STATE OF GUJARAT & ANR.

v.

HON'BLE MR. JUSTICE R. A. MEHTA (RETD) & ORS.

(Civil Appeal Nos. 8814-8815 of 2012)

JANUARY 2, 2013

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Gujarat Lokayukta Act, 1986:

s.3 – Appointment of Lokayukta – 'Consultation' – Connotation of – Primacy of opinion of Chief Justice of State – Held: Section 3 must be construed in the light of meaning given by courts to the word 'consultation' so as to give effect to the provisions of the statute to make it operative and workable – Statutory construction of provisions of the Act itself mandates primacy of opinion of the Chief Justice – In a situation where one of the consultees has ***primacy*** *of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean* ***concurrence*** *– Interpretation of statutes – Purposive construction.*

s.3 – Appointment of Lokayukta – Process of consultation – Chief Justice of State recommending the name of a retired Judge of High Court to Governor and Chief Minister – Leader of opposition in the House intimating that he had been consulted by Governor and he had agreed to the appointment – Held: Process of consultation stood complete as 3 out of 4 statutory authorities had approved the name of the respondent and Chief Justice replied to Chief Minister regarding his objections with respect to appointment of respondent as Lokayukta.

s.3 – Appointment of Lokayukta – Held: Chief Justice

recommending only one name, instead of a panel of names, is in consonance with the law laid down by Supreme Court, and there is no cogent reason not to give effect to the said recommendation.

s.3 – Delay in appointment of Lokayukta – Held: Statutory provisions make it mandatory on the part of the State to ensure that the office of Lokayukta is filled up without any delay.

Constitution of India, 1950:

Arts. 163 and 166 – Manner in which Governor acts – Explained – Held: Where Governor acts as the Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the exercise of power by him, must only be upon the aid and advice of the Council of Ministers – Therefore, appointment of Lokayukta can be made by the Governor, as Head of the State, only with aid and advice of Council of Ministers, and not independently as a Statutory Authority

Administrative Law:

Bias – Appointment of Lokayukta – Chief Minister raising objections to recommendation of name of respondent by Chief Justice – Held: An apprehension of bias against a person, does not render such person, ineligible/ disqualified, or unsuitable for the purpose of being appointed to a particular post, or at least for the purpose of which, the writ of quo warranto is maintainable – Objections raised by State Government, are not cogent enough to ignore the primacy of opinion of Chief Justice in this regard – Views of Chief Minister may not resonate with those of the public at large and, thus, such apprehension is misplaced – The reasons discussed by Chief Justice appear to be rational and based on facts – The issue appears to have been dealt with objectively – There is no scope of judicial review so far as the

process of decision making is concerned – Judicial review – Constitution of India, 1950 – Art. 226.

Judgments:

Judgment of High Court – Use of harsh language against authorities – Held: Judges must not use strong and carping language, rather they must act with sobriety, moderation and restraint – In the instant case, the Judge ought to have maintained a calm disposition and should not have used harsh language against a Constitutional authority, i.e. the Chief Minister – Judicial restraint.

SUPREME COURT RULES, 1966:

O.7, r. 2 – Reference to larger bench – Factors to be taken into account – Explained.

WORDS AND PHRASES:

Words 'by and under' – Connotation of.

The appointment of respondent no. 1 as Lokayukta was challenged by the State Government in a writ petition before the High Court. There being difference of opinion between the two Judges of the High Court comprising the Bench, the matter was referred to the third Judge. The writ petition was ultimately dismissed as per majority opinion.

In the instant appeal filed by the State Government, it was contended for the appellants that the Governor was bound to act only in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister; that the consultation by the Governor with the Attorney General of India being alien to the Gujarat Lokayukta Act, 1986, runs contrary to the statutory provisions of the said Act; that the Chief Justice ought to have recommended a panel of names for consideration by the other

consultees, i.e., the Chief Minister and Leader of Opposition, and that he could not recommend only one name, as the same would cause the entire process to fall within the ambit of concurrence, rather than that of consultation; that the Chief Justice ought to have taken into consideration, the objections raised by the appellants, qua the recommendation made by the Chief Justice with respect to the appointment of respondent no. 1; and that the third Judge made unwarranted and uncalled for remarks in carping language in connection with the Chief Minister which tantamounted to resounding strictures, and the same required to be expunged.

