tax payee or not?

A.17. Anu and her husband were filing joint return.

Q.18. Did Anu have any individual income?

A.18. I don't know.

Q.19. Did Kunal Saha provide you the earning statement of Anuradha Saha, wherein her gross monthly pay was shown as $ 1060 as on 16.1.1998?

A.19. I don't believe that I have tha

…

Q.21. What documents have you taken into consideration of Anu's income for giving your opinion?

A.21. None.

Q.22. Whether Anu was employed at the time of her death?

A.22. I don't think so; I don't believe so."

11. The claimant on the other hand, had placed strong reliance upon the evidence of the Economics Expert Prof. John F. Burke to prove the income of the deceased as on the date of her death and actual income if she would have lived up to the age of 70 years as he had also examined Prof. John Broughton in justification of his claim.

The learned counsel for the appellant-doctors contended that Prof. John F. Burke, who was examined through video conferencing in the presence of the Local Commissioner, has estimated the life time income of the deceased to be 5 million and 125 thousand US dollars without any supporting material. The said foreign expert witness did not know whether the deceased had any individual income. He did not know about the earning statement of the deceased produced by the claimant. He has also stated that the deceased was not employed at the time of her death.

12. The learned counsel for the appellant-doctors also submitted that the earning statement issued by Catholic Home Bureau stating the income of the deceased at $1060.72 for the period ending 15th January, 1998 cannot be relied upon for the following reasons:-

(a) The earning statement was not proved in accordance with law since only the affidavit of claimant was exhibited and not the documents

before Justice Lokeshwar Prasad (Retired) i.e. the Local Commissioner on 5.12.2003 during the cross-examination.

(b) There is nothing to show that Anuradha Saha was under employment at Catholic Home Bureau.

(c) Letter of appointment has not been annexed.

(d) Federal Tax record has not been produced. The Economics expert has stated that Anuradha and the claimant were filing joint tax return.

(e) It does not show weekly income of the deceased as has been treated by NCDRC.

(f) Nature of appointment, even if presumed, has not been stated, i.e., whether it was temporary or permanent, contractual or casual and period of employment.

It is further submitted by the learned counsel that the evidence of Prof. John F. Burke, Jr. has not been relied upon to prove the loss of income of the deceased as it shows that the deceased was not paying income tax. Therefore, the National Commission has erred in partly allowing the claim of the claimant while computing the compensation on the basis of the earning of the deceased.

On awarding compensation under the head of 'loss of consortium':

13. The learned senior counsel and other counsel for the appellant-doctors submitted that the National Commission has erred in awarding Rs.10,00,000/- towards loss of consortium. This Court in various following decisions has awarded Rs. 5,000/- to Rs.25,000/- on the aforesaid account:-

CASE LAW	AMOUNT
1. Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421	Rs.10,000
2. New India Assurance Company Limited v. Yogesh Devi, (2012) 3 SCC 613	Rs.10,000
3. National Insurance Company Limited v. Sinitha, (2012) 2 SCC 356	Rs.5,000
4. Sunil Sharma v. Bachitar Singh, (2011) 11 SCC 425	Rs.25,000
5. Pushpa v. Shakuntala, (2011) 2 SCC 240	Rs.10,000
6. Arun Kumar Agrawal v. National Insurance Company Limited, (2010) 9 SCC 218	Rs.15,000
7. Shyamwati Sharma v. Karam Singh, (2010) 12 SCC 378	Rs.5,000
8. Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422 in Sarla Dixit v. Balwant Yadav	Rs.15,000
9. Raj Rani v. Oriental Insurance Company Limited, (2009) 13 SCC 654	Rs.7,000
10. Sarla Verma v. Delhi Transport Corporation, (2009) 6 SCC 121	Rs.10,000
11. Rani Gupta v. United India Insurance Company Limited, (2009) 13 SCC 498	Rs.25,000
12. National Insurance Company Limited v. Meghji Naran Soratiya, (2009) 12 SCC 796	Rs.10,000
13. Oriental Insurance Company Limited v. Angad Kol, (2009) 11 SCC 356	Rs.10,000
14. Usha Rajkhowa v. Paramount Industries, (2009) 14 SCC 71	Rs.5,000
15. Laxmi Devi v. Mohammad. Tabbar, (2008) 12 SCC 165	Rs.5,000

16. Andhra Pradesh State Road Transport Corporation v. M. Ramadevi, (2008) 3 SCC 379	Rs.5,000
17. State of Punjab v. Jalour Singh, (2008) 2 SCC 660	Rs.5,000
18. Abati Bezbaruah v. Dy. Director General, Geological Survey of India, (2003) 3 SCC 148	Rs.3,000
19. Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala, (2001) 5 SCC 175	Rs.5,000
20. Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179	Rs.15,000
21. G.M., Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176	Rs.15,000
22. National Insurance Co. Ltd. v. Swaranlata Das, 1993 Supp (2) SCC 743	Rs.7,500

14. Further, the senior counsel and other counsel for the appellant-doctors contended that the case of *Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka & Ors.*[4] relied upon by the claimant is misconceived as that case relates to the continuous pain and suffering of the victim, who had lost control over his lower limb and required continuous physiotherapy for rest of his life. It was not the amount for loss of consortium by the husband or wife. Hence, it is submitted by them that the National Commission erred in granting Rs.10 lakhs under the head of 'loss of consortium'.

On the objective and pattern of payment of compensation cases:

15. It is further contended by the learned counsel for the appellant-doctors that the compensation awarded by the National Commission should be meant to restore the claimant

14. (2009) 6 SCC 1.

to the pre-accidental position and in judging whether the compensation is adequate, reasonable and just, monetary compensation is required to be arrived at on the principle of restitutio-in-integram. The National Commission while calculating the just monetary compensation, the earnings of the claimant who himself is a doctor, is also required to be taken into consideration. Regarding the contention of the claimant that in allowing compensation the American standard is required to be applied, it has not been disclosed before the Commission as to what is the American standard. On the contrary, the National Commission was directed by this Court to calculate the compensation in the case as referred to in *Malay Kumar Ganguly's* case (supra) and on the basis of the principles laid-down by this Hon'ble Court in various other judgments. The two judgments which have been referred to in *Malay Kumar Ganguly's* case (supra) are *Oriental Insurance Company Ltd. Vs. Jashuben & Ors.* (supra) and *R.K. Malik Vs. Kiran Pal*[5], where this Court has not directed assessment of compensation according to American standard. Therefore, the contention of the claimant that compensation has to be assessed according to American standard is wholly untenable in law and the same is liable to be rejected.

16. Further, it is contended by the senior counsel and other counsel for the appellant-doctors and Hospital that the reliance placed by the claimant upon the decision of this Court reported in *Patricia Jean Mahajan's* case (supra) clearly shows that the multiplier method applicable to claim cases in India was applied after taking note of contribution by the deceased for his dependants. The said case is a clear pointer to the fact that even if a foreigner dies in India, the basis of calculation has to be applied according to Indian Standard and not the American method as claimed by the claimant.

17. Further, the word 'reasonable' implies that the appellant-doctors and AMRI Hospital cannot be saddled with

5. (2009) 14 SCC 1.

an exorbitant amount as damages - which cannot either be treated as an obvious or natural though not foreseeable consequence of negligence.

18. Further, the learned senior counsel has placed reliance on the judgment of this Court in *Nizam Institute of Medical Sciences* (supra) wherein this Court enhanced the original compensation awarded to the claimant-victim who had been paralyzed due to medical negligence from waist down, under the heads: requirement of nursing care; need for driver-cum-attendant, as he was confined to a wheel chair; and he needed physiotherapy.

In the present case, the negligence complained of is against the doctors and the Hospital which had resulted in the death of the wife of the claimant. In that case, the extent of liability ought to be restricted to those damages and expenses incurred as a direct consequence of the facts complained of, while setting apart the amount to be awarded under the head 'loss of dependency'. The relevant portion of the aforesaid judgment of this Court in the *Nizam's Institute of Medical Sciences* is quoted hereunder:

> "……. The adequate compensation that we speak of, must to some extent, be a rule of thumb measure, and **as a balance has to be struck, it would be difficult to satisfy all the parties concerned." (paragraph 88)**

19. It is further contended by the learned senior counsel and other counsel for the appellant-doctors that the claimant failed to produce any document by taking recourse to Order XLI Rule 27 of Code of Civil Procedure and Order LVII of Supreme Court Rules to justify his claims of approximately an additional amount of Rs.20 crores including the cost of filing of the claim for compensation to the amount of compensation demanded for medical negligence which is a far-fetched theory and every negative happening in the claimant's life post-death of his wife Anuradha Saha cannot be attributed as

to medical negligence. Therefore, the enhancement of compensation as prayed for by the claimant stood rightly rejected by the National Commission by recording reasons. Therefore, this Court need not examine the claim again.

On the use of multiplier method for determining compensation:

20. It is contended by the senior counsel and other counsel for the appellants that the multiplier method has enabled the courts to bring about consistency in determining the loss of dependency more particularly, in cases of death of victims of negligence, it would be important for the courts to harmoniously construct the aforesaid two principles to determine the amount of compensation under the heads: expenses, special damages, pain and suffering.

21. In *Sarla Verma's* case (supra), this Court, at Paragraphs 13 to 19, held that the multiplier method is the proper and best method for computation of compensation as there will be uniformity and consistency in the decisions. The said view has been reaffirmed by this Court in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.,* Civil Appeal No.4646 of 2009 decided on April 2, 2013.

22. It is further submitted by the learned counsel that in capitalizing the pecuniary loss, a lesser multiplier is required to be applied inasmuch as the deceased had no dependants. In support of his contention, reliance is placed upon the decision of this Court reported in *Patricia Mahajan's* case (supra) in which this Court having found a person who died as a bachelor, held that a lesser multiplier is required to be applied to quantify the compensation.

23. It is further contended by the senior counsel and other counsel for the appellant-doctors that in *Susamma Thomas* (supra) this Court has observed that "in fatal accident cases, the measure of damage is the pecuniary loss suffered and is

likely to be suffered by each dependant as a result of the death". This means that the court while awarding damages in a fatal accident case took into account the pecuniary loss already suffered as a result of the negligence complained of, and the loss of dependency based on the contributions made by the deceased to the claimant until her death. While the former may be easily ascertainable, the latter has been determined by the National Commission by using the multiplier method and in respect of the use of the multiplier method for the purpose of calculating the loss of dependency of the claimant, in paragraph No. 16 of the aforesaid judgment this Hon'ble Court observed as follows:

> "16. It is necessary to reiterate that the multiplier method is logically sound and legally well-established. There are some cases which have proceeded to determine the compensation on the basis of aggregating the entire future earnings for over the period the life expectancy was lost, deducted a percentage there from towards uncertainties of future life and award the resulting sum as compensation. This is clearly unscientific…."

24. In *Sarla Verma's* case (supra) this Court sought to define the expression 'just compensation' and opined as under:

> "16.….Just Compensation" is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit.
>
> 17. Assessment of compensation though involving certain hypothetical considerations should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making

process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation."

(Emphasis laid by this Court)

25. It was also contended by the learned counsel for the appellant-doctors that apart from accident cases under the Motor Vehicles Act, 1988, the multiplier method was followed in *Lata Wadhwa & Ors. Vs. State of Bihar*[6] by a three Judge Bench of this Court, which is a case where devastating fire took place at Jamshedpur while celebrating the birth anniversary of Sir Jamshedji Tata. Even in *M.S. Grewal & Anr. Vs. Deep Chand Sood and Ors.*[7], the multiplier method was followed wherein school children were drowned due to negligence of school teachers. In the *Municipal Corporation of Delhi Vs. Uphaar Tragedy Victims Association & Ors.*[8] the multiplier method was once again followed where death of 59 persons took place in a cinema hall and 109 persons suffered injury.

26. Therefore, it is contended by the senior counsel and other counsel for the appellant-doctors that multiplier method should be used while awarding compensation to the victims because it leads to consistency and avoids arbitrariness.

On contributory negligence by the claimant

27. The learned senior counsel and other counsel for the appellant-doctors submitted that the National Commission in

6. (2001) 8 SCC 197.
7. (2001) 8 SCC 151.
8. (2011) 14 SCC 481.

the impugned judgment should have deducted 25% of the compensation amount towards contributory negligence of the claimant caused by his interference in the treatment of the deceased. Instead, the National Commission has deducted only 10% towards the same. According to the learned senior counsel and other counsel for the appellants, the National Commission erred in not adhering to the tenor set by this Court while remanding the case back to it for determining the compensation to arrive at an adequate amount which would also imply an aspect of contributory negligence, individual role and liability of the Hospital and the doctors held negligent. Therefore, this Court is required to consider this aspect and deduct the remaining 15% out of the compensation awarded by the National Commission towards negligence by the claimant.

On enhancement of compensation claimed by the claimant :

28. The learned senior counsel and other counsel for the appellant-doctors and the Hospital contended that enhanced claim of the claimant in his appeal is without any amendment to the pleadings and therefore, is not maintainable in law. The claimant in his written submission filed during the course of arguments in July, 2011 before the National Commission, has made his claim of Rs.97,56,07,000/- which the National Commission has rightly rejected in the impugned judgment holding that it was legally impermissible for it to consider that part of the evidence which is strictly not in conformity with the pleadings in order to award a higher compensation as claimed by the claimant. In justification of the said conclusion and finding of the National Commission, the learned counsel have placed reliance upon the principle analogous to Order II Rule 2 of C.P.C., 1908 and further contended that the claimant who had abandoned his claim now cannot make new claims under different heads. Further, it is submitted by Mr. Vijay Hansaria, the learned senior counsel on behalf [illegible]t

though the claimant had filed an application on 9.11.2009 in M.A. No.1327 of 2009 for additional claim; the said application was withdrawn by him on 9.2.2010. Therefore, his claim for enhancing compensation is not tenable in law. In support of the said contention, he has placed reliance upon the judgment of this Court in *National Textile Corporation Ltd. Vs. Nareshkumar Badrikumar Jagad*[9], wherein it is stated by this Court that the pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial.

In support of the said proposition of law, reliance was also placed upon other judgment of this Court in *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria*[10], wherein this Court, at paragraph 61, has held that :-

> "in civil cases, pleadings are extremely important for ascertaining title and possession of the property in question."

The said view of this Court was reiterated in *A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandavana Paripalanai Sangam*[11],

29. Further, the learned senior counsel for the appellant-doctors and AMRI Hospital placed reliance upon the provisions of the Consumer Protection Act, 1986 and the Motor Vehicles Act, 1988 to urge that though the Consumer Courts have pecuniary jurisdiction for deciding the matters filed before it whereby the pecuniary jurisdiction of the District Forum is Rs.20 lakhs, State Commission is from Rs.20 lakhs to Rs.1 crore, whereas for National Commission, it is above Rs.1 crore, the Motor Accident Claims Tribunal have unlimited jurisdiction. In the Consumer Protection Act, 1986 there is a provision for limitation of 2 years for filing of complaint under Section 24-A

9. (2011) 12 SCC 695.

10. (2012) 5 SCC 370.

11.(2012) 6 SCC 430.

of the Act and there is no limitation prescribed in the Motor Vehicles Act, 1988.

30. Sections 12 and 13 of the Consumer Protection Act, 1986 provide as to how the complaint has to be made and the procedure to be followed by the claimant for filing the complaint. Rule 14(c) of the Consumer Protection Rules, 1987 and the Consumer Protection Regulations, 2005 require the complainant to specify the relief which he claims. The filing of the complaint/appeal/revision is dealt with Consumer Protection Regulations, 2005. Under the Motor Vehicles Act, 1988, a victim or deceased's legal representative does not have to specify the amount claimed as held by this Court in the case of *Nagappa Vs. Gurudayal Singh*[12].

31. Under Section 158(6) of the Motor Vehicles Act, 1988, the report forwarded to the Claims Tribunal can be treated as an application for compensation even though no claim is made or specified amount is claimed whereas under the Consumer Protection Act, a written complaint specifying the claim to be preferred before the appropriate forum within the period of limitation prescribed under the provision of the Act is a must.

32. Under Section 163-A of the Motor Vehicles Act, 1988 a claimant is entitled to compensation under the structured formula even without negligence whereas no such provision exists under the Consumer Protection Act.

33. In this regard, the learned senior counsel and other counsel for the appellant-doctors and Hospital placed reliance upon the judgment of this Court in the case of *Ibrahim Vs. Raju*[13] and submitted that the said case does not apply to the fact situation for two reasons, namely, it was a case under the Motor Vehicles Act, 1988, whereas this case involves the Consumer Protection Act. Secondly, this Court in the previous case, enhanced the compensation observing that due to

12. (2003) 2 SCC 274.

13. (2011) 10 SCC 634.

financial incapacity the claimant could not avail the services of the competent lawyer, which is not the case in hand, in as much as the claimant had hired the services of an advocate who is Bar-at-Law and the President of the Supreme Court Bar Association.

34. Further, the learned counsel for the appellant-doctors placed reliance upon the judgment of this Court in the case of *Sanjay Batham Vs. Munnalal Parihar*[14], which is a case under the Motor Vehicles Act, 1988. This Court enhanced the compensation following the judgment in *Nagappa's* case (supra). The learned counsel also placed reliance upon the judgment of this Court in *Nizam Institute's* case (supra) where the complainant had made a claim of Rs.7.50 crores. This Court enhanced the compensation from Rs.15.50 lakhs to Rs.1 crore. But, the *Nizam Institute's* case is not a case for the proposition that a claimant can be awarded compensation beyond what is claimed by him. On the other hand, it was a case of peculiar facts and circumstances since the claimant had permanent disability which required constant medical attention, medicines, services of attendant and driver for himself. The cases referred to by the claimant regarding medical negligence in his written submission are distinguishable from the present case and in none of these cases upon which reliance has been placed by the claimant, this Court has awarded compensation beyond what is claimed. Therefore, the reliance placed upon the aforesaid judgments by the claimant does not support his claim and this Court need not accept the same and enhance the compensation as has been claimed by him since he is not entitled to the same.

Death of the claimant's wife due to cumulative effect of negligence :

35. This Court vide its judgment in *Malay Kumar Ganguly's* case (supra) has held that:

14. (2011) 10 SCC 655.

> "186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been the contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced, keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient."

The two words "may" and "cumulative incidence" in the abovesaid observations of this Court is relevant for determining the quantification of compensation. It is submitted that this Court is also not sure that the negligence solely has contributed to the death of the claimant's wife. At the most, this Court is of the view that the negligence may have contributed to the death of the claimant's wife. The incidences leading to or contributing to the death of the deceased are:

(i) Disease TEN itself is a fatal disease which has very high mortality rate.

(ii) TEN itself produces septicemic shock and deceased Anuradha died because of such consequence.

(iii) No direct treatment or treatment protocol for TEN.

(iv) Negligence of many in treating deceased Anuradha.

(v) Contributory negligence on the part of Dr.Kunal Saha and his brother.

Furthermore, it is observed factually that lethal combination of Cisapride and Fluconazole had been used for a number of days at Breach Candy Hospital during her stay which leads to cardiac arrest. Therefore, the National

have considered different incidences as aforesaid leading to the death of the claimant's wife so as to correctly apportion the individual liability of the doctors and the AMRI Hospital in causing the death of the wife of the claimant.

36. Further, with regard to the liability of each of the doctors and the AMRI Hospital, individual submissions have been made which are presented hereunder:

Civil Appeal No. 692/2012

37. It is the case of the appellant-AMRI Hospital that the National Commission should have taken note of the fact that the deceased was initially examined by Dr. Sukumar Mukherjee and the alleged medical negligence resulting in the death of the deceased was due to his wrong medication (overdose of steroid). Therefore, the Hospital has little or minimal responsibility in this regard, particularly, when after admission of the deceased in the Hospital there was correct diagnosis and she was given best possible treatment. The National Commission erred in apportioning the liability on the Hospital to the extent of 25% of the total award. This Court in the earlier round of litigation held that there is no medical negligence by Dr. Kaushik Nandy, the original respondent No.6 in the complaint, who was also a doctor in the appellant-Hospital.

38. Further, the learned senior counsel for the AMRI Hospital submitted that the arguments advanced on behalf of the appellants-doctors Dr. Balram Prasad in C.A. No.2867/2012, Dr. Sukumar Mukherjee in C.A. No.858/2012 and Dr. Baidyanath Haldar in C.A. 731/2012 with regard to percentage, on the basis of costs imposed in paragraph 196 of the judgment in the earlier round of litigation is without any basis and further submitted that under the heading - 'Individual Liability of Doctors' findings as to what was the negligence of the doctors and the appellant AMRI Hospital is not stated. If the said findings of the National Commission are considered, then it cannot be argued that the appellant AMRI Hospital should pay

the highest compensation. Further, the learned senior counsel rebutted the submission of the claimant contending that since he had himself claimed special damages against the appellant-doctors, the Hospital and Dr. Abani Roy Choudhary in the complaint before the National Commission, therefore, he cannot now contend contrary to the same in the appeal before this Court.

CIVIL APPEAL NO. 858 OF 2012

39. It is the case of the appellant- Dr. Sukumar Mukherjee that the National Commission while apportioning the liability of the appellant, has wrongly observed that :

> "Supreme Court has primarily found Dr.Sukumar Mukherjee and AMRI hospital guilty of negligence and deficient in service on several counts. Therefore, going by the said findings and observations of Supreme Court we consider it appropriate to apportion the liability of Dr. Sukumar Mukherjee and AMRI hospital in equal proportion, i.e. each should pay 25% i.e. 38,90,000/- of the awarded amount of 1,55,60,000/-."

40. It is submitted by the learned counsel for the appellant - Dr. Sukumar Mukherjee that scrutiny of the judgment in *Malay Kumar Ganguly's* case (supra) will show that at no place did the Hon'ble Supreme Court made any observation or recorded any finding that the appellant Dr. Mukherjee and the Hospital are primarily responsible. On the contrary, under the heading "Cumulative Effect of Negligence" under paras 186 and 187, this Hon'ble Court has held as under:

> "186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court

consequences the patient faced keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient.

187. It is to be noted that doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under Section 304-A cannot be objectively determined."

41. It is further submitted by the learned counsel for the appellant- Dr. Sukumar Mukherjee that the wife of the claimant was suffering from rash/fever from April 1998, she was seen by the appellant-Dr.Sukumar Mukherjee only on three occasions before his pre-planned visit to the U.S.A. for attending a medical conference i.e. on 26.4.1998, 7.5.1998 and on the night of 11.5.1998 and then the appellant-Dr.Mukherjee left India for USA and returned much after the demise of the claimant's wife. On her first examination on 26.4.1998 the appellant suggested a host of pathological tests. The patient was requested to visit the Doctor with these reports. No drugs were prescribed by the appellant-Dr.Mukherjee at this examination. On 7.5.1998, Anuradha Saha walked into the clinic of the appellant-Dr.Mukherjee at 9.30 p.m. and reported that she was uncomfortable because she had consumed food of Chinese cuisine. The appellant-Dr.Mukherjee noticed that there was a definite change in the nature of the rash. Based on the information furnished and the status and condition of the patient, she was diagnosed to be suffering from allergic vasculitis and the appellant-Dr.Mukherjee commenced treating the patient with Depomedrol, which is a drug belonging to the family of steroids. The appellant-Dr.Mukherjee recommended

Depomedrol 80 mg.IM twice daily for 3 days to be reconsidered after Anuradha Saha was subject to further review. Depomedrol is very much indicated in Vasculitis (USPDI 1994): "Depomedrol is anti-inflammatory, anti-allergic drug. Therefore, it is Doctor's judgment to use the drug." The appellant-Dr.Mukherjee administered one injection of Depomedrol on the night of 7.5.1998. He did not administer any other injections to the deceased thereafter. It is further submitted that much higher dose of Depomedrol have been recommended in USPDI 1994 and CDRom Harisons Principles of Medicine 1998 in by pass skin diseases like multiple sclerosis with a dose of 177.7 mg daily for 1 week and 71 mg on every other day for one month.

42. On 11.5.1998 when the appellant-Dr.Mukherjee examined Anuradha Saha at the AMRI Hospital prior to his departure to U.S.A., he prescribed a whole line of treatment and organized reference to different specialists/consultants. He recommended further pathological tests because on examining the patient at the AMRI, he noticed that she had some blisters which were not peeled off. There was no detachment of skin at all. He also requested in writing the treating consultant physician of AMRI Dr. Balram Prasad, MD to organize all these including referral to all specialists. The appellant-Dr.Mukherjee suspected continuation of allergic Vasculitis in aggravated form and prescribed steroids in a tapering dose on 11.5.1998 and advised other tests to check infection and any immuno abnormalities. It is stated that the appellant-Dr.Mukherjee did not examine the patient thereafter and as aforementioned, he left on a pre-arranged visit to U.S.A. for a medical conference. No fees were charged by the appellant-Dr.Mukherjee. It is further submitted that before the appellant-Dr.Mukherjee started the treatment of the deceased, Dr.Sanjoy Ghose on 6.5.1998 treated her and during the period of treatment of the appellant-Dr. Mukherjee from 7.5.1998 to 11.5.1998, on 9.5.1998 Dr.Ashok Ghosal (Dermatologist) treated Anuradha Saha. These facts were not stated in the complaint petition and concealed by the claimant. To this asp e

Court has also recorded a finding in the case referred to supra that the patient was also examined by two consultant dermatologists Dr.A.K. Ghosal and Dr. S. Ghosh who diagnosed the disease to be a case of vasculitis.

43. It is further submitted by the learned counsel for the appellant-Dr. Mukherjee that the cause of death as recorded in the death certificate of the deceased is "septicemic shock with multi system organ failure in a case of TEN leading to cardio respiratory arrest". Blood culture was negative prior to death. There was no autopsy to confirm the diagnosis at Breach Candy Hospital, Mumbai. Dr. Udwadia observed on 27.5.1998 that the patient has developed SIRS in absence of infection in TEN. The patient expired on 28.5.1998 and the death certificate was written by a junior doctor without the comments of Dr. Udwadia. It is submitted by the learned counsel that there is neither any allegation nor any finding by this Court that the doctors of the AMRI Hospital had contributed to septicemia. The mere finding that the patient was not properly dressed at AMRI Hospital where she stayed for only 6 days of early evocation of the disease do not justify contribution to septicemic shock of the deceased. Further, there is no record to show that at AMRI Hospital the skin of the patient had peeled out thereby leading to chance of developing septicemia. On the other hand, it is a fact borne out from record that the patient was taken in a chartered flight to Breach Candy Hospital, Bombay against the advice of the doctors at Kolkata and further nothing is borne out from the records as what precaution were taken by the claimant while shifting the patient by Air to Breach Candy Hospital thereby leading to the conclusion that during the travel by chartered flight she might have contracted infection of the skin leading to septicemia. It is further submitted by the learned counsel for the appellant- Dr. Sukumar Mukherjee that the fact that the disease TEN requires higher degree of care since there is no definite treatment, such high degree of care will be relatable to comfort but not definitely to septicemia that occurred at Breach Candy Hospital. Hence, negligence has to

be assessed for damages for failure to provide comfort to the patient and not a contributory to septicemia shock suffered by the deceased.

44. It is submitted by the learned counsel for appellant-Dr. Sukumar Mukherjee that there is no finding or allegation that the drug Depomedrol prescribed by the appellant-Dr.Mukherjee caused the disease TEN. The appellant advised a number of blood tests on 11.5.98 in AMRI Hospital to detect any infection and immune abnormality due to steroids and to foresee consequences. It is further submitted that Breach Candy Hospital records show that the patient was haemo-dynamically stable. Even Dr.Udwadia of Breach Candy Hospital on 17.5.1998 doubted with regard to the exact disease and recorded the disease as TEN or Steven Johnson Syndrom.

Therefore, the National Commission ought to have considered different incidences as aforesaid leading to the death of the claimant's wife and the quantum of damages shall have to be divided into five parts and only one part shall be attributed to the negligence of the appellant-Dr.Mukherjee.

Civil Appeal No. 2867 of 2012

45. It is the case of Dr. Balram Prasad-appellant in Civil Appeal No. 2867 of 2012 that on 11.05.1998, Dr. Sukumar Mukherjee, before leaving for U.S.A., attended the patient at the AMRI Hospital at 2.15 p.m. and after examining the deceased, issued the second and last prescription on the aforesaid date without prescribing anything different but re-assured the patient that she would be fine in a few weeks' time and most confidently and strongly advised her to continue with the said injection for at least four more days. This was also recorded in the aforesaid last prescription of the said date. Further, it is stated that without disclosing that he would be out of India from 12.05.1998, he asked the deceased to consult the named Dermotologist, Dr. B.Haldar @ Baidyanath Haldar, the appellant in Civil Appeal No. 731 of 2

Dr. Abani Roy Chowdhury in his last prescription on the last visit of the deceased. Most culpably, he did not even prescribe I.V. Fluid and adequate nutritional support which was mandatory in that condition. Dr. Haldar took over the treatment of the deceased as a Dermatologist Head and Dr. Abani Roy Chowdhury as Head of the Medical Management from 12.05.1998 with the positive knowledge and treatment background that the patient by then already had clear intake of 880 mg of Depomedrol injection as would be evident from AMRI's treatment sheet dated 11.05.1998.

46. It is further stated by the claimant in the complaint lodged before National Commission that it contained specific averments of negligence against the appellant-doctors. The only averment of alleged negligence was contained in paragraph 44 of the complaint which reads as under:

> "44. That Dr. Balram Prasad as attending physician at AMRI did do nothing better. He did not take any part in the treatment of the patient although he stood like a second fiddle to the main team headed by the opposite party No. 2 and 3. He never suggested even faintly that AMRI is not an ideal place for treatment of TEN patient; on the converse, he was full of praise for AMRI as an ideal place for the treatment of TEN patients knowing nothing how a TEN patient should be treated."

47. The claimant has also placed strong reliance upon the answer given by him to question No. 26 in his cross examination which reads thus:

> "Q.No.26. Dr. Prasad says that Depomedrol dose according to the treatment sheet of the AMRI Hospital, he made a specific suggestion that the dose should be limited to that particular day only. Is it correct?
>
> Ans. It is all matter of record. Yeah, he said one day in AMRI record."

48. Though, the appellant-Dr. Balram Prasad was accused in the criminal complaint lodged by the claimant he was neither proceeded against as an accused in the criminal complaint nor before the West Bengal Medical Council but was named as a witness. Further, it is stated by the claimant that he urged before the National Commission as well as before this Court in unequivocal terms that the bulk of the compensation awarded would have to be in the proportion of 80% on the AMRI Hospital, 15% on Dr. Sukumar Mukherjee and balance between the rest. Despite the aforesaid submission before the National Commission, the claimant claims that it has erred in awarding the proportion of the liability against each of the appellant-doctors in a manner mentioned in the table which is provided hereunder:

NAME OF THE PARTY	AMOUNT TO BE PAID
Dr. Sukumar Mukherjee	Compensation:Rs.38,90,000\ Cost of litigation:1,50,000
Dr. Baidyanath Haldar	Compensation:Rs.25,93,000 Cost of litigation: Rs.1,00,000
Dr. Abani Roy Chowdhury (since deceased) (claim foregone)	Compensation: 25,00,000
AMRI Hospital	Compensation: Rs.38,90,000 Cost of litigation: Rs.1,50,000
Dr. Balram Prasad	Compensation: Rs.25,93,000 Cost of litigation: Rs.1,00,000

49. The appellant-Dr. Balram Prasad in Civil Appeal No.2867/2012 contends that he was the junior most attending physician attached to the Hospital, he was not called upon to prescribe medicines but was only required to continue and/or monitor the medicines prescribed by the specialist in the discipline. But realizing the seriousne e

appellant had himself referred the patient to the three specialists and also suggested for undertaking a skin biopsy. The duty of care ordinarily expected of a junior doctor had been discharged with diligence by the appellant. It is further contended that in his cross-examination before the National Commission in the enquiry proceeding, the claimant himself has admitted that the basic fallacy was committed by three physicians, namely, Dr. Mukherjee, Dr. Haldar and Dr. Roy Chowdhury. The above facts would clearly show that the role played by the appellant-Doctors in the treatment of the deceased was only secondary and the same had been discharged with reasonable and due care expected of an attending physician in the given facts and circumstances of the instant case.

50. In the light of the above facts and circumstances, the contention of the claimant that the death of the claimant's wife was neither directly nor contributorily relatable to the alleged negligent act of the appellant- Dr. Balram Prasad, it is most respectfully submitted that the National Commission was not justified in apportioning the damages in the manner as has been done by the National Commission to place the appellant on the same footing as that of Dr. Baidyanath Haldar, who was a senior doctor in-charge of the management/treatment of the deceased.

51. The learned senior counsel for the appellant-Dr. Balram Prasad further urged that the National Commission has also erred in not taking into account the submissions of the claimant that 80% of the damages ought to have been levied on the Hospital, 15% on Dr. Sukumar Mukherjee and the balance between the rest. It is urged that the proportion of the compensation amount awarded on the appellant is excessive and unreasonable which is beyond the case of the claimant himself.

CIVIL APPEAL NO. 731 OF 2012

52. The learned counsel Mr. Ranjan Mukherjee appearing on behalf of the appellant in this appeal has filed the written submissions on 15.4.2013. He has reiterated his submission in support of his appeal filed by the said doctor and has also adopted the arguments made in support of the written submissions filed on behalf of the other doctors and AMRI Hospital by way of reply to the written submissions of the claimant. Further, he has submitted that the appellant Dr. Baidyanath Haldar is about 80 years and is ailing with heart disease and no more in active practice. Therefore, he requested to set aside the liability of compensation awarded against him by allowing his appeal.

All the doctors and the Hospital urged more or less the same grounds.

Civil Appeal No. 2866 of 2012

53. This appeal has been filed by the claimant. It is the grievance of the claimant that the National Commission rejected more than 98% of the total original claim of Rs.77.7 crores which was modified to Rs.97.5 crores later on by adding "special damages" due to further economic loss, loss of employment, bankruptcy etc. suffered by the claimant in the course of 15-year long trial in relation to the proceedings in question before the National Commission and this Court. The National Commission eventually awarded compensation of only Rs.1.3 crores after reducing from the total award of Rs.1.72 crores on the ground that the claimant had "interfered" in the treatment of his wife and since one of the guilty doctors had already expired, his share of compensation was also denied.

54. Therefore, the present appeal is filed claiming the just and reasonable compensation urging the following grounds:

a) The National Commission has failed to consider the pecuniary, non-pecuniar[illegible]s

as extracted hereinbefore.

b) The National Commission has made blatant errors in mathematical calculation while awarding compensation using the multiplier method which is not the correct approach.

c) The National Commission has erroneously used the multiplier method to determine compensation for the first time in Indian legal history for the wrongful death caused by medical negligence of the appellant-doctors and the AMRI Hospital.

d) The National Commission has reinvestigated the entire case about medical negligence and went beyond the observations made by this Court in *Malay Kumar Ganguly's* case (supra) by holding that the claimant is also guilty for his wife's death.

e) The National Commission has failed to grant any interest on the compensation though the litigation has taken more than 15 years to determine and award compensation.

f) The National Commission has failed to consider the devaluation of money as a result of "inflation" for awarding higher compensation that was sought for in 1998.

g) It is also vehemently contended by the claimant that the National Commission has made blatant and irresponsible comment on him stating that he was trying to "make a fortune out of a misfortune." The said remark must be expunged.

55. The appellant-doctors and the AMRI Hospital contended that the compensation claimed by the claimant is an enormously fabulous amount and should not be granted to the claimant under any condition. This contention ought to have

been noticed by the National Commission that it is wholly untenable in law in view of the Constitution Bench decision of this Court in the case of *Indian Medical Association Vs. V.P. Shantha & Ors.*[15], wherein this Court has categorically disagreed on this specific point in another case wherein "medical negligence" was involved. In the said decision, it has been held at paragraph 53 that to deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant.

56. Further, in a three Judge Bench decision of this Court in *Nizam Institute's* case(supra) it has been held that if a case is made out by the claimant, the court must not be chary of awarding adequate compensation. Further, the claimant contends that this Court has recently refused to quash the defamation claim to the tune of Rs.100 crores in *Times Global Broadcasting Co. Ltd. & Anr. Vs. Parshuram Babaram Sawant* [SLP (Civil) No(s) 29979/2011 decided on 14-11-2011], suggesting that in appropriate cases, seemingly large amount of compensation is justified.