Dismissing the appeals, the Court

HELD: 1.1. These appeals raise legal issues of great public importance, such as, what is the meaning of the term 'consultation' contained in S.3 of the Gujarat Lokayukta Act, 1986 (the Act), and also whether the opinion of the Chief Justice has primacy with respect to the appointment of the Lokayukta. However, a two-Judges bench in the case of *Suraz Trust India* has entertained the questions raised while doubting the correctness of the larger bench decisions and the same is pending consideration before a three-Judges bench. [para 5] [26-G; 27-B-C]

Suraz Trust India v. Union of India & Anr. **(2011) 4 SCALE 252 – referred to.**

1.2. It is, evident that before making a reference to a larger Bench, the Court must reach a conclusion regarding the correctness of the judgment delivered by it previously, and adjudge the effect of any error therein, upon the public, what inconvenience, hardship or mischief it would cause, and what the exact nature of the infirmity or error that warrants a review of such earlier

judgments. In the instant case, there is no such compelling circumstance that may warrant a review, and thus, taking into consideration the facts of the case, it cannot be said that the matter requires a reference to a larger Bench. [para 7] [28-F-H]

The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income-tax, Bombay North, Ahmedabad **1965 SCR 908 = AIR 1965 SC 1636 – relied on.**

2.1. In *Gujarat Revenue Tribunal Bar Association's case*,* **this Court has held that, the object of consultation is to render its process meaningful, so that it may serve its intended purpose. The meaning of consultation varies from case to case, depending upon its fact-situation and the context of the statute, as well as the object it seeks to achieve. In a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence. The court must examine the fact-situation in a given case to determine whether the process of consultation, as required under the particular situation did in fact, stand complete. [para 9 and 16] [31-C; 36-A-C]**

State of Gujarat & Anr. v. Gujarat Revenue Tribunal Bar Association & Anr*., **JT 2012 (10) SC 422; *UOI v. Sankalchand Himatlal Sheth & Anr*. **1978 (1) SCR 423 = AIR 1977 SC 2328;** *State of Kerala v. Smt. A. Lakshmikutty & Ors.* **1987 (1) SCR 136 = AIR 1987 SC 331;** *High Court of Judicature for Rajasthan v. P.P Singh & Anr*., **2003 (1) SCR 593 = AIR 2003 SC 1029;** *UOI & Ors. v. Kali Dass Batish & Anr*., **2006 (1) SCR 261 = AIR 2006 SC 789;** *Andhra Bank v. Andhra Bank Officers & Anr.*, **AIR 2008 SC 2936; and** *Union of India v. R. Gandhi, President, Madras Bar Association* **2010 (6) SCR 857 = (2010) 11 SCC 1;** *Chandramouleshwar Prasad v. The Patna High Court & Ors*., **1970 (2) SCR 666 =AIR 1970 SC 370;** *Centre for PIL & Anr. v. Union of India & Anr*., **2011**

(4) SCR 445 = AIR 2011 SC 1267; *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak & Ors*., **AIR 2002 SC 3578;** *Ram Chandra Nayak v. State of Orissa* **AIR 2002 Ori 25;** *Indian Administrative Service (S.C.S.) Association, U.P. & Ors. v. Union of India & Ors.,* **1992 (2) Suppl. SCR 389 = (1993) Supp.1 SCC 730 - referred to**

2.2. The statutory construction of the provisions of the Gujarat Lokayukta Act, 1986 itself mandates the primacy of the opinion of the Chief Justice for the simple reason that S.3 provides for the consultation with the Chief Justice. The purpose of giving primacy of opinion to the Chief Justice is for the reason that he enjoys an independent Constitutional status, and also because the person eligible to be appointed as Lokayukta is from among the retired Judges of the High Court and the Chief Justice is, therefore, the best person to judge their suitability for the post. Besides, s. 6 provides for the removal of Lokayukta, and lays down the procedure for such removal. The same can be done only on proven misconduct in an inquiry conducted by the Chief Justice/ his nominee with respect to specific charges. Section 8(3) further provides for recusal of the Lokayukta in a matter where a public functionary has raised the objection of bias, and whether such apprehension of bias actually exists or not, shall be determined in accordance with the opinion of the Chief Justice. [para 56] [61-A-E]

N. Kannadasan v. Ajoy Khose & Ors. **2009 (7) SCR 668 = (2009) 7 SCC 1;** *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana & Ors.,* **1996 (3) SCR 474 = AIR 1996 SC 1308; and** *Ashok Tanwar & Anr. v. State of H.P. & Ors.,* **2004 (6) Suppl. SCR 1065 = AIR 2005 SC 614;** *Supreme Court Advocates-on-Record Association & Anr. v. Union of India*, **1993 (2) Suppl. SCR 659 = AIR 1994 SC 268 – referred to.**

2.3. The doctrine of purposive construction may be

taken recourse to for the purpose of giving full effect to statutory provisions, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute unworkable. In the process of statutory construction, the court must construe the Act before it, bearing in mind the legal maxim *ut res magis valeat quam pereat* **– which means – it is better for a thing to have effect than for it to be made void, i.e., a statute must be construed in such a manner, so as to make it workable. The court must give effect to the purpose and object of the Act for the reason that legislature is presumed to have enacted a reasonable statute. [para 66 and 67] [65-B-C-F-G; 66-E]**

M. Pentiah & Ors. v. Muddala Veeramallappa & Ors. **1961 SCR 295 = AIR 1961 SC 1107;** *S.P. Jain v. Krishna Mohan Gupta & Ors.***, 1987 (1) SCR 411 = AIR 1987 SC 222;** *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors*., **1987 (2) SCR 1 = AIR 1987 SC 1023;** *Tinsukhia Electric Supply Co. Ltd. v. State of Assam & Ors*., **1989 (2) SCR 544 = AIR 1990 SC 123;** *UCO Bank & Anr. v. Rajinder Lal Capoor* **2008 (5) SCR 775 = (2008) 5 SCC 257; and** *Grid Corporation of Orissa Limited & Ors. v. Eastern Metals and Ferro Alloys & Ors*., **2010 (10) SCR 779 = (2011) 11 SCC 334– referred to.**

Nokes v. Doncaster Amalgamated Collieries Ltd., **(1940) 3 All E.R. 549;** *Whitney v. Inland Revenue Commissioner,* **1926 AC 37 – referred to**

2.4. It is evident from the Preamble of the Act, 1986 that the Lokayukta has two duties, firstly, to protect honest public functionaries from false complaints and allegations, and secondly, to investigate charges of corruption filed against public functionaries. The office of the Lokayukta is very significant for the people of the

State, as it provides for a mechanism through which, the people of the State can get their grievances heard and redressed against maladministration. Thus, the Lokayukta Act may be termed as a pro-people Act. If a political party in power succeeds in its attempt to appoint a pliant Lokayukta, the same would be disastrous and would render the Act otiose. A pliant Lokayukta, therefore, would render the Act completely meaningless/ ineffective, as he would no doubt reject complaints u/s 7 of the Act, at the instance of the government, taking the prima facie view that there is no substance in the complaint, and further, he may also make a suggestion u/s 20 of the said Act, to exclude a public functionary, from the purview of the Act, which may include the Chief Minister himself. Thus, s.3 of the Act must be construed in light of the meaning given by the courts to the word 'consultation', so as to give effect to the provisions of the statute to make it operative and workable. [para 8, 61 and 69] [29-B; 61-C-D-E; 67-A-C]

Vineet Narain & Ors. v. Union of India & Anr., **1997 (6) Suppl. SCR 595 = AIR 1998 SC 889;** *State of Madhya Pradesh & Ors. v. Shri Ram Singh* **2000 (1) SCR 579 = AIR 2000 SC 870;** *State of Maharashtra thr. CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar* **JT 2012 (10) SC 446; and** *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr*. **2012 (3) SCR 52 = AIR 2012 SC 1185;** *re: Special Courts Bill*, **1978, AIR 1979 SC 478 – referred to.**

2.5. The Gujarat Lokayukta Act, 1986 stipulates that the institution of Lokayukta must be demonstrably independent and impartial. Proviso to sub-s. (1) of s.3 envisages the appointment of the Lokayukta when the Legislative Assembly has been dissolved, or when a Proclamation of Emergency under Art. 356 of the Constitution is in operation, upon consultation with the Chief Justice of the State and the Leader of Opposition. However, such consultation with the Leader of