57. The claimant further urged that this is the fundamental principle for awarding "just compensation" and this Court has categorically stated while remanding the case back to the National Commission that the principle of just compensation is based on "restitutio in integrum", i.e. the claimant must receive the sum of money which would put him in the same position as he would have been if he had not sustained the wrong. It is further contended that the claimant had made a claim referred to supra under specific headings in great detail with justification for each of the heads. Unfortunately, despite referring to judicial notice and the said claim-table in its final judgment, the National Commission has rejected the entire claim on the sole ground that since the additional claim was not pleaded earlier, none of the claims made by the claimant can be considered. Therefore, the National Commission was wrong in rejecting

15. (1995) 6 SCC 651

different claims without any consideration and in assuming that the claims made by the claimant before the Tribunal cannot be changed or modified without prior pleadings under any other condition. The said view of the National Commission is contrary to the numerous following decisions of this Court which have opined otherwise:-

Ningamma and Anr. Vs. United India Insurance Company Ltd.[16]*, Malay Kumar Ganguly's* case referred to supra, *Nizam Institute's* case (supra), *Oriental Insurance Company Ltd. Vs. Jashuben & Ors.* (supra), *R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd. & Ors.*[17]*, Raj Rani & Ors Vs. Oriental Insurance Company Ltd. & Ors.*[18], *Laxman @ Laxman Mourya Vs. Divisional Manager Vs. Oriental Insurance Co. Ltd. & Anr.*[19] and *Ibrahim Vs. Raju & Ors.* (supra).

58. The claimant has further argued that the just compensation for prospective loss of income of a student should be taken into consideration by the National Commission. In this regard, he has contended that this Court while remanding the case back to the National Commission only for determination of quantum of compensation, has made categorical observations that compensation for the loss of wife to a husband must depend on her "educational qualification, her own upbringing, status, husband's income, etc." In this regard, in the case of *R.K. Malik & Anr.* (supra) (paragraphs 30-32) this Court has also expressed similar view that status, future prospects and educational qualification must be judged for deciding adequate compensation. It is contended by the claimant that it is an undisputed fact that the claimant's wife was a recent graduate in Psychology from a highly prestigious Ivy League School in New York who had a brilliant future ahead

16. (2009) 13 SCC 710.
17. (1995) 1 SCC 551.
18. (2009) 13 SCC 654.
19. (2011) 10 SCC 756.

of her. Unfortunately, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt of the victim showing a paltry income of only $ 30,000 per year, which she was earning as a graduate student. This was a grave error on the part of the National Commission, especially, in view of the observations made by this Court in the case of *Arvind Kumar Mishra Vs. New India Assurance Co.*[20]*,* wherein this Court has calculated quantum of compensation based on 'reasonable' assumption about prospective loss as to how much an Engineering student from BIT might have earned in future even in the absence of any expert's opinion (paragraphs 13,14). The principles of this case were followed in many other cases namely, *Raj Kumar Vs. Ajay Kumar & Anr.*[21]*, Govind Yadav Vs. New India Insurance Co. Ltd.*[22], *Sri Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance*[23], *Ibrahim Vs. Raju & Ors.* (supra), *Laxman @ Laxman Mourya Vs. Divisional Manager, Oriental Insurance Co. Ltd.* (supra) and *Kavita Vs. Dipak & Ors.*[24]

59. In view of the above said decisions of this Court, the prospective loss of income for the wrongful death of claimant's wife must be reasonably judged based on her future potential in the U.S.A. that has also been calculated scientifically by economic expert, Prof. John F. Burke.

60. It is further the case of the claimant that the National Commission has completely failed to award "just compensation" due to non consideration of all the following critical factors:

1) The Guidelines provided by Supreme Court: This Court has provided guidelines as to how the National

20. (2010) 10 SCC 254.
21. (2011) 1 SCC 343.
22. (2011) 10 SCC 683.
23. (2011) 13 SCC 236.
24. (2012) 8 SCC 604.

Commission should arrive at an "adequate compensation" after consideration of the unique nature of the case.

2) Status and qualification of the victim and her husband.

3) Income and standard of living in the U.S.A.: As both the deceased and the claimant were citizens of U.S.A. and permanently settled as a "child psychologist" and AIDs researcher, respectively, the compensation in the instant case must be calculated in terms of the status and standard of living in the U.S.A.. In *Patricia Mahajan's* case (supra), where a 48 year old US citizen died in a road accident in India, this Court has awarded a compensation of more than Rs. 16 crores after holding that the compensation in such cases must consider the high status and standard of living in the country where the victim and the dependent live.

4) Economic expert from the U.S.A.:

The claimant initially filed a complaint before the National Commission soon after the wrongful death of his wife in 1998 with a total claim of Rs.77.7 crores against the appellant- doctors and AMRI Hospital which was rejected and this Court remanded this matter to the National Commission for determination of the quantum of compensation with a specific direction in the final sentence of judgment that "foreign experts" may be examined through video conferencing.

5) Scientific calculation of loss of income: The National Commission should have made scientific calculation regarding the loss of income of the claimant. This direction has been given by this Court in a number of cases. Further, he has contended that the claimant moved this Court for video conferencing. The claimant examined Prof. John F. Burke, a U.S.A. based Economist of international repute,

in May-June, 2011. Prof John F. Burke was also cross-examined by the appellant-doctors and the AMRI Hospital. Prof. Burke scientifically calculated and testified himself under direct as well as cross-examination as to how he came to calculate the prospective loss of income for a similarly situated person in U.S.A. as Anuradha, the deceased and categorically stated that the direct loss of income for Anuradha's premature death would amount to "5 million and 125 thousand dollars". This loss of income was calculated after deduction of 1/3rd of the amount for her personal expenses. 1/3rd deduction of income for personal expenses has also been recommended in a judgment of this Court in the case of *Sarla Verma* (supra). Prof. Burke has also explained how he calculated the loss of income due to the premature death of Anuradha and further testified that his calculation for loss of Anuradha's income was a *"very conservative forecast"* and that to some other estimates, the damages for Anuradha's death could be "9 to 10 million dollars. While the loss of income would be multi million dollars as direct loss for wrongful death of Anuradha, it may appear as a fabulous amount in the context of India. This is undoubtedly an average and legitimate claim in the context of the instant case. And further, it may be noted that far bigger amounts of compensation are routinely awarded by the courts in medical negligence cases in the U.S.A. In this regard this Court also made very clear observation in *Indian Medical Association Vs. V.P. Shanta & Ors.*(supra), that to deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice.

6) Loss of income of claimant:

The National Commission has ignored the loss of income of the claimant though this Court has categorically stated while remanding the case to the National Commission that pecuniary and non-pecuniary losse[illegible]p

to the date of trial" must be considered for the quantum of compensation. The claimant had incurred a huge amount of expenses in the course of the more than 15 years long trial in the instant case. These expenses include the enormous cost for legal expenses as well as expenses for the numerous trips between India and the U.S.A. over the past more than 12 years. In addition to that the claimant has also suffered huge losses during this period, both direct loss of income from his job in U.S.A. as well as indirect loss for pain and intense mental agony for tenure denial and termination of his employment at Ohio State University (OSU) which was a direct result of the wrongful death of Anuradha in India as would be evident from the judgment passed by the Court of Claims in Ohio which was filed by the AMRI Hospital on July 18, 2011. The claimant also submitted an affidavit as directed by the National Commission in which the detailed description about the loss that he suffered in his personal as well as professional career in U.S.A. over the past 12 years for the wrongful death of Anuradha, has been mentioned. Needless to say that these additional damages and financial losses the claimant has suffered since he filed the original complaint against the appellant-doctors could not possibly be a part of the original claim filed by him 15 years ago.

61. In view of the circumstances narrated above, the claimant has referred a revised quantum of claim which also includes a detailed break-up of the individual items of the total claim in proper perspective under separate headings of pecuniary, non-pecuniary, punitive and special damages. The individual items of claim have also been justified with appropriate references and supporting materials as needed. The total quantum of claim for the wrongful death of the claimant's wife now stands at Rs.97,56,07,000/- including pecuniary damages of Rs.34,56,07,000/-, non pecuniary damages of Rs.31,50,00,000/-, special damages of US $

1,000,000/- for loss of job in Ohio and punitive damages of US $ 1,000,000/. This updated break-up of the total claim has been shown in the claim-table referred to in the later part of the judgment. The claimant respectfully submits that the National Commission should have considered this total claim in conjunction with the affidavit filed by him during the course of making final arguments. The National Commission also should have taken into consideration the legal principles laid down in the case of *Nizam Institute* (supra) wherein this Court allowed the claim of compensation which was substantially higher than the original claim that he initially filed in the court. Further, the National Commission ought to have taken into consideration the observations made in the remand order passed by this Court while determining the quantum of compensation and the legitimate expectation for the wrongful death of a patient 'after factoring in the position and stature of the doctors concerned as also the Hospital'. This Court also held in *Malay Kumar Ganguly's* case (supra) that AMRI is one of the best Hospitals in Calcutta, and that the doctors were the best doctors available. Therefore, the compensation in the instant case may be enhanced in view of the specific observations made by this Court.

62. Appellant-doctors Dr. Sukumar Mukherjee and Dr. Baidyanath Haldar have attempted to claim in their respective appeals that they cannot be penalized with compensation because they did not charge any fee for treatment of the deceased. Such a claim has no legal basis as in view of the categorical observations made by this Court in *Savita Garg Vs. Director, National Heart Institute*[25] and in *Malay Kumar Ganguly's* case (supra) wherein this Court has categorically stated that the aforesaid principle in Savita Garg's case applies to the present case also insofar as it answers the contentions raised before us that the three senior doctors did not charge any professional fees.

25. (2004) 8 SCC 56.

63. Further, it is contended by the claimant that from a moral and ethical perspective, a doctor cannot escape liability for causing death of a patient from medical negligence on the ground that he did not charge any fee. If that was true, poor patients who are sometimes treated for free and patients in many charitable Hospitals would be killed with impunity by errant and reckless doctors. It is urged that the National Commission ought to have considered the claim made for prospective loss of income of the appellant's wife and has committed error in rejecting the same and it has also rejected the amount of the pecuniary losses of this claimant under separate headings which are mentioned in the table referred to supra including expenses that were paid at the direction of the National Commission, namely, expenses relating to video-conferencing or payment for the Court Commissioners. Most of these direct losses were suffered by the claimant as a result of the wrongful death of his wife in the long quest for justice over the past 15 years as a result of the wrongful death of his wife. The National Commission did not provide any reason as to why the said claims were denied to him, as per this Court's decision in *Charan Singh Vs. Healing Touch Hospital*[26].

64. It is further urged by the claimant that the National Commission, in applying the multiplier method as provided in the Second Schedule under Section 163 A of the Motor Vehicles Act, is erroneous to calculate compensation in relation to death due to medical negligence.

65. Further, the claimant has taken support from the following medical negligence cases decided by this Court. It was contended by the claimant that out of these cases not a single case was decided by using the multiplier method, such as, *Indian Medical Assn. Vs. V.P. Shanta & Ors.* (supra), *Spring Meadows Hospital & Anr Vs. Harjol Ahluwalia*[27], *Charan Singh Vs. Healing Touch Hospital and Ors.*(supra),

26. (2002) 7 SCC 668.

27. (1998) 4 SCC 39.

J.J. Merchants & Ors. Vs. Srinath Chaturbedi (supra), *Savita Garg Vs. Director National Heart Institute* (supra), *State of Punjab Vs. Shiv Ram & Ors.*(supra), *Samira Kohli Vs. Dr. Prabha Manchanda & Anr.*(supra), *P.G. Institute of Medical Sciences Vs. Jaspal Singh & Ors.,* (supra) *Nizam Institute Vs. Prasant Dhananka* (supra) *Malay Kumar Ganguly Vs. Sukumar Mukherjee & Ors.* (supra) and *V. Kishan Rao Vs. Nikhil Superspeciality Hospital & Anr.* (supra).

66. In fact, the National Commission or any other consumer court in India have never used the multiplier system to calculate adequate compensation for death or injury caused due to medical negligence except when the National Commission decided the claimant's case after it was remanded back by this Court. Reliance was placed upon *Sarla Verma's* case (supra) at paragraph 37, wherein the principle laid down for determining compensation using multiplier method does not apply even in accident cases under Section 166 of the MV Act. In contrast to death from road or other accident, it is urged that death or permanent injury to a patient caused from medical negligence is undoubtedly a reprehensible act. Compensation for death of a patient from medical negligence cannot and should not be compensated simply by using the multiplier method. In support of this contention he has placed reliance upon the *Nizam Institute's* case (supra) at paragraph 92, wherein the Court has rejected the specific claim made by the guilty Hospital that multiplier should be used to calculate compensation as this Court has held that such a claim has absolutely no merit.

67. The multiplier method was provided for convenience and speedy disposal of no fault motor accident cases. Therefore, obviously, a "no fault" motor vehicle accident should not be compared with the case of death from medical negligence under any condition. The aforesaid approach in adopting the multiplier method to determine the just compensation would be damaging for society for the reason that the rules for using the multiplier [illegible]al

income of only Rs.15,000/- per year would be taken as a multiplicand. In case, the victim has no income then a multiplier of 18 is the highest multiplier used under the provision of Sections 163 A of the Motor Vehicles act read with the Second Schedule. Therefore, if a child, housewife or other non-working person fall victim to reckless medical treatment by wayward doctors, the maximum pecuniary damages that the unfortunate victim may collect would be only Rs.1.8 lakh. It is stated in view of the aforesaid reasons that in today's India, Hospitals, Nursing Homes and doctors make lakhs and crores of rupees on a regular basis. Under such scenario, allowing the multiplier method to be used to determine compensation in medical negligence cases would not have any deterrent effect on them for their medical negligence but in contrast, this would encourage more incidents of medical negligence in India bringing even greater danger for the society at large.

68. It is further urged by the claimant that the National Commission has failed to award any compensation for the intense pain and suffering that the claimant's wife had to suffer due to the negligent treatment by doctors and AMRI Hospital but the National Commission had made a paltry award equivalent to $ 20,000 for the enormous and life-long pain, suffering, loss of companionship and amenities that the unfortunate claimant has been put throughout his life by the negligent act of the doctors and the AMRI Hospital.

69. The claimant further contended that he is entitled to special damages for losses that he suffered upto the date of trial as held by this Court while remanding this matter in Malay Kumar Ganguly's case back to the National Commission. Thus, the claimant filed a legitimate claim for special damages for the losses sustained by him in the course of 15 years long trial including the loss of his employment at the Ohio State University and resultant position of bankruptcy and home foreclosure. The National Commission did not provide any reason for rejecting the said claim which is in violation of the observations made

in *Charan Singh's* case (supra).

70. Further, this Court has affirmed the principle regarding determination of just compensation in the following cases that inflation should be considered while deciding quantum of compensation: *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.* (supra), *Govind Yadav Vs. New Indian Insurance Co. Ltd.* (supra) and *Ibrahim Vs. Raju & Ors.* (supra).

71. Using the cost of inflation index (in short C.I.I.) as published by the Govt. of India, the original claim of Rs.77.7 crores made by the claimant in 1998 would be equivalent to Rs.188.6 crores as of 2012-2013. The mathematical calculation in this regard has been presented in the short note submitted by the claimant. Thus, the compensation payable for the wrongful death of claimant's wife would stand today at Rs.188.6 crores and not Rs.77.7 crores as originally claimed by him in 1998 without taking into consideration the various relevant aspects referred to supra and proper guidance and advice in the matter.

72. Further, it is urged by the claimant that he is entitled to interest on the compensation at reasonable rate as the National Commission has awarded interest @ 12% but only in case of default by the appellant- doctors and the AMRI Hospital to pay the compensation within 8 weeks after the judgment which was delivered on October 21, 2011. That means, the National Commission did not grant any interest for the last 15 years long period on the compensation awarded in favour of the claimant as this case was pending before the judicial system in India for which the claimant is not responsible. The said act is contrary to the decision of this Court in *Thazhathe Purayil Sarabi & Ors. Vs. Union of India & Anr.*[28].

73. He has also placed reliance upon in justification of his claim of exemplary or punitive damages. A claim of US $

28. (2009) 7 SCC 372.

1,000,000 as punitive damages has been made against the AMRI Hospital and Dr. Sukumar Mukherjee as provided in the table. In support of this contention he placed strong reliance on *Landgraf Vs. USI Film Prods*[29] and this Court's decision in *Destruction of Public and Private Properties Vs. State of A.P.*[30], wherein it is held that punitive or exemplary damages have been justifiably awarded as a deterrent in the future for outrageous and reprehensible act on the part of the accused. In fact punitive damages are routinely awarded in medical negligence cases in western countries for reckless and reprehensible act by the doctors or Hospitals in order to send a deterrent message to other members of the medical community. In a similar case, the Court of Appeals in South Carolina in *Welch Vs. Epstein*[31] held that a neurosurgeon is guilty for reckless therapy after he used a drug in clear disregard to the warning given by the drug manufacturer causing the death of a patient. This Court has categorically held that the injection Depomedrol used at the rate of 80 mg twice daily by Dr. Sukumar Mukherjee was in clear violation of the manufacturer's warning and recommendation and admittedly, the instruction regarding direction for use of the medicine had not been followed in the instant case. This Court has also made it clear that the excessive use of the medicine by the doctor was out of sheer ignorance of basic hazards relating to the use of steroids as also lack of judgment. No doctor has the right to use the drug beyond the maximum recommended dose.

74. The Supreme Court of Ohio in *Dardinger Vs. Anthem Blue Cross Shield et al*[32]. had judged that since $ 49 million punitive damages was excessive it still awarded US $19 million in a case of medical negligence. The aforesaid judgments from the U.S.A. clearly show that punitive damages usually are many

29. 511 U.S. 244, 1994.

30. (2009) 5 SCC 212.

31. 536 S.E. 2d 408 2000.

32. 781 N.E. 2d, 2002

times bigger than the compensatory damages. A nominal amount of US $ 1,000,000 has been claimed as punitive damages in the instant case to send a deterrent message to the reckless doctors in India keeping in view the major difference in the standard of living between India and U.S.A. In fact, this Court in a well-known case of *Lata Wadhwa* (supra) in which a number of children and women died from an accidental fire, awarded punitive damages to send a message against the unsafe condition kept by some greedy organizations or companies in the common public places in India.

75. It was further contended by the claimant that this Court remanded the case back to the National Commission for determination of the quantum of compensation only but the National Commission in clear disregard to the direction issued by this Court, has re-examined the issues involved for medical negligence. Further, in *Malay Kumar Ganguly's* case, this Court has rejected the assertion made by the doctors of the Hospital that the claimant had interfered with the treatment of his wife or that other doctors and/ or the Hospital i.e. Breach Candy Hospital in Bombay should also be made a party in this case.

76. It is further contended by the claimant that the National Commission has wrongfully apportioned the total amount of compensation by losing sight of the observations made by this Court while remanding the case back to it for determination of the quantum of compensation. This Court did not make any observation as to how the compensation should be divided, as awarded by the National Commission. Except for the appellant-Dr. Sukumar Mukherjee who was imposed with a cost of Rs.5,00,000/- this Court did not impose cost against any other doctors even though the Court found other appellant-doctors also guilty for medical negligence.

77. It is further contended that the National Commission on 31st March, 2010 in *S.P. Aggarwal Vs. Sanjay Gandhi P.G. Institute* (FA No.478/2005) held that "i[illegible]at

several doctors and paramedical staff of the appellant institute were involved, it is the appellant institute which has to be held vicariously liable to compensate the complainant to the above extent."

78. It is further urged that in *Nizam Institute's* case (supra) this Court imposed the entire compensation against the Hospital despite holding several doctors responsible for causing permanent injury to the patient. While remanding back the issue of quantifying the quantum of compensation to the National Commission, this Court has observed that the standard of medical nursing care at the AMRI Hospital was abysmal. It is further submitted that 80% of the total compensation should be imposed against the AMRI Hospital and 20% against Dr. Sukumar Mukherjee. The claimant has claimed the damages as under :-

PECUNIARY DAMAGES:		
A <u>Cost associated with the victim, Anuradha Saha</u>		
1	Loss of prospective/future earning upto to 70 years	Rs.9,25,00,000/-
2	Loss of US Social Security income up to 82 years	Rs.1,44,00,000/-
3	Paid for treatment at AMRI/Breach Candy Hospital	Rs.12,00,000/-
4	Paid for chartered flight to transfer Anuradha	Rs. 9,00,000/-
5	Travel/hotel/other expenses during Anuradha's treatment in Mumbai/ Kolkata in 1998	Rs. 7,00,000/-
6	Paid for court proceedings including video conferencing from U.S.A.	Rs.11,57,000/-

B <u>Cost associated with Anuradha's husband, Dr. Kunal Saha</u>		
1	Loss of income for missed work	Rs.1,12,50,000/-
2	Travel expenses over the past 12 years	Rs.70,00,000/-
C <u>Legal expenses</u>		
1	Advocate fees	Rs.1,50,00,000/-
2	other legal expenses	Rs.15,00,000/-
Total pecuniary damages		Rs.34,56,07,000/-
Non-Pecuniary Special Damages		
1	Loss of companionship and life amenities	Rs.13,50,00,000/-
2	Emotional distress, pain and suffering for husband	Rs.50,00,000/-
3	Pain/suffering endured by the victim during therapy	Rs.4,50,00,000/-
Total non pecuniary damages		Rs.31,50,00,000/-
D	**PUNITIVE/EXEMPLARY DAMAGES**	Rs.13,50,00,000/-
E	**SPECIAL DAMAGES**	Rs.18,00,00,000/
Total		Rs.97,56,07,000/-

Therefore, the claimant has prayed for allowing his appeal by awarding just and reasonable compensation under various heads as claimed by him.

79. On the basis of the rival legal f[illegible]s urged on behalf of the respective doct[illegible]al

and the claimant, the following points would arise for consideration of this Court:-

1) Whether the claim of the claimant for enhancement of compensation in his appeal is justified. If it is so, for what compensation he is entitled to?

2) While making additional claim by way of affidavit before the National Commission when amending the claim petition, whether the claimant is entitled for compensation on the enhanced claim preferred before the National Commission?

3(a) Whether the claimant seeking to amend the claim of compensation under certain heads in the original claim petition has forfeited his right of claim under Order II Rule 2 of CPC as pleaded by the AMRI Hospital?

3(b) Whether the claimant is justified in claiming additional amount for compensation under different heads without following the procedure contemplated under the provisions of the Consumer Protection Act and the Rules?

4. Whether the National Commission is justified in adopting the multiplier method to determine the compensation and to award the compensation in favour of the claimant?

5. Whether the claimant is entitled to pecuniary damages under the heads of loss of employment, loss of his property and his traveling expenses from U.S.A. to India to conduct the proceedings in his claim petition?

6. Whether the claimant is entitled to the interest on the compensation that would be awarded?

7. Whether the compensation awarded in the impugned judgment and the apportionment of the compensation amount fastened upon the doctors and the hospital requires interference and whether the claimant is liable for contributory negligence and deduction of compensation under this head?

8. To what Order and Award the claimant is entitled to in these appeals?

80. It would be convenient for us to take up first the Civil Appeal No. 2866 of 2012 filed by Dr. Kunal Saha, the claimant, as he had sought for enhancement of compensation. If we answer his claim then the other issues that would arise in the connected appeals filed by the doctors and the AMRI Hospital can be disposed of later on. Therefore, the points that would arise for consideration in these appeals by these Court have been framed in the composite. The same are taken up in relation to the claimants' case in-seriatum and are answered by recording the following reasons:

Answer to Point nos. 1, 2 and 3

81. Point Nos. 1, 2 and 3 are taken up together and answered since they are inter related.

The claim for enhancement of compensation by the claimant in his appeal is justified for the following reasons:

The National Commission has rejected the claim of the claimant for "inflation" made by him without assigning any reason whatsoever. It is an undisputed fact that the claim of the complainant has been pending before the National Commission and this Court for the last 15 years. The value of money that was claimed in 1998 has been devalued to a great extent. This Court in various following cases has repeatedly affirmed that inflation of money should be considered while deciding the quantum of compensation:-

In *Reshma Kumari and Ors. Vs. Madan Mohan and Anr.* (supra), this Court at para 47 has dealt with this aspect as under:

"47.One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."

In *Govind Yadav Vs. New India Insurance Company Ltd.* (supra), this court at para 15 observed as under which got re-iterated at paragraph 13 of *Ibrahim Vs. Raju & Ors.* (supra):-

"15. In *Reshma Kumari v. Madan Mohan* this Court reiterated that the compensation awarded under the Act should be just and also identified the factors which should be kept in mind while determining the amount of compensation. The relevant portions of the judgment are extracted below: (SCC pp. 431-32 & 440-41, paras 26-27 & 46-47)

'26. The compensation which is required to be determined must be just. While the claimants are required to be compensated for the loss of their dependency, the same should not be considered to be a windfall. Unjust enrichment should be discouraged. This Court cannot also lose sight of the fact that in given cases, as for example death of the only son to a mother, she can never be compensated in monetary terms.

27. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another

(sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable. That may be so.'

* * *

46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in *Oriental Insurance Co. Ltd. v. Jashuben* held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.

47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."

82. The C.I.I. is determined by the Finance Ministry of

Union of India every year in order to appreciate the level of devaluation of money each year. Using the C.I.I. as published by the Government of India, the original claim of Rs.77.7 crores preferred by the claimant in 1998 would be equivalent to Rs.188.6 crores as of 2013 and, therefore the enhanced claim preferred by the claimant before the National Commission and before this Court is legally justifiable as this Court is required to determine the just, fair and reasonable compensation. Therefore, the contention urged by the appellant-doctors and the AMRI Hospital that in the absence of pleadings in the claim petition before the National Commission and also in the light of the incident that the subsequent application filed by the claimant seeking for amendment to the claim in the prayer of the complainant being rejected, the additional claim made by the claimant cannot be examined for grant of compensation under different heads is wholly unsustainable in law in view of the decisions rendered by this Court in the aforesaid cases. Therefore, this Court is required to consider the relevant aspect of the matter namely, that there has been steady inflation which should have been considered over period of 15 years and that money has been devalued greatly. Therefore, the decision of the National Commission in confining the grant of compensation to the original claim of Rs.77.7 crores preferred by the claimant under different heads and awarding meager compensation under the different heads in the impugned judgment, is wholly unsustainable in law as the same is contrary to the legal principles laid down by this Court in catena of cases referred to supra. We, therefore, allow the claim of the claimant on enhancement of compensation to the extent to be directed by this Court in the following paragraphs.

83. Besides enhancement of compensation, the claimant has sought for additional compensation of about Rs.20 crores in addition to his initial claim made in 2011 to include the economic loss that he had suffered due to loss of his employment, home foreclosure and bankruptcy in U.S.A which

would have never happened but for the wrongful death of his wife. The claimant has placed reliance on the fundamental principle to be followed by the Tribunals, District Consumer Forum, State Consumer Forum, and the National Commission and the courts for awarding 'just compensation'. In support of this contention, he has also strongly placed reliance upon the observations made at para 170 in the *Malay Kumar Ganguly's* case referred to supra wherein this Court has made observations as thus:

> "170. Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitutio in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See *Livingstone v. Rawyards Coal Co.*)"

The claimant made a claim under specific heads in great detail in justification for each one of the claim made by him. The National Commission, despite taking judicial notice of the claim made by the claimant in its judgment, has rejected the entire claim solely on the ground that the additional claim was not pleaded earlier, therefore, none of the claims made by him can be considered. The rejection of the additional claims by the National Commission without consideration on the assumption that the claims made by the claimant before the National Commission cannot be changed or modified without pleadings under any condition is contrary to the decisions of this Court rendered in catena of cases. In support of his additional claim, the claimant places reliance upon such decisions as mentioned hereunder:

(a) In *Ningamma's* case (supra), this Court has observed at para 34 which reads thus:

"34. Undoubtedly, Section 166 of th st

compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not.

(b) In *Malay Kumar Ganguly's* case, this Court by placing reliance on the decision of this Court in *R.D. Hattangadi Vs. Pest Control (India) (P) Ltd.,* (supra) made observation while remanding back the matter to National Commission solely for the determination of quantum of compensation, that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss "already suffered or is likely to be suffered in future". Rightly, the claimant has contended that when original complaint was filed soon after the death of his wife in 1998, it would be impossible for him to file a claim for "just compensation" for the pain that the claimant suffered in the course of the 15 years long trial.

c) In *Nizam Institute's* case supra, the complainant had sought a compensation of Rs.4.61 crores before the National Commission but he enhanced his claim to Rs 7.50 crores when the matter came up before this Court. In response to the claim, this Court held as under:

"82. The complainant, who has argued his own case, has submitted written submissions now claiming about Rs 7.50 crores as compensation under various heads. He has, in addition sought a direction that a further sum of Rs 2 crores be set aside to be used by him should some developments beneficial to him in the medical field take place. Some of the claims are untenable and we have no hesitation in rejecting them. We, however, find that the claim with respect to some of the other items need to be

allowed or enhanced in view of the peculiar facts of the case."

d) In *Oriental Insurance Company Ltd. Vs. Jashuben & Ors.* (supra), the initial claim was for Rs.12 lakhs which was subsequently raised to Rs.25 lakhs. The claim was partly allowed by this Court.

e) In *R.D. Hattangadi Vs. Pest Control* (India) (supra) the appellant made an initial compensation claim of Rs.4 lakhs but later on enhanced the claim to Rs.35 lakhs by this Court.

f) In *Raj Rani & Ors. Vs. Oriental Insurance Company Ltd. & Ors.,*(supra) this Court has observed that there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. The relevant paragraph reads as under:

"14. In *Nagappa v. Gurudayal Singh* this Court has held as under: (SCC p. 279, para 7)

"7. Firstly, under the provisions of the Motor Vehicles Act, 1988, (hereinafter referred to as 'the MV Act') there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal/ court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is-it should be 'just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act."

g) In *Laxman @ Laxaman Mourya Vs. Divisional Manager, Oriental Insurance Co. Ltd. & Anr.,* (supra) this Court awarded more compensation than what was claimed by the claimant after making the following categorical observations:-

"In the absence of any bar in the A

that reason, any competent court, is entitled to award higher compensation to the victim of an accident"

h) In *Ibrahim Vs. Raju & Ors.,*(supra) this Court awarded double the compensation sought for by the complainant after discussion of host of previous judgments.

84. In view of the aforesaid decisions of this Court referred to supra, wherein this Court has awarded 'just compensation' more than what was claimed by the claimants initially and therefore, the contention urged by learned senior counsel and other counsel on behalf of the appellant-doctors and the AMRI Hospital that the additional claim made by the claimant was rightly not considered by the National Commission for the reason that the same is not supported by pleadings by filing an application to amend the same regarding the quantum of compensation and the same could not have been amended as it is barred by the limitation provided under Section 23 of the Consumer Protection Act, 1986 and the claimant is also not entitled to seek enhanced compensation in view of Order II Rule 2 of the CPC as he had restricted his claim at Rs. 77,07,45,000/-, is not sustainable in law. The claimant has appropriately placed reliance upon the decisions of this Court in justification of his additional claim and the finding of fact on the basis of which the National Commission rejected the claim is based on untenable reasons. We have to reject the contention urged by the learned senior counsel and other counsel on behalf of the appellant-doctors and the AMRI Hospital as it is wholly untenable in law and is contrary to the aforesaid decisions of this Court referred to supra. We have to accept the claim of the claimant as it is supported by the decisions of this Court and the same is well founded in law. It is the duty of the Tribunals, Commissions and the Courts to consider relevant facts and evidence in respect of facts and circumstances of each and every case for awarding just and reasonable compensation. Therefore, we are of the view that the claimant is entitled for enhanced compensation under certain items

made by the claimant in additional claim preferred by him before the National Commission. We have to keep in view the fact that this Court while remanding the case back to the National Commission only for the purpose of determination of quantum of compensation also made categorical observation that:

"172. Loss of wife to a husband may always be truly compensated by way of mandatory compensation. How one would do it has been baffling the court for a long time. For compensating a husband for loss of his wife, therefore, the courts consider the loss of income to the family. It may not be difficult to do when she had been earning. Even otherwise a wife's contribution to the family in terms of money can always be worked out. Every housewife makes a contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband's income, etc."

[Emphasis laid by this Court]

In this regard, this Court has also expressed similar view that status, future prospects and educational qualification of the deceased must be judged for deciding adequate, just and fair compensation as in the case of *R.K. Malik & Anr.* (supra).

85. Further, it is an undisputed fact that the victim was a graduate in psychology from a highly prestigious Ivy League school in New York. She had a brilliant future ahead of her. However, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt showing a paltry income of only $30,000 per year which she was earning as a graduate student. Therefore, the National Commission has committed grave error in taking that figure to determine compensation under the head of loss of dependency and the same is contrary to the observations made

by this Court in the case of *Arvind Kumar Mishra Vs. New India Assurance* which reads as under:

> "14. On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like BIT, it can be reasonably assumed that he would have got a good job. The appellant has stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of Rs. 3,50,000 per annum. Even if that is not accepted for want of any evidence in support thereof, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned Rs. 60,000 per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. In our opinion, it is fair and reasonable to assess his future earnings at Rs. 60,000 per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis."

86. The claimant further placed reliance upon the decisions of this Court in *Govind Yadav Vs. New India Insurance Co. Ltd.*(supra), *Sri Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance* (supra), *Ibrahim Vs. Raju & Ors., Laxman @ Laxman Mourya Vs. Divisional Manager, Oriental Insurance Co. Ltd.* (supra) and *Kavita Vs. Dipak & Ors.* (supra) in support of his additional claim on loss of future prospect of income. However, these decisions do not have any relevance to the facts and circumstances of the present case. Moreover, these cases mention about 'future loss of income' and not 'future prospects of income' in terms of the potential of the victim and we are inclined to distinguish between the two.

87. We place reliance upon the decisions of this Court in *Arvind Kumar Mishra's* case (supra) and also in *Susamma Thomas* (supra), wherein this Court held thus:

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

88. Further, to hold that the claimant is entitled to enhanced compensation under the heading of loss of future prospects of income of the victim, this Court in *Santosh Devi Vs. National Insurance Company and Ors.* (supra), held as under:

> "18. Therefore, we do not think that while making the observations in the last three lines of para 24 of Sarla Verma judgment, the Court had intended to lay down an absolute rule that there will be no [illegible]e

of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

89. In view of the aforesaid observations and law laid down by this Court with regard to the approach by the Commission in awarding just and reasonable compensation taking into consideration the future prospects of the deceased even in the absence of any expert's opinion must have been reasonably judged based on the income of the deceased and her future potential in U.S.A. However, in the present case the calculation of the future prospect of income of the deceased has also been scientifically done by economic expert Prof. John F. Burke. In this regard, the learned counsel for the other appellant-doctors and the Hospital have contended that without amending the claim petition the enhanced claim filed before the National Commission or an application filed in the appeal by the claimant cannot be accepted by this Court. In support of this contention, they have placed reliance upon the various provisions of the Consumer Protection Act and also decisions of this Court which have been adverted to in their submissions recorded in this judgment. The claimant strongly contended by placing reliance upon the additional claim by way of affidavit filed before the National Commission which was sought to be justified with reference to the liberty given by this Court in the earlier proceedings which arose when the application filed by the claimant was rejected and this Court has permitted him to file an affidavit before the National Commission and the same has been done. The ground urged by the claimant is that the National Commission has not considered the entire claim including the additional claim made before it. He has placed strong reliance upon *V.P. Shantha's* case (supra) in support of his contention wherein it was held as under:

"53. Dealing with the present state of medical negligence cases in the United Kingdom it has been observed:

"The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into account while the legitimate claims of the patient cannot be ignored.

Medical negligence apart, in practice, the courts are increasingly reluctant to interfere in clinical matters. What was once perceived as a legal threat to medicine has disappeared a decade later. While the court will accept the absolute right of a patient to refuse treatment, they will, at the same time, refuse to dictate to doctors what treatment they should give. Indeed, the fear could be that, if anything, the pendulum has swung too far in favour of therapeutic immunity. (p. 16)

It would be a mistake to think of doctors and hospitals as easy targets for the dissatisfied patient. It is still very difficult to raise an action of medical negligence in Britain; some, such as the Association of the Victims of Medical Accidents, would say that it is unacceptably difficult. Not only are there practical difficulties in linking the plaintiff's injury to medical treatment, but the standard of care in medical negligence cases is still effectively defined by the profession itself. All these factors, together with the sheer expense of bringing legal action and the denial of legal aid to all but the poorest, operate to inhibit medical litigation in a way in which the American system, with its contingency fees and its sympathetic juries, does not.

It is difficult to single out any one cause for what increase there has been in the volume of medical negligence actions in the United Kingdom. A common explanation is that there are, quite simply, more medical accidents occurring - whether this be due to increased pressure on hospital facilities, to falling stan[illegible]al

competence or, more probably, to the ever-increasing complexity of therapeutic and diagnostic methods." (p. 191)

A patient who has been injured by an act of medical negligence has suffered in a way which is recognised by the law - and by the public at large - as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident." (pp. 192-93)

(Mason's Law and Medical Ethics, 4th Edn.)"

[Emphasis laid by this Court]

90. He has also placed reliance upon the Nizam Institute of Medical Sciences's case referred to supra in support of his submission that if a case is made out, then the Court must not be chary of awarding adequate compensation. The relevant paragraph reads as under:

"88. We must emphasise that the court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation. The "adequate compensation" that we speak of, must to some extent, be a rule of thumb measure, and as a balance has to be struck, it would be difficult to satisfy all

the parties concerned."

91. He has further rightly contended that with respect to the fundamental principle for awarding just and reasonable compensation, this Court in *Malay Kumar Ganguly's* case (supra) has categorically stated while remanding this case back to the National Commission that the principle for just and reasonable compensation is based on 'restitutio in integrum' that is, the claimant must receive sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

92. Further, he has placed reliance upon the judgment of this Court in the case of *Ningamma's* case (supra) in support of the proposition of law that the Court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. The relevant paragraph reads as under:

"34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not."

93. He has also rightly placed reliance upon observations made in *Malay Kumar Ganguly's* case referred to supra wherein this Court has held the appellant doctors guilty of causing death of claimant's wife while remanding the matter back to the National Commission only for determination of quantum of compensation for medical negligence. This Court has further observed that compensation should include "loss of earning of profit up to the date of trial o

include any loss "already suffered or likely to be suffered in future". The claimant has also rightly submitted that when the original complaint was filed soon after the death of his wife in 1998, it would be impossible to file a claim for "just compensation". The claimant has suffered in the course of the 15 years long trial. In support of his contention he placed reliance on some other cases also where more compensation was awarded than what was claimed, such as *Oriental Insurance Company Ltd. Vs. Jashuben & Ors., R.D. Hattangadi , Raj Rani & Ors, Laxman @ Laxaman Mourya* all cases referred to supra. Therefore, the relevant paragraphs from the said judgments in-seriatum extracted above show that this Court has got the power under Article 136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the affected claimant.

In view of the aforesaid reasons stated by us, it is wholly untenable in law with regard to the legal contentions urged on behalf of the AMRI Hospital and the doctors that without there being an amendment to the claim petition, the claimant is not entitled to seek the additional claims by way of affidavit, the claim is barred by limitation and the same has not been rightly accepted by the National Commission.

94. Also, in view of the above reasoning the contention that the claimant has waived his right to claim more compensation in view of the Order II Rule 2 of CPC as pleaded by the AMRI Hospital and the appellant-doctors is also held to be wholly unsustainable in law. The claimant is justified in claiming additional claim for determining just and reasonable compensation under different heads. Accordingly, the point Nos. 1, 2, and 3 are answered in favour of the claimant and against the appellant-doctors and the Hospital.

Answer to point no. 4

95. With regard to point no. 4, the National Commission has used the "multiplier" method under Section 163A read with

the second schedule of the Motor Vehicles Act to determine the quantum of compensation in favour of the claimant applying the multiplier method as has been laid down by this Court in Sarla Verma's case(supra). Consequently, it has taken up multiplier of 15 in the present case to quantify the compensation under the loss of dependency of the claimant. It is urged by the claimant that use of multiplier system for determining compensation for medical negligence cases involving death of his wife is grossly erroneous in law. The claimant has rightly placed reliance upon the cases of this Court such as, *Indian Medical Assn. Vs. V.P. Shanta & Ors.*(supra), *Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia*[33], *Charan Singh Vs. Healing Touch Hospital and Ors.*(supra), *J.J. Merchants & Ors. Vs. Srinath Chaturbedi* (supra), *Savita Garg Vs. Director National Heart Institute* (supra), *State of Punjab Vs. Shiv Ram & Ors.*(supra), *Samira Kholi Vs. Dr. Prabha Manchanda & Anr.*(supra), *P.G. Institute of Medical Sciences Vs. Jaspal Singh & Ors.,* (supra) *Nizam Institute Vs. Prasant Dhananka* (supra) *Malay Kumar Ganguly Vs. Sukumar Mukherjee & Ors.* (supra) and *V. Kishan Rao Vs. Nikhil Superspeciality Hospital & Anr.* (supra) to contend that not a single case was decided by using the multiplier method.

In support of this contention, he has further argued that in the three judge Bench decision in the case of *Nizam Institute's* case (supra), this Court has rejected the use of multiplier system to calculate the quantum of compensation. The relevant paragraph is quoted hereunder:

> "92. Mr Tandale, the learned counsel for the respondent has, further submitted that the proper method for determining compensation would be the multiplier method. We find absolutely no merit in this plea. <u>The kind of damage that the complainant has suffered, the expenditure that he has incurred and is likely to incur in the future and</u>

33. (1998) 4 SCC 39.

the possibility that his rise in his chosen field would now be restricted, are matters which cannot be taken care of under the multiplier method."

[Emphasis laid by this Court]

He has further urged that the 'multiplier' method as provided in the second Schedule to Section 163-A of the M.V.Act which provision along with the Second Schedule was inserted to the Act by way of Amendment in 1994, was meant for speedy disposal of 'no fault' motor accident claim cases. Hence, the present case of gross medical negligence by the appellant-doctors and the Hospital cannot be compared with 'no fault' motor accident claim cases.

96. The appellant Dr. Balram Prasad on the other hand relied upon the decision in *United India Insurance Co. Ltd. Vs. Patricia Jean Mahajan* (supra) and contended that multiplier method is a standard method of determining the quantum of compensation in India. The relevant paragraphs read as under:

"20. The court cannot be totally oblivious to the realities. The Second Schedule while prescribing the multiplier, had maximum income of Rs 40,000 p.a. in mind, but it is considered to be a safe guide for applying the prescribed multiplier in cases of higher income also but in cases where the gap in income is so wide as in the present case income is 2,26,297 dollars, in such a situation, it cannot be said that some deviation in the multiplier would be impermissible. Therefore, a deviation from applying the multiplier as provided in the Second Schedule may have to be made in this case. Apart from factors indicated earlier the amount of multiplicand also becomes a factor to be taken into account which in this case comes to 2,26,297 dollars, that is to say an amount of around Rs 68 lakhs per annum by converting it at the rate of Rs 30. By Indian standards it is certainly a high amount. Therefore, for the purposes of fair compensation, a lesser multiplier can be

applied to a heavy amount of multiplicand. A deviation would be reasonably permissible in the figure of multiplier even according to the observations made in the case of Susamma Thomas where a specific example was given about a person dying at the age of 45 leaving no heirs being a bachelor except his parents.

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22. We therefore, hold that ordinarily while awarding compensation, the provisions contained in the Second Schedule may be taken as a guide including the multiplier, but there may arise some cases, as the one in hand, which may fall in the category having special features or facts calling for deviation from the multiplier usually applicable."

97. It is further urged by the learned senior counsel Mr. Vijay Hansaria for the appellant-AMRI Hospital relying on *Sarla Verma's* case (supra) that the multiplier method has enabled the courts to bring about consistency in determining the 'loss of dependency' more particularly in the death of victims of negligence. The relevant paragraph reads as under:

"14. The lack of uniformity and consistency in awarding compensation has been a matter of grave concern. Every district has one or more Motor Accidents Claims Tribunal(s). If different Tribunals calculate compensation differently on the same facts, the claimant, the litigant, the common man will be confused, perplexed and bewildered. If there is significant divergence among the Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system."

The learned counsel for the appellant-AMRI Hospital further argued that reliance placed upon the judgment in *Nizam Institute's* case referred to supra by the claimant is misplaced since the victim in that case suffered from permanent disability which required constant medical assista

urged that *Nizam Institute* case cannot be relied upon by this Court to determine the quantum of compensation by not adopting multiplier method in favour of the claimant.

A careful reading of the above cases shows that this Court is skeptical about using a strait jacket multiplier method for determining the quantum of compensation in medical negligence claims. On the contrary, this Court mentions various instances where the Court chose to deviate from the standard multiplier method to avoid over-compensation and also relied upon the quantum of multiplicand to choose the appropriate multiplier. Therefore, submission made in this regard by the claimant is well founded and based on sound logic and is reasonable as the National Commission or this Court requires to determine just, fair and reasonable compensation on the basis of the income that was being earned by the deceased at the time of her death and other related claims on account of death of the wife of the claimant which is discussed in the reasoning portion in answer to the point Nos. 1 to 3 which have been framed by this Court in these appeals. Accordingly, we answer the point No. 4 in favour of the claimant holding that the submissions made by the learned counsel for the appellant-doctors and the AMRI Hospital in determination of compensation by following the multiplier method which was sought to be justified by placing reliance upon *Sarla Verma* and *Reshma's* cases (supra) cannot be accepted by this Court and the same does not inspire confidence in us in accepting the said submission made by the learned senior counsel and other counsel to justify the multiplier method adopted by the National Commission to determine the compensation under the head of loss of dependency. Accordingly, we answer the point no. 4 in favour of the claimant and against the appellants-doctors and AMRI Hospital.

Answer to Point no. 5

98. It is the claim of the claimant that he has also suffered huge losses during this period, both direct loss of income from

his job in U.S.A. as well as indirect loss for pain and intense mental agony for tenure denial and termination of his employment at Ohio State University which was a direct result of the wrongful death of deceased in India as would be evident from the judgment passed by the Court of Claims in Ohio which was filed by the Hospital on 18th July, 2011. In lieu of such pain and suffering the claimant made a demand of Rs.34,56,07,000/- under different heads of 'loss of income for missed work', 'travelling expenses over the past 12 years' and 'legal expenses including advocate fees' etc.

99. We have perused through the claims of the claimant under the above heads and we are inclined to observe the following :-

The claim of Rs.1,12,50,000/- made by the claimant under the head of loss of income for missed work, cannot be allowed by this Court since, the same has no direct nexus with the negligence of the appellant- doctors and the Hospital. The claimant further assessed his claim under the head of 'Travel expenses over the past 12 years' at Rs.70,00,000/-. It is pertinent to observe that the claimant did not produce any record of plane fare to prove his travel expenditure from U.S.A. to India to attend the proceedings. However, it is an undisputed fact that the claimant is a citizen of U.S.A. and had been living there. It cannot be denied that he had to incur travel expenses to come to India to attend the proceedings. Therefore, on an average, we award a compensation of Rs.10 lakhs under the head of 'Travel expenses over the past twelve years'.

Further, the claimant argues that he has spent Rs.1,65,00,000/- towards litigation over the past 12 years while seeking compensation under this head. Again, we find the claim to be on the higher side. Considering that the claimant who is a doctor by profession, appeared in person before this Court to argue his case. We acknowledge the fact that he might have required rigorous assistance of lawyers to prepare his case and produce evidence in order. a

compensation of Rs.1,50,000/- under the head of 'legal expenses'. Therefore, a total amount of Rs. 11,50,000/- is granted to the claimant under the head of 'cost of litigation'.

Answer to Point no. 6

100. A perusal of the operative portion of the impugned judgment of the National Commission shows that it has awarded interest at the rate of 12% per annum but only in case of default by the doctors of AMRI Hospital to pay the compensation within 8 weeks after the judgment was delivered on October 21, 2011. Therefore, in other words, the National Commission did not grant any interest for the long period of 15 years as the case was pending before the National Commission and this Court. Therefore, the National Commission has committed error in not awarding interest on the compensation awarded by it and the same is opposed to various decisions of this Court, such as in the case of T*hazhathe Purayil Sarabi & Ors. Vs. Union of India & Anr.* regarding payment of interest on a decree of payment this Court held as under:

> "25. It is, therefore, clear that the court, while making a decree for payment of money is entitled to grant interest at the current rate of interest or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.
>
> 26. The courts are consistent in their view that normally when a money decree is passed, it is most essential that interest be granted for the period during which the money was due, but could not be utilised by the person in whose favour an order of recovery of money was passed.

> 27. As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilise the money due, which has been, in fact, utilised by the person withholding the same. Accordingly, payment of interest follows as a matter of course when a money decree is passed.
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> 28. The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when claim for the principal sum is made, namely, the date of institution of the proceedings in the recovery o f the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute."

101. Further, in Kemp and Kemp on Quantum of Damages, the objective behind granting interest is recorded as under:

> "The object of a court in awarding interest to a successful litigant is to compensate him for being kept out of money which the court has found is properly due to him. That objective is easy to achieve where it is clear that on a certain date the defendant ought to have paid to the plaintiff an ascertained sum, for example by way of repayment of a loan. The problems which arise in personal injury and fatal accident cases in relation to awards of interest result from the facts that while, on the one hand, the cause of action accrues at the time of the accident, so that compensation is payable as from that time, on the other hand

(a) the appropriate amount of compensation cannot be assessed in a personal injury case with any pretence of accuracy until the condition of the plaintiff has stabilised, and

(b) subject to the provisions of the Supreme Court Act 1981, S.32A when that section is brought into force, when damages are assessed they are assessed once for all in relation to both actual past and anticipated future loss and damage.

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The necessity for guidelines, and the status of guidelines, were considered by the House of Lords in *Cookson v. Knowles*[34]. In that case Lord Diplock with whom the other members of the House agreed, said:

> The section as amended gives to the judge several options as to the way in which he may assess the interest element to be included in the sum awarded by the judgment. He may include interest on the whole of the damages or on a part of them only as he thinks appropriate. He may award it for the whole or any part of the period between the date when the cause of action arose and the date of judgment and he may award it at different rates for different part of the period chosen.
>
> The section gives no guidance as to the way in which the judge should exercise his choice between the various options open to him. This is all left to his discretion; but like all discretions vested in judges by statute or at common law, it must be exercised judicially or, in the Scots phrase used by Lord Emslie in Smith V. Middleton, 1972 S.C. 30, in a selective and discriminating manner, not arbitrarily or idiosyncractically- for otherwise the rights of parties to litigation would become dependent upon judicial whim.
>
> It is therefore appropriate for an appellate court to lay down guidelines as to what matters it is proper for the judge to take into account in deciding how to exercise the discretion confided in him by the statute. In exercising this appellate function, the court is not expounding a rule of law from which a judge is precluded from departing where special circumstances exist in a particular case; nor indeed, even in cases where there are no special circumstances, is an appellate court justified in giving effect to the preference of its members for exercising the discretion in a different way from that adopted by the judge if the choice between the alternative ways of exercising it is one upon which judicial opinion might reasonably differ."

34. [1979] A..C. 556.

102. Therefore, the National Commission in not awarding interest on the compensation amount from the date of filing of the original complaint up to the date of payment of entire compensation by the appellant-doctors and the AMRI Hospital to the claimant is most unreasonable and the same is opposed to the provision of the Interest Act, 1978. Therefore, we are awarding the interest on the compensation that is determined by this Court in the appeal filed by the claimant at the rate of 6% per annum on the compensation awarded in these appeals from the date of complaint till the date of payment of compensation awarded by this Court. The justification made by the learned senior counsel on behalf of the appellant-doctors and the AMRI Hospital in not awarding interest on the compensation awarded by the National Commission is contrary to law laid down by this Court and also the provisions of the Interest Act, 1978. Hence, their submissions cannot be accepted as the same are wholly untenable in law and misplaced. Accordingly, the aforesaid point is answered in favour of the claimant.

Answer to point no. 7

103. Before we answer this point, it is pertinent to mention that we are not inclined to determine the liability of the doctors in causing the death of the claimant's wife since the same has already been done by the Court in *Malay Kumar Ganguly's* case (supra). We will confine ourselves to determine the extent to which the appellant-doctors and the Hospital are liable to pay compensation awarded to the claimant for their acts of negligence in giving treatment to the deceased wife of the claimant.

Liability of the AMRI Hospital:

104. It is the claim of appellant-AMRI Hospital that the arguments advanced on behalf of the appellant-doctors that is, Dr. Balram Prasad, Dr. Sukumar Mukherjee and Dr. Baidyanath Haldar and the claimant Dr. Kunal Saha, that the appellant AMRI is liable to pay the highest share of compensation in terms of percentage on the basis of the cost imposed by this Court in the earlier round of litigation in *Malay Kumar Ganguly's* case, supra are not sustainable in law.

105. The learned senior counsel for the appellant-AMRI Hospital Mr. Vijay Hansaria argued that the submission made by the claimant Dr. Kunal Saha is not sustainable both on facts and in law since he himself had claimed special damages against the appellant-doctors, Dr. Sukumar Mukherjee, Dr. Baidyanath Haldar and Dr. Abani Roy Choudhury in his appeal and therefore, he cannot now in these proceedings claim to the contrary. On the other hand, the claimant Dr. Kunal Saha argues that though the National Commission claims that this Court did not make any observation on apportionment of liability while remanding the matter back to it for determining the quantum of compensation, this Court had implicitly directed the bulk of compensation to be paid by the Hospital. Through Paragraph No. 196, the judgment reads as under:

> "196. We, keeping in view the stand taken and conduct of AMRI and Dr. Mukherjee, direct that costs of Rs 5,00,000 and Rs 1,00,000 would be payable by AMRI and Dr. Mukherjee respectively. We further direct that if any foreign experts are to be examined it shall be done only through videoconferencing and at the cost of the respondents."

This Court has stated that the bulk of the proportion of compensation is to be paid by the Hospital and the rest by Dr. Sukumar Mukherjee. None of the other doctors involved were imposed with cost though they were found guilty of medical negligence. The claimant relied upon the decision in *Nizam Institute's* case (supra) in which this Court directed the Hospital to pay the entire amount of compensation to the claimant in that case even though the treating doctors were found to be responsible for the negligence. The claimant also relied upon the observations made by this Court while remitting the case back to National Commission for determining the quantum of compensation, to emphasize upon the negligence on the part of the Hospital. The findings of this Court in *Malay Kumar Ganguly's* case read as under:

> "76. AMRI records demonstrate how abysmal the nursing care was. We understand that there was no burn unit in AMRI and there was no burn unit at Breach Candy Hospital either. A patient of TEN is kept in ICU. All emphasis has been laid on the fact that one room was virtually made an ICU. Entry restrictions were strictly adhered to. Hygiene was ensured. But constant nursing and supervision was required. In the name of preventing infection, it cannot be accepted that the nurses would not keep a watch on the patient. They would also not come to see the patients or administer drugs.
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> 77. No nasogastric tube was given although the condition of the mouth was such that Anuradha could not have been

given any solid food. She required 7 to 8 litres of water daily. It was impossible to give so much water by mouth. The doctors on the very first day found that the condition of the mouth was bad.

78. The ENT specialist in his prescription noticed blisters around the lips of the patient which led her to difficulty in swallowing or eating. No blood sample was taken. No other routine pathological examination was carried out. It is now beyond any dispute that 25-30% body surface area was affected (re. Prescription of Dr. Nandy, Plastic Surgeon). The next day, he examined the patient and he found that more and more body surface area was affected. Even Dr. Prasad found the same.

79. Supportive therapy or symptomatic therapy, admittedly, was not administered as needle prick was prohibited. AMRI even did not maintain its records properly. The nurses reports clearly show that from 13th May onwards even the routine check-ups were not done."

106. The liability of compensation to be apportioned by this Court on the appellant-AMRI Hospital is mentioned in paragraph 165 of the *Malay Kumar Ganguly's* case which reads as under:

"165. As regards, individual liability of Respondents 4, 5 and 6 is concerned, we may notice the same hereunder. As regards AMRI, it may be noticed:

(i)Vital parameters of Anuradha were not examined between 11-5-1998 to 16-5-1998 (body temperature, respiration rate, pulse, BP and urine input and output).

(ii) IV fluid not administered. (IV fluid administration is absolutely necessary in the first 48 hours of treating TEN.)"

107. However, this Court in the aforesaid case, also recorded as under:

"184. In *R.V. Yogasakaran* the New Zealand Court opined that the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities. (See also Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p. 12.)"

108. Even in the case of *Savita Garg Vs. National Heart Institute* (supra) this Court, while determining the liability of the Hospital, observed as under:

"15. Therefore, as per the English decisions also the distinction of "contract of service" and "contract for service", in both the contingencies, the courts have taken the view that the hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of the patients. Therefore, the distinction which is sought to be pressed into service so ably by learned counsel cannot absolve the hospital or the Institute as it is responsible for the acts of its treating doctors who are on the panel and whose services are requisitioned from time to time by the hospital looking to the nature of the diseases. The hospital or the Institute is responsible and no distinction could be made between the two classes of persons i.e. the treating doctor who was on the staff of the hospital and the nursing staff and the doctors whose services were temporarily taken for treatment of the patients.....

16. Therefore, the distinction between the "contract of service" and "contract for ser... y

elaborately discussed in the above case and this Court has extended the provisions of the Consumer Protection Act, 1986, to the medical profession also and included in its ambit the services rendered by private doctors as well as the government institutions or the non-governmental institutions, be it free medical services provided by the government hospitals. In the case of *Achutrao Haribhau Khodwa v. State of Maharashtra* their Lordships observed that in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in tort would be maintainable. Their Lordships further observed that if the doctor has taken proper precautions and despite that if the patient does not survive then the court should be very slow in attributing negligence on the part of the doctor. It was held as follows: (SCC p. 635)

'A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But in cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a

case an action in torts would be maintainable.'

Similarly, our attention was invited to a decision in the case of *Spring Meadows Hospital v. Harjol Ahluwalia.* Their Lordships observed as follows: (SCC pp. 46-47, para 9)

> '9.…Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor…'

Therefore, as a result of our above discussion we are of the opinion that summary dismissal of the original petition by the Commission on the question of non-joinder of necessary parties was not proper. In case the complainant fails to substantiate the allegations, then the complaint will fail. But not on the ground of non-joinder of necessary party. But at the same time the hospital can discharge the burden by producing the treating doctor in defence that all due care and caution was taken and despite that the patient died. The hospital/Institute is not going to suffer on account of non-joinder of necessary parties and the Commission should have proceeded against the hospital. Even otherwise also the Institute had to produce the treating physician concerned and has to produce evidence that all care and caution was taken by them or their staff to justify that there was no negligence involved in the matter. Therefore, nothing turns on not impleading the treating doctor as a party. Once an allegation is made that the patient was admitted in a particular hospital and

evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor or hospital. Therefore, in any case, the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities."

(Emphasis laid by this Court)

109. Therefore, in the light of the rival legal contentions raised by the parties and the legal principles laid down by this Court in plethora of cases referred to supra, particularly, *Savita Garg's* case, we have to infer that the appellant-AMRI Hospital is vicariously liable for its doctors. It is clearly mentioned in *Savita Garg's* case that a Hospital is responsible for the conduct of its doctors both on the panel and the visiting doctors. We, therefore, direct the appellant-AMRI Hospital to pay the total amount of compensation with interest awarded in the appeal of the claimant which remains due after deducting the total amount of Rs.25 lakhs payable by the appellants-doctors as per the Order passed by this Court while answering the point no. 7.

Liability of Dr. Sukumar Mukherjee:

110. As regards the liability of Dr. Sukumar Mukherjee, it is his case that nowhere has this Court in Malay Kumar Ganguly's decision hold the appellant Dr. Mukherjee and appellant-AMRI Hospital "primarily responsible" for the death of the claimant's wife. On the contrary, referring to paras 186

and 187 of the said judgment, under the heading of 'cumulative effect', the appellant's counsel has argued that his liability is not established by the Court. The said paragraphs are extracted hereunder:

"186. A patient would feel the deficiency in service having regard to the cumulative effect of negligence of all concerned. Negligence on the part of each of the treating doctors as also the hospital may have been the contributing factors to the ultimate death of the patient. But, then in a case of this nature, the court must deal with the consequences the patient faced, keeping in view the cumulative effect. In the instant case, negligent action has been noticed with respect to more than one respondent. A cumulative incidence, therefore, has led to the death of the patient.

187. It is to be noted that the doctrine of cumulative effect is not available in criminal law. The complexities involved in the instant case as also the differing nature of negligence exercised by various actors, make it very difficult to distil individual extent of negligence with respect to each of the respondent. In such a scenario finding of medical negligence under Section 304-A cannot be objectively determined."

111. In the light of the legal contention raised by the appellant-Dr. Mukherjee, we are inclined to make the following observation regarding his liability in the present case. The paragraphs relied upon by Dr. Mukherjee as have been mentioned above are in relation to the culpability of the doctors for causing the death of the patient under Section 304-A of IPC. It is imperative to mention here that the quantum of compensation to be paid by the appellant-doctors and the AMRI Hospital is not premised on their culpability under Section 304-A of IPC but on the basis of their act of negligence as doctors in treating the deceased wife of the claimant. We are therefore inclined to reiterate the findings of thi[illegible]e

liability of Dr. Mukherjee in *Malay Kumar Ganguly's* case which read as under:

> "159. When Dr. Mukherjee examined Anuradha, she had rashes all over her body and this being the case of dermatology, he should have referred her to a dermatologist. Instead, he prescribed "depomedrol" for the next 3 days on his assumption that it was a case of "vasculitis". The dosage of 120 mg depomedrol per day is certainly a higher dose in case of a TEN patient or for that matter any patient suffering from any other bypass or skin disease and the maximum recommended usage by the drug manufacturer has also been exceeded by Dr. Mukherjee. On 11-5-1998, the further prescription of depomedrol without diagnosing the nature of the disease is a wrongful act on his part.
>
> 160. According to general practice, long-acting steroids are not advisable in any clinical condition, as noticed hereinbefore. However, instead of prescribing a quick-acting steroid, the prescription of a long-acting steroid without foreseeing its implications is certainly an act of negligence on Dr. Mukherjee's part without exercising any care or caution. As it has been already stated by the experts who were cross-examined and the authorities that have been submitted that the usage of 80-120 mg is not permissible in TEN. Furthermore, after prescribing a steroid, the effect of immunosuppression caused due to it, ought to have been foreseen. The effect of immunosuppression caused due to the use of steroids has affected the immunity of the patient and Dr. Mukherjee has failed to take note of the said consequences."

112. It is also important to highlight in this judgment that the manner in which Dr. Mukherjee attempted to shirk from his individual responsibility both in the criminal and civil cases made against him on the death of the claimant's wife is very

much unbecoming of a doctor as renowned and revered as he is. The finding of this Court on this aspect recorded in *Malay Kumar Ganguly's* case reads as under:

> "182. It is also of some great significance that both in the criminal as also the civil cases, the doctors concerned took recourse to the blame game. Some of them tried to shirk their individual responsibilities. We may in this behalf notice the following:
>
> (i) In response to the notice of Dr. Kunal, Dr. Mukherjee says that depomedrol had not been administered at all. When confronted with his prescription, he suggested that the reply was not prepared on his instructions, but on the instruction of AMRI.
>
> (ii) Dr. Mukherjee, thus, sought to disown his prescription at the first instance. So far as his prescription dated 11-5-1998 is concerned, according to him, because he left Calcutta for attending an international conference, the prescription issued by him became non-operative and, thus, he sought to shift the blame on Dr. Halder.
>
> (iii) Dr. Mukherjee and Dr. Halder have shifted the blame to Dr. Prasad and other doctors. Whereas Dr. Prasad countercharged the senior doctors including Respondent 2 stating:
>
> "Prof. B.N. Halder (Respondent 2) was so much attached with the day-today treatment of patient Anuradha that he never found any deficiency in the overall management at AMRI so much so that he had himself given a certificate that her condition was very much fit enough to travel to Mumbai…."

113. Therefore, the negligence of Dr. Sukumar Mukherjee in treating the claimant's wife had been already established by this Court in *Malay Kumar Ganguly's* [illegible] Since he is a senior doctor who was in charge of [illegible]e

deceased, we are inclined to mention here that Dr. Mukherjee has shown utmost disrespect to his profession by being so casual in his approach in treating his patient. Moreover, on being charged with the liability, he attempted to shift the blame on other doctors. We, therefore, in the light of the facts and circumstances, direct him to pay a compensation of Rs.10 lakhs to the claimant in lieu of his negligence and we sincerely hope that he upholds his integrity as a doctor in the future and not be casual about his patient's lives.

Liability of Dr.Baidyanath Haldar:

114. The case of the appellant Dr. Baidyanath Haldar is that he is a senior consultant who was called by the attending physician to examine the patient on 12.5.1998. On examining the patient, he diagnosed the disease as TEN and prescribed medicines and necessary supportive therapies. It is his further case that he was not called either to see or examine the patient post 12.5.1998. The case against Dr. B. Haldar is his prescription of Steroid Predinosolone at the rate of 40 mg thrice a day which was excessive in view of the fact that the deceased was already under high dose of steroid. It is urged by the appellant-Dr. Haldar that the deceased was under a high dose of steroid at the rate of 160 mg per day and it was the appellant who tapered it down by prescribing a quick acting steroid Predinosolone at 120 mg per day. The appellant-Dr. Haldar further urged that he was called only once to examine the deceased and he was not called thereafter. Hence, the National Commission wrongly equated him with Dr. Balram Prasad who was the attending physician. Though the claimant did not make any counter statement on apportioning liability to the appellant-Dr. Haldar, it is pertinent for us to resort to the findings recorded by this Court in the case while remanding it back to the National Commission for determining the individual liability of the appellant doctors involved in the treatment of the deceased. The findings of this Court in *Malay Kumar Ganguly's* case supra, are recorded as under:

"161. After taking over the treatment of the patient and detecting TEN, Dr. Halder ought to have necessarily verified the previous prescription that has been given to the patient. On 12-5-1998 although "depomedrol" was stopped, Dr. Halder did not take any remedial measures against the excessive amount of "depomedrol" that was already stuck in the patient's body and added more fuel to the fire by prescribing a quick-acting steroid "prednisolone" at 40 mg three times daily, which is an excessive dose, considering the fact that a huge amount of "depomedrol" has been already accumulated in the body.

162. Life saving "supportive therapy" including IV fluids/ electrolyte replacement, dressing of skin wounds and close monitoring of the infection is mandatory for proper care of TEN patients. Skin (wound) swap and blood tests also ought to be performed regularly to detect the degree of infection. Apart from using the steroids, aggressive supportive therapy that is considered to be rudimentary for TEN patients was not provided by Dr. Halder.

163. Further "vital signs" of a patient such as temperature, pulse, intake-output and blood pressure were not monitored. All these factors are considered to be the very basic necessary amenities to be provided to any patient, who is critically ill. The failure of Dr. Halder to ensure that these factors were monitored regularly is certainly an act of negligence. Occlusive dressings were carried out as a result of which the infection had been increased. Dr. Halder's prescription was against the Canadian Treatment Protocol reference to which we have already made hereinbefore. It is the duty of the doctors to prevent further spreading of infections. How that is to be done is the doctors concern. Hospitals or nursing homes where a patient is taken for better treatment should not be a place for getting infection."

115. Similar to the appellant Dr. Sukumar Mukherjee, the appellant Dr. Baidyanath Haldar is also a senior doctor of high repute. However, according to the findings of this Court in *Malay Kumar Ganguly's* case, he had conducted with utmost callousness in giving treatment to the claimant's wife which led to her unfortunate demise. The appellant Dr. Baidyanath Haldar too, like Dr. Sukumar Mukherjee, made every attempt to shift the blame to the other doctors thereby tainting the medical profession who undertook to serve. This Court thereby directs him to pay Rs.10 lakhs as compensation to the claimant in lieu of his negligence in treating the wife of the claimant.

Liability of Dr Baidyanath Prasad:

116. It is the case of the appellant-Dr. Balram Prasad that he was the junior-most attending physician at AMRI Hospital who saw the deceased for the first time on 11.5.1998. He was not called upon to prescribe medicines but was only required to continue and monitor the medicines to be administered to the deceased as prescribed by the specialists. The learned senior counsel on behalf of the appellant-Dr. B.Prasad argues that the complaint made by the claimant had no averments against him but the one whereby it was stated by the claimant at paragraph 44 of the complaint which reads thus:

> "44. That Dr. Balram Prasad as attending physician at AMRI did do nothing better. He did not take any part in the treatment of the patient although he stood like a second fiddle to the main team headed by the opposite party no. 2 & 3. He never suggested even faintly that AMRI is not an ideal place for treatment of TEN patient; on the converse, he was full of praise for AMRI as an ideal place for the treatment of TEN patients knowing nothing how a TEN patient should be treated."

117. To prove his competence as a doctor, the appellant-Dr. Balram Prasad further produced a portion of the complaint which reads thus:

> "33……. that no skin biopsy for histopathology report was ever recommended by any (except Dr. B.Prasad), which is the basic starting point in such treatment, the same mistake was also committed by the opposite party no. 1"

118. The appellant Dr. Balram Prasad further emphasizes upon the cross-examination of the claimant to prove that he was not negligent while treating the patient. Question No. 26 of the cross examination reads as under:

> "Q. No. 26: Dr. Prasad says that Depomedrol dose according to the treatment sheet of the AMRI hospital, he made a specific suggestion that the dose should be limited to that particular day only. Is it correct?
>
> Ans: It is all matter of record. Yeah, he said that one day in AMRI record."

119. Though the claimant did not make specific claim against the appellant-Dr. Balram Prasad, appellant Dr. B. Haldar claimed in his submission that he has been wrongly equated with Dr. Balram Prasad who was the attending physician and Dr. Anbani Roy Choudhury who was the physician in charge of the patient.

120. It is pertinent for us to note the shifting of blames on individual responsibility by the doctors specially the senior doctor as recorded by this Court which is a shameful act on the dignity of medical profession. The observations made by this Court in this regard in *Malay Kumar Ganguly's* case read as under:

> "182.....(iii) Dr. Mukherjee and Dr. Halder have shifted the blame to Dr. Prasad and other doctors. Whereas Dr. Prasad countercharged the senior doctors including Respondent 2 stating:
>
> "Prof. B.N. Halder (Respondent 2) d

with the day-today treatment of patient Anuradha that he never found any deficiency in the overall management at AMRI so much so that he had himself given a certificate that her condition was very much fit enough to travel to Mumbai.…"

In answer to a question as to whether Dr. Halder had given specific direction to him for control of day-today medicine to Anuradha, Dr. Prasad stated:

"… this was done under the guidance of Dr. Sukumar Mukherjee (Respondent 1), Dr. B.N. Halder (Respondent 2) and Dr. Abani Roy Chowdhury (Respondent 3)."

He furthermore stated that those three senior doctors primarily decided the treatment regimen for Anuradha at AMRI.

(iv) Dr. Kaushik Nandy had also stated that three senior doctors were in charge of Anuradha's treatment.

(v) AMRI states that the drugs had been administered and nursing care had been given as per the directions of the doctors.

(vi) Respondents 5 and 6, therefore, did not own any individual responsibility on themselves although they were independent physicians with postgraduate medical qualifications.

183. In Errors, Medicine and the Law, Cambridge University Press, p. 14, the authors, Alan Merry and Alexander McCall Smith, 2001 Edn., stated:

"Many incidents involve a contribution from more than one person, and this case is an example. It illustrates the tendency to blame the last identifiable element in the claim of causation-the person holding the 'smoking gun'. A more comprehensive approach would identify the relative

contributions of the other failures in the system, including failures in the conduct of other individuals.…."

121. Paragraph 183 of the judgment indicates that the Court abhorred the shifting of blames by the senior doctor on the attending physician the appellant Dr. Balram Prasad even though the Court held him guilty of negligence. This Court found the appellant-Dr. Balram Prasad guilty as under:

"166. As regards, Dr. Balaram Prasad, Respondent 5, it may be noticed:

(i) Most doctors refrain from using steroids at the later stage of the disease due to the fear of sepsis, yet he added more steroids in the form of quick-acting "prednisolone" at 40 mg three times a day.

(ii) He stood as a second fiddle to the treatment and failed to apply his own mind.

(iii) No doctor has the right to use the drug beyond the maximum recommended dose."

122. We acknowledge the fact that Dr. Balram Prasad was a junior doctor who might have acted on the direction of the senior doctors who undertook the treatment of the claimant's wife in AMRI-Hospital. However, we cannot lose sight of the fact that the appellant Dr. Balram Prasad was an independent medical practitioner with a post graduate degree. He still stood as a second fiddle and perpetuated the negligence in giving treatment to the claimant's wife. This Court in *Malay Kumar Ganguly's* case found him to be negligent in treating the claimant's wife in spite of being the attending physician of the Hospital. But since he is a junior doctor whose contribution to the negligence is far less than the senior doctors involved, therefore this Court directs him to pay a compensation of Rs. 5 lakhs to the claimant. We hope that this compensation acts as a reminder and deterrent to him against being casual and passive in treating his patients in his forthcoming

profession.