Opposition also stands dispensed with, if the Assembly is dissolved or suspended. Thus, it is evident that the Governor can appoint a Lokayukta, even when there is no Council of Ministers in existence. [para 38] [52-C-D-F]

2.6. The facts of the instant case make it crystal clear that the process of consultation stood complete as on 2.8.2011, as 3 out of 4 statutory authorities had approved the name of the respondent. The Chief Minister had certain objections regarding the appointment of respondent No.1, as Lokayukta, and his objections were duly considered by the Chief Justice, after which, it was also explained to the Chief Minister that the said objections raised by him, were in fact, completely irrelevant, or rather, not factually correct. This Court has reached the inescapable conclusion that none of the objections raised by the Chief Minister could render respondent no.1 ineligible/ disqualified or unsuitable for appointment to the post of Lokayukta. [para 45, 46] [56-D-G; 57-C-D]

2.7. As the Chief Justice has primacy of opinion in the matter, the non-acceptance of such recommendations, by the Chief Minister, remains insignificant. Thus, it clearly emerges that in the instant case, the Governor, u/s 3 of the Act, 1986 has acted upon the aid and advice of the Council of Ministers. Section 3 of the Act, 1986, does not envisage unanimity in the consultative process. In such a situation, the appointment of respondent no.1 cannot be held to be illegal. Thus, there is no scope of judicial review so far as the process of decision making in this case is concerned. [para 46, 57 and 74] [57-E; 61-G; 71-E]

2.8. The recommendation of the Chief Justice suggesting only one name, instead of a panel of names, is in consonance with the law laid down by this Court, and there is no cogent reason not to give effect to the

said recommendation. If the Chief Justice sends a panel of names, and the Governor selects one from them, then it would obviously become the primacy of the Governor and would not remain the primacy of the Chief Justice, which is the requirement under the law. [para 11 and 74] [33-B; 70-H; 71-A]

N. Kannadasan v. Ajoy Khose & Ors. **2009 (7) SCR 668 = (2009) 7 SCC 1;** *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana & Ors.,* **1996 (3) SCR 474 = AIR 1996 SC 1308; and** *Ashok Tanwar & Anr. v. State of H.P. & Ors.* **2004 (6) Suppl. SCR 1065 = AIR 2005 SC 614 – referred to.**

2.9. The statutory provisions make it mandatory on the part of the State to ensure that the office of the Lokayukta is filled up without any delay, as the Act provides for such filling up, even when the Council of Ministers is not in existence. In the instant case, admittedly, the office of the Lokayukta has been lying vacant for a period of more than 9 years i.e. from 24.11.2003 till date. [para 38] [52-F-G]

3.1. Absence of bias can be defined as the total absence of any pre-conceived notions in the mind of the Authority/Judge, and in the absence of such a situation, it is impossible to expect a fair deal/trial and no one would therefore, see any point in holding/participating in one, as it would serve no purpose. The Judge/Authority must be able to think dispassionately, and sub-merge any private feelings with respect to each aspect of the case. The apprehension of bias must be reasonable, i.e., which a reasonable person would be likely to entertain. [para 34] [49-D-F]

3.2. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim - *nemo debet esse judex in causa propria sua.* **It applies only when**

the interest attributed to an individual is such, so as to tempt him to make a decision in favour of, or to further, his own cause. While considering the issue of bias, the Court must bear in mind the impression which the public at large may have, and not that of an individual. [para 34] [49-F; 50-C]

S. Parthasarathi v. State of Andhra Pradesh, **1974 (1) SCR 697 = AIR 1973 SC 2701;** *State of Punjab v. V.K. Khanna & Ors.,* **2000 (5) Suppl. SCR 200 = AIR 2001 SC 343;** *N.K. Bajpai v. Union of India & Anr.,* **2012 (2) SCR 433 = (2012) 4 SCC 653; and** State of *Punjab v. Davinder Pal Singh Bhullar & Ors. etc.* **2011 SCR 540 = AIR 2012 SC 364 – referred to**