Liability of the claimant - Dr. Kunal Saha:

123. Finally, we arrive at determining the contribution of the claimant to the negligence of the appellant- doctors and the AMRI Hospital in causing the death of his wife due to medical negligence. The National Commission has determined the compensation to be paid for medical negligence at Rs.1,72,87,500/-. However, the National Commission was of the opinion that the interference of the claimant was also contributed to the death of his wife. The National Commission relied upon paragraph 123 of the judgment of this Court in *Malay Kumar Ganguly's* case to arrive at the aforesaid conclusion. Paragraph 123 of the judgment reads thus:

> "123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages."

Therefore, holding the claimant responsible for contributory negligence, the National Commission deducted 10% from the total compensation and an award of Rs.1,55,58,750/- was given to the claimant.

124. The appellants-doctors and the AMRI Hospital have raised the issue of contributory negligence all over again in the present case for determining the quantum of compensation to be deducted for the interference of the claimant in treatment of the deceased.

125. On the other hand, the claimant in his written statement has mentioned that this Court has rejected the assertion that the claimant interfered with the treatment of his wife. The appellant-doctors raised the same issue in the revision petition which was appropriately dismissed. He relied upon the observations made by this Court which read as under:

> "117. Interference cannot be taken to be an excuse for abdicating one's responsibility especially when an interference could also have been in the nature of suggestion. Same comments were said to have been made by Dr. Halder while making his statement under Section 313 of the Code of Criminal Procedure. They are admissible in evidence for the said purpose. Similarly, the statements made by Dr. Mukherjee and Dr. Halder in their written statements before the National Commission are not backed by any evidence on record. Even otherwise, keeping in view the specific defence raised by them individually, interference by Kunal, so far as they are concerned, would amount to hearsay evidence and not direct evidence.
>
> 122. The respondents also sought to highlight on the number of antibiotics which are said to have been administered by Kunal to Anuradha while she was in AMRI contending that the said antibiotics were necessary. Kunal, however, submitted that the said antibiotics were prescribed by the doctors at AMRI and he did not write any prescription. We would, however, assume that the said antibiotics had been administered by Kunal on his own, but it now stands admitted that administration of such antibiotics was necessary.
>
> 123. To conclude, it will be pertinent to note that even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants.

> In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages."
>
> (Emphasis laid by this Court)

A careful reading of the above paragraphs together from the decision of *Malay Kumar Ganguly's* case would go to show that the claimant though over-anxious, did to the patient what was necessary as a part of the treatment. The National Commission erred in reading in isolation the statement of this Court that the claimant's action may have played some role for the purpose of damage.

126. We further intend to emphasize upon the observation of this Court in *Malay Kumar Ganguly's* case which reads as under:

> "194. Further, the statement made by the High Court that the transfer certificate was forged by the patient party is absolutely erroneous, as Dr. Anil Kumar Gupta deposed before the trial court that he saw the transfer certificate at AMRI's office and the words "for better treatment" were written by Dr. Balaram Prasad in his presence and these words were written by Dr. Prasad, who told it would be easier for them to transport the patient. In a case of this nature, Kunal would have expected sympathy and not a spate of irresponsible accusations from the High Court."

In the abovementioned paragraph, this Court clearly deterred the High Court from making irresponsible accusations against the claimant who has suffered not only due to the loss of his wife but also because his long drawn battle for justice. Unfortunately, the National Commission made the same mistake.

127. We, therefore, conclude that the National Commission erred in holding that the claimant had contributed to the negligence of the appellant-doctors and the Hospital which resulted in the death of his wife when this Court clearly absolved the claimant of such liability and remanded the matter back to the National Commission only for the purpose of determining the quantum of compensation. Hence, we set aside the finding of the National Commission and re-emphasize the finding of this Court that the claimant did not contribute to the negligence of the appellants-doctors and AMRI Hospital which resulted in the death of his wife.

Answer to point no. 8

128. This Court, while remanding the matter back to the National Commission, has categorically stated that the pecuniary and non-pecuniary losses sustained by the claimant and future losses of him up to the date of trial must be considered for the quantum of compensation. That has not been done in the instant case by the National Commission. Therefore, the claimant is entitled for enhancement of compensation on the aforesaid heads as he has incurred huge amount of expenses in the court of more than 15 years long trial in the instant case. The total claim, original as well as enhanced claim by way of filing affidavit with supporting documents, is Rs.97,56,07,000/- that includes pecuniary damages of Rs.34,56,07,000/- and non pecuniary damages of Rs.31,50,00,000/-, special damages of US $4,000,000 for loss of job/house in Ohio and punitive damages of US $1,000,000. The updated break-up of the total claim has been perused and the same has not been considered by the National Commission keeping in view the claim and legal evidence and observations made and directions issued by this Court in Malay Kumar Ganguly's case to determine just and reasonable compensation. Therefore, we are of the view that the claimant is entitled for enhanced compensation that will be mentioned under different heads which will be no[illegible]e

paragraphs of this judgment.

129. The National Commission has also not taken into consideration the observations made by this Court while remanding the case for determining the quantum of compensation with regard to the status of treating doctors and the Hospital. Further, the National Commission has failed to take into consideration the observations made in the aforesaid judgment wherein in paragraphs 152 and 155 it is held that AMRI Hospital is one of the best Hospitals in Calcutta and the doctors were best doctors available. This aspect of the matter has been completely ignored by the National Commission in awarding just and reasonable compensation in favour of the claimant.

130. Since, it has already been determined by the Court that the compensation paid by the National Commission was inadequate and that it is required to be enhanced substantially given the facts and evidence on record, it will be prudent to take up the different heads of compensation separately to provide clarity to the reasoning as well.

Loss of income of the deceased:

131. The grievance of the claimant is that the National Commission has failed to take into consideration the legal and substantial evidence produced on record regarding the income of the deceased wife as she was a citizen of U.S.A. and permanently settled as a child psychologist and the claimant was AIDS researcher in the U.S.A. Therefore, the National Commission ought to have taken the above relevant factual aspect of the case into consideration regarding the status and standard of living of the deceased in U.S.A. to determine just compensation under the head of loss of dependency. The claimant has rightly relied upon the case involving death of a 47-48 years old U.S.A. citizen in a road accident in India, in *United India Insurance Co. Ltd. & Others Vs. Patricia Jean Mahajan & Ors.* referred to supra where this Court has

awarded compensation of Rs.10.38 crores after holding that while awarding compensation in such cases the Court must consider the high status and standard of living of both the victim and dependents. However, the National Commission did not consider the substantial and legal evidence adduced on record by the claimant regarding the income that was being earned by the claimant's wife even though he has examined the U.S.A. based Prof. John F. Burke through video conferencing in May-June, 2011. He was also cross examined by the counsel of the appellant- doctors and the Hospital and had scientifically calculated and testified under direct as well as cross examination as to how he came to calculate the prospective loss of income for a similarly situated person in U.S.A. as of the deceased. Prof. John F. Burke has categorically stated that direct loss of income of the deceased on account of her premature death, would amount to 5 million and 125 thousand dollars. The loss of income on account of premature death of the claimant's wife was calculated by the said witness who is an Economist in America and he has also deducted one-third for her personal expenses out of her annual income which is at par with the law laid down by this Court in number of cases including *Sarla Verma's* case (supra). In the cross examination of the said expert witness by the learned counsel for the appellant-doctors and the Hospital, he has also explained how he calculated the loss of income on the premise of the premature death of the claimant's wife. According to Prof. John F. Burke, the above calculation of 5 million and 125 thousand dollars for loss of income of the deceased was a very conservative forecast and other estimates the damages for her premature death could be 9 to 10 million dollars. It is the claim of the claimant that loss of income of multi-million dollars as direct loss for the wrongful death of the deceased may appear as a fabulous amount in the context of India but undoubtedly an average and legitimate claim in the context of the instant case has to be taken to award just compensation. He has placed reliance upon the judgment of this Court in *Indian Medical Association's* case (supra) wh

Bench has stated that to deny the legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. We have considered the above important aspect of the case in the decision of this Court for enhancing the compensation in favour of the claimant.

132. As per the evidence on record, the deceased was earning $ 30,000 per annum at the time of her death. The appellant-doctors and the Hospital could not produce any evidence to rebut the claims of the claimant regarding the qualification of her wife. Further, Prof. John F. Burke, an economic expert testified that the deceased could have earned much more in future given her present prospect. But relying upon the principle laid down by this Court, we cannot take the estimate of Prof. John F. Burke to be the income of the deceased. We also feel that $30,000 per annum earned by the deceased during the time of her death was not from a regular source of income and she would have earned lot more had it been a regular source of income, having regard to her qualification and the job for which she was entitled to. Therefore, while determining the income of the deceased, we rely on the evidence on record for the purpose of determining the just, fair and reasonable compensation in favour of the claimant. It would be just and proper for us to take her earning at $40,000 per annum on a regular job. We further rely upon the paragraphs in the cases of *Sarla Verma* and *Santosh Devi* referred to supra while answering the point no. 1, to hold that 30% should be added towards the future loss of income of the deceased. Also, based on the law laid down by this Court in catena of cases referred to supra, 1/3rd of the total income is required to be deducted under the head of personal expenditure of the deceased to arrive at the multiplicand.

133. The multiplier method to be applied has been convincingly argued by the learned counsel for the appellant-doctors and the Hospital against by the claimant which we concede with based on the reasoning mentioned while

answering the point no. 4. Therefore, estimating the life expectancy of a healthy person in the present age as 70 years, we are inclined to award compensation accordingly by multiplying the total loss of income by 30.

134. Further, the claimant has rightly pointed that the value of Indian currency has gone down since the time when these legal proceedings have begun in this country. This argument of the claimant has been accepted by us while answering the point nos. 2 and 3. Therefore, it will be prudent for us to hold the current value of Indian Rupee at a stable rate of Rs.55/- per 1$.

Therefore, under the head of 'loss of income of the deceased' the claimant is entitled to an amount of Rs.5,72,00,550/- which is calculated as [$40,000+(30/100x40,000$)-(1/3 x 52,000$) x 30 x Rs.55/-] = Rs.5,72,00,550/-.

Other Pecuniary Damages:

135. The pecuniary damages incurred by the claimant due to the loss of the deceased have already been granted while answering the point no. 5. Therefore, we are not inclined to repeat it again in this portion. However, the expenditure made by the claimant during the treatment of the deceased both in Kolkata and Mumbai Hospitals deserves to be duly compensated for awarding reasonable amount under this head as under:-

(a) For the medical treatment in Kolkata and Mumbai:

136. An amount of Rs.23 lakhs has been claimed by the claimant under this head. However, he has been able to produce the medical bill only to the extent of Rs.2.5 lakhs which he had paid to the Breach Candy Hospital, Mumbai. Assuming that he might have incurred some more expenditure, the National Commission had quantified the expenses under this head to the tune of Rs.5 lakhs. We stil nt

as insufficient in the light of the fact that the deceased was treated at AMRI Hospital as an in-patient for about a week; we deem it just and proper to enhance the compensation under this head by Rs.2 lakhs thereby awarding a total amount Of Rs.7 lakhs under this head.

(b) Travel and Hotel expenses at Bombay:

137. The claimant has sought for compensation to the tune of Rs.7 lakhs for travel and expenses for 11 days he had to stay in Mumbai for the treatment of his wife. However, again he has failed to produce any bills to prove his expenditure. Since, his travel to Mumbai for the treatment of his wife is on record, the National Commission has awarded compensation of Re.1 lakh under this head. We find it fit and proper to enhance the compensation by Rs.50,000/- more considering that he had also incurred some unavoidable expenditure during his travel and stay in Mumbai at the time of treatment of the deceased. Therefore, under this head, we award a compensation of Rs.1,50,000/-.

138. However, with respect to the claim made under the cost of chartered flight, a sum of Rs.5,00,000/- is already awarded by the National Commission and we are not inclined to interfere with the same in absence of any evidence which alters the computation of the cost incurred in chartered flight. Hence, we uphold the amount awarded by the National Commission under the head of 'cost of chartered flight'.

Non pecuniary damages:

139. It is the case of the claimant that the National Commission has awarded paltry amount equivalent to $20,000 for the enormous and lifelong pain, suffering, loss of companionship and amenities that he had been put through due to the negligent act of the appellant- doctors and the Hospital. The claimant had claimed Rs.50 crores under this head before the National Commission without giving any break up figures

for the amount. Before this Court however, the claimant has reduced the claim to Rs.31,50,00,000/- under three different heads. He has claimed Rs.13,50,00,000/- for loss of companionship and life amenities, Rs.50,00,000/- for emotional distress, pain and suffering of the husband- the claimant and Rs.4,50,00,000/- for pain and suffering endured by the deceased during her treatment.

140. In this regard, we are inclined to make an observation on the housewife services here. In the case of *Arun Kumar Agarwal Vs. National Insurance Company*[35], this Court observed as follows:

> 22. We may now deal with the question formulated in the opening paragraph of this judgment. In Kemp and Kemp on Quantum of Damages, (Special Edn., 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a housekeeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife, and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.
>
> 23. In England the courts used to award damages solely on the basis of pecuniary loss to family due to the demise of the wife. A departure from this rule came to be made in Berry v. Humm & Co. where the plaintiff claimed damages for the death of his wife caused due to the negligence of the defendant's servants. After taking cognizance of some

35. (2010) 9 SCC 218.

precedents, the learned Judge observed: (KB p. 631)

"… I can see no reason in principle why such pecuniary loss should be limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, and why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of their being rendered freely in the future but for the death."

24. In *Regan v. Williamson* the Court considered the issue relating to quantum of compensation payable to the dependants of the woman who was killed in a road accident. The facts of that case were that on the date of accident, the plaintiff was aged 43 years and his children were aged 14 years, 11 years, 8 years and 3 years respectively. The deceased wife/mother was aged 37 years. The cost of a housekeeper to carry out services previously rendered by his wife was 22.5 pounds per week, the saving to him in not having to clothe and feed his wife was 10 pound per week, leaving a net loss of 12.50 pounds per week or 600 pounds a year. However, the Court took into account the value of other services previously rendered by the wife for which no substitute was available and accordingly increased the dependency to 20 pounds a week. The Court then applied a multiplier of 11 in reaching a total fatal accidents award of 12,298 pounds. In his judgment, Watkins, J. noted as under: (WLR pp. 307 H-308 A)

"The weekend care of the plaintiff and the boys remains a problem which has not been satisfactorily solved. The plaintiff's relatives help him to a certain extent, especially on Saturday afternoons. But I formed the clear impression that the plaintiff is often, at weekends, sorely tired in trying to be an effective substitute for the deceased. The problem

could, to some extent, be cured by engaging another woman, possibly to do duty at the weekend, but finding such a person is no simple matter. I think the plaintiff has not made extensive enquiries in this regard. Possibly the expense involved in getting more help is a factor which has deterred him. Whatever be the reason, the plain fact is that the deceased's services at the weekend have not been replaced. They are lost to the plaintiff and to the boys."

He then proceeded to observe: (WLR p. 309 A-D)

"I have been referred to a number of cases in which judges have felt compelled to look upon the task of assessing damages in cases involving the death of a wife and mother with strict disregard to those features of the life of a woman beyond her so-called services, that is to say, to keep house, to cook the food, to buy the clothes, to wash them and so forth. In more than one case, an attempt has been made to calculate the actual number of hours it would take a woman to perform such services and to compensate dependants upon that basis at so much an hour and so relegate the wife or mother, so it seems to me, to the position of a housekeeper.

(Emphasis laid by this Court)

While I think that the law inhibits me from, much as I should like to, going all the way along the path to which Lord Edmund-Davies pointed, I am, with due respect to the other judges to whom I have been referred, of the view that the word 'services' has been too narrowly construed. It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework. This s

to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded."

25. In *Mehmet v. Perry* the pecuniary value of a wife's services were assessed and granted under the following heads:

(a) Loss to the family of the wife's housekeeping services.

(b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.

26. In India the courts have recognized that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

27. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. the husband and children. However, for the purpose of award

of compensation to the dependants, some pecuniary estimate has to be made of the services of the housewife/mother. In that context, the term "services" is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

30. In A. Rajam v. M. Manikya Reddy, M. Jagannadha Rao, J. (as he then was) advocated giving of a wider meaning to the word "services" in cases relating to award of compensation to the dependants of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

'The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From this total must be deducted the expense the family would have otherwise been spending for the deceased housewife.

While estimating the 'services' of the housewife, a narrow meaning should not be given to the meaning of the word 'services' but it should be construed broadly and one has to take into account the loss o d

attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services.'

XXX XXX XXX

32. In National Insurance Co. Ltd. v. Mahadevan the learned Single Judge referred to the Second Schedule of the Act and observed that quantifying the pecuniary loss at the same rate or amount even after 13 years after the amendment, ignoring the escalation in the cost of living and the inflation, may not be justified.

33. In Chandra Singh v. Gurmeet Singh, Krishna Gupta v. Madan Lal, Captan Singh v. Oriental Insurance Co. Ltd. and Amar Singh Thukral v. Sandeep Chhatwal, the Single and Division Benches of the Delhi High Court declined to apply the judgment of this Court in Lata Wadhwa case for the purpose of award of compensation under the Act. In Krishna Gupta v. Madan Lal the Division Bench of the High Court observed as under: (DLT p. 834, para 24)

"24. … The decision of the Apex Court in Lata Wadhwa in our considered opinion, cannot be said to have any application in the instant case. The Motor Vehicles Act, 1939 was the complete code by itself. It not only provides for the right of a victim and/or his legal heirs to obtain compensation in case of bodily injury or death arising out of use of motor vehicle, but the Forum therefor has been provided, as also the mode and manner in which the compensation to be awarded therefor. In such a situation, it would be inappropriate to rely upon a decision of the Apex Court, which had been rendered in an absolutely different fact situation and in relation whereto there did not exist any statutory compensation. Lata Wadhwa was decided in a matter where a fire occurred during a celebration. The liability of Tata Iron & Steel Co. Ltd. was

not disputed. Compensation was awarded having regard to the peculiar feature obtaining in that case which has got nothing to do with the statutory compensation payable under the provisions of the Motor Vehicles Act."

(Emphasis laid by this Court)

141. Also, in a three judge Bench decision of this Court in the case of *Rajesh & Ors. Vs. Rajvir Singh and Ors.*[36], this Court held as under:

"20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in *Santhosh Devi* (supra). We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2,500/- to Rs. 10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In *Sarla Verma's* case (supra), it was held that compensation for loss of consortium should be in the range of Rs. 5,000/- to Rs. 10,000/-, In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United

36. 2013 (6) SCALE 563.

States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

(Emphasis laid by this Court)

142. Under the heading of loss due to pain and suffering and loss of amenities of the wife of the claimant, Kemp and Kemp write as under:

"The award to a plaintiff of damages under the head "pain and suffering" depends as Lord Scarman said in Lim Poh Choo v. Camden and Islington Area health Authority, "upon the claiamant's personal awareness of pain, her capacity of suffering. Accordingly, no award is appropriate if and in so far as the claimant has not suffered and is not likely to suffer pain, and has not endured and is not likely to endure suffering, for example, because he was rendered immediately and permanently unconscious in the accident. By contrast, an award of damages in respect of loss of amenities is appropriate whenever there is in fact such a loss regardless of the claimant's awareness of the loss."

…….

Further, it is written that,

"Even though the claimant may die from his injuries shortly after the accident, the evidence may justify an award under this head. Shock should also be taken account of as an ingredient of pain and suffering and the claimant's particular circumstances may well be highly relevant to the extent of her suffering.

…….

By considering the nature of amenities lost and the injury and pain in the particular case, the court must assess the effect upon the particular claimant. In deciding the appropriate award of damages, an important consideration show long will he be deprived of those amenities and how long the pain and suffering has been and will be endured. If it is for the rest of his life the court will need to take into account in assessing damages the claimant's age and his expectation in life. That applies as much in the case of an unconscious plaintiff as in the case of one sentient, at least as regards the loss of amenity."

The extract from Malay Kumar Ganguly's case read as under:

"3. Despite administration of the said injection twice daily, Anuradha's condition deteriorated rapidly from bad to worse over the next few days. Accordingly, she was admitted at Advanced Medicare Research Institute (AMRI) in the morning of 11-5-1998 under Dr. Mukherjee's supervision. Anuradha was also examined by Dr. Baidyanath Halder, Respondent 2 herein. Dr. Halder found that she had been suffering from erythema plus blisters. Her condition, however, continued to deteriorate further. Dr. Abani Roy Chowdhury, Consultant, Respondent 3 was also consulted on 12-5-1998.

4. On or about 17-5-1998 Anuradha was shifted to Breach Candy Hospital, Mumbai as h[illegible]r

deteriorated severely. She breathed her last on 28-5-1998……"

143. The above extracted portion from the above judgment would show that the deceased had undergone the ordeal of pain for 18 long days before she breathed her last. In this course of period, she has suffered with immense pain and suffering and undergone mental agony because of the negligence of the appellant-doctors and the Hospital which has been proved by the claimant and needs no reiteration.

144. Further, in the case of *Nizam Institute* (supra), the claimant who was also the surviving victim of a motor vehicle accident was awarded Rs.10 lakhs for pain and suffering. Further, it was held in *R.D. Hattangadi's* case (supra) as follows:

"14. In *Halsbury's Laws of England,* 4th Edn., Vol. 12 regarding non-pecuniary loss at page 446 it has been said:

> *Non-pecuniary loss: the pattern.*- Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award."|

145. Therefore, the claim of Rs.4,50,00,000/- by the claimant is excessive since it goes against the amount awarded by this Court under this head in the earlier cases referred to supra. We acknowledge and empathise with the fact

that the deceased had gone through immense pain, mental agony and suffering in course of her treatment which ultimately could not save her life, we are not inclined to award more than the conventional amount set by this Court on the basis of the economic status of the deceased. Therefore, a lumpsum amount of Rs.10 lakhs is awarded to the claimant following the *Nizam Institute's* case (supra) and also applying the principles laid in Kemp and Kemp on the "Quantum of Damages", under the head of 'pain and suffering of the claimant's wife during the course of treatment'.

146. However, regarding claim of Rs.50,00,000/- by the claimant under the head of 'Emotional distress, pain and suffering for the claimant' himself, we are not inclined to award any compensation since this claim bears no direct link with the negligence caused by the appellant-doctors and the Hospital in treating the claimant's wife.

In summary, the details of compensation under different heads are presented hereunder:

Loss of income of the deceased	Rs.5,72,00,550/-
For Medical treatment in Kolkata and Mumbai	Rs.7,00,000/-
Travel and Hotel expenses at Mumbai	Rs.6,50,000/-
Loss of consortium	Rs.1,00,000/-
Pain and suffering	Rs.10,00,000/-
Cost of litigation	Rs.11,50,000/-

147. Therefore, a total amount of Rs.6,08,00,550/- is the compensation awarded in this appeal to the claimant Dr. Kunal Saha by partly modifying the award granted by the National Commission under different heads with 6% interest per annum from the date of application till the date

148. Before parting with the judgment we are inclined to mention that the number of medical negligence cases against doctors, Hospitals and Nursing Homes in the consumer forum are increasing day by day. In the case of *Paschim Banga Khet Mazdoor Samity Vs. State of West Bengal*[37], this Court has already pronounced that right to health of a citizen is a fundamental right guaranteed under Article 21 of the Constitution of India. It was held in that case that all the government Hospitals, Nursing Homes and Poly-clinics are liable to provide treatment to the best of their capacity to all the patients.

149. The doctors, Hospitals, the Nursing Homes and other connected establishments are to be dealt with strictly if they are found to be negligent with the patients who come to them pawning all their money with the hope to live a better life with dignity. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right. We, therefore, hope and trust that this decision acts as a deterrent and a reminder to those doctors, Hospitals, the Nursing Homes and other connected establishments who do not take their responsibility seriously.

150. The central and the state governments may consider enacting laws wherever there is absence of one for effective functioning of the private Hospitals and Nursing Homes. Since the conduct of doctors is already regulated by the Medical Council of India, we hope and trust for impartial and strict scrutiny from the body. Finally, we hope and believe that the institutions and individuals providing medical services to the public at large educate and update themselves about any new medical discipline and rare diseases so as to avoid tragedies such as the instant case where a valuable life could have been saved with a little more awareness and wisdom from the part of the doctors and the Hospital.

37. (1996) 4 SCC 37.

151. Accordingly, the Civil Appeal No. 2867/2012 filed by Dr. Balram Prasad, Civil Appeal No. 858/2012 filed by Dr. Sukumar Mukherjee and Civil Appeal No. 731/2012 filed by Dr. Baidyanath Haldar are partly allowed by modifying the judgment and order of the National Commission in so far as the amount fastened upon them to be paid to the claimant as mentioned below. Dr. Sukumar Mukherjee and Dr. Baidyanath Haldar are liable to pay compensation to the tune of Rs.10 lakhs each and Dr. Balram Prasad is held liable to pay compensation of Rs.5 lakhs to the claimant. Since, the appellant-doctors have paid compensation in excess of what they have been made liable to by this judgment, they are entitled for reimbursement from the appellant-AMRI Hospital and it is directed to reimburse the same to the above doctors within eight weeks.

152. The Civil Appeal No. 692/2012 filed by the appellant-AMRI Hospital is dismissed and it is liable to pay compensation as awarded in this judgment in favour of the claimant after deducting the amount fastened upon the doctors in this judgment with interest @ 6% per annum.

153. The Civil Appeal No. 2866/2012 filed by the claimant-Dr.Kunal Saha is also partly allowed and the finding on contributory negligence by the National Commission on the part of the claimant is set aside. The direction of the National Commission to deduct 10% of the awarded amount of compensation on account of contributory negligence is also set aside by enhancing the compensation from Rs.1,34,66,000/- to Rs.6,08,00,550/- with 6% interest per annum from the date of the complaint to the date of the payment to the claimant.

154. The AMRI Hospital is directed to comply with this judgment by sending demand draft of the compensation awarded in this appeal to the extent of liability imposed on it after deducting the amount, if any, already paid to the claimant, within eight weeks and submit the compliance report.

R.P.

SITA RAM

v.

BALBIR @ BALI & ANR.

(Criminal Appeal No. 1834 of 2013)

OCTOBER 24, 2013

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

BAIL:

Cancellation of bail -- A group of 30-35 persons led by first respondent, armed with lathis and firearms causing death of one person and injuries to others - High Court granting anticipatory bail to first respondent - Held: Additional Sessions Judge has found prima facie case against first respondent and other accused -- Incident had caused public panic in the area - First respondent is a very influential person in the area -- Moreover, his antecedents are such that a reasonably strong apprehension of his tampering with witnesses or to carry out threats is imminent and omnipresent --The severity of the attack and leading role of first respondent should not be overlooked - In the circumstances, the impugned order is set aside and bail granted to first respondent is cancelled - Penal Code, 1860 - ss. 109, 114, 148, 302, 307, 323, 325 r/w s.149 - Arms Act, 1959 - ss.25 and 27.

The complainant-appellant was first accosted by respondent no. 1 over collection of donation from the former and when he reported the matter to police, respondent no. 1 with 30-35 supporters armed with lathis and firearms went to his shop and wielded lathis and also opened fire causing death of one person and injuries to several others. The Addl. Sessions Judge rejected the bail application of respondent no. 1, but the single Judge of the High Court granted him bail. Aggrieved, the

complainant filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The appellant/informant has mentioned in the FIR the names of respondent no.1 as also other accused persons and the fact that they were armed with lathis and firearms and they opened fire leading to firearms injuries to several persons and death of the brother-in-law of the informant. The incident had caused public panic in the area, as is evident from contemporary newspaper reports. Respondent no.1, is an ex-MLA and is indubitably a very influential person in the area. The Addl. Sessions Judge has found existence of a prima facie case u/ss 148, 302/149, 307/149 and 323/149 IPC and ss. 25 and 27 of the Arms Act against all the accused and in addition to this, a prima facie case u/ss 302 and 109 IPC and 25 of Arms Act against respondent no. 1. [para 4 and 5] [168-D-F; 169-B-D]

1.2 Keeping all the factors in perspective, especially the wide-scale injuries suffered by several persons, there is a strong prima facie case of the involvement of respondent no.1 in the alleged crimes. Moreover, the antecedents of respondent no.1 are such that a reasonably strong apprehension of his tampering with witnesses carrying out threats is imminent and omnipresent. The severity of the attack and leading role of respondent no. 1 should not be overlooked. For these manifold reasons, the impugned order is set aside and the bail granted to respondent no.1 is cancelled. [para 6] [169-E-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1834 of 2013.

From the Judgment and Order dated 11.02.2013 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No. M-40691/12 (O&M).

Rishi Malhotra for the Appellant.

P.S. Patwalia, Ashutosh Chugh, Parthiv K. Goswami, Diksha Rai, Deep Karan Dalal, Dr. Monika Gusain for the Respondents.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. The Appellant, who is the informant in FIR No.141 dated 6.5.2011 at Police Station, Kalanaur, District Rohtak, for offences punishable under Sections 109, 114, 148, 302, 307, 323 and 325 IPC read with Section 149 IPC and Section 25 of the Arms Act, assails the impugned Order dated 11.2.2013 passed by the High Court of Punjab & Haryana granting bail to Respondent no.1, namely, Balbir @ Bali. The learned Single Judge has been impressed by the fact that the injuries on deceased Vishnu (Brother-in-law of the Appellant/Informant), as mentioned in the FSL Report, had been caused by a high speed bullet projectile fired most probably from a .315 bore standard rifle which, according to the version in the FIR, was not the weapon carried by Balbir/Respondent no.1. The learned Judge has also noted that the six witnesses examined under Section 161, Cr.P.C. have not specifically stated that the Respondent no.1 was holding a firearm. However, what emerges from their statements is that on an indication given by Balbir/Respondent no.1, Vishnu was fatally fired upon. The factum of Respondent no.1 having been incarcerated at that time for one year and seven and a half months also appears to have weighed on the learned Single Judge.

3. On the contrary, the Addl. Sessions Judge, Rohtak, by Order dated 22.3.2012 had dismissed the Bail Application filed by Balbir/Respondent no.1. He had noted that the alleged sequence of events inter alia were that when a donation had been demanded from the Appellant he had agreed to match the amount given by his neighbour in the Anaj Mandi, where

this entire incident occurred. The persons demanding the donation, however, stated that Respondent no.1 had instructed them to collect Rs.50,000/- from the Informant/Appellant and on being so told, the latter had stated that Respondent no.1 owed him Rs.5,00,000/- out of which they could deduct Rs.2,50,000/- as his donation provided the remaining Rs.2,50,000/- was returned to him. On this conversation being reported back to Respondent no.1, he arrived at approximately 5.00 p.m. at the Anaj Mandi and accosted the Appellant/Informant by verbal abuses as well as by fist blows. Appellant ran away from the spot and immediately lodged a police report. Nevertheless, at 7:00 p.m., Respondent no.1 along with 30-35 supporters armed with weapons again came to the shop of the Appellant and administered lathi blows and also opened fire, leading to injuries to several persons and a fatal injury to Vishnu.

4. We have perused the FIR and are satisfied that the narration of events of the Additional Sessions Judge is consistent thereto. The Appellant/Informant has mentioned the names of Respondent no.1 as also Rajesh, Pawan, Kala, Salad, Mukesh, Kuldip Singh, Satbir, Sombir, Naresh, Rishi and his brothers, Bindu, Hansi, Dharam, Ajit, Leela, Raja and Rajbir and the fact that all these persons were armed with weapons. In the FIR, the Appellant/Informant has stated that Respondent no.1 fired upon his brother-in-law Vishnu from his revolver and thereafter Sombir also fired upon Vishnu. The other persons mentioned also opened fire indiscriminately leading to firearm injuries on several persons who were at the shop of the Appellant/Informant at that fateful time. Injuries caused by blunt weapons (the FIR speaks of Respondent no.1 and party also possessing lathis) find mention in the MLC Reports. It is true that the FSL Report does not indicate that Vishnu was killed by a revolver shot, allegedly possessed and fired by Balbir/Respondent no.1; but more likely from a .315 bore standard rifle, as was possessed by Sombir. However, it is also alleged that Sombir fired on the instigation, instance and indication of Respondent no.1. Moreover, the leadi[illegible]t

no.1 is not incredible only because an injury from a revolver has not been reported as he could have fired therefrom and missed Vishnu.

5. This incident had caused public panic in the area, as is evident from contemporary newspaper and journalistic reports. Respondent no.1 is indubitably a very influential person in the area, at the time of the incident he was an ex-MLA. Section 109 and Section 149, as envisaged under the IPC have been cited. By Orders dated 23.1.2013, the Addl. Sessions Judge has, on a perusal of the police report and material documents, found existence of a prima facie case under Sections 148, 302 read with Section 149, 307 read with Section 149, 323 read with Section 149 IPC against all the accused and in addition to this a prima facie case under Section 302 IPC, 109 IPC and 25 of Arms Act against Balbir @ Bali, a prima facie case under Section 307 IPC against Naresh and Rishi, a prima facie case under Section 25 of Arms Act against Dinesh @ Kala and Sunil and a prima facie case under Section 27 of Arms Act.

6. Keeping all these factors in perspective, especially the wide-scale injuries suffered by several persons, there is a strong prima facie case of the involvement of the Respondent no.1 in the alleged crimes. Moreover, the antecedents of Respondent no.1 are such that a reasonably strong apprehension of his tampering with witnesses or leveling of threats is imminent and omnipresent. The severity of the attack should not be overlooked. For these manifold reasons, we set aside the impugned Order dated 11.2.2013, allow the Appeal and cancel the bail granted to Respondent no.1 who shall surrender to custody forthwith.

7. Nothing stated above should however influence the Sessions Judge and the trial of the case shall be conducted on its own merits.

R.P. Appeal allowed.

T.C. GUPTA
v.
BIMAL KUMAR DUTTA & ORS.
(Civil Appeal No. 9476 of 2013)

OCTOBER 25, 2013

[P. SATHASIVAM, CJI AND RANJAN GOGOI, J.]

CONTEMPT OF COURT:

Contempt proceedings - A contempt action being in the nature of quasi criminal proceedings, the degree of satisfaction that must be reached by the court to hold a person guilty of commission of contempt would be akin to what is required to prove a criminal charge, namely, proof beyond reasonable doubt.

Contempt proceedings -- Alleging disobedience of order of High Court - High Court holding the appellant guilty of commission of contempt of its order and directing for his personal appearance for hearing on quantum of punishment - Held: Order of the court in respect of which violation is alleged must be clear, unambiguous and unequivocal and defiance thereof must be apparent on the very face of the action with which a contemnor is charged -- In the instant case, the interim order of the High Court had directed status quo to be maintained in respect of allotments -- Admittedly, no allotments had been made by the appellant or any other authority -- Order of High Court set aside - Haryana Development and Regulation of Urban Areas Act, 1975.

Contempt proceedings - Interpretation of the order alleged to have been disobeyed - Held: Would not be appropriate while dealing with a charge of contempt -- In a situation like the case in hand, where High Court had directed maintenance of status quo as to allotment, it was not open

for High Court to hold the contemnor guilty by understanding the said order to mean status quo or a restraint in respect of grant of licences under the Act.

CONTEMPT OF COURTS ACT, 1971:

s.12, Explanation - Unconditional apology - Held: An apology tendered by a contemnor should not be rejected merely on the ground that it is qualified or conditional so long it is made bona fide -- There is nothing on record to suggest that the unqualified and unconditional apology tendered by appellant in his reply before the High Court was actuated by reasons that are not bona fide.

In a writ petition instituted in public interest before the High Court raising a grievance with regard to the Final Development Plan, on the application for stay of the implementation of the Plan, the High Court on 18.8.2011 directed status quo as to allotment to be maintained. However, the appellant who was the Director General, Town and Country Planning, granted a licence dated 28.12.2011 for setting up of a Residential Plotted Colony on 100.262 acres of land. This led to the institution of the contempt proceedings in which the appellant filed his response contending that no allotment was made by him or by any other authority so as to constitute violation of the order dated 18.08.2011. The appellant also tendered his unqualified and unconditional apology. However, High Court by its order dated 23.7.2012 held the appellant guilty of commission of contempt and passed orders for his personal appearance for hearing on the quantum of punishment. Aggrieved, the Officer filed the appeal. None appeared on behalf of the first respondent i.e. writ contempt petitioner.

Allowing the appeal, the Court

HELD: 1.1. A contempt action being in the nature of

quasi criminal proceedings, the degree of satisfaction that must be reached by the court to hold a person guilty of commission of contempt would be akin to what is required to prove a criminal charge, namely, proof beyond reasonable doubt. The order of the court in respect of which violation is alleged must, therefore, be clear, unambiguous and unequivocal and defiance thereof must be apparent on the very face of the action with which a contemnor is charged. In the instant case, the interim order of the High Court had directed status quo to be maintained in respect of allotments. Admittedly, no allotments had been made by the appellant or any other authority. [para 10] [177-F-H; 178-A]

1.2 An interpretation of the terms of court's order in respect of which disobedience is alleged would not be appropriate while dealing with a charge of contempt. Such a charge cannot be brought home by unravelling the true meaning of the court's order by a subsequent order when there is an apparent ambiguity, lack of clarity or dichotomy in the initial order. In a situation like the case in hand, where the High Court had directed maintenance of status quo as to allotment, it was not open for the High Court to hold the contemnor guilty of commission of contempt by understanding the order dated 18.08.2011 to mean status quo or a restraint in respect of grant of licences under the Haryana Act of 1975. [para 10] [178-A-D]

1.3 Further, the Explanation to s. 12 of the Contempt of Courts Act, 1971 makes it clear that an apology tendered by a contemnor should not be rejected merely on the ground that it is qualified or conditional so long it is made bona fide. The appellant, in his reply, after offering his explanations, had tendered his unconditional and unqualified apology in the event the explanations did not commend for acceptance of the [illegible]s

nothing on record to suggest that the unqualified and unconditional apology tendered by the appellant in his reply before the High Court was actuated by reasons that are not bona fide. The order dated 23.07.2012 passed by the High Court cannot be sustained and, as such, is set aside. [para 11 and 13] [178-E-F, G-H; 179-C]

O.P.Sharma and Ors. Vs. High Court of Punjab and Haryana **2011 (6) SCR 301 = (2011) 6 SCC 86, relied on.**

Case Law Reference:

2011 (6) SCR 301 relied on para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9476 of 2013.

From the Judgment and Order dated 23.07.2012 of the High Court of Punjab and Haryana at Chandigarh in C.O.C.P. No. 120 of 2012.

Goolam E. Vahanvati, AG, Anubha Agarwal for the Appellant.

Soli J. Sorabjee, Arun Monga, Aviral Dhirendra, Tushar Bakshi, Kamal Mohan Gupta, Parmod K. Singh, Jitender Bidhuri for the Respondents.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. By its order dated 23.07.2012 the High Court of Punjab and Haryana has found the appellant guilty of commission of contempt in respect of an order dated 18.08.2011 passed in Civil Misc. No.10994 of 2011 arising out of Writ Petition (C) No.11684 of 2011. Consequently, the appellant was summoned to appear before the High Court on 30.07.2012 for hearing before pronouncement of order on the punishment to be imposed. Aggrieved, the present appeal has been filed.

3. The facts that will be necessary to be noticed are as follows:

The respondent No.1 herein, as the writ petitioner, instituted a Public Interest Litigation before the High Court (C.W.P. No.11684 of 2011) raising a grievance with regard to the Final Development Plan 2025-AD for Gurgaon-Manesar Urban Complex published vide Notification No. CCP (NCR)/ FDP(G)/2011/1386 dated 24.05.2011. Specifically, it was contended that Sectors 63-A and Sector 67-A have been carved out in the Development Plan contrary to the Zoning Regulations which are required to be followed. The Final Development Plan, it may be noticed, is prepared under the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (hereinafter referred to as the Act of 1963).

4. Notice on the writ petition was issued by the High Court on 8.07.2011. Thereafter, on 11.08.2011 Civil Misc. Application No.10994 of 2011 was filed before the High Court for stay of the implementation of the Final Development Plan "in view of contemplated grant of licence to the colonizers/developers/ societies." On 18.08.2011 the following order was passed by the High Court in C.M.No.10994 of 2011:

"Notice for the date fixed.

Mr. Anil Rathee, Addl. A.G., Haryana, present in Court, accepts notice.

In the meanwhile, there will be status quo as to allotment as on today."

5. Though an application to vacate the aforesaid interim order was filed by the Respondents in the writ petition the interim order was neither vacated nor modified by the High Court and continued to remain in force. While the matter was so situated the appellant who then se[illegible] the Director General, Town & Country Planning, Ha[illegible]a

licence dated 28.12.2011 for setting up of a Residential Plotted Colony on land measuring 100.262 acres falling in Sector 63-A of the Gurgaon-Manesar. The aforesaid grant of licence [under the Haryana Development and Regulations of Urban Areas Act, 1975] (hereinafter referred to as 'Haryana Act of 1975') by the appellant had led to the institution of the contempt proceeding in question which was registered as C.O.C.P. No.120 of 2012. The said action was initiated on the basis that the grant of the licence dated 28.12.2011 by the appellant is in violation of the order of the Court dated 18.08.2011.

6. The appellant had filed his response in the contempt proceeding contending that no allotment was made by him or by any other authority so as to constitute violation of the order of the High Court dated 18.08.2011. The appellant, in his reply, further stated that in every residential sector, a maximum of 20% of the net planned area was earmarked for group housing and 3.5% for commercial purposes whereas for plotted residential colonies there was no restriction except the requirement of a minimum area of 100 acres. It was also stated that while the applications for group housing and commercial activities was to be accorded priority on the basis of date of application the same was not so in respect of applications for plotted colonies which are to be considered and licences are to be granted on fulfilment of the conditions prescribed. It was further stated by the appellant that though not specifically prohibited by the order dated 18.08.2011, out of sheer deference, no licence has been granted or contemplated for group housing colony/commercial colony as such licences can be granted upto a maximum limit of the net planned areas. Licences for plotted colonies, according to the appellant, stood on a different footing inasmuch as for grant of such licences no ceiling limit exists. After offering the aforesaid explanations, in the penultimate paragraph of the reply the appellant had tendered his unqualified and unconditional apology in the following terms:

'It is humbly submitted that the answering deponent has unfailing regard for this Hon'ble Court and all others courts of India and cannot think of disobeying any order passed by the Hon'ble Law Court. It is an article of faith for them to respect the orders passed by the Hon'ble Courts. However, if this Hon'ble Court still comes to the conclusion that the answering deponent has committed any contempt of court, the deponent tender unqualified and unconditional apology for the same.'

7. The High Court, on consideration of its interim order dated 18.08.2011 and response of the appellant referred to above, came to the conclusion that its order dated 18.08.2011 has to be understood to have imposed a comprehensive embargo on issuance of all kinds of licences and, therefore, the grant of licence dated 28.12.2011, though for a plotted housing colony, amounted to violation of the order dated 18.08.2011. Accordingly, the High Court held the appellant guilty of commission of contempt and passed orders for his personal appearance for hearing on the quantum of punishment.

8. We have heard Mr.Goolam E. Vahanvati, learned Attorney General for India, appearing for the appellant, Mr. Kamal Mohan Gupta, learned counsel for the respondent No.2 and Mr. Soli J. Sorabjee, learned senior counsel for the respondent No.3. None has appeared on behalf of the first respondent i.e. writ contempt petitioner before the High Court.

9. It is the common ground of the learned counsels appearing for the contesting parties that the interim order of the High Court dated 18.08.2011 had only restrained the concerned authority from making any allotments. Admittedly, no allotment(s) were made. There was no specific order prohibiting the implementation of the development plan, though such a relief was prayed for before the High Court. It is urged that the appellant, in his reply, had set out the manner in which he had understood the order dated 18.08.2011, namely, that the said order had not placed any kind of prohibition on grant of licences under the Haryana Act of

deference to the order of High Court, no licence either for group housing or commercial activities in either Sector 63-A or 67-A was issued or granted and the entire of the earmarked land in both these sectors for Group Housing and Commercial purposes was kept vacant. Only in respect of plotted colonies for which there was no ceiling limit the licence dated 28.12.2011 was issued. It is further urged that in the light of the specific order passed by the High Court it cannot be said that the appellant or any other person or authority had violated the same. It is also pointed out by the learned counsels that, in any view of the matter, the appellant had tendered his unqualified and unconditional apology which, in fitness of things, ought to have been accepted by the High Court. Lastly, the learned Attorney General, by drawing the Court's attention to the counter affidavit filed before this Court by the second respondent, has submitted that the writ petition itself had been dismissed by the High Court on 30.10.2012 holding that the validity of the development plan published by the Government in accordance with the relevant provisions of the Statute is not open to challenge by means of a Public Interest Litigation. It is also pointed out that the aforesaid order of the High Court has attained finality in law.

10. The terms of the order of the High Court dated 18.08.2011; the averments/statements made in the contempt petition and the reply thereto on behalf of the appellant as well as the subsequent facts placed before us have received our due and anxious consideration. The interim order of the High Court had directed status quo to be maintained in respect of allotments. Admittedly, no allotments had been made by the appellant or any other authority. A contempt action being in the nature of quasi criminal proceeding the degree of satisfaction that must be reached by the Court to hold a person guilty of commission of contempt would be akin to what is required to prove a criminal charge, namely, proof beyond reasonable doubt. The order of the Court in respect of which violation is alleged must, therefore, be clear, unambiguous and

unequivocal and defiance thereof must be apparent on the very face of the action with which a contemnor is charged. An interpretation of the terms of Court's order in respect of which disobedience is alleged would not be appropriate while dealing with a charge of contempt. Such a charge cannot be brought home by unravelling the true meaning of the Court's order by a subsequent order when there is an apparent ambiguity, lack of clarity or dichotomy in the initial order. In a situation like the present where the High Court had directed maintenance of status quo as to allotment when the interim prayer was to stay the implementation of the final development plan "in view of contemplated grant of licence to the colonizers/developers/ Societies" it was not open for the High Court to hold the contemnor guilty of commission of contempt by understanding the order dated 18.08.2011 to mean status quo or a restraint in respect of grant of licences under the Haryana Act of 1975.

11. In an earlier part of the present order, we have noticed the unqualified and unconditional apology tendered by the appellant before the High Court in the event his explanations were to be found unacceptable. The explanation to Section 12 of the Contempt of Courts Act, 1971, makes it clear that an apology tendered by a contemnor should not be rejected merely on the ground that it is qualified or conditional so long it is made bona fide. In his reply, the appellant, after offering his explanations, had tendered his unconditional and unqualified apology in the event the explanations did not commend for acceptance of the High Court. In the decision rendered in *O.P.Sharma and Ors. Vs. High Court of Punjab and Haryana*[1], this Court has already held that in view of the explanation to Section 12 of the Contempt of Courts Act an apology ought not to be rejected only on the ground that it is qualified so long as it is made bona fide. In the present case there is nothing on record to suggest that the unqualified and unconditional apology tendered by the appellant in his reply before the High Court was actuated by reasons that are not bona fide.

1. (2011) 6 SCC 86 [para 34 and 35]

12. It has also been noticed by us that the writ petition in which the interim order dated 18.08.2011 came to be passed has been finally terminated by an order dated 30.10.2012 dismissing the writ petition and also that the said order has attained finality in law. This is another relevant circumstance that cannot be ignored though we should not be understood to be saying that all cases of dismissal of the writ petition, by itself, would absolve a contemnor of the charge of commission of contempt in respect of an interim order passed while the writ petition had remained pending.

13. In view of the aforesaid, we are unable to sustain the order dated 23.07.2012 passed by the High Court. We accordingly set aside the said order dated 23.07.2012 and allow the appeal.

R.P. Appeal allowed.

GURJANT SINGH @ JANTA
v.
STATE OF PUNJAB
(Criminal Appeal No. 1868 of 2013)

OCTOBER 28, 2013

[SURINDER SINGH NIJJAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s. 50 - Requirement and purpose of search and seizure in presence of a Gazetted Officer or Magistrate - Explained.

ss.42 and 50 r/w s.15 - Appellant caught carrying 3 bags of poppy husk in tractor trolley - Conviction of accused and sentence of 10 years RI and fine of Rs. 1 lakhs u/s 15 - Upheld by High Court - Held: Compliance of s. 50 of conducting search in the presence of Gazetted Officer or a Magistrate, cannot be an empty formality and cannot be dealt with lightly by courts -- Conclusion of trial court that ss.42 and 50 were not applicable to the case was a total misunderstanding of legal provisions in the light of facts placed before it -- Judgment of trial court and confirmation of the same by High Court cannot be sustained -- Conviction and sentence imposed on appellant is set aside.

s.50 - Search and seizure in presence of Gazetted Officer or Magistrate - Held: In the instant case, trial court omitted to examine defence of appellant that the officer in whose presence search was carried out was not a regularly promoted D.S.P. but an "own rank pay D.S.P.".

Criminal appeal -- Duty of appellate court - Held: High Court being the first appellate court was required to independently reappraise the entire material and record the

conclusions supported by cogent reasons -- High Court failed to independently examine the correctness of findings recorded by trial court and simply extracted a portion of the judgment of trial court, while affirming the conviction-- It failed to exercise its jurisdiction in dismissing the appeal.

The appellant was prosecuted for committing an offence u/s of 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on the allegation that on 4.4.1996 at 00.15 A.M., he was carrying 3 gunny bags weighing 34 kg. each of poppy husk in the tractor-trolly, which was searched in the presence of PW-3. The appellant, in his statement u/s 313 CrPC stated that he was falsely implicated in the case and he was taken away from his house in the presence of his wife. He got examined his wife and two more witnesses. His plea of non-compliance of ss.42 and 50 was turned down by the trial court holding that there was no necessity to comply with s.50 and on that basis it did not go into the question whether PW-3 was a gazetted officer. The trial court convicted the appellant u/s 15 and sentenced him to 10 years RI and a fine of Rs. 1 lakh. The High Court dismissed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The ratiocination of the trial court in having held that ss.42 and 50 of the NDPS Act were not attracted to the case on hand was not correct. [para 12] [188-E]

State of Punjab vs. Balbir Singh **1994 (2) SCR 208 = (1994) 3 SCC 299 - held inapplicable**

1.2 The distinct feature and the most crucial aspect of the case was that P.W.6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W.6, as an investigating officer, felt the need to invoke

the provisions of s.50 of the NDPS Act and thereby to provide an opportunity to the appellant for holding any search in the presence of a Gazetted Officer or a Magistrate. When once P.W.6 could assimilate the legal requirement as stipulated u/s 50, the conclusion of the trial court in having held that ss.42 and 50 were not applicable to the case on hand was a total misunderstanding of the legal provisions in the light of the facts placed before it. The trial court failed to understand principle No. 1 set out in paragraph 25 of the decision in Balbir Singh in the proper perspective. Consequently, the conclusion arrived at by trial court for convicting the appellant was wholly unjustified. [para 16-17] [191-C-G; 192-C-D]

1.3 The purpose of s.50 is to ensure that on the one hand, the holding of a search and seizure was not a farce of an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. At the same time, such a course of compliance of s.50 would also enable the person accused of such a grave offence to demonstrate that there was no necessity for holding any search on him and thereby persuade the Gazetted Officer or Magistrate to protect his fundamental right of freedom, from being unlawfully proceeded against. Therefore, such a dual requirement of law prescribed u/s 50 cannot be dealt with lightly by the courts dealing with the trial of such offences brought before it. In the instant case, the trial court while dealing with the case of the prosecution as well as the defence pleaded, committed a serious flaw in holding that ss. 42 and 50 were not attracted to the case on hand. [para 23-24] [195-F-H; 196-A-D]

State of Punjab vs. Baldev Singh **1999 (3) SCR 977 = (1999) 6 SCC 172; and** *State of H.P. vs. Pawan Kumar* **2005 (3) SCR 417 = (2005) 4 SCC 350 - relied on.**

1.4 Besides, when, admittedly, s.50 was invoked by offering the presence of a Gazetted Officer or a Magistrate to the appellant and at the request of P.W.6, P.W.3, who was stated to be the D.S.P. at that point of time, was summoned and in whose presence the search and seizure was stated to have been made, the trial court failed to appreciate whether such a search or seizure was really held in accordance with ss.42 and 50 of the NDPS Act.One of the grounds raised on behalf of the appellant was that P.W.3 was not holding the post of D.S.P. in a substantive manner in order to hold that he was a Gazetted Officer on the date of search. The trial court having taken a view that ss.42 and 50 were not applicable, completely omitted to examine the said defence raised on behalf of the appellant. There is no contra evidence laid on behalf of the prosecution to counter the said ground raised on behalf of the appellant. [para 24-25] [196-D-G; 197-C]

2.1 The High Court being the first appellate court was required to independently reappraise the entire material and record the conclusions supported by cogent reasons. The High Court failed to independently examine the correctness of the findings recorded by the trial court and simply extracted a portion of the judgment of the trial court, while affirming the conviction and, thus, failed to exercise its jurisdiction in dismissing the appeal. [para 19 and 26] [192-F-G; 197-D-E]

2.2 In the circumstances it will be highly dangerous to simply affirm the ultimate conclusion of the trial court in having convicted the appellant and the sentence imposed based on such conviction, as the same was without any ratiocination. The judgment of the trial court

and the confirmation of the same by the High Court cannot be sustained. The conviction and sentence imposed on the appellant is set aside. [para 26-27] [197-D, E-F]

Case Law Reference:

1994 (2) SCR 208	**held inapplicable**	**para 8**
1999 (3) SCR 977	**relied on**	**para 10**
2005 (3) SCR 417	**relied on**	**para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1868 of 2013.

From the Judgment and Order dated 12.08.2010 of the High Court of Judicature at Punjab & Haryana at Chandigarh, in Criminal Appeal No. 5-SB of 2000.

S.S. Ray, Rakhi Ray, Vaibhav Gulia for the Appellant.

Sanchar Anand, AAG, Anant K. Vatsya (for Kuldip Singh) for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment of the High Court of Punjab and Haryana at Chandigarh dated 12.08.2010 in Criminal Appeal No.5-SB of 2000. The appellant was proceeded against for an offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "the NDPS Act"). The trial Court by its judgment dated 30.07.1999, in Sessions Case No.39 of 31.05.1996, found the appellant guilty of the offence alleged

against him and while convicting him imposed a sentence of 10 years rigorous imprisonment apart from a fine of Rs.1,00,000/- (Rupees One Lac only) and in default of payment of fine to undergo rigorous imprisonment for one more year.

4. The case of the prosecution as projected before the trial Court was that on 04.04.1996, S.I. Darbara Singh, who was examined as P.W.6, was posted as S.H.O, Police Station, Sunam. According to him he along with A.S.I. Balbir Singh, A.S.I. Massa Singh, H.C. Bhim Sain and other police officers were present at 'T' point in an area of village Ugrahan in connection with Nakabandi. At about 00.15 AM, one tractor trolley was seen coming from the side of village Ugrahan. The head lights of the tractor trolley were on and P.W.6 gave a signal from his torch light and the tractor trolley was stopped by the driver. According to P.W.6, as soon as the tractor trolley was stopped, the driver who tried to slip away was overpowered by P.W.6 and other police officials. The driver stated to have revealed his name as Gurjant Singh @ Janta, the appellant herein. Thereafter, when P.W.6 checked the trolley of the tractor he found three gunny bags lying inside the trolley. P.W.6 informed the appellant that he intended to search the gunny bags as he suspected some incriminating article in the gunny bags. P.W.6 further informed the appellant that, if he so desired, the search could be conducted in the presence of a Gazetted officer or a Magistrate. The appellant stated to have expressed his consent that the search may be conducted in the presence of some Gazetted officer or a Magistrate.

5. After recording the statement of the appellant and after getting his signature attested by A.S.I Balbir Singh and A.S.I Massa Singh, P.W.6 claimed to have flashed a wireless message whereupon Baldev Singh, DSP, Sunam, who was examined as P.W.3, reached the spot. P.W.6 stated to have searched the gunny bags lying in the tractor trolley in which poppy husk was recovered. P.W.6 claimed to have drawn two samples of 250 gms from each of the gunny bag. The remaining

poppy husk, which weighed to the extent of 34 kg in each of the gunny bag, was stated to have been separately sealed, while the six sample parcels were also sealed separately with the impression 'DS'. P.W.6 also claimed to have prepared a sample seal chit separately. Tractor trolley and the case properties were taken into possession by P.W.6 through a recovery memo attested by P.W.3 as well as by A.S.I Balbir Singh and A.S.I. Massa Singh. The appellant was stated to have been arrested, and the arrest memo along with Rukka, was sent to the police station through C. Harjinder Singh, based on which an FIR was recorded by A.S.I Sukhdev Singh. After preparing the rough site plan of the place of recovery with correct marginal notes and after recording the statement of the witnesses on the same day, P.W.6 stated to have deposited the case property with the MHC with seals intact along with the sample seal.

6. The final report was thereafter stated to have been filed in the Court. Before the trial Court P.W.1 Kulwant Singh, Registration Clerk, P.W.2 A.S.I Balbir Singh, P.W.3 D.S.P. Baldev Singh, P.W.4 Harbans Singh C.No.365, P.W.5 Jaswinder Singh and P.W.6 S.I. Darbara Singh were examined and the report of the Chemical Examiner Ex.PK was also filed. When the incriminating circumstances were put to the appellant under Section 313 Cr.P.C, appellant pleaded false implication alleging that he was taken away from his house in the presence of his wife and a false case was planted on him. In defence, the appellant examined H.C. Paramjit Singh as D.W.1 Gurmail Kaur, his wife as D.W.2 and one other witness C. Avtar Singh as D.W.3.

7. Before the trial Court it was contended on behalf of the appellant that there was clear violation of Sections 42 and 50 of the NDPS Act, in as much as, the search was not conducted in the presence of a Gazetted officer or a Magistrate. According to the appellant, he was forcibly taken away from his house and a false case was planted an

was made in the presence of P.W.3 was not true. It was also contended that P.W.3 was not a regularly promoted D.S.P. but was only an Inspector in the category of Own Rank Pay (ORP). It was contended that since he was only an Inspector and was drawing the pay of an Inspector, while acting as D.S.P, he cannot be held to be a Gazetted Officer.

8. The trial Court, however, took the view that there was no necessity to comply with Section 50 of the NDPS Act and on that basis did not go into the question whether P.W.3 was a competent Gazetted Officer, in order to validate the search stated to have been held in his presence. The trial Court in support of its conclusion relied upon the judgment in the case of *State of Punjab vs. Balbir Singh* reported in (1994) 3 SCC 299 and found the appellant guilty of the offence alleged against him and convicted him by imposing a sentence of 10 years rigorous imprisonment along with the fine of Rs.1 lac with the default clause to undergo imprisonment for one more year. In the appeal preferred by the appellant before the High Court, unfortunately, the High Court by simply extracting the concluding part of the judgment of the trial Court chose to confirm the conviction and sentence. The appellant has, therefore, come forward with this appeal.

9. We heard Mr. S.S. Ray, learned counsel for the appellant as well as Mr. Sanchar Anand, learned Additional Advocate General for the respondent. The learned counsel for the appellant mainly contended that there was non-compliance of Section 50 in the matter of search alleged to have been made on the appellant and the tractor; that the contention of the appellant about the status of P.W.3 that he was not a Gazetted officer on the date of the alleged search was not considered by the Courts below and that none of the defence witnesses were properly appreciated by the trial Court as well as by the High Court. The learned counsel, therefore, contended that the conviction and sentence imposed on the appellant cannot be sustained.

10. Reliance was placed upon the decisions in *State of Punjab vs. Baldev Singh* reported in (1999) 6 SCC 172, *State of H.P. vs. Pawan Kumar* reported in (2005) 4 SCC 350 in support of his submissions.

11. Learned Additional Advocate General in his submissions contended that there was no illegality in the judgment of the trial Court in convicting the appellant and the imposition of sentence and, therefore, the High Court was justified in confirming the same. Learned Additional Advocate General contended that the reliance placed upon the decision of this Court by the trial Court, namely, the one in *Balbir Singh* (supra) was well justified. The learned Additional Advocate General, therefore, contended that the judgment impugned does not call for interference.

12. Having considered the respective submissions and also having bestowed our serious consideration to the judgment of the trial Court, as well as that of the High Court, at the very outset we wish to state that the reliance placed upon by the trial Court in *Balbir Singh* (supra) was totally inappropriate to the facts of this case and consequently the ratiocination of the trial Court in having held that Sections 42 and 50 were not attracted to the case on hand was not correct.

13. When we refer to the decision of this Court in *Balbir Singh* (supra), what has been held therein as a broad principle in paragraph 25(1), is as under:

> "25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows:
>
> (1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of [illegible]h

search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

14. The said principle clearly postulates a situation where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of Cr.P.C. and in the course of such investigation when a search is completed and in that process happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of invoking Section 50 would not arise. When that principle is examined carefully one can easily understand that without any prior information as to possession of any narcotic drug and psychotropic substance, a police officer might have held a search in the course of discharge of his duties as contemplated under the provisions of Cr.P.C and, therefore, it would well neigh impossible to state that even under such a situation, the application of Section 50 would get attracted. In fact, if we examine the facts involved in *Balbir Singh* (supra), as per the contention of learned counsel for the State, in that decision the police officer effected the arrest, search and seizure on reasonable suspicion that a cognizable offence was committed and not based on any prior information that any offence punishable under NDPS Act was committed and, therefore, it was argued that complying with the provisions of the NDPS Act at the time of the said arrest, search and seizure did not arise in as much as such arrest, search and seizure was substantially in accordance with the provisions of the Cr.P.C. It was, therefore, contended that such arrest, search

and seizure cannot be declared as illegal. While examining the contention in the said background, principle no.1 in paragraph 25 came to be rendered.

15. However, while analyzing the importance of Section 50 of the NDPS Act in that very decision, this Court has held as under in paragraph 20:

"20. In *Miranda v. Arizona* the Court, considering the question whether the accused be apprised of his right not to answer and keep silent while being interrogated by the police, observed thus:

"At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere."

It was further observed thus:

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he [illegible]e

of persons acting solely in his interest."

When such is the importance of a right given to an accused person in custody in general, the right by way of safeguard conferred under Section 50 in the context is all the more important and valuable. Therefore it is to be taken as an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a Gazetted Officer or a Magistrate. Thus the provisions of Section 50 are mandatory."

16. If the ratio of the said decision had been properly understood, the flaw committed by the trial Court and as confirmed by the High Court in our considered opinion would not have arisen. The distinct feature in the case on hand was that on the date of occurrence i.e. on 04.04.1996 at 00.15 AM, the police party headed by P.W.6, accosted a tractor trolley coming from the side of village Ugrahan, which was stopped by him and that when the driver after stopping the tractor tried to escape was apprehended by the police team. The most crucial aspect of the case was that P.W.6 noticed three gunny bags lying in the tractor of the appellant and felt that some incriminating substance was kept in those gunny bags. P.W.6, therefore, took the view that before effecting search of the gunny bags, the necessity of affording an opportunity to the appellant to conduct the search in the presence of a Gazetted officer or a Magistrate was imperative. In other words, after noticing three gunny bags, P.W.6, as an investigating officer, felt the need to invoke the provisions of Section 50 and thereby provide an opportunity to the appellant for holding any search in the presence of a Gazetted officer or a Magistrate. When once P.W.6 could assimilate the said legal requirement as stipulated under Section 50 of the NDPS Act, we fail to understand as to how principle No.1 in paragraph 25 of the decision reported in *Balbir Singh* (supra) could be applied. Unfortunately, the trial Court failed to understand the said principle set out in *Balbir Singh* (supra) in the proper perspective while holding that

neither Section 42 nor Section 50 was attracted to the facts of this case.

17. On the other hand even according to the prosecution, namely, the investigating officer himself, i.e. P.W.6, a search was required after apprehending the appellant along with the tractor and the gunny bags and such search had to be necessarily conducted in accordance with Section 50 of the NDPS Act. It was further the case of the prosecution that such a step was pursued by calling upon the appellant to exercise his opinion and after affirmatively ascertaining whether he wanted any search to be conducted in the presence of the Gazetted officer, only then P.W.3 was summoned, in whose presence the search operation was held. Therefore, the conclusion of the trial Court in having held that Sections 42 and 50 were not applicable to the case on hand was a total misunderstanding of the legal provisions in the light of the facts placed before it and consequently the conclusion arrived at for convicting the appellant was wholly unjustified.

18. In fact, after reaching the said conclusion, all that the trial Court did was to hold that the version of the prosecution witnesses cannot be discarded merely because they were police officers and that the evidence of P.W.3 was sufficient to support the search and recovery of the narcotic substance from the appellant. The trial Court also held that the version of the defence witnesses was not worth mentioning.

19. Unfortunately, the High Court has committed the same errors whilst considering the correctness of the judgment of the trial Court. The High Court being the first appellate Court was required to independently reappraise the entire material, record the conclusions supported by cogent reasons. In our opinion, the High Court failed to exercise its jurisdiction in dismissing the appeal.

20. Before concluding, we wish to refer to the decisions placed before us to state the import[illegible]e

stipulations contained in Section 50, before holding the search, in order to ensure fair consideration of the offence alleged against an accused under the NDPS Act, before reaching any conclusion about the commission of the alleged offence.

21. In the Constitution Bench decision of this Court in *Baldev Singh* (supra), the importance of due compliance of Section 50 has been mainly set out in paragraphs 28, 32 and 33 which are as under:

> "28……The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted."
>
> 32. However, the question whether the provisions of Section 50 are mandatory or directory and, if mandatory, to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and

> cast a duty of the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a gazetted officer or a Magistrate, if he so requires, is sacrosanct and indefeasible - it cannot be disregarded by the prosecution except at its own peril.
>
> 33. The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial."

22. In *Pawan Kumar* (supra) wherein the Constitution Bench decision was referred to and was reiterated as under in paragraph 26:

"26.……..Otherwise, there would be no distinction between recovery of illicit drugs, etc. seized during a search conducted after following the provisions of Section 50 of the Act and a seizure made during a search conducted in breach of the provisions of Section 50. Having regard to the scheme and the language used a very strict view of Section 50 of the Act was taken and it was held that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and sentence of an accused bad and unsustainable in law. As a corollary, there is no warrant or justification for giving an extended meaning to the word "person" occurring in the same provision so as to include even some bag, article or container or some other baggage being carried by him."

23. The aforesaid observations of the above Constitution Bench decision in *Baldev Singh* (supra) and the three Judge Bench decision in *Pawan Kumar* (supra), clearly highlight the legal requirement of compliance of Section 50 in its true spirit. It will have to be stated that such compliance of the requirement under Section 50 of holding of a search and seizure in the presence of Gazetted officer or a Magistrate, cannot be an empty formality. In other words, the offer to the person to be searched in the presence of a Gazetted officer or a Magistrate, should really serve the purpose of ensuring that there was every bona fide effort taken by the prosecution to bring forth the grave offence of possession of narcotic substance and proceed against the person by way of prosecution and thereby establish the truth before the appropriate judicial forum. In the same breath such a course of compliance of Section 50 would also enable the person accused of such a grave offence to be convinced that the presence of such an independent Gazetted officer or a Magistrate would also enable the person proceeded against to demonstrate that there was no necessity for holding any search on him and thereby persuade the concerned Gazetted officer or Magistrate to protect his fundamental right

of freedom, from being unlawfully proceeded against. In other words, the purpose of Section 50 was to ensure that on the one hand, the holding of a search and seizure was not a farce of an exercise in order to falsely implicate a person by unscrupulous police authorities, while on the other hand to prevent an accused from committing an offence of a serious nature against the society, warranting appropriate criminal proceedings to be launched and in the event of establishing such offence, conviction and sentence to be imposed in accordance with law. Therefore, such a dual requirement of law prescribed under Section 50 cannot be dealt with lightly by the Courts dealing with the trial of such offences brought before it.

24. Keeping the above principles in mind, when we examine the manner in which the trial Court dealt with the case of the prosecution as well as the defence pleaded, we find that the trial Court committed a serious flaw in holding that Sections 42 and 50 were not attracted to the case on hand, which we have found in the earlier paragraph was a total misreading of the provision as well as the decision relied upon by it. That apart, when admittedly Section 50 was invoked by offering the presence of a Gazetted officer or a Magistrate to the appellant and at the request of P.W.6, P.W.3, who was stated to be the D.S.P. at that point of time, was summoned and in whose presence the search and seizure was stated to have been made, the trial Court failed to appreciate whether such a search or seizure was really held in accordance with Sections 42 and 50 of the NDPS Act.

25. One of the grounds raised on behalf of the appellant was that P.W.3 was not holding the post of D.S.P. in a substantive manner in order to hold that he was a Gazetted officer on the date of search. According to the appellant, P.W.3 was not a regularly promoted D.S.P. but was only an Inspector functioning as a D.S.P. in a category called 'Own Rank Pay' D.S.P. According to the appellant, P.W.3 was drawing the pay of an Inspector from I.R.D. and was n[illegible]of

D.S.P. on a regular basis. It was, therefore, contended that such a person who was not duly promoted as D.S.P., cannot be equated to the status of a Gazetted officer in order to hold that a search conducted in his presence was a valid search as contemplated under Section 50 of the NDPS Act. As far as the said point raised on behalf of the appellant, we do not find any material or a counter-stand taken to the effect that P.W.3 was a regularly promoted D.S.P. or that as per the rules even as an 'Own Rank Pay' D.S.P.,he could be equated to any other D.S.P., holding a substantive post. Unfortunately, as stated by us earlier, the trial Court having taken a view that Sections 42 and 50 were not applicable, completely omitted to examine the said defence raised on behalf of the appellant. We also do not find any contra evidence laid on behalf of the prosecution to counter the said ground raised on behalf of the appellant.

26. In such circumstances it will be highly dangerous to simply affirm the ultimate conclusion of the trial Court in having convicted the appellant and the sentence imposed based on such conviction, as the same was without any ratiocination. It was most unfortunate that the High Court failed to independently examine the correctness of the findings recorded by the trial Court by simply extracting a portion of the judgment of the trial Court, while affirming the conviction.

27. For all the above stated reasons, the judgment of the trial Court and the confirmation of the same by the High Court cannot be sustained. The appeal stands allowed. The conviction and sentence imposed on the appellant is set aside and the appellant shall be set at liberty forthwith, if not required in any other case.

R.P. Appeal allowed.

SUKUMAR DE
v.
BIMALA AUDDY & ORS.
(Special Leave Petition (Civil) No. 25797 of 2004)

OCTOBER 28, 2013

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

CODE OF CIVIL PROCEDURE, 1908:

O.21, r.89 - Application to set aside sale, on deposit - Order of High Court affording the judgment-debtors one more opportunity to deposit the amount - Challenged by auction-purchaser - Held: Immediately after the order of High Court, judgment-debtors had deposited the amount -- Exercise of discretion by High Court cannot be found to be erroneous nor contrary to law so as to warrant interference in exercise of jurisdiction under Art. 136 of the Constitution -- There is no substantial question of law - Constitution of Indi, 1950 - Art.136.

In the case of a decree for a sum of Rs.6,600/- passed in the year 1967, the property of the judgment debtor (respondent no. 4) was put up on auction on July, 1970; and the bid of the petitioner in a sum of Rs.1.5 lakhs being the highest, the auction sale was confirmed in his favour on 9.7.1990. Respondent No. 4 filed an application requesting the executing court to intimate the amount to be deposited so that he could file application under O. 21, r. 89 of CPC. The application was rejected. The High Court set aside the order of the executing court and directed the executing court to intimate the amount to the judgment debtors. However, in another revision petition, the High Court, by the impugned order passed on 8.6.2004, gave one more opportunity to the judgment-debtor to pay decretal amount with interest as upto that

stage the controversy regarding actual payment had not been settled.

Dismissing the special leave petition filed by the auction purchaser, the Court

HELD:

In the circumstances, exercise of discretion by the High Court cannot be found to be erroneous nor contrary to law so as to warrant interference of this Court under Art. 136 of the Constitution. Further, there is no substantial question of law. It is also to be kept in mind that immediately after the impugned order of the High Court, the judgment debtors had deposited the amount. In the circumstances, they should not be made to lose the property. [para 8] [204-E-F]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 25797 of 2004.

From the Judgment and Order dated 08.06.2004 of the High Court at Calcutta in Civil Order No. 2719 of 1992.

Rana Mukherjee, Mridula Ray Bharadwaj, Gopal Jha for the Petitioner.

Krishnan Venugopal, Uttpal Majmudar, B.P. Yadav, Sarla Chandra for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. This case has a chequered history. However, we do not find it necessary to narrate all the events leading to the filing of the present Special Leave Petition, as the issue in the present Special Leave Petition, which arises out of impugned judgment dated 8.6.2004 of the High Court of Calcutta, is a narrow one. In fact, as would be noticed hereafter, the order in question is discretionary in nature and the grievance

of the petitioner is that in the facts and circumstances of the present case no such discretion should have been exercised by the High Court thereby granting one more opportunity to the respondents to pay the decretal amount with interest, the effect of which was to nullify the auction of the property in the execution proceedings which was bought by the petitioners herein.