3.3. There are sufficient safeguards in the Statute itself, to take care of the pre-conceived notions in the mind, or the bias of the Lokayukta, and so far as the suitability of the person to be appointed as Lokayukta is concerned, the same is to be examined, taking into consideration the interests of the people at large, and not those of any individual. [para 74] [71-C-D]

3.4. It is a settled legal proposition that a judgment of this Court is binding, particularly, when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. [para 35] [50-F-G]

Smt. Somavanti & Ors. v. The State of Punjab & Ors., **1963 SCR 774 = AIR 1963 SC 151;** *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur,* **AIR 1970 SC 1002;** *Ambika Prasad Mishra v. State of U.P. & Ors.* **1980 (3) SCR 1159 = AIR 1980 SC 1762; and** *Director of*

Settlements, A.P. & Ors. v. M.R. Apparao & Anr., **2002 (2) SCR 661 = AIR 2002 SC 1598;** *Bidi Supply Co. v. Union of India & Ors.* **1956 SCR 267 = AIR 1956 SC 479 – referred to**

4.1. Under the scheme of our Constitution, the Governor is synonymous with the State Government, and can take an independent decision upon his/her own discretion only when he/she acts as a statutory authority under a particular Act, or under the exception(s), provided in the Constitution itself. Where the Governor acts as the Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the exercise of power by him, must only be upon the aid and advice of the Council of Ministers, for the reason that the Governor, being the custodian of all executive and other powers under various provisions of the Constitution, is required to exercise his formal Constitutional powers, only upon, and in accordance with, the aid and advice of his Council of Ministers. He is, therefore, bound to act under the Rules of Business framed under Art. 166 (3) of the Constitution. The expression, 'Business of the Government of India' in clause (3) of Art. 77, and the expression, 'Business of the Government of the State' in clause (3) of Art. 166, include all executive business. In the of Rules of Executive Business, the topic involving the appointment of a Lokayukta, must be brought before the Council of Ministers. [para 21, 22, 25 and 74] [40-F-H; 41-A-E; 44-H; 45-A; 70-D-E]

Samsher Singh v. State of Punjab & Anr., **1975 (1) SCR 814 = AIR 1974 SC 2192;** *Brundaban Nayak v. Election Commission of India & Anr.*, **1965 SCR 53 = AIR 1965 SC 1892;** *Election Commission of India & Anr. v. Dr. Subramanian Swamy & Anr.*, **1996 (1) Suppl. SCR 637 = AIR 1996 SC 1810;** *Pu Myllai Hlychho & Ors. v. State of Mizoram & Ors.*, **2005 (1) SCR 279 = AIR 2005 SC 1537;**

Ram Nagina Singh & Ors. v. S.V. Sohni & Ors., **AIR 1976 Pat 36;** *Ram Nagina Singh & Ors. v. S.V. Sohni & Ors.*, **AIR 1976 Pat 36;** *Bhuri Nath & Ors. v. State of J & K & Ors.,* **1997 (1) SCR 138 = AIR 1997 SC 1711 – referred to**

4.2. While Art. 163 provides that there shall be a Council of Ministers with the Chief Minister as the head, to aid and advise the Governor, in the exercise of his functions, an exception has been carved out with respect to situations wherein, he is, by or under the Constitution, required to perform certain functions by exercising his own discretion. The exceptions carved out in the main clause of Art. 163(1), permit the legislature to entrust certain functions to the Governor to be performed by him, either in his discretion, or in consultation with other authorities, independent of the Council of Ministers. The meaning of the words 'by or under' is well settled. Whenever the Constitution intends to confer discretionary powers upon the Governor, or to permit him to exercise his individual judgment, it has done so expressly. [Arts. 200; 239(2); 371-A(1)(b); 371-A(1)(a); 371-A(2)(b); and 371-A(2)(f), VI Schedule, Para 9(2) (and VI Schedule, Para 18(3), until omitted with effect from January 21, 1972]. [para 17, 26 and 28] [37-C-D; 45-D-E; 46-E]

Dr. Indramani Pyarelal Gupta & Ors. v. W.R. Natu & Ors., **1963 SCR 721 = AIR 1963 SC 274 – relied on**