2. The facts which needs to be traversed for this purpose are recapitulated below:

Way back in the year 1965, a money suit No. 20 of 1965 was instituted by one Smt. Bimala Bala Sen, (since deceased) (hereinafter to be referred as the decree holder) for a sum of Rs. 6,100/-, being refund of earnest money. An ex parte decree was passed on 23.12.1967 against Respondent Nos. 1 to 4, 6 and 7 herein (hereinafter to be referred as the judgment debtors). This decree was in the sum of Rs. 6,600/- (Rs. 6,100/- money claimed + Rs. 500/- as cost). The judgment debtors filed an application for setting aside the ex parte decree which was dismissed and appeals thereagainst were also dismissed. This decree thus, became final. Execution Case was filed on 24.9.1970 by the decree holder.

3. In this execution proceedings, some objections were filed by the judgment debtors. The Executing Court even gave opportunity to the judgment debtors to deposit decretal amount. However, ultimately on 7.7.1990, the property namely 11 Cottahs of land with a two storied pukka building situated at 46 and 48, R.K. Chatterjee Road, Kasba, Calcutta was put to auction and the petitioners were the highest bidders therein with the bid of Rs. 1.5 lakhs. On 9.7.1990, auction sale was confirmed. The petitioner deposited poundage fee alongwith challan of one-fourth of the bid amount i.e. Rs. 37,500/-. On the very next day, one of the judgment debtors namely Respondent No. 4 herein filed an application in the execution case for intimation as to how the decreetal amount be deposited. This petition was however, rejected by the Executing Court on 8.8.1990. Against this order, Revision P[illegible]e

the High Court under Section 115 of the Code of Civil Procedure. On 9.11.1990, it was registered as C.O. 3515/ 1990. In the meantime, on 12.11.1990, the petitioner deposited entire purchase money and sale certificate was issued in their favour by the Executing Court.

4. The revision petition of the judgment debtors (C.O. 3515/1990) was finally heard by the High Court and allowed on 10.4.1992. The High Court in the said order noted the submission of the judgment debtors to the effect that at the time of auction of the property value thereof was more than Rs. 8,00,000/- which was sold for a partly amount of Rs. 1.5 lakhs. It was also pleaded that as the judgment debtors could not obtain particulars of the auction sale through their lawyers, they could not file an application under Order 21 Rule 89 of C.P.C. for depositing the requisite amount in the execution case and get the sale set aside. On coming to know of the auction sale, they moved the application for ascertaining the dues for the purpose of filing application under Order 21 Rule 89 of the C.P.C. But the Executing Court instead of giving information put the said application to a future date i.e. on 8.8.1990 and thereafter dismissed the same. The High Court noted the provisions of Rule 89 of Order 21 of the C.P.C., as per which a person interested in setting aside the sale can deposit in Court a sum equal to 5 percent of the auction purchaser and also for payment through the decree holder, the amount specified in the proclamation of sale. On this basis, the High Court concluded that it was necessary that the amount should be determined before the deposit is made. Though it is the responsibility of the applicant to see that the correct amount is deposited, however, some sort of ministerial work has got to be done before the determination of the correctness of the amount. Therefore, the Executing Court was in error by not disclosing the amount which was to be deposited and the judgment debtors should not suffer because of the mistake of the Court. On these grounds, the order of the Executing Court was set aside with direction that the Court below should

proceed from the stage when the application for determination of the amount to be deposited was filed on 10.7.1990. Direction was given to the Court to determine the amount to be deposited by the applicant/ judgment debtor and then permitting him to deposit the amount as per order passed, according to law.

5. After receiving the order, aforesaid order of the High Court, the Executing Court gave the direction to the Shristadar to submit a report of the calculation of the amount. He, accordingly gave his report stating that the judgment debtors had to pay a sum of Rs. 1.14 lakhs. Direction was given to the JD's to deposit the amount. This order was challenged by the judgment debtors questioning the calculations made and submitted that decretal amount of Rs. 6,600/- could not become Rs. 1.14 lakhs even after adding interest etc. The High Court vide orders dated 22.9.1992 set aside this order of the Execution Court as well on the ground that calculations were wrong. Directions were given to the Executing Court to make the calculation afresh.

6. Fresh calculations were made by Shristadar on 24.9.1992 significantly reducing the amount due under decree to Rs. 42055.87/- from earlier calculation of Rs. 1.14 lakhs. On that very day, the trial court directed the judgment debtors to deposit the said amount by "November 1992". This order was also challenged by the judgment debtors by approaching the High Court by means of a revision petition questioning the calculations. The High Court even granted stay of the impugned order initially. This revision petition kept pending for quite some time and is ultimately decided by the impugned order only on 8.6.2004. Before the High Court, the petitioner or the decree holder did not appear despite services of notice. High Court noted that the calculations are correctly arrived at. At the same time it deemed it proper to give one opportunity to the judgment debtors to deposit the amount and the operative portion of the said order reads as under:

"Accordingly we dispose of the Re y

modifying the order passed by the learned executing Court on 24.9.1992 in the manner indicated herein below. The judgment debtor shall deposit with the executing court a sum of Rs. 42,055,87 as calculated by the office of the executing Court, within one month from date. On deposit of the said sum, the sale shall stand set aside. The learned executing court shall take steps to disburse to the purchaser and the decree holder their respective dues as contemplated under clauses (a) of sub rule (1) of rule 89 of Order 21 of the Code. In addition to the above, the executing court shall make over to the judgment debtors the stamps purchased by the auction purchaser for the purpose of the sale certificate so that the amount of the stamps may be recorded by the judgment debtor in accordance with the provisions of section 54 of the Indian Stamp Act, 1899. The learned executing court shall pass an order of the basis whereof the judgment debtor would be entitled to receive back the amount of the stamp duty although the same had been purchased in the name of the auction purchaser who will be entitled to receive back the cash value thereof. The learned executing Court is directed to take steps to dispose of the matter expeditiously since the same has been pending for a long time."

7. In sum and substance the position which emerges on the auction of the property in question can be summarised as below:

The property was put up on auction on July, 1970 and the bid of the petitioner in a sum of Rs.1.5 lakhs was the highest. The auction sale was confirmed on 9.7.1990. Under Order 21 Rule 89 C.P.C., a chance is given to the applicant to deposit the amount payable including 5 percent for the successful auction purchases and on deposit of that amount the Executing Court will set aside the sale on 10.7.1990 itself. The Respondent No. 4/ judgment debtor has filed the application requesting the

executing court to intimate the amount to be deposited so that he could file application under Order 21 Rule 89 of CPC. Though this application was rejected, the order of the executing court was set aside by the High Court allowing the revision of the judgment debtor and directing the executing court to intimate the same to the judgment debtor. In the first instance, the amount calculated was Rs. 1.14 lakhs which turned out to be wrong calculations, in as much as the High Court set aside the said order and on re-calculation, the amount payable was calculated at Rs. 42,055.87/-. The Executing Court had directed the judgment debtors to pay this amount which was to be paid by 11.11.92. However, before that the judgment debtor filed another revision petition. This revision petition is decided by the impugned order passed on 8.6.2004. No doubt, the amount calculated is found to be correct but the High Court chose to give one opportunity to the judgment debtor to deposit the amount as upto that stage the controversy regarding actual payment had not been settled.

8. In these circumstances, exercise of discretion in the aforesaid manner cannot be found to be erroneous and contrary to law which warrants interference of this Court under Article 136 of the Constitution of India. Further, we do not find any substantial question of law. It is also to be kept in mind that immediately after the impugned order of the High Court the judgment debtors had deposited the amount. There should not be made to lose the property, in the aforesaid circumstances.

9. We thus, dismiss the Special Leave Petition in limine.

R.P. SLP dismissed.

MANISH TRIVEDI

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1881 of 2013)

OCTOBER 29, 2013

[CHANDRAMAULI KR. PRASAD AND JAGDISH SINGH KHEHAR, JJ.]

RAJASTHAN MUNICIPALITIES ACT, 1959:

s.87 of the Rajasthan Act r/w s.21, IPC and s.2(c)(viii) of PC Act -- 'Public servant' - Appellant, a Municipal Councillor and Member of Municipal Board - Held: By s. 87 of Rajasthan Municipalities Act, Legislature has created a fiction that every Member of Municipal Board shall be deemed to be a public servant within the meaning of s. 21, IPC - Thus, appellant is a public servant within the meaning of s.21,IPC - Penal Code, 1860 - s.21 -- Prevention of Corruption Act, 1988 -- s.2(c)(viii).

PREVENTION OF CORRUPTION ACT, 1988:

s.2(c)(viii) - 'Public servant' - Held: Act envisages widening of the scope of definition of expression 'public servant' -- It was brought in force to purify public administration -- Legislature has used a comprehensive definition of 'public servant' to achieve the purpose of punishing and curbing corruption among public servants -- Therefore, it would be inappropriate to limit the contents of definition clause by a construction which would be against the spirit of the statute - Interpretation of statute.

s.2(c)(viii) - 'Public servant' - Appellant a Municipal Councillor and Member of Municipal Board - Held: Is a public servant within the meaning of s.2(c) -- Clause (viii) of s.2(c) makes any person, who holds an office by virtue of which he

is authorized or required to perform any public duty, to be a public servant -- Word 'office' in the context would mean a position or place to which certain duties are attached and has an existence which is independent of the persons who fill it -- Councillors and Members of Municipal Board are positions under Rajasthan Municipalities Act -- They perform various duties which are in the field of public duty -- Rajasthan Municipalities Act, 1959 -- s.87-- Penal Code, 1860 - s.21.

INTERPRETATION OF STATUTES:

Legal fiction - Held: Legislature is competent to create a legal fiction -- A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist -- When legislature creates a legal fiction, court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction -- Legislature, while enacting s.87 of Rajasthan Municipalities, has created a legal fiction for the purpose of assuming that the Members, otherwise, may not be public servants within the meaning of s.21 IPC but shall be assumed to be so in view of legal fiction so created -- Rajasthan Municipalities Act, 1959 - s.87 -- Penal Code, 1860 - s.21.

WORDS AND PHRASES:

'Office' - Connotation of Prevention of Corruption Act, 1988.

A charge sheet for offences u/ss 7 and 13(1)(d) r/w s.13(2) of the Prevention of Corruption Act, 1988 was filed against the appellant, who at the relevant time was a Municipal Councillor and a Member of the Municipal Board. During the trial, the appellant filed an application before the trial court for dropping the proceeding, *inter alia,* contending that he being a Councillor did not come within the definition of 'public serva

could not be put on trial for the offence charged. The trial court rejected the prayer. The High Court also rejected his petition u/s 482 of the Code of Criminal Procedure, 1973.

Dismissing the appeal, the Court

HELD: 1.1 Admittedly, the appellant is an elected Councillor and a Member of the Municipal Board. Section 87 of the Act makes every Member to be public servant within the meaning of s. 21, IPC. The legislature, while enacting s.87 of the Rajasthan Municipalities Act, 1959 has created a legal fiction for the purpose of assuming that the Members, otherwise, may not be public servants within the meaning of s.21 of the Penal Code but shall be assumed to be so in view of the legal fiction so created. Therefore, there is no escape from the conclusion that the appellant is a public servant within the meaning of s.21 of the Penal Code. [para 14 & 15] [215-D, H; 216-A, C-D]

1.2 Legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. [para 15] [216-A-C]

1.3 Under the scheme of the Rajasthan Municipalities Act it is evident that the appellant happens to be a Councillor and a Member of the Board. Further in view of language of s.87, he is a public servant within the meaning of s.21 of the Penal Code. 'Public servant' has been defined u/s 2(c) of the Prevention of Corruption Act, 1988, which is relevant in the instant case. Prosecution under this Act can take place only of such persons, who

come within the definition of public servant therein. The appellant is sought to be prosecuted under the Prevention of Corruption Act, 1988 and, therefore, to determine his status it would be necessary to look into its interpretation u/s 2(c) thereof, read with the provisions of the Rajasthan Municipalities Act. [para 17] [216-F-G; 217-A-C]

State of Maharashtra v. Prabhakarrao, **(2002) 7 SCC 636 - relied on.**

1.4 The 1988 Act envisages widening of the scope of the definition of the expression 'public servant'. It was brought in force to purify public administration. The legislature has used a comprehensive definition of 'public servant' to achieve the purpose of punishing and curbing corruption among public servants. Therefore, it would be inappropriate to limit the contents of the definition clause by a construction which would be against the spirit of the statute. Bearing in mind this principle, there is no doubt that the appellant is a public servant within the meaning of s. 2(c) of the Act. Clause (viii) of s.2(c) makes any person, who holds an office by virtue of which he is authorized or required to perform any public duty, to be a public servant. The word 'office' is of indefinite connotation and, in the present context, it would mean a position or place to which certain duties are attached and has an existence which is independent of the persons who fill it. Councillors and members of the Board are positions which exist under the Rajasthan Municipalities Act. It is independent of the person who fills it. They perform various duties which are in the field of public duty. It is, thus, evident that the appellant is a public servant within s.2(c)(viii) of the Prevention of Corruption Act, 1988. [para 19] [219-H; 220-A-E]

1.5 A Member of the Board, or for that matter a Councillor per se, may not come wi of

the public servant as defined u/s 21 of the Penal Code, but this does not mean that they cannot be brought in the category of public servant by any other enactment. Section 87 of the Rajasthan Municipalities Act makes Councillor and Member of Board come within a public servant within the meaning of s. 21 of the Penal Code. Besides, in the case in hand, the meaning of the expression 'public servant' as defined u/s 2(c) of the Prevention of Corruption Act, 1988 is significant and, therefore, decisions rendered by this Court while interpreting s. 21 of the Penal Code, which in substance and content are substantially different than s. 2(c) of the 1988 Act, shall have no bearing at all for decision in the instant case. [para 20 and 22] [220-G-H; 221-A, F-G]

R.S. Nayak v. A.R. Antulay **1984 (2) SCR 495 = (1984) 2 SCC 183;** *Ramesh Balkrishna Kulkarni v. State of Maharashtra,* **1985 (2) Suppl. SCR 345 = (1985) 3 SCC 606;** *State of T.N. v. T. Thulasingam,* **1994 Supp (2) SCC 405 - held inapplicable.**

1.6 As regards the decision of the single Judge of the Rajasthan High Court in the case of Sumitra Kanthiya, it has also not considered s.87 of the Rajasthan Municipalities Act. The single Judge has also not at all adverted to s.87 of the Rajasthan Municipalities Act as also s. 2(c) of the Prevention of Corruption Act, 1988 and, therefore, the judgment rendered by the Rajasthan High Court in Sumitra Kanthiya does not lay down the law correctly and is, therefore, overruled. [para 22] [221-G-H; 222-C-D]

Smt. Sumitra Kanthiya vs. State of Rajasthan, **disposed of by Rajasthan High Court on 30.7.2008 - overruled.**

Case Law Reference:

1984 (2) SCR 495	**held inapplicable**	**para 8**

1985 (2) Suppl. SCR 345	**held inapplicable**	**para 9**
1994 Supp (2) SCC 405	**held inapplicable**	**para 10**
(2002) 7 SCC 636	**relied on**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1881 of 2013.

From the Judgment and Order dated 01.03.2013 of the High Court of Rajasthan at Jodhpur in Crl. Misc. Petition No. 1686 of 2009.

Yashank Adiyaru, Arthi Bansal, Ajay Digpaul, N. Annapoorani for the Appellant.

Milind Kumar for Respondent.

The Judgment of the Court was deliverd by

CHANDRAMAULI KR. PRASAD, J. 1. The petitioner's challenge to his prosecution for an offence under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act has been turned down by the trial court and the said order has been affirmed by the High Court by its order dated 1st of March, 2013 passed in Criminal Miscellaneous Petition No. 1686 of 2009. It is against this order that the petitioner has preferred this special leave petition.

2. Delay condoned.

3. Leave granted.

4. Shorn of unnecessary details, facts giving rise to the present appeal are that the appellant at the relevant time was a Councillor elected to the Municipal Council, Banswara and a Member of the Municipal Board. According to the prosecution, one Prabhu Lal Mochi lodged a report in the Anti-Corruption Bureau, inter alia, alleging that he had a shoe repair shop near the gate of Forest Department, Banswara and the employees

of the Municipal Council had seized his cabin in the year 2000 rendering him unemployed. According to the allegation, he applied for the allotment of a kiosk before the Municipal Council but did not succeed. On enquiry the informant was told that it is the appellant who can get the allotment made in his favour and accordingly he contacted the appellant. It is alleged that the appellant demanded a sum of Rs. 50,000/- for getting the allotment done in his name and ultimately it was agreed that initially the informant would pay Rs. 5,000/- to the appellant and the rest amount thereafter. On the basis of the aforesaid information, according to the prosecution, a trap was laid and the appellant was caught red-handed and a sum of Rs. 5,000/- was recovered from him.

5. After usual investigation, charge-sheet was submitted against the appellant and he was put on trial. During the trial evidence of one of the witnesses was recorded and thereafter, the appellant filed an application before the trial court for dropping the proceeding, inter alia, contending that he being a Councillor does not come within the definition of 'public servant' and as such, he cannot be put on trial for the offence under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. The trial court rejected the said prayer vide its order dated 13th of October, 2009. The appellant assailed this order before the High Court in an application filed under Section 482 of the Code of Criminal Procedure and the High Court by the impugned judgment has rejected his prayer.

6. It is against this order that the appellant is before us with the leave of the court.

7. We have heard Mr. Yashank Adhiyaru, Senior Counsel for the appellant while respondent is represented by Mr. Milind Kumar.

8. Mr. Adhiyaru submits that a Municipal Councillor is not a public servant and, therefore, his prosecution for the offence

alleged is bad in law. According to him, for prosecuting an accused for offence under the Prevention of Corruption Act, 1988 the accused charged must be a public servant and the appellant not being a public servant cannot be prosecuted under the said Act. Further, for a person to have the status of a public servant he must be appointed by the Government and must be getting pay or salary from the Government. Not only this, to be a public servant, such a person has to discharge his duties in accordance with the rules and regulations made by the Government. According to him, the appellant was elected as a Municipal Councillor and he does not owe his appointment to any governmental authority. Being a person elected by the people, the commands and edicts of a Government authority do not apply to him. In support of the submission he has placed reliance on a judgment of this Court in the case of *R.S. Nayak v. A.R. Antulay,* (1984) 2 SCC 183. He has drawn our attention to the following passage from the said judgment.

> "41.....Whatever that may be the conclusion is inescapable that till 1964 at any rate MLA was not comprehended in the definition of 'public servant' in Section 21. And the Santhanam Committee did not recommend its inclusion in the definition of 'public servant' in Section 21.
>
> 42.....Now if prior to the enactment of Act 40 of 1964 MLA was not comprehended as a public servant in Section 21, the next question is: did the amendment make any difference in his position. The amendment keeps the law virtually unaltered. Last part of clause (9) was enacted as clause (12)(a). If MLA was not comprehended in clause (9) before its amendment and dissection, it would make no difference in the meaning of law if a portion of clause (9) is re-enacted as clause (12)(a). It must follow as a necessary corollary that the amendment of clauses (9) and (12) by Amending Act 40 of 1964 did not bring about any change in the interpretation of claus[illegible]a)

after the amendment of 1964……..

Xxx xxx xxx

……Therefore, apart from anything else, on historical evolution of Section 21, adopted as an external aid to construction, one can confidently say that MLA was not and is not a 'public servant' within the meaning of the expression in any of the clauses of Section 21 IPC."

9. Another decision on which the counsel has placed reliance is the judgment of this Court in the case of *Ramesh Balkrishna Kulkarni v. State of Maharashtra,* (1985) 3 SCC 606, and he has drawn our attention to Paragraph 5 from the said judgment which reads as follows:

"5. In view of this decision, therefore, we need not go to the other authorities on the subject. Even so, we are of the opinion that the concept of a "public servant" is quite different from that of a Municipal Councillor. A "public servant" is an authority who must be appointed by Government or a semi-governmental body and should be in the pay or salary of the same. Secondly, a "public servant" is to discharge his duties in accordance with the rules and regulations made by the Government. On the other hand, a Municipal Councillor does not owe his appointment to any governmental authority. Such a person is elected by the people and functions undeterred by the commands or edicts of a governmental authority. The mere fact that an MLA gets allowance by way of honorarium does not convert his status into that of a "public servant". In *R.S. Nayak v. A.R. Antulay,* (1984) 2 SCC 183 the learned Judges of the Constitution Bench have referred to the entire history and evolution of the concept of a "public servant" as contemplated by Section 21 of the IPC."

10. Yet another decision on which counsel has placed reliance is the judgment of this Court in the case of *State of*

T.N. v. T. Thulasingam, 1994 Supp (2) SCC 405, and he has drawn our attention to Paragraph 76 from the said judgment which reads as follows:

"76. The High Court was, however, right in acquitting various Councillors of the charge under the Prevention of Corruption Act as they are not public servants, in view of the decision of this Court in *Ramesh Balkrishna Kulkarni v. State of Maharashtra* (1985) 3 SCC 606. The acquittal of the Councillors (A-75 to A-80 and A-82); Chairman and Member of the Accounts Committee (A-84 to A-86); Members of the Works Committee (A-87); Members of the Education Committee (A-94 to A-96); Member of the Town Planning Committee (A-98) and Councillors (A-102 and A-104) under the provisions of the Prevention of Corruption Act is thus upheld. However, their respective convictions and sentences for other charges as found by the trial court are upheld and their acquittal by the High Court for those other charges was not justified. All the public dignitaries themselves had become the kingpin of the criminal conspiracy to defraud the Corporation of Madras."

11. Counsel for the appellant has also placed reliance on an unreported judgment of the Rajasthan High Court in the case of *Smt. Sumitra Kanthiya vs. State of Rajasthan,* disposed of on 30th of July, 2008 passed in Criminal Revision Petition No. 453 of 2008 and our attention has been drawn to the following passage from the said judgment:

"In view of the above decision of the Hon'ble Supreme Court, the petitioners being municipal councillors are not public servant and charges framed against them without giving them opportunity of hearing on 18.7.2007 cannot be sustainable, specially when the State refused to sanction prosecution and the Anti Corruption Department submitted final report but the learned Judge took the cognizance overlooking the above legal aspects."

12. Mr. Milind Kumar, learned counsel appearing on behalf of the respondent State of Rajasthan, however, submits that the appellant, undisputedly being the Municipal Councillor and a Member of the Board, comes within the definition of public servant and, hence, he cannot escape from the prosecution for the offence punishable under the Prevention of Corruption Act, 1988.

13. We have bestowed our consideration to the rival submission and we do not find any substance in the submission of Mr. Yashank Adhiyaru and the authorities relied on are clearly distinguishable.

14. As stated earlier, it is an admitted position that the appellant happens to be an elected Councillor and a Member of the Municipal Board. Section 3(2) of the Act defines Board. Section 7 provides for its establishment and incorporation and Section 9 provides for composition thereof. Section 3(15) defines 'Member' to mean a person who is lawfully a Member of a Board. Section 87 of the Rajasthan Municipalities Act, 1959 makes every Member to be public servant within the meaning of Section 21 of the Indian Penal Code and the same reads as follows:

> **"87. Members etc., to be deemed public servants.**-(1) Every member, officer or servant, and every lessee of the levy of any municipal tax, and every servant or other employee of any such lessee shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860 (Central Act XLV of 1860).
>
> (2) The word "Government" in the definition of "legal remuneration" in Section 161 of that Code shall, for the purposes of sub-section (1) of this section, be deemed to include a municipal board."

15. From a plain reading of the aforesaid provision it is evident that by the aforesaid section the legislature has created

a fiction that every Member shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. It is well settled that the legislature is competent to create a legal fiction. A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. In our opinion, the legislature, while enacting Section 87 has, thus, created a legal fiction for the purpose of assuming that the Members, otherwise, may not be public servants within the meaning of Section 21 of the Indian Penal Code but shall be assumed to be so in view of the legal fiction so created. In view of the aforesaid, there is no escape from the conclusion that the appellant is a public servant within the meaning of Section 21 of the Indian Penal Code.

16. To put the record straight, we must incorporate an ancillary submission of Mr. Adhiyaru. He submits that 'Every member' used in Section 87 relates to such members who are associated with any 'lessee of the levy of any Municipal tax'. This submission has only been noted to be rejected. The expression 'Every member' in Section 87 is independent and not controlled by the latter portion at all and in view of the plain language of the section, no further elaboration is required.

17. Under the scheme of the Rajasthan Municipalities Act it is evident that the appellant happens to be a Councillor and a Member of the Board. Further in view of language of Section 87 of the Rajasthan Municipalities Act, he is a public servant within the meaning of Section 21 of the Indian Penal Code. Had this been a case of prosecution under the Prevention of Corruption Act, 1947 then this would have been the end of the matter. Section 2 of this Act defines 'public servant' to mean public servant as defined under Section 21 of the Indian Penal Code. However, under the Prevention o

with which we are concerned in the present appeal, the term 'public servant' has been defined under Section 2(c) thereof. In our opinion, prosecution under this Act can take place only of such persons, who come within the definition of public servant therein. Definition of public servant under the Prevention of Corruption Act, 1947 and Section 21 of the Indian Penal Code is of no consequence. The appellant is sought to be prosecuted under the Prevention of Corruption Act, 1988 and, hence, to determine his status it would be necessary to look into its interpretation under Section 2(c) thereof, read with the provisions of the Rajasthan Municipalities Act. The view which we have taken finds support from the judgment of this Court in *State of Maharashtra v. Prabhakarrao,* (2002) 7 SCC 636, wherein it has been held as follows:

> "5. Unfortunately, the High Court in its order has not considered this question at all. It has proceeded on the assumption that Section 21 of the Indian Penal Code is the relevant provision for determination of the question whether the accused in the case is a public servant. As noted earlier, Section 21 IPC is of no relevance to consider the question which has to be on interpretation of provision of Section 2(c) of the Prevention of Corruption Act, 1988 read with the relevant provisions of the Maharashtra Cooperative Societies Act, 1960."

18. Now we proceed to consider whether or not the appellant, a Councillor and the member of the Board, is a public servant under Section 2(c) of the Prevention of Corruption Act, 1988. Section 2(c) of this Act reads as follows:

> "2. **Definitions.**-In this Act, unless the context otherwise requires,-
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx

> (c) " public servant" means,-
>
> (i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;
>
> (ii) any person in the service or pay of a local authority;
>
> (iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
>
> (iv) any Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;
>
> (v) any person authorised by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;
>
> (vi) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;
>
> (vii) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;
>
> (viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;
>
> (ix) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Gover[illegible]y

corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(x) any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(xi) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

Explanation 1.-Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.

Explanation 2.-Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

19. The present Act envisages widening of the scope of the definition of the expression 'public servant'. It was brought

in force to purify public administration. The legislature has used a comprehensive definition of 'public servant' to achieve the purpose of punishing and curbing corruption among public servants. Hence, it would be inappropriate to limit the contents of the definition clause by a construction which would be against the spirit of the statute. Bearing in mind this principle, when we consider the case of the appellant, we have no doubt that he is a public servant within the meaning of Section 2(c) of the Act. Sub-section (viii) of Section 2(c) of the present Act makes any person, who holds an office by virtue of which he is authorized or required to perform any public duty, to be a public servant. The word 'office' is of indefinite connotation and, in the present context, it would mean a position or place to which certain duties are attached and has an existence which is independent of the persons who fill it. Councillors and members of the Board are positions which exist under the Rajasthan Municipalities Act. It is independent of the person who fills it. They perform various duties which are in the field of public duty. From the conspectus of what we have observed above, it is evident that appellant is a public servant within Section 2(c)(viii) of the Prevention of Corruption Act, 1988.

20. Now we revert to the authorities relied on by Mr. Adhiyaru i.e. *R.S.Nayak* (supra), *Ramesh Balkrishna Kulkarni* (supra) and *T.Thulasingam* (supra). In all these decisions, this Court was considering the scope of Section 21 of the Indian Penal Code which defines 'public servant'. It was necessary to do so as Section 2 of the Prevention of Corruption Act, 1947 defined 'public servant' to mean as defined under Section 21 of the Indian Penal Code. A member of the Board, or for that matter, a Councillor per se, may not come within the definition of the public servant as defined under Section 21 of the Indian Penal Code but this does not mean that they cannot be brought in the category of public servant by any other enactment. In the present case, the Municipal Councillor or member of the Board does not come within the definition of public servant as defined under Section 21 of the Indian Penal C e

legal fiction created by Section 87 of the Rajasthan Municipalities Act, they come within its definition.

21. It is an admitted position that in none of the aforesaid judgments relied on by the appellant, this Court had considered any provision similar to Section 87 of the Rajasthan Municipalities Act and, therefore, those judgments cannot be read to mean that a Municipal Councillor in no circumstance can be deemed to be a public servant. Mr. Adhiyaru points out that provisions pari materia to that of Section 87 of the Rajasthan Municipalities Act did exist in the respective enactments under consideration in these cases and, therefore, it has to be assumed that this Court, while holding that Municipal Councillors are not public servant, must have taken note of the similar provision. However, in fairness to him, he concedes that such a provision, in fact, has not been considered in these judgments. We are of the opinion that for ascertaining the binding nature of a judgment, what needs to be seen is the ratio. The ratio of those cases is that Municipal Councillors are not public servants under Section 21 of the Indian Penal Code. But Section 87 of the Rajasthan Municipalities Act, as discussed above, make Councillor and member of Board a public servant within the meaning of Section 21 of the Indian Penal Code. Hence, all the judgments of this Court referred to above are clearly distinguishable.

22. Not only this, in the case in hand, we are concerned with the meaning of the expression 'public servant' as defined under Section 2(c) of the Prevention of Corruption Act, 1988 and, hence, decisions rendered by this Court while interpreting Section 21 of the Indian Penal Code, which in substance and content are substantially different than Section 2(c) aforesaid, shall have no bearing at all for decision in the present case. As regards the decision of the learned Single Judge of the Rajasthan High Court in the case of *Sumitra Kanthiya* (supra), it has also not considered Section 87 of the Rajasthan Municipalities Act. In fact, to come to the conclusion that the

Municipal Councillor would not come within the definition of public servant, it has mainly placed reliance on a judgment of this Court in the case of *Ramesh Balkrishna Kulkarni* (supra). We have considered this judgment in little detail in the preceding paragraphs of the judgment and found the same to be distinguishable as the said decision did not consider the statutory provision in the present format. Further, the aforesaid case does not lay down an absolute proposition of law that Municipal Councillor in no circumstances can be treated as a public servant. The learned Judge has also not at all adverted to Section 87 of the Rajasthan Municipalities Act as also Section 2(c) of the Prevention of Corruption Act, 1988 and, hence, the judgment rendered by the Rajasthan High Court in *Sumitra Kanthiya* (supra) does not lay down the law correctly and is, therefore, overruled.

23. As the trial is pending since long, we deem it expedient that the learned Judge in seisin of the trial makes an endeavour to dispose of the trial expeditiously and in no case later than six months from the date of receipt of a copy of this order.

24. In the result, we do not find any merit in the appeal and it is dismissed accordingly.

R.P. Appeal dismissed.

UNITED INDIA INSURANCE COMPANY LTD.

v.

SUNIL KUMAR & ANR.

(Civil Appeal No. 9694 of 2013)

OCTOBER 29, 2013

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

MOTOR VEHICLES ACT, 1988:

s. 163-A r/w s. 170 and 173 - Special provisions as to payment of compensation on structured formula basis - Appeal by insurer - Held: In view of points (iii) to (v) in Shila Datta's case having been referred to larger Bench as also the view in Sinitha's case that it is open to the owner or insurance company, as the case may be, to defeat a claim u/s 163-A of the Act by pleading and establishing a fault ground (wrongful act or neglect or default), matter referred to larger Bench.

s.163-A - Petition for compensation - Held: Liability to make compensation u/s 163-A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry u/s 163-A -- Once it is established that death or permanent disablement occurred during the course of user of vehicle and the vehicle is insured, insurance company or owner, as the case may be, shall be liable to pay compensation, which is a statutory obligation.

The respondent filed a claim petition u/s 163-A of the Motor Vehicles Act, 1988 (the Act), claiming compensation for the injury sustained by him in a road accident. The award passed by the Tribunal was challenged by the Insurance Company in an appeal before the High Court, which, placing reliance on the judgment in *Nicolletta Rohtagi's* case, dismissed the

appeal holding that the Insurance Company failed to comply with s. 170 of the Act.

Referring the matter to larger Bench, the Court

HELD: 1.1 The impugned order is based on the principle laid down in Nicolletta Rohtagi's case, the correctness of which is doubted in Shila Datta's case, in which points (iii) to (v) have been referred to a larger Bench. [para 2] [226-D-E]

United India Insurance Company Ltd. v. Shila Datta and Others **2011 (14) SCR 763 = (2011) 10 SCC 509;** *National Insurance Co. Ltd. v. Nicolletta Rohtagi* **2002 (2) Suppl. SCR 456 = (2002) 7 SCC 456 - referred to.**

1.2 Besides, in the instant case, claim petition was filed u/se 163-A of the Act, which was resisted by the Insurance Company contending that the same was not maintainable since the injured himself was driving the vehicle and that no disability certificate was produced. Interpreting s. 163-A of the Act, in Sinitha's case it has been held that it is open to the owner or the insurance company, as the case may be, to defeat a claim u/s 163-A of the Act by pleading and establishing through cogent evidence a fault ground (wrongful act or neglect or default). The Court concluded that s.163 of the Act is founded under the fault liability principle. The Three-Judge Bench of this Court in Deepal Girishbhai Soni's case was not placed before the Bench deciding *Sinitha's* case. [para 3-5] [227-A-B; 228-C-D, F-G; 229-G]

National Insurance Company Limited v. Sinitha and others **2011 (16) SCR 166 = (2012) 2 SCC 356;** *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala* **2001 (2) SCR 999 = (2001) 5 SCC 175;** *Deepal Girishbhai Soni & Ors. v. United India Insurance Co. Ltd., Baroda* **(2004) 5 SCC 385 - referred to.**

1.3 This Court is, therefore, of the view that liability to make compensation u/s 163-A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry u/s 163-A. Once it is established that death or permanent disablement occurred during the course of the user of the vehicle and the vehicle is insured, the insurance company or the owner, as the case may be, shall be liable to pay the compensation, which is a statutory obligation. Section 163-A does not make any provision for apportionment of the liability. If the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default or wrongful act on the part of the victim or claimant, it would defeat the very object and purpose of s. 163-A of the Act. Legislature never wanted the claimant to plead or establish negligence on the part of the owner or the driver. In this view of the matter, the view in Sinitha's case cannot be concurred with. [para 8-9] [231-C-F]

1.4 Consequently, the matter is referred to a larger Bench for a correct interpretation of the scope of s.163-A of Act as well as points no.(iii) to (v) referred to in *Shila Datta's* case. [para 9] [231-F-G]

Case Law Reference:

2011 (14) SCR 763	**referred to**	**para 2**
2002 (2) Suppl. SCR 456	**referred to**	**para 2**
2011 (16) SCR 166	**referred to**	**para 3**
2001 (2) SCR 999	**referred to**	**para 3**
(2004) 5 SCC 385	**referred to**	**para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9694 of 2013.

From the Judgment and Order dated 10.10.2011 of the

High Court of Delhi at New Delhi in MAC Appeal No. 900 of 2011.

A.K. Raina, A.K. Kaul, Dr. Kailash Chand for the Appellant.

Nidhi, Ajay Kumar Talesara for the Respondents.

The Order of the Court was delivered by

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

2. Heard learned counsel for the parties. Learned counsel appearing for the Respondent submitted that in view of the judgment of this Court in United India Insurance Company Ltd. v. Shila Datta and others [(2011) 10 SCC 509], this matter will have to be referred to a larger Bench, especially with regard to points no.(iii) to (v) referred to in the above-mentioned judgment, which are in conflict with the judgment of this Court in *National Insurance Co. Ltd. v. Nicolletta Rohtagi* [(2002) 7 SCC 456]. The impugned order, we notice, is based on the principle laid down in *Nicolletta Rohtagi's* case (supra), the correctness of which is doubted in *Shila Datta's* case (supra). In the present case, the claim petition was filed by the Respondent under Section 163-A of the Motor Vehicles Act, 1988, claiming compensation for the injury sustained by him in a road accident occurred on 20.11.2006. The Tribunal after recording the evidence and after hearing the parties, vide its order dated 16.8.2011 passed an award for a sum of Rs.3,50,000/- along with interest at the rate of 7% per annum from the date of the filing of the petition till realization. Aggrieved by the same, the Insurance Company filed an appeal before the High Court of Delhi. The High Court placing reliance on the judgment in *Nicolletta Rohtagi's* case (supra) dismissed the appeal since the Insurance Company failed to comply with Section 170 of the Motor Vehicles Act and the Insurance Company has come up with this appeal. Learned counsel for the Respondent contended that the question whether permission is required or not under Section 170 stands referred to a larger Bench.

3. We have yet another issue to be examined. As already indicated that in the instant case, claim petition was filed under Section 163-A of the Motor Vehicles Act, which was resisted by the Insurance Company contending that the same is not maintainable since the injured himself was driving the vehicle and that no disability certificate was produced. A Two-Judge Bench of this Court in *National Insurance Company Limited v. Sinitha and Others* [(2012) 2 SCC 356] examined the scope of Section 163-A of the Motor Vehicles Act and took the view that Section 163-A of the Act has been founded under "fault liability principle". Referring to another judgment of a co-equal Bench in *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala* [(2001) 5 SCC 175], the learned Judges took the view that while determining whether Section 163-A of the Motor Vehicles Act, 1988 is governed by the fault or the no-fault liability principle, Sections 140(3) and (4) are relevant. The Bench noticed under Section 140(3), the burden of pleading and establishing whether or not wrongful act, neglect or default was committed by the person (for or on whose behalf) compensation is claimed under Section 140, would not rest on the shoulders of the claimant. The Court also noticed that Section 140(4) of the Motor Vehicles Act further reveals that a claim for compensation under Section 140 of the Act cannot be defeated because of any of the fault grounds (wrongful act, neglect or default).

4. The Division Bench in *Sinitha's* case (supra), then took the view that under Section 140 of the Act so also under Section 163-A of the Act, it is not essential for a claimant seeking compensation to plead or establish that the accident out of which the claim arises suffers from wrongful act or neglect or default of the offending vehicle. The Bench then expressed the view that the legislature designedly included the negative clause through Section 140(4) of the Motor Vehicles Act, but consciously omitted the same in the scheme of Section 163-A of the Act intentionally and purposefully. The Court also concluded, on a conjoint reading of Sections 140 and 163-A,

the legislative intent is clear, namely, that a claim for compensation raised under Section 163-A of the Act need not be based on pleadings or proof at the hands of the claimants showing absence of wrongful act, being neglect or default, but the Bench concluded that it is not sufficient to determine whether the provision falls under the fault liability principle. The Court held that to decide whether the provision is governed by the fault liability principle, the converse has to be established i.e. whether a claim raised thereunder can be defeated by the party concerned (the owner or the insurance company) by pleading and proving wrongful act, neglect or default. Interpreting Section 163-A of the Act, the Judges in *Sinitha's* case (supra) held that it is open to the owner or the insurance company, as the case may be, to defeat a claim under Section 163-A of the Act by pleading and establishing through cogent evidence a fault ground (wrongful act or neglect or default). The Court concluded that Section 163 of the Act is founded under the fault liability principle.

5. We find difficult to accept the reasoning expressed by the Two-Judge Bench in *Sinitha's* case (supra). In our view, the principle laid down in *Hansrajbhai V. Kodala's* case (supra) has not been properly appreciated or applied by the Bench. In fact, another Division Bench of this Court vide its order dated 19.4.2002 had doubted the correctness of the judgment in *Hansrajbhai V. Kodala's* case (supra) and referred the matter to a Three-Judge Bench to examine the question whether claimant could pursue the remedies simultaneously under Sections 166 and 163-A of the Act. The Three-Judge Bench of this Court in *Deepal Girishbhai Soni & Ors. v. United India Insurance Co. Ltd., Baroda* [(2004) 5 SCC 385] made a detailed analysis of the scope of Sections 166 and 163-A and held that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other, as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. The Court also extensively examined the scope of Section 163-A

163-A was introduced in the Act by way of a social security scheme and is a Code by itself. The Court also held that Section 140 of the Act deals with interim compensation but by inserting Section 163-A, the Parliament intended to provide for making of an award consisting of a pre-determined sum without insisting on a long-drawn trial or without proof of negligence in causing the accident. The Court noticed that Section 163-A was inserted making a deviation from the common law liability under the Law of Torts and also in derogation of the provisions of the Fatal Accidents Act. The Three-Judge Bench also held that Section 163-A has an overriding effect and provides for special provisions as to payment of compensation on structured formula basis. Sub-section (1) of Section 163-A contains a non-obstante clause, in terms whereof the owner of the motor vehicle or the authorized insurer is liable to pay, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. The Court also held that the scheme of the provisions of Section 163-A and Section 166 are distinct and separate in nature. In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that the Parliament intended to insert a non-obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of. The above-mentioned Three-Judge Bench judgment was not placed before the learned Judges who decided the *Sinitha's* case (supra).

6. We find, both Sections 140 and 163-A deal with the case of death and permanent disablement. The expression "permanent disablement" has been defined under Section 142,

so far as Section 140 is concerned. So far as Section 163-A is concerned, the expression "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923. Both Sections 140 and 163-A deal with cases of no fault liability. In order to prefer a claim under Section 140(2), claimant need not plead or establish that death or permanent disablement, in respect of which claim has been made, was due to any wrongful act, neglect or default of the deceased or the disabled person. Similarly, under Section 163-A also, claimant shall not be required to plead or establish that death or permanent disablement, in respect of which claim has been made, was due to any wrongful act, neglect or default of the deceased or the injured, as the case may be. In other words, an enquiry as to who is at fault is foreign to the determination of a claim under Section 140 as well as Section 163-A. Claim under Section 140 as well as Section 163-A shall not be defeated by the Insurance Company or the owner of the vehicle, as the case may be, by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement claim has been made. So also, the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of share of such person in the responsibility for his death or permanent disablement.

7. We find, in *Sinitha's* case (supra), one of the factors which weighed with the learned Judges was the absence of a similar provision like sub-section (4) of Section 140 in Section 163-A which, according to the learned Judges, has been intentionally and purposefully done by the legislature. We find it difficult to accept that view. We are of the view that if such an interpretation is given, the very purpose and object of Section 163-A would be defeated and render the provision otiose and a claimant would prefer to make a claim under Section 140, rather than under Section 163-A of the Act by exercising option under Section 163-B of the Act. Because, if a claim under Section 140, is raised because of Sectio

would not be defeated by the owner of the vehicle or the insurance company, as the case may be, and the claimant may get a fixed sum prescribed under Section 140(2). Sub-section (4) of Section 140 has been introduced by the legislature since claim under Section 140 would be followed by Section 166. So far as Section 163-A is concerned, claim is restricted on the basis of pre-determined formula, unlike in the case of application under Section 166.

8. We are, therefore, of the view that liability to make compensation under Section 163-A is on the principle of no fault and, therefore, the question as to who is at fault is immaterial and foreign to an enquiry under Section 163-A. Section 163-A does not make any provision for apportionment of the liability. If the owner of the vehicle or the insurance company is permitted to prove contributory negligence or default or wrongful act on the part of the victim or claimant, naturally it would defeat the very object and purpose of Section 163-A of the Act. Legislature never wanted the claimant to plead or establish negligence on the part of the owner or the driver. Once it is established that death or permanent disablement occurred during the course of the user of the vehicle and the vehicle is insured, the insurance company or the owner, as the case may be, shall be liable to pay the compensation, which is a statutory obligation.

9. We, therefore, find ourselves unable to agree with the reasoning of the Two-Judge Bench in *Sinitha's* case (supra). Consequently, the matter is placed before the learned Chief Justice of India for referring the matter to a larger Bench for a correct interpretation of the scope of Section 163-A of the Motor Vehicles Act, 1988, as well as the points no.(iii) to (v) referred to in Shila Datta's case (supra)

R.P. Matter referred to Larger Bench.

JAGDISH SINGH

v.

HEERALAL AND OTHERS

(Civil Appeal No. 9771 of 2013)

OCTOBER 30, 2013

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

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002:

ss. 2(zc) and 2(zf) - Security interest - Original title deeds of properties deposited with bank creating equitable mortgage against loan - Held: Security interest, within the meaning of s.2(zf) has been created in respect of the properties in question which are secured assets within the meaning of s.2(zc), in favour of the secured creditor (the bank) within the meaning of s.2(zd) -- On failure to re-pay, the bank can always enforce its security interest over the secured assets.

ss.13(4), 17 and 34 - Title deeds deposited with bank as security against loan - Borrower failed to repay the loan - Bank sold the property after publishing the auction notice - Suit by plaintiff's claiming the property as HUF property - Held: In case the borrower fails to discharge his liability, the bank can take the "measures" provided in s.13(4) for recovery of the loan amount - s.17confers a right of appeal to any person, aggrieved by any of the "measures" referred to in sub-s. (4) of s.13 taken by the secured creditor - Expression 'any person' used in s.17 is of wide import and takes within its fold the borrower, the guarantor as also the plaintiffs in the suit as well - Thus, irrespective of the question whether the civil suit is maintainable or not under the Act itself, a remedy is provided to such persons so that they can invoke the provisions of s.17, in case the bank (secured creditor) adopts any measure

including the sale of secured assets, on which plaintiffs claim interest.

s.34 r/w s.35 - Civil court not to have jurisdiction - Held: Civil court jurisdiction is completely barred, as regards the "measure" taken by a secured creditor under sub-s. (4) of s.13 against which an aggrieved person has a right of appeal before DRT or Appellate Tribunal to determine as to whether there has been any illegality in the "measures" taken - Bank, in the instant case, has proceeded only against secured assets of borrowers - In the circumstances, High Court was in error in holding that only civil court has jurisdiction to examine as to whether the "measures" taken by secured creditor under sub-s. (4) of s.13 were legal or not - Judgment of High Court is set aside - Code of Civil Procedure, 1908 - s.9.

Respondent no. 6 obtained a loan from the Bank of India on 17.2.2000. The loan was secured by equitable mortgage executed by respondent Nos.7 to 9 in respect of the suit land. Respondent Nos.6 to 8 also created equitable mortgage on three houses, which were in their respective names. Original title deeds of all the properties were deposited with the bank. Since they committed default in re-paying the loan, the bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and, ultimately, the auction of the suit land was confirmed by the Bank 8.11.2005 on the appellant-auction purchaser depositing the required amount. Respondents Nos. 1 to 5 filed a suit in the Court of the District Judge against respondent Nos.7 to 9 and others including the appellant and the Bank, for a declaration of title, partition and permanent injunction. Respondent no. 6 and the Bank filed a preliminary objection before the civil court under O. 7 r.11 of the Code of Civil Procedure, 1908 stating that in view of s. 13 read with s. 34 of the Securitisation Act, the civil court had no

jurisdiction to entertain the suit. The civil court upheld the preliminary objection holding that the suit was not maintainable. However, the High Court allowed the appeal of respondents nos. 1 to 5. Aggrieved, the auction-purchaser filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The auction notice was duly published in the newspapers on 30.09.2005. No objection was raised by the plaintiffs and the suit land was auctioned on 08.11.2005, which was settled in favour of the highest bidder - the appellant. The entire auction price was paid by the appellant and the sale in his favour was duly confirmed. Respondent Nos.7 to 9 challenged the sale notice by filing an application before the DRT, which was dismissed on 21.07.2006, and as no appeal was preferred against it, it attained finality. Respondent Nos.1 to 5 filed the suit claiming the properties as belonging to HUF. But, the facts would clearly indicate that the properties in question were purchased by respondent Nos.6 to 8 in their individual names, long after the death of the common ancestor and that too by registered sale deeds and no claim was ever made at any stage by any member of the HUF that the said properties were HUF properties and not the individual properties of respondents nos. 6 to 8. [para 10-11] [241-H; 242-A-E]

1.2 Security interest, within the meaning of s.2(zf) has been created in respect of the properties in question which are secured assets within the meaning of s.2(zc), in favour of the secured creditor (the bank) within the meaning of s.2(zd). On failure to re-pay, the bank, secured creditor can always enforce its security interest over the secured assets. [para 13] [243-A-B]

2.1 Section 13(1) of the Securitisation Act states that notwithstanding anything contained e

Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal by such creditor, in accordance with the provisions of the Act. In case the borrower fails to discharge his liability, the bank can take the "measures" provided in s.13(4) of the Securitisation Act for recovery of the loan amount. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. [para 14 and 22] [243-C-D; 249-A-B]

2.2 Section 17 of the Securitisation Act confers a right of appeal to any person, if that person is aggrieved by any of the "measures" referred to in sub-s. (4) of s.13 taken by the Secured Creditor. The expression 'any person' used in s.17 is of wide import and takes within its fold the borrower, the guarantor or any other person who may be affected by action taken u/s 13(4) of the Securitisation Act. Therefore, the expression 'any person' referred to in s.17 would take in the plaintiffs in the suit as well. Thus, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of s.17 of the Securitisation Act, in case the bank (secured creditor) adopts any measure including the sale of the secured assets, on which the plaintiffs claim interest. [para 15, 17 and 18] [244-E-F; 247-A-D]

United Bank of India v. Satyavati Tondon and Others **2010 (9) SCR 1 = (2010) 8 SCC 110;** *Nahar Industrial Enterprises Limited v. Hongkong Shanghai Banking Corporation* **2009 (12) SCR 54 = (2009) 8 SCC 646, *Indian Bank v. ABS Marine Products Pvt. Ltd.* 2006 (1) Suppl. SCR 52 = (2006) 5 SCC 72 - referred to.**

2.3 Section 34 of the Securitisation Act ousts the civil court jurisdiction. The opening portion of s.34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in respect of any matter' referred to in s.34 would take in the "measures" provided under sub-s.(4) of s.13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-s. (4) of s.13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-s. (4) of s.13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, s.35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in s.9 CPC as well. [para 19 and 22] [247-E; 249-C-F]

Mardia Chemicals and Others v. Union of India and Others **2004 (3) SCR 982 = (2004) 4 SCC 311;** *Central Bank of India v. State of Kerala and Others* **2009 (3) SCR 735 = (2009) 4 SCC 94, and** *Authorised Officer, Indian Overseas Bank and Others v. Ashok Saw Mill* **2009 (11) SCR 599 = (2009) 8 SCC 366 - referred to.**

2.4 The bank, in the instant case, has proceeded only against secured assets of the borrowers. In the circumstances, the High Court was in error in holding that only civil court has jurisdiction to examine as to whether the "measures" taken by the secured creditor under sub-s. (4) of s.13 of the Securitisation Act were legal or not. The judgment of the High Court is set aside. [para 23] [249-H; 250-A-B]

Case Law Reference:

2004 (3) SCR 982	**referred to**	**Para 8**
2009 (3) SCR 735	**referred to**	**Para 8**
2010 (9) SCR 1	**referred to**	**Para 8**
2009 (11) SCR 599	**referred to**	**Para 8**
2009 (12) SCR 54	**referred to**	**Para 9**
2006 (1) Suppl. SCR 52	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9771 of 2013.

From the Judgment and Order dated 05.08.2010 of the High Court of Madhya Pradesh, Bench at Indore in Civil First Appeal No. 130 of 2008.

A.K. Chitale, Niraj Sharma, Sumit Kumar Sharma for the Appellant.

Sanjay Parikh, Mamta Saxena, A.N. Singh, Bushra Parveen (for Anitha Shenoy), Soma Mullick (for Pranab Kumar Mullick), Pukhrambam Ramesh Kumar for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant herein was the auction purchaser, being the highest bidder for Rs.18,01,000/-, in respect of the land admeasuring one acre in Khasra Nos.104/3 and 105/2, Patwari Halka No.4, Village Segaon, Anjad Road, Barwani, M.P., which was brought to sale for recovery of loan amounts under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Securitisation Act"). The auction was confirmed by the bank on 08.11.2005 on the appellant's depositing Rs.2,90,250/

- by 09.11.2005 and remaining 75% within 15 days. The appellant was not put in possession of the property in question even though the auction was confirmed.

3. The appellant - auction purchaser then came to know that Respondent Nos.1 to 5 herein have filed a Civil Suit No.16A/07 in the Court of District Judge, Barwani District for a declaration of title, partition and permanent injunction against Respondent Nos.7 to 9 and others in which the appellant and the bank were also made parties. Following are the reliefs sought for in the said civil suit:

"(A) Decree may be passed in favour of the plaintiff and against the defendants for declaration of title to this effect that one acre land in survey No.104/3 and 105/2 described in plaint para 4 (a) is undivided joint family property of plaintiff and defendants No.1 to 4 and the defendants have no right to mortgage it or attachment and auction of the same against any loan recovery by defendant No.5 and if defendants No.1 to 5 might have created any charge on the said land then it is not binding on the plaintiff.

(B) Decree of partition may be passed in favour of the plaintiffs and against the defendants for division of the suit land by metes and bounds and decree may be passed for separating the land of title of the plaintiffs and mutation effected in revenue papers.

(C) Decree of permanent injunction may be passed in favour of the plaintiffs against the defendant that the defendants shall not, directly or indirectly, transfer, auction or interfere over the suit land of the plaintiff in any manner.

(D) Costs of the suit may be awarded against the defendants.

(E) Other relief which the Hon'ble Court may deem proper may be granted to the plaintiff against the defendants."

4. Respondent Nos.7 to 9 herein, in the meanwhile, filed an application before the Debt Recovery Tribunal (for short "the DRT"), Jabalpur under Section 17 of the Securitisation Act challenging the sale notice dated 08.11.2005. The application was opposed by the bank and the same was dismissed by the DRT vide its order dated 21.07.2006.

5. Respondent Nos.6 and 7 (the Bank) filed a preliminary objection before the civil court stating that in view of Section 13 read with Section 34 of the Securitisation Act, the civil court has no jurisdiction to entertain the suit. The court, therefore, framed the following issues:

> "Whether under the provisions of Section 34 & 35 of SARFAESI Act 2002 this court does not have the jurisdiction to decide the suit as mentioned in special pleadings in para 10 of the written statement of defendant No.10 and also mentioned in para 15 of the written statement of defendant Nos.6 & 7."

6. The civil court upheld the preliminary objection stating that if the plaintiffs had any right, they ought to have filed an appeal under Section 17 of the DRT Act and not a suit in view of the specific bar contained in Section 34 of the Securitisation Act. Civil court, therefore, passed an order on 18.01.2008 holding that the suit is not maintainable and, hence, the application preferred by the bank under Order 7 Rule 11 of the Civil Procedure Code (for short "the CPC") was allowed.

7. Aggrieved by the said order, Respondent Nos.1 to 5 herein filed Civil First Appeal No.130/08 before the High Court of Madhya Pradesh at Indore. The High Court, however, allowed the appeal. The operative portion of the judgment reads as follow:

> "I have perused the contents of the plaint from the record of the case. A bare perusal of the plaint indicates that the plaintiffs have raised the question of title, on the basis of

> Joint Hindu Family property and they being the members of the Joint Hindu Family, it has been pleaded by them that the property in question had been acquired through the earnings of the joint family property. On that basis, it has been maintained by them that the property in question was liable to be treated as Joint Hindu Family property, and not the exclusive property of the defendants. In these circumstances, on the bare perusal of the contents of the plaint, it cannot be suggested at all that the civil suit, filed by the plaintiffs, is barred under any provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000, or that civil court has no jurisdiction in the matter."

8. Aggrieved by the same, this appeal has been preferred. Shri A.K. Chitale, learned senior counsel appearing for the appellant, submitted that the High Court has not properly appreciated the scope of Section 34 of the Securitisation Act and has completely over-looked the principle laid down by this Court in various Judgments with regard to the scope of Section 9 CPC vis-à-vis Section 34 of the Securitisation Act. Reference was made to the Judgments of this court in *Mardia Chemicals and Others v. Union of India and Others* (2004) 4 SCC 311, *Central Bank of India v. State of Kerala and Others* (2009) 4 SCC 94, *United Bank of India v. Satyavati Tondon and Others* (2010) 8 SCC 110 and *Authorised Officer, Indian Overseas Bank and Others v. Ashok Saw Mill* (2009) 8 SCC 366. Learned senior counsel submitted that the appellant is a bona fide purchaser for value and the sale was confirmed in his favour as early as on 08.11.2005. Further, it was pointed out that the application preferred by Respondent Nos.7 to 9 before the DRT, challenging the sale notice dated 08.11.2005, was also dismissed by the DRT on 21.07.2006. Consequently, the High Court was not justified in interfering with the order passed by the District Judge.

9. Shri Sanjay Parikh, learned cou[illegible]e

respondents, on the other hand, submitted that the High Court has rightly interfered with the order of the District Judge after having found that the civil court has got the jurisdiction to deal with the rights of the respondents - plaintiffs. Learned counsel submitted that the High Court has correctly appreciated the scope of Section 34 of the Securitisation Act. Reference was made to the Judgments of this Court in *Nahar Industrial Enterprises Limited v. Hongkong Shanghai Banking Corporation* (2009) 8 SCC 646, *Indian Bank v. ABS Marine Products Pvt. Ltd.* (2006) 5 SCC 72 and also to the *Mardia Chemicals Ltd.* (supra). Learned counsel submitted that the DRT, exercising powers under Section 17 of the Securitisation Act, cannot decide the rights of Respondent Nos.1 to 5 vis-à-vis Respondent Nos.7 to 9 in a proceeding under Section 17 of the Securitisation Act and civil court is the right forum to decide as to whether the secured assets are ancestral properties of a Hindu Undivided Family (HUF) and they were acquired through the earnings out of the joint family properties.

Discussion

10. The Bank of India had advanced a loan of Rs.25 lakhs to M/s Guru Om Automobiles, 10th respondent herein, through its proprietor, the 6th respondent on 17.02.2000. The loan was secured by equitable mortgage executed by Respondent Nos.7 to 9 in respect of land measuring one acre in Khasra No.104/3 and 105/2, Patwari Halka No.5, Village Seagon, Anjad Road, Barwani, MP. Respondent Nos.6 to 8 had also created equitable mortgage on three houses, which were in their respective names. Original title deeds of all the above-mentioned properties were duly deposited with the bank at the time of availing of the loan. Since they committed default in re-paying the loan, the bank issued notice under Section 13(2) of the Securitisation Act and took steps under Section 13(4) of the Securitisation Act in respect of properties on 01.03.2004. Auction notice was duly published in the newspapers on 30.09.2005. No objection was raised by the plaintiffs and the suit land was auctioned on 08.11.2005, which was settled in

favour of the highest bidder - the appellant herein. The entire auction price was paid by the auction purchaser and the sale in his favour was duly confirmed. Respondent Nos.7 to 9 challenged the sale notice, as already indicated, by filing an application No.19/2005 before the DRT, Jabalpur, which was dismissed on 21.07.2006. No appeal was preferred against that order and that order has attained finality.

11. We notice, at this juncture, Respondent Nos.1 to 5 filed Civil Suit No.16A/07 in the Court of the District Judge, Barwani against the appellant, as well as the bank and Respondent Nos.6 to 9, alleging that the family members of Respondent Nos.1 to 9 herein being sons/grandsons of deceased Premji, constituted a HUF engaged in agriculture. It was stated that the said properties were purchased in the names of Respondent Nos.7 to 9 out of the funds of HUF and house Nos.41/1, 42/3 and 42/2 were also purchased in the names of Respondent Nos.6 to 8 respectively, out of the funds of HUF and, therefore, the properties of HUF. But, the facts would clearly indicate that the properties referred to above were purchased by Respondent Nos.6 to 8 in their individual names, long after the death of Premji and that too by registered sale deeds and no claim was ever made at any stage by any member of the HUF that the suit land was a HUF property and not the individual property. Respondent Nos.7 to 9 had purchased those lands vide sale deed dated 14.09.1999 and the 6th respondent had also purchased in his individual name House No.42/1 on 31.03.1998 vide registered sale deed. Similarly, Respondent No.7 had also purchased House No.42/3 in his individual name. No claim, whatsoever, was made at any stage by any member of the family that those properties and buildings were HUF properties and not the individual properties of Respondent Nos.6 to 8 herein.

12. We find that the bank had advanced loans on the strength of the above-mentioned documents which stood in the names of Respondent Nos.6 to 9. Due t[illegible]e

loan amount, the Bank can always proceed against the secured assets.

13. Security interest, within the meaning of Section 2(zf) has been created in respect of the above mentioned properties which are secured assets within the meaning of Section 2(zc), in favour of the secured creditor (the bank) within the meaning of Section 2(zd). On failure to re-pay, the bank, secured creditor can always enforce its security interest over the secured assets.

14. Secured asset is defined under Section 2(zc) of the Securitisation Act to mean the property on which security interest is created. Section 13(1) of the Securitisation Act states that notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal by such creditor, in accordance with the provisions of the Act. In case the borrower fails to discharge his liability, the bank can take the measures provided in Section 13(4) of the Securitisation Act for recovery of the loan amount. The "measures" available for enforcement of security interest is dealt with in the following provision:

13. **Enforcement of security interest -**

(1) to (3) xxx xxx xxx

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

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

(b) take over the management of the business of the

borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

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

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

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

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

15. Section 17 of the Securitisation Act confers a right of appeal to any person, including the borrower, if that person is aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 taken by the Secured Creditor. The operative portion of Section 17 is extracted hereinbelow for ready reference:

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

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

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

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder."

16. Any person aggrieved by any order made by the DRT under Section 17 may also prefer an appeal to the Appellate Tribunal under Section 18 of the Act.

17. The expression 'any person' used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in *Satyavati Tondon's* case (supra).

18. Therefore, the expression 'any person' referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.

19. Section 34 of the Securitisation Act ousts the civil court jurisdiction. For easy reference, we may extract Section 34 of the Securitisation Act, which is as follow:

> "34. **Civil Court not to have jurisdiction** - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

20. The scope of Section 34 came up for consideration before this Court in *Mardia Chemicals Ltd.* (supra) and this court held as follow:

> "50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13."

21. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.

22. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in respect of any matter' referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

23. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub-section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether there has been any illegality in the "measures" taken. The bank, in the instant case, has proceeded only against

secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystalised, before creating security interest in respect of the secured assets. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has jurisdiction to examine as to whether the "measures" taken by the secured creditor under sub-section (4) of Section 13 of the Securitisation Act were legal or not. In such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs.

R.P. Appeal allowed.

RAJEEV KUMAR

v.

STATE OF HARYANA

(Criminal Appeal No. 967 of 2005)

OCTOBER 31, 2013

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

PENAL CODE, 1860:

s.304-B - Dowry death - Held: One of the essential ingredients of the offence of dowry death u/s 304-B is that the accused must have subjected a woman to cruelty in connection with demand of dowry soon before her death - In the instant case, contents of dying declaration do not establish that deceased was harassed for dowry soon before her death - The statement of the father of deceased indicates that soon before the death, the appellant had subjected her to cruelty which was not in any way connected with the demand of dowry - As the essential ingredient of s.304-B has not been established by the prosecution, trial court and High Court were not correct in holding the appellant guilty of offence of dowry death u/s 304B, IPC - Evidence Act, 1872 - s.113-B.

ss.498-A and 306 - Cruelty and abetment of suicide - Held: The dying declaration of the deceased as well as the evidence of her father are sufficient to establish that the appellant used to fight on petty issues and give beatings to the deceased, which drove her to commit suicide -- This is, therefore, a clear case where the appellant had committed offences punishable u/ss 498A and 306 - Appellant convicted u/ss 498-A and 306 and sentenced to imprisonment for one year under the first count and imprisonment for 3 years under the second count - Evidence Act, 1872 - s.113-A.

DYING DECLARATION:

Victim of burn injuries - Doctor who examined the injured in hospital gave a certificate that she was fit to give statement - Larynx and trachea found by post mortem doctor charred by heat - Held: The opinions of the two medical experts are not in variance of the ocular evidence that the deceased was in a position to speak when her dying declarations were recorded -- Therefore, the two dying declarations can be relied on by the court - Medical Jurisprudence.

The daughter of PW5 was married to the appellant on 28.1.1989. On 26.2.1991, she received burn injuries in her matrimonial home and succumbed to the injuries in the hospital. Prior to her death, at 11.20 P.M. on the same date, she gave her statement to the ASI (PW9) that earlier the appellant used to tease her for dowry, and he used to taunt her on petty matters and because of this she sprinkled kerosene on her and set herself on fire. This statement was registered as the FIR. Soon thereafter, the Judicial Magistrate (PW 8) recorded her statement u/s 164 Cr.P.C. in which she reiterated her statement given to the police. The trial court convicted the appellant u/s 304B IPC and sentenced him to RI for 7 years and a fine of Rs. 2,000/-. The High Court declined to interfere.

In the instant appeal filed by the accused, it was contended for the appellant that the larynx and trachea of the deceased were charred by heat and burns and, as such, she was not able to speak and the doctor (PW 2) was also not present at the time of recording the statements of the deceased and, therefore, the dying declarations should not be relied on; and that, in any case, the finding of the courts below that the appellant was harassing the deceased for dowry was not correct.

Allowing the appeal in part, the Court

HELD: 1.1 It is clear from the evidence of the PW-2, the doctor, who gave the fitness cert d

PW-9, (the Judicial Magistrate and the ASI, respectively, who recorded the statements of the deceased), that at the time the statements of the victim were recorded by them, she was in a fit condition to make the statement. When, however, the post mortem was carried out on 27.02.1991 by PW-7 at 4.00 P.M. he found that the larynx and trachea of the deceased were charred by heat. PW-7, in his statement has clarified that when the larynx and trachea are charred, the person cannot speak, but when the larynx and tracheae are in the process of being charred, the person can speak. DW-5, the doctor examined by the accused has given his opinion that if the vocal chord of larynx is charred, such person may be able to speak, but not clearly, and it will be difficult to understand. The opinions of the two medical experts, therefore, are not in variance of the ocular evidence of PW-2, PW-8 and PW-9 that the deceased was in a position to speak when her dying declarations were recorded on the night of 26.02.1991. Therefore, the two dying declarations can be relied on by the court. [para 10] [262-B-F]

1.2 It will be clear from the contents of the dying declaration (Ext. PN) that the deceased was fed up with the activities of her husband and she poured kerosene oil on herself and burnt herself. What those activities of the appellant were which prompted her to commit suicide have not been clearly stated, but she has stated that her husband used to get upset on petty issues. Further, the evidence of PW-5, the father of the deceased indicates that soon before the death of the deceased, the appellant had subjected her to cruelty which was not in any way connected with the demand of dowry. [para 11-12] [263-F-H]

1.3 One of the essential ingredients of the offence of dowry death u/s 304B, IPC is that the accused must have subjected a woman to cruelty in connection with demand of dowry soon before her death and this ingredient has

to be proved by the prosecution beyond reasonable doubt and only then the court will presume u/s 113B of the Evidence Act that the accused has committed the offence of dowry death. As this ingredient of s.304-B, IPC, has not been established by the prosecution, the trial court and the High Court were not correct in holding the appellant guilty of the offence of dowry death u/s 304B, IPC. [para 12] [265-B-E]

Bansi Lal v. State of Haryana **2011 (1) SCR 724 = (2011) 11 SCC 359; and** *Smt. Shanti and Another v. State of Haryana* **1990 (2) Suppl. SCR 675 =AIR 1991 SC 1226 - distinguished.**

1.4 However, the appellant is certainly guilty of offences of abetment of suicide and cruelty. The language of s.113-A of the Evidence Act makes it clear that if a woman has committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband. The Explanation to s.113-A of the Evidence Act states that for the purpose of s.113-A, "cruelty" shall have the same meaning as in s.498A, IPC. The Explanation to s.498A, IPC, defines 'cruelty' and Clause (a) of the Explanation states that cruelty means any willful conduct which is of such nature as is likely to drive a woman to commit suicide. The dying declaration of the deceased (Ext. PN) as well as the evidence of PW-5 are sufficient to establish that the appellant used to fight on petty issues and give beatings to the deceased, which drove the deceased to commit suicide. This is, therefore, a clear case where the appellant had committed offences punishable u/ss 498A and 306, IPC. [para 15] [267-A-B, E-H; 268-A]

1.5 In K. Prema S.Rao*, this Court has held that it was not necessary to remit the matter [illegible]r

framing a charge u/s 306, IPC, and the accused also cannot complain for want of opportunity to defend the charge u/s 306 IPC, if the facts found in evidence justify the conviction of the appellant u/ss 498-A and 306, IPC instead of graver offence u/s 304-B IPC. Therefore, this Court holds the appellant guilty of offences u/ss 498A and 306, IPC. Considering the particular conduct of the appellant which drove the deceased to commit suicide, a sentence of one year imprisonment and fine of Rs.1,000/- is imposed on him for the offence u/s 498A, IPC and a sentence of three years imprisonment and fine of Rs.2,000/- for the offence u/s 306, IPC. However, the sentences of imprisonment for the two offences will run concurrently. [para 16-17] [268-B, C-D, E-G]

K. Prema S. Rao and Another etc. v. Yadla Srinivasa Rao and Others,* **etc. 2002 (3) Suppl. SCR 339 = (2003) 1 SCC 217 - relied on.

Sanjiv Kumar v. State of Punjab **(2009) 16 SCC 487,** *Durga Prasad & Anr. V. State of Madhya Pradesh* **2010 (7) SCR 104 = (2010) 9 SCC 73,** *Gurdeep Singh v. State of Punjab & Ors.* **2011 (10) SCR 655 = (2011) 12 SCC 408 and** *Devinder alias Kala Ram & Ors. v. State of Haryana* **(2012) 10 SCC 763 - cited.**

Case Law Reference:

(2009) 16 SCC 487	**cited**	**para 7**
2010 (7) SCR 104	**cited**	**para 7**
2011 (10) SCR 655	**cited**	**para 7**
(2012) 10 SCC 763	**cited**	**para 7**
2011 (1) SCR 724	**distinguished**	**para 9**
1990 (2) Suppl. SCR 675	**distinguished**	**para 9**
2002 (3) Suppl. SCR 339	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 967 of 2005.

From the Judgment and order dated 16.09.2004 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 337-SB of 1992.

S.B. Upadhyay, Kunwar C.M. Khan, Kumud L. Das, Irshad Ahmad for the Appellant.

Vikas Sharma, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 16.09.2004 of the Punjab and Haryana High Court in Criminal Appeal No.337-SB of 1992.

Facts:

2. The facts very briefly are that on 26.02.1991 at 11.20 P.M., the Assistant Sub-Inspector of Police of Police Station-City Dabwali, District Sirsa in Haryana, Madan Lal recorded a statement of Vandana at CHC Hospital, Mandi Dabwali. She stated that about two years ago, she was married to the appellant and the appellant used to taunt her on petty matters and earlier the appellant used to tease her for dowry and on being fed up with the habits of the appellant, on 26.02.1991 between 7.00 and 7.30 P.M., she sprinkled kerosene on her and set herself on fire. The statement of Vandana was registered as First Information Report (FIR) by the S.I. of P.S. Dabwali, Kuldeep Singh. Soon thereafter on 26.02.1991, the Judicial Magistrate, First Class, R.S. Bagri, recorded a statement of Vandana under Section 164 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') in which Vandana reiterated her statement to the Police. On 27.02.1991 at 2.20 A.M., Vandana died. Post mortem was carried out on the body

of Vandana (hereinafter referred to as 'the deceased') by Dr. S.S. Bansal. The Police then took up the investigation and submitted a charge-sheet against the appellant.

3. On 28.08.1991, the Sessions Court framed a charge under Section 304B, IPC, against the appellant to which the appellant pleaded not guilty. At the trial, the prosecution examined Kedar Nath, who had prepared the scaled plan (Ext. PA) on the place of occurrence, as PW-1; Dr. R.C. Chaudhary, Medical Officer, General Hospital, Mandi Dabwali, who had examined the deceased and found the burn injuries on her body as PW-2; S.I. Kuldeep Singh of P.S. Dabwali, who had registered the FIR as PW-3; the landlord of the house in which the deceased lived with her husband as PW-4; Niranjan Ram Gupta, the father of the deceased, as PW-5; Bhupinder Kumar, the uncle of the deceased as PW-6; Dr. S.S. Bansal, who conducted the post mortem on the body of the deceased as PW-7; R.S. Bagri, the Judicial Magistrate, who recorded the statement of the deceased under Section 164, Cr.P.C. as PW-8 and ASI Madan Lal, the Investigating Officer, as PW-9. The statement of the appellant was recorded under Section 313, Cr.P.C. In defence, the appellant examined Ramesh Devra as DW-1; Jagdish Kumar as DW-2; Nihal Singh, Assistant Chief Medical Officer, Sirsa, as DW-3; Dr. Ajay Kumar Gupta, Medical Officer, Civil Hospital, Sirsa, as DW-4 and Dr. J.L. Bhutani as DW-5. After considering the evidence and the arguments on behalf of the parties, the learned Additional Sessions Judge, Sirsa, in his judgment dated 31.08.1992 held that the prosecution has been able to prove the charge against the appellant and accordingly convicted him under Section 304B, IPC. Thereafter, the learned Additional Sessions Judge heard the accused on the quantum of sentence and ordered that the appellant be sentenced to seven years R.I. with a fine of Rs.2,000/- and in default of payment of fine, to undergo further imprisonment of six months.

4. Aggrieved, the appellant filed Criminal Appeal No.337-SB of 1992 before the High Court. After hearing the appeal, the High Court in the impugned judgment held that the deceased had indicated in her dying declarations (Exts.PG and PN) before ASI Madan Lal and the Judicial Magistrate R.S. Bagri that she was being harassed by her husband with demands of dowry on account of which she had sprinkled kerosene on herself before setting herself ablaze. The High Court further held that the statement of the deceased in these two dying declarations (Exts. PG and PN) that she was being harassed for dowry stood corroborated by the evidence of the father of the deceased (PW-5) and uncle of the deceased (PW-6). The High Court rejected the contention raised on behalf of the appellant that the deceased was not in the medical condition to speak inasmuch as her larynx and tracheae had been charred by burns, relying on the testimony of the medical experts Dr. R.C. Chaudhary (PW-2) and Dr. J.L. Bhutani (DW-5) as well as the testimony of the ASI Madan Lal (PW-9) and the Judicial Magistrate R.S. Bagri (PW-8), who had recorded the dying declarations of the deceased. The High Court accordingly held that there was no ground to interfere with the orders of conviction and sentence passed by the trial court and dismissed the criminal appeal of the appellant.

Contentions of the learned counsel for the parties:

5. Mr. S.B. Upadhyay, learned counsel for the appellant, submitted that the finding in the impugned judgment that the appellant was harassing the deceased for dowry is not correct inasmuch as PW-4, the landlord of the house in which the deceased and her husband were living, has stated in his evidence that he did not hear any sort of disharmony or fighting between the appellant and the deceased and that they used to live and lead a normal married life and both of them were blessed with a daughter, who was aged about six to seven months. He further submitted that when the Judicial Magistrate (PW-8) recorded the statement of the deceased under Section 164, Cr.P.C., Dr. R.C. Chaudhary (PW-

will be evident from the evidence of PW-8. He submitted that PW-2, on the other hand, was the doctor who issued the fitness certificate to the Judicial Magistrate that the deceased was in a fit state to give the statement. He referred to the opinion of Dr. S.S. Bansal (PW-7) to submit that the larynx and tracheae is a voice box containing vocal cords through which a man speaks and if they were charred by heat and burns, a person will not be able to speak. He submitted that DW-2 was present in the hospital for the whole night on 26.02.1991 and DW-2 has stated that the deceased was not in a position to speak when the alleged dying declarations are said to have been made. He submitted that the trial court and the High Court, therefore, were not correct in relying on the dying declarations of the deceased recorded by the ASI Madan Lal and the Judicial Magistrate R.S. Bagri for holding the appellant guilty.

6. Mr. Upadhyay next submitted that on a reading of the entire evidence of PW-5 (the father of the deceased), it will be clear that the appellant and the deceased were happy with each other and this will also be evident from the letters exchanged between the family members between March 1989 and January 1991 (Exts. DE/2, DE/6, DE/7, DE/9, DE/12, DE/15, DE/17, DE/18, DE/19, DE/20, DE/21, DE/22 and DE/23). He submitted that this is, therefore, not a case where the appellant had made any demand of dowry on the deceased and had subjected the deceased to any cruelty or harassment in connection with the demand of dowry soon before her death and hence the ingredients of the offence under Section 304B, IPC, are missing in this case and, therefore, the appellant could not have been held guilty under Section 304B, IPC.

7. Mr. Upadhyay cited the decisions of this Court in *Sanjiv Kumar v. State of Punjab* [(2009) 16 SCC 487], *Durga Prasad & Anr. v. State of Madhya Pradesh* [(2010) 9 SCC 73], *Gurdeep Singh v. State of Punjab & Ors.* [(2011) 12 SCC 408] and *Devinder alias Kala Ram & Ors. v. State of Haryana* [2012) 10 SCC 763] in support of his submission that the

offence under Section 304B, IPC, is not made out against the appellant. He submitted that at the worst the appellant can be held guilty under Section 306, IPC, for having abetted suicide by the deceased if the dying declaration is to be accepted. He argued that the appellant has already undergone two years imprisonment and is now on bail and also has a young daughter to take care of and, therefore, the appellant should not be subjected to further imprisonment for the offence under Section 306, IPC.

8. Mr. Vikas Sharma, learned counsel appearing for the State of Haryana, on the other hand, submitted that the two dying declarations (Ext. PG and PN) of the deceased are clear that the appellant used to harass the deceased for dowry and being fed up with the habits of the appellant, the deceased sprinkled kerosene oil on herself and set herself ablaze. He submitted that the evidence of Dr. S.S. Bansal (PW-7) is clear that one can speak when the larynx and tracheae are in the process of being charred. He submitted that even DW-5, the medical expert produced by the accused in his defence, has admitted in cross-examination that in case of charring of vocal chords, the patient may be able to speak and the trial court has relied on this admission made by DW-5. He submitted that Dr. R.C. Chaudhary has also deposed that the deceased was fit to make the statement. He submitted that both these witnesses were medical experts and were rightly relied on by the trial court and the High Court to reject the contention of the appellant that the deceased was not in a fit condition to give the statements to ASI Madan Lal and the Judicial Magistrate R.S. Bagri. Mr. Sharma also relied on the evidence of PW-5 that the appellant used to give beatings to the deceased and demand more and more dowry. He submitted that the trial court and the High Court were therefore right in holding the appellant guilty of the offence under Section 304B IPC.

9. Mr. Sharma cited the decision of this Court in *Bansi Lal v. State of Haryana* [(2011) 11 SCC 359] in which it has been held that while considering a case und[illegible]C,

cruelty in connection with demand of dowry has to be proved in close proximity to the time of death because of the expression "soon before her death" in Section 304B IPC, and the Court has to analyse the facts and circumstances of each case leading to the death of the victim and decide if there is such proximate connection between the act of cruelty in connection with demand of dowry and death of the woman. He also cited the decision of this Court in *Smt. Shanti and Another v. State of Haryana* [AIR 1991 SC 1226] for the proposition that once the death of a woman is found to be unnatural, either homicidal or suicidal, Section 304B, IPC, has to be attracted.

Findings of the Court:

10. The first question that we have to decide is whether the deceased was in a condition to make the dying declarations (Exts.PG and PN) before ASI Madan Lal and the Judicial Magistrate R.S. Bagri when her larynx and tracheae had been affected by burns. PW-2, Dr. R.C. Chaudhary, has stated in his evidence that on 26.02.1991, on the application of the Police (Ext.PD), he gave his opinion in Ext.PD/1 to the effect that the patient was fit to give her statement and this opinion was given at 10.30 P.M. PW-9, ASI Madan Lal, has deposed in his evidence that the doctor vide his endorsement (Ext.PD/1) declared that Vandana was fit to give her statement and then he recorded the statement of Vandana (Ext.PG) correctly and after Vandana admitted the contents of the statement to be correct, she gave her thumb impression in Ext.PG in token of its correctness. PW-9 has further stated that at that time Vandana was living and taking long sigh and she remained conscious at the time of giving her statement (Ext. PG). PW-9 has also stated that he then went to the Judicial Magistrate R.S. Bagri (PW-8) whose residence was near the hospital and R.S.Bagri accompanied him to the hospital and recorded the statement of Vandana. The Judicial Magistrate R.S. Bagri has accordingly deposed that ASI Madan Lal had approached him in person at his residence at 10.40 P.M. along with application

(Ext.PM) and he came to the hospital and moved an application (Ext.PM/1) to the Medical Officer concerned and thereafter he recorded her statement and at the time of recording the statement, Dr. R.C. Chaudhary was not present but he had given a certificate (Ext.PM/2) on the application (Ext.PM/1) that Vandana was in a fit state to make a statement and she continued to be so during the making of the statement. It is thus clear from the evidence of the aforesaid three witnesses PW-2, PW-8 and PW-9 that at the time the statements of Vandana were recorded by ASI Madan Lal (PW-9) and the Judicial Magistrate R.S. Bagri (PW-8), she was in a fit condition to make the statement. When, however, the post mortem was carried out on 27.02.1991 by Dr.S.S. Bansal (PW-7) at 4.00 P.M. he found that the larynx and tracheae of the deceased were charred by heat. On questions being put to him whether a person will be able to speak when her larynx and tracheae were charred by heat, PW-7 has clarified that when the larynx and tracheae are charred, the person cannot speak, but when the larynx and tracheae are in the process of being charred, the person can speak. Dr. J.L. Bhutani, DW-5, has given his opinion that if the vocal chord of larynx is charred, such person may be able to speak, but not clearly, and it will be difficult to understand. The opinions of the two medical experts, therefore, are not in variance of the ocular evidence of PW-2, PW-8 and PW-9 that Vandana was in a position to speak when her dying declarations were recorded on the night of 26.02.1991. Hence, the two dying declarations (Ext.PG and Ext.PN) can be relied on by the Court.

11. The next question which we have to decide is whether the prosecution has been able to prove beyond reasonable doubt that the appellant has committed the offence of dowry death under Section 304B, IPC. The two dying declarations are similarly worded. We, therefore, extract hereinbelow only the dying declaration which was recorded by the Judicial Magistrate (Ext. PN):

"Statement of Vandana, w/o Rajiv Singla, age 23 years, occupation house wife, R/o Dabwali, u/s 164 Cr.P.C.

I was married to Dr. Rajiv Singla 2 years back. My husband used to get upset on petty issues. My in-laws lived separately. They are living after the 6 months of my marriage. My daughter is of 2 months. Today about 7.30 p.m., in evening I was fed up with activities of my husband and put on kerosene oil and burn myself. Earlier my husband used to taunt me for dowry. Action should be taken against my husband.

Sd/- R.C. Bangri
JMIC
Dabwali, 26-2-91

RO & AC

RTI of Vandana
Identified
Sd/-
Madan Lal, ASI
P.C. City Dabwali,
Dated: 26-2-91"

It will be clear from the contents of the dying declaration (Ext. PN) that the deceased was fed up with the activities of her husband and she poured kerosene oil on herself and burnt herself. What those activities of the appellant were which prompted her to commit suicide have not been clearly stated, but she has stated that her husband used to get upset on petty issues and earlier her husband used to taunt her for dowry.

12. When, however, we scrutinize the evidence of PW-5, the father of the deceased, we find that soon before the death of the deceased, the appellant had subjected the deceased to cruelty which was not in any way connected with the demand of dowry. The relevant part of the evidence of PW-5 is quoted hereinbelow:

"Smt. Vandhana deceased was my daughter. I had married my daughter Vandhana with Rajiv Kumar, accused now present in the Court on 28.01.1989 at Kartarpur. Out of her wed lock with the accused Rajiv Kumar, a female child was born on 2.7.90. Vandhana deceased and Rajiv Kumar accused, her husband used to reside/live in Mandi Dabwali. After marriage, whenever Vandhana used to come to tell us, she used to tell me that her husband Rajiv Kumar gives her beating and demands more and more dowry. We used to fulfill the demand of Rajiv Kumar accused in the shape of dowry put forward before us by my daughter and used to send her back after advising her that she is to live with her husband and should try to adjust with him. On 19.2.91 Vandhana came to me at Kartarpur and told me that two days prior to 19.2.91, Rajiv Kumar accused her husband gave her merciless beating. She narrated this to me in the presence of my wife Smt. Pushpa Rani and Bhupinder Singh my brother in fact, he is my friend. On the night of 24.2.91, I had received anonymous telephone call on the telephone no. 242 that Rajiv Kumar has fled away leaving his minor daughter alone. On hearing this, my daughter Vandhana got perturbed and wanted us to leave her at Mandi Dabwali immediately. On 25.02.91 (25.2.91) we left Vandhana at Mandi Dabwali. I was accompanied by my wife Pushpa Rani and Bhupinder Kumar. On reaching at Dabwali we found Rajiv Kumar present in his clinic and later on he came to the house. We told Rajiv Kumar that he should not repeatedly give beating to Vandhana. We told him that it was not proper for him to do so. We also advised our daughter Vandhana to adjust with her husband and to remain calm and quiet and not to speak. On 25.2.91 itself after advising Rajiv Kumar and Vandhana we came back to Kartarpur after staying at night at Bhatinda. On 27.2.91, I received a telephonic message that Vandhana after sprinkling kerosene oil on her body has put herself fire and that she is dead and no longer alive."

From the aforesaid evidence of PW-5, it is clear that the marriage between the appellant and the deceased took place on 28.01.1989 and the demand of dowry by the appellant and the beatings for more dowry was after the marriage. PW-5 has also stated that on 19.02.1991 the deceased came to him at Kartarpur and told him that two days prior to 19.02.1991, the appellant gave her merciless beating. PW-5 has, however, not stated that the beating that the appellant gave to the deceased on 19.02.1991 was in connection with demand of dowry. One of the essential ingredients of the offence of dowry death under Section 304B, IPC is that the accused must have subjected a woman to cruelty in connection with demand of dowry soon before her death and this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death under Section 113B of the Indian Evidence Act. As this ingredient of Section 304B, IPC, has not been established by the prosecution, the trial court and the High Court were not correct in holding the appellant guilty of the offence of dowry death under Section 304B, IPC.

13. We have perused the decision of this Court in *Smt. Shanti and Another v. State of Haryana* (supra) cited by Mr. Sharma and we find that in the aforesaid case the facts were that Smt. Shanti was mother-in-law of the deceased and Smt. Krishna was another inmate in the matrimonial home in which the deceased was living and it was alleged that both Smt. Shanti and Smt. Krishna were harassing the deceased all the while after the marriage for not bringing a scooter and television as part of the dowry and she was treated cruelly. On 26.04.1988 at about 11.00 P.M., the father of the deceased came to know that the deceased had been murdered and was cremated by two ladies and he filed a report accordingly before the police. Both the courts below held that the two ladies did not send the deceased to her parents house and drove out the brother and father of the deceased complaining that a scooter and a television has not been given as dowry. The evidence of

the father, mother and brother of the deceased was that they were not even informed soon after the death of the deceased and the appellants had hurriedly cremated the dead body. In these circumstances, this Court held that the presumption under Section 113-B of the Indian Evidence Act that the two ladies have committed the offence under Section 304B, IPC, was attracted. This was, therefore, a case where the evidence clearly disclosed that the deceased had been subjected to harassment or cruelty committed by the appellants soon before her death.

14. We have also examined the decision of this Court in *Bansi Lal v. State of Haryana* (supra), cited by Mr. Sharma, and we find that the facts in that case were that the appellant Bansi Lal was married to Sarla on 04.04.1988. She was subjected to cruelty, harassment and demand of dowry and on 25.06.1991 she died. After investigation of the case, prosecution filed a charge-sheet against Bansi Lal and his mother Smt. Shanti Devi and charges were framed against them under Sections 498A, 304B and 306, IPC, and they were convicted for the said charges by the trial court. The High Court, however, acquitted Smt. Shanti Devi, but convicted Bansi Lal because of demand of dowry and cruelty in connection with demand of dowry to which the deceased was subjected to by him. Bansi Lal had made a statement under Section 313, Cr.P.C. that Sarla was in love with some other person but she was forced to marry Bansi Lal against her will due to which she felt suffocated and committed suicide, leaving a suicide note to that effect. On these facts, this Court held that once it is shown that soon before her death the deceased has been subjected to cruelty or harassment for or in connection with the demand for dowry, the Court shall presume that such person has caused the dowry death under Section 113-B of the Evidence Act, and if the case of the Bansi Lal was that Sarla has committed suicide, the onus was on him to establish his defence by leading sufficient evidence to rebut the presumption that he has not caused the dowry death, but Bansi Lal has failed to discharge that onus.

15. On the evidence on record, though the appellant is not guilty of the offence under Section 304B, IPC, he is certainly guilty of offences of abetment of suicide and cruelty. Section 113-A of the Indian Evidence Act states as follows:

> "113A. **Presumption as to abetment of suicide by a married woman.**-When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.
>
> *Explanation.*--For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code"

The language of Section 113-A of the Indian Evidence Act makes it clear that if a woman has committed suicide within a period of seven years from the date of her marriage and that her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband. The Explanation to Section 113-A of the Indian Evidence Act states that for the purpose of Section 113-A "cruelty" shall have the same meaning as in Section 498A, IPC. The Explanation to Section 498A, IPC, defines 'cruelty' and Clause (a) of the Explanation states that cruelty means any willful conduct which is of such nature as likely to drive a woman to commit suicide. The dying declaration of the deceased (Ext. PN) as well as the evidence of PW-5 extracted above are sufficient to establish that the appellant used to fight on petty issues and give beatings to the deceased, which drove the deceased to commit suicide. This is, therefore, a clear case where the appellant had committed offences under Sections 498A and 306, IPC.

16. In *K. Prema S. Rao and Another, etc. v. Yadla Srinivasa Rao and Others, etc.* [(2003) 1 SCC 217], this Court on similar facts has held that to attract the provisions of Section 304B, IPC, one of the main ingredients of the offence, which is required to be established, is that "soon before her death" she was subjected to cruelty and harassment "in connection with the demand for dowry" and this ingredient of the offence was not there in that case. This Court, however, held that it was not necessary to remit the matter to the trial court for framing a charge under Section 306, IPC, and the accused also cannot complain for want of opportunity to defend the charge under Section 306, IPC, if the facts found in evidence justify the conviction of the appellant under Sections 498A and 306, IPC instead of the graver offence under Section 304B, IPC. In that case, the three-Judge Bench of this Court held the appellant guilty of the offences under Sections 498A and 306, IPC instead of the graver offence under Section 304B, IPC.

17. In this case also, we hold the appellant guilty of offences under Sections 498A and 306, IPC. Considering the particular conduct of the appellant which drove the deceased to commit suicide, we impose a sentence of one year imprisonment and fine of Rs.1,000/- for the offence under Section 498A, IPC and impose a sentence of three years imprisonment and fine of Rs.2,000/- for the offence under Section 306, IPC, and direct that in case of failure to pay the fine for either of the two offences, the appellant shall undergo a further imprisonment for a period of six months. We make it clear that the sentences of imprisonment for the two offences will run concurrently. If the appellant has already undergone the punishment imposed by this judgment, his bail bonds shall stand discharged.

18. The appeal is allowed to that extent.

R.P. Appeal allowed.

BHUPENDRA

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1774 of 2008)

NOVEMBER 11, 2013

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

PENAL CODE 1860:

ss.498, 304-B and 306 - Demand for dowry by bride's husband and his parents - Death of bride by consuming poisonous substance - Conviction of husband by courts below - Upheld.

ss.304-B and s.306 - Dowry death - Chemical examination of viscera - Held: Not mandatory in every case of a dowry death -- Even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable u/s 304-B or u/s 306 takes place -- In a case of unnatural death inviting s.304-B IPC (read with the presumption u/s 113-B of Evidence Act) or s.306 IPC (read with the presumption u/s 113-A of Evidence Act) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.

ss.304-B and 306 - Dowry death and suicide - Held: ss.306 and 304-B not mutually exclusive -- If a conviction for causing suicide is based on s.304-B, it will necessarily attract s.306 -- However, the converse is not true.

MEDICAL JURISPRUDENCE:

Chemical analysis of viscera - Object of, and circumstances under which it is done - Explained.

The appellant was married on 7.6.1993. On 20.8.1996, his wife committed suicide. The prosecution case was that the appellant and his family members demanded dowry at the time of marriage and thereafter, which was given to them. On 20.8.1996, they demanded Rs.10,000/- and as bride's father was unable to fulfill the demand, she consumed wheat tablets and died in the hospital on the same date at 11.30 p.m. A charge-sheet was filed against the appellant and his parents for offences punishable u/ss 498-A, 304-B and 306, IPC. The trial court convicted the appellant and his father of the offences charged and acquitted his mother. The High Court upheld the conviction of the appellant, and acquitted his father on benefit of doubt.

In the instant appeal, it was contended for the appellant that since there was no chemical examination report of the viscera, it could not be said that the deceased died because of consuming poisonous wheat tablets; and that a conviction could not be sustained both u/s 304-B IPC as well as u/s 306 of the IPC. It was urged that both these sections were mutually exclusive and a conviction can be founded on either of these sections but not both. However, these points were not raised before the courts below.

Dismissing the appeal, the Court

HELD: 1.1 Normally, the viscera are preserved and submitted for chemical analysis under the following circumstances: (1) When the investigating officer requests for such an examination; (2) When the medical officer suspects the presence of poison by smell or some other evidence while conducting an autopsy on injury cases; (3) To exclude poisoning, in instances where the cause of death could not be arrived at on post mortem examination and there is no natural disease or injury to

account for it, and (4) In decomposed bodies. [para 22] [278-C-E]

Taiyab Khan and Others v. State of Bihar (Now Jharkhand), **(2005) 13 SCC 455;** *Ananda Mohan Sen and Another v. State of West Bengal,* **2007 (6) SCR 1088 = (2007) 10 SCC 774;** *State of Karnataka v. K. Yarappa Reddy,* **1999 (3) Suppl. SCR 359 = (1999) 8 SCC 715 - relied on.**

1.2 A chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable u/s 304-B or u/s 306, IPC takes place; in a case of an unnatural death inviting s.304-B, IPC (read with the presumption u/s 113-B of the Evidence Act) or s.306, IPC (read with the presumption u/s 113-A of the Evidence Act) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary. [para 26] [279-G-H; 280-A-B]

1.3 Besides, on facts from the evidence adduced in the instant case, it has been established that the cause of death of the deceased was clearly a result of consumption of poison. The post mortem doctor had stated in his testimony that the death of the deceased was caused due to suspected poisoning. This particular statement was not challenged. Similarly, the doctor who examined the deceased had mentioned in his intimation to the Police Station that the patient had been brought to the hospital because she had consumed a wheat tablet. Even DW-1, in his statement before the court, stated that the brother-in-law of the appellant told him that the deceased had consumed some poisonous pills in the house of the appellant and was admitted in the hospital. All this evidence clearly suggests that there was no doubt that the deceased had died an unnatural death and that her death was due to consumption of some

poisonous substance. [para 27-30] [280-B-F]

Mutual exclusivity of ss.304-B and 306 IPC

2. Section 306 IPC is much broader in its application and takes within its fold one aspect of s.304-B. These two sections are not mutually exclusive. If a conviction for causing a suicide is based on s.304-B, it will necessarily attract s.306. However, the converse is not true. [para 35] [282-B-C]

Satvir Singh and Others v. State of Punjab and Another, **2001 (3) Suppl. SCR 353 = (2001) 8 SCC 633;** *Shanti and Another v. State of Haryana,* **1990 (2) Suppl. SCR 675 = (1991) 1 SCC 371 and** *Kans Raj v. State of Punjab and Others,* **2000 (3) SCR 662 = (2000) 5 SCC 207 - relied on.**

Case Law Reference:

(2005) 13 SCC 455	**relied on**	**para 23**
2007 (6) SCR 1088	**relied on**	**para 24**
1999 (3) Suppl. SCR 359	**relied on**	**para 25**
2001 (3) Suppl. SCR 353	**relied on**	**para 32**
1990 (2) Suppl. SCR 675	**relied on**	**para 33**
2000 (3) SCR 662	**relied on**	**para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1774 of 2008.

From the Judgment and Order dated 26.10.2007 of the High Court of Madhya Pradesh, Jabalpur, Bench at Gwalior in Criminal Appeal No. 344 of 2001.

J.C. Gupta, Rajesh, Yogesh Tiwari, Dharam Singh for the Appellant.

C.D. Singh, Sakshi Kakkar for the

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question before us is whether Bhupendra (the appellant) was rightly convicted by the Additional Sessions Judge, Morena, Madhya Pradesh of having committed an offence punishable under Section 498-A, Section 304-B and Section 306 of the Indian Penal Code (IPC) and whether his conviction was rightly upheld by the High Court of Madhya Pradesh. In our opinion the question must be answered in the affirmative and therefore we find no merit in this appeal.

The facts

2. Geeta Bai married Bhupendra on 7th June, 1993 and at that time her father PW-1 Bhika Ram gave dowry to Bhupendra and his family according to their means. The case of the prosecution was that Geeta Bai was harassed by Bhupendra and members of his family who demanded dowry over and above what was given to them at the time of marriage. Initially, the demand was for a she buffalo which was met by Bhika Ram. Then there was a further demand for Rs. 10,000/- in cash on 20th August, 1996. However, since Bhika Ram was unable to meet this demand, and apparently fearing the worst, Geeta Bai consumed wheat tablets on the evening of 20th August, 1996 at her matrimonial home.

3. Since Geeta Bai had taken unwell, Bhupendra took her to the District Hospital at Morena for treatment. PW-8 Dr. S.C. Aggarwal informed the Station Officer of Police Station City Kotwali at about 10.30 p.m. about the incident. Later on, Geeta Bai died at about 11.25 p.m. and intimation of this was also sent by Dr. Aggarwal to the Station Officer of Police Station City Kotwali. On the basis of the information received, a case was registered and investigations commenced by the police.

4. Separately, Bhika Ram made a complaint on 21st August, 1996 to the Superintendent of Police and to the District

Magistrate at Morena that Bhupendra, his father Vrindavan and his mother Sheela Devi had caused the dowry death of Geeta Bai.

5. On the same day, a post mortem examination was conducted on the body of Geeta Bai and it was opined by PW-7 Dr. Siyaram Sharma (who had conducted the post mortem examination) that she had two injuries on her body, one on the left forearm which was caused by a hard, blunt object while the other injury was on the back of the right hand caused by a tooth bite. Both these injuries were ante mortem. It was also opined that the cause of death was suspected poisoning.[1]

6. On these broad facts, a charge sheet was filed against the three accused persons for offences punishable under Sections 498-A and 304-B of the IPC and in the alternative for an offence punishable under Section 306 of the IPC.

Decision of the Trial Court

7. The Sessions Judge in Sessions Trial No. 328 of 1996 pronounced judgment on 6th June, 2001. It was held, on an examination of the oral and documentary evidence, that there was nothing to doubt the correctness and veracity of the evidence given by Bhika Ram, his wife PW-2 Munni Devi, his brother-in-law PW-3 Munna Lal, the aunt of the deceased being PW-4 Urmila and Bhika Ram's brother PW-5 Ram Narayan.

8. It was held, on the basis of their evidence, that apart from the dowry given to Bhupendra's family at the time of marriage, there was an additional demand for dowry made by Vrindavan to give him one buffalo. This demand was met by Bhika Ram but there was a further demand on 20th August, 1996 for a sum of Rs. 10,000/- which could not be met by him.

9. It was also held that due to the inability of Bhika Ram to

1. Though the viscera of the deceased were sent for chemical examination, the examination report had not been rece[illegible]as examined on 13th August, 1999.

immediately meet the demand for additional dowry, Geeta Bai was subjected to harassment and cruelty for not bringing adequate dowry. She was subjected to beating and was not given proper clothes to wear about which she had even informed Bhika Ram.

10. Finally, it was held that Geeta Bai had died an unnatural death within 7 years of her marriage thereby inviting an adverse presumption of a dowry death against all the accused persons.

11. The Sessions Judge noted that according to the accused, Geeta Bai died due to food poisoning. He noted that there was no evidence brought forth in this regard and that no other member of the family had complained of any food poisoning. It was also noted that Dr. S.C. Aggarwal had stated in his cross examination that the ill effects of food poisoning are not so intense as to cause the death of a person within an hour.

12. On the basis of the evidence on record the Sessions Judge found Bhupendra and Vrindavan guilty of offences punishable under Section 498-A, Section 304-B and Section 306 of the IPC. However, he found that the prosecution had failed to prove that Sheela Devi had humiliated Geeta Bai or treated her with cruelty which resulted in her death within 7 years of her marriage under unnatural circumstances.

Decision of the High Court

13. Feeling aggrieved, by their conviction and the sentence imposed upon them, Vrindavan and Bhupendra filed Criminal Appeal No. 344 of 2001 in the High Court of Madhya Pradesh. By judgment and order dated 26th October, 2007 the High Court upheld the conviction of Bhupendra but held that there was no clinching evidence against Vrindavan and therefore he was entitled to the benefit of doubt and consequent acquittal.

14. The High Court noted the contentions made on behalf of the convicts on the merits of the case, namely, that the

statements of Geeta Bai's parents were not reliable and that she had died as a result of food poisoning. It was also contended that some material witnesses had not been examined by the prosecution.

15. The High Court concluded that virtually from the date of her marriage, Geeta Bai had been treated with cruelty and subjected to harassment for not bringing sufficient dowry. In fact Vrindavan had clearly informed Bhika Ram that Geeta Bai would be killed in case the demand for additional dowry was not fulfilled. Even on 20th August, 1996 Bhupendra had come to Bhika Ram's house and had demanded Rs. 10,000/- cash as additional dowry. On that occasion, when Geeta Bai was going to her matrimonial home along with Bhupendra, she told Bhika Ram that she was being harassed and requested him to fulfill the demand for additional dowry otherwise she would be killed.

16. The High Court found no reason to disbelieve the testimony of Bhika Ram nor did it find any reason to disbelieve the testimony of other witnesses even though they belonged to Bhika Ram's extended family. The High Court also concluded that Geeta Bai was subjected to cruelty and harassment as a result of which she consumed wheat tablets and died an unnatural death. It was also noted that there were ante mortem injuries on the body of Geeta Bai.

17. As regards the failure of the prosecution to record the testimony of some material witnesses, the High Court held that the prosecution had examined witnesses who gave evidence in detail about the cruelty and death of Geeta Bai and no adverse inference could be drawn if additional witnesses were not examined.

18. The High Court found that in so far as the conviction of Bhupendra is concerned, there was adequate evidence to uphold it but the evidence to hold Vrindavan guilty was insufficient and accordingly he was acc

19. Feeling aggrieved by the judgment and order dated 26th October, 2007 passed by the High Court, Bhupendra is in appeal.

Discussion

20. Learned counsel urged two contentions before us, none of which were raised before the Sessions Judge or before the High Court. Frankly, we ought not to entertain these contentions. But, according to learned counsel there is some lack of clarity on the issues raised and it is only because of this that we have entertained his submissions.

21. The first contention was that since there was no chemical examination report of the viscera, it could not be said that Geeta Bai died because of consuming poisonous wheat tablets. The second contention was that a conviction could not be sustained both under Section 304-B of the IPC as well as under Section 306 of the IPC. In this context it was urged that both these sections were mutually exclusive and a conviction can be founded on either of these sections but not both.

Section 304-B of the IPC reads as follows:

> **"304-B. Dowry death.**-(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.
>
> *Explanation*.-For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with

> imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

Section 306 of the IPC reads as follows:

> **"306. Abetment of suicide.**-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Absence of a viscera report

22. Normally, the viscera are preserved and submitted for chemical analysis under the following circumstances: (1) When the investigating officer requests for such an examination; (2) When the medical officer suspects the presence of poison by smell or some other evidence while conducting an autopsy on injury cases; (3) To exclude poisoning, in instances where the cause of death could not be arrived at on post mortem examination and there is no natural disease or injury to account for it, and (4) In decomposed bodies.[2]

23. In *Taiyab Khan and Others v. State of Bihar (Now Jharkhand),* (2005) 13 SCC 455 it was urged that the viscera report would have shown whether the dowry death of the appellant's wife occurred on account of consumption of poison. Since the chemical examination report of the viscera was not received, it could not be said to be a case of death by poisoning. This contention was rejected by holding that factually the case was one of an unnatural death. Therefore, since Section 304-B of the IPC refers to death which occurs otherwise than under normal circumstances, the absence of a viscera report would not make any difference to the fate of the case. In other words, for the purposes of Section 304-B of the IPC the mere fact of an unnatural death is sufficient to invite a

2. Parikhs's Textbooks of Medical Jurisprude... edition, 1985 at page 90.

presumption under Section 113-B of the Evidence Act, 1872.

24. The view expressed in *Taiyab Khan* was reiterated in *Ananda Mohan Sen and Another v. State of West Bengal,* (2007) 10 SCC 774. In that case the exact cause of death could not be stated since the viscera preserved by the autopsy surgeon were to be sent to the chemical expert. In fact, one of the witnesses stated that the unnatural death was due to the effect of poisoning but he would be able to conclusively state the cause of death by poisoning only if he could detect poison in the viscera report. This Court noted that it was not in dispute that the death was an unnatural death and held that the deposition of the witness indicated that the death was due to poisoning. It is only the nature of the poison that could not be identified. In view of this, the conviction of the appellant under Section 306 of the IPC was upheld, there being no charge under Section 304-B of the IPC.

25. In *State of Karnataka v. K. Yarappa Reddy,* (1999) 8 SCC 715 the accused and the victim had coffee at a friend's house. Soon thereafter, the accused launched a murderous assault on the victim with a chopper. It was pleaded by the accused that if they actually had coffee at the friend's house, it would have shown up in the stomach contents. This Court dismissed the contention as "too puerile". It was held that there was no need for the doctor to ascertain whether there was coffee in the stomach contents of the victim. This is because the case was not one of suspected death by poisoning.

26. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under Section 306 of the IPC takes place; in a case of an unnatural death inviting Section 304-B of the IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 of the IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.

27. That apart, we find on facts from the evidence adduced in this case that the cause of death of Geeta Bai was clearly a result of consumption of poison. Dr. Siyaram Sharma had stated in his testimony that the death of the deceased was caused due to suspected poisoning. This particular statement was not challenged by Bhupendra.

28. Similarly, Dr. Aggarwal had mentioned in his intimation on 20th August, 1996 at 10.30 p.m. to Police Station City Kotwali, Morena that Geeta Bai had been brought to the hospital because she had consumed a wheat tablet.[3]

29. Even DW-1 Ram Naresh Sharma, in his statement before the Court stated that the brother-in-law of Bhupendra told him that Geeta Bai had consumed some poisonous pills in the house of the appellant and was admitted in the hospital.

30. All this evidence clearly suggests that there was no doubt that Geeta Bai had died an unnatural death and that her death was due to consumption of some poisonous substance. What exactly is the poison she consumed pales into insignificance even on the facts of the case and the evidence on record.

31. We therefore reject the first contention advanced by learned counsel both in law as well as on merits.

Mutual exclusivity of Sections 304-B and 306 of the IPC

32. The second contention is also without any substance. In *Satvir Singh and Others v. State of Punjab and Another,*

3. A wheat tablet is used by farmers for killing insects in the wheat crop and is said to be commonly found in a village ho

(2001) 8 SCC 633 this Court drew a distinction between Section 306 of the IPC and Section 304-B of the IPC in the following words:-

> "Section 306 IPC when read with Section 113-A of the Evidence Act has only enabled the court to punish a husband or his relative who subjected a woman to cruelty (as envisaged in Section 498-A IPC) if such woman committed suicide within 7 years of her marriage. It is immaterial for Section 306 IPC whether the cruelty or harassment was caused "soon before her death" or earlier. If it was caused "soon before her death" the special provision in Section 304-B IPC would be invocable, otherwise resort can be made to Section 306 IPC."

33. It was held that Section 306 of the IPC is wide enough to take care of an offence under Section 304-B also. However, an offence under Section 304-B of the IPC has been made a far more serious offence with imposition of a minimum period of seven years imprisonment with the sentence going upto imprisonment for life. Considering the gravity of the offence it is treated separately from an offence punishable under Section 306 of the IPC. On this basis, this Court rejected the contention that if a dowry related death is a case of suicide it would not fall within the purview of Section 304-B of the IPC at all. Reliance in this regard was placed on *Shanti and Another v. State of Haryana,* (1991) 1 SCC 371 and *Kans Raj v. State of Punjab and Others,* (2000) 5 SCC 207 wherein this Court held that a suicide is one of the modes of death falling within the ambit of Section 304-B of the IPC.

34. In *Shanti* this Court was concerned with a death that had occurred "otherwise than under normal circumstances" as mentioned in Section 304-B of the IPC. It was held that an unnatural dowry death, whether homicidal or suicidal, would attract Section 304-B of the IPC. This expression was also considered in *Kans Raj* where it was held that it would mean death, not in the normal course, but apparently under suspicious

circumstances, if not caused by burns or bodily injury. In *Kans Raj* the conviction of the husband of the deceased was upheld both for offences punishable under Section 304-B of the IPC and Section 306 of the IPC also.

35. We are, therefore, of the opinion that Section 306 of the IPC is much broader in its application and takes within its fold one aspect of Section 304-B of the IPC. These two sections are not mutually exclusive. If a conviction for causing a suicide is based on Section 304-B of the IPC, it will necessarily attract Section 306 of the IPC. However, the converse is not true.

36. Consequently, we reject the second contention urged by the learned counsel for the appellant.

Conclusion

37. We see no merit in the appeal and it is accordingly dismissed.

38. The bail bond of Bhupendra is cancelled and it is directed that he should be taken into custody to serve out the remainder of his sentence.

R.P. Appeal dismissed.