Chandra Mohan v. State of U.P. & Ors., **AIR 1966 SC 1987; and** *Rajendra Singh Verma (dead) thr. Lrs. & Ors. v. Lt. Governor (NCT of Delhi) & Ors.* **2011 (12) SCR 496 = (2011) 10 SCC 1;** *Hardwari Lal v. G.D. Tapase & Ors*., **AIR 1982 P & H 439;** *Vice-Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors.,* **1996 (10) Suppl. SCR 175 = (1997) 10 SCC 264;** *M.P. Special Police Establishment v. State of M.P. & Ors*., **2004 (5) Suppl. SCR 1020 = AIR 2005 SC 325;** *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.,* **1983 (1) SCR 8 = AIR**

1982 SC 1249; *Rameshwar Prasad (VI) v. Union of India* **2006 (1) SCR 562 = (2006) 2 SCC 1 – referred to.**

4.3. The judgments of this Court do not leave any room for doubt with respect to the fact that, when the Governor does not act as a statutory authority, but as the Head of the State, being Head of the executive and appoints someone under his seal and signature, he is bound to act upon the aid and advice of the Council of Ministers. Thus, the law as evolved and applicable can be summarised to the effect that the Governor is bound to act on the aid and advice of the Council of Ministers, unless he acts as, "persona designata" i.e. *"eo nomine",* **under a particular statute, or acts in his own discretion under the exceptions carved out by the Constitution itself. Therefore, the appointment of the Lokayukta can be made by the Governor, as the Head of the State, only with the aid and advice of the Council of Ministers, and not independently as a Statutory Authority. [para 33,42 and 74] [49-C; 54-C-D; 70-E-F]**

State of Maharashtra v. Ramdas Shrinivas Nayak & Anr., **1983 (1) SCR 8 = AIR 1982 SC 1249;** *Narmada Bachao Andolan v. State of Madhya Pradesh* **2011 (12) SCR 84 = AIR 2011 SC 3199;** *Maru Ram, Bhiwana Ram etc. etc. v. Union of India & Ors. etc.,* **AIR 1980 SC 2147;** *State of U.P. & Ors. etc. v. Pradhan Sangh Kshettra Samiti & Ors. etc.,* **1995 (2) SCR 1015 = AIR 1995 SC 1512;** *S.R. Chaudhuri v. State of Punjab & Ors.,* **2001 (1) Suppl. SCR 621 = AIR 2001 SC 2707 – referred to.**

4.4. In the instant case, the Governor has misjudged her role and has insisted that under the Act of 1986, the Council of Ministers has no role to play in the appointment of the Lokayukta, and that she could therefore, fill it up in consultation with the Chief Justice of the High Court and the Leader of Opposition. Such attitude is not in conformity, or in consonance with the

democratic set up of government envisaged in our Constitution. The Governor consulted the Attorney General of India for legal advice, and communicated with the Chief Justice of the High Court directly, without taking into confidence, the Council of Ministers. In this respect, she was wrongly advised to the effect that she had to act as a statutory authority and not as the Head of the State. However, it is evident that the Chief Minister had full information and was in receipt of all communications from the Chief Justice, whose opinion is to be given primacy as regards such matters, and can only be overlooked, for cogent reasons. [para 74] [70-D-H]

5.1. Courts should not make any undeserving or derogatory remarks against any person, unless the same are necessary for the purpose of deciding the issue involved in a given case. Even where criticism is justified, the court must not use intemperate language and must maintain judicial decorum at all times. Maintaining judicial restraint and discipline are necessary for the orderly administration of justice. Therefore, while formation and expression of honest opinion and acting thereon, is a necessity to decide a case, courts must always act within the four-corners of the law. [para 71 and 73]

State of M.P. & Ors. etc.etc. v. Nandlal Jaiswal & Ors. etc.etc., **1987 (1) SCR 1 = AIR 1987 SC 251;** *A.M. Mathur v. Pramod Kumar Gupta*, **1990 (2) SCR 110 = AIR 1990 SC 1737;** *State of Bihar & Anr. v. Nilmani Sahu & Anr.,* (1999) 9 SCC 211; In *the matter of: "K" a Judicial Officer,* **2001 (1) SCR 959 = AIR 2001 SC 972; In *the matter of:* *"RV", a Judicial Officer*, 2004 (5) Suppl. SCR 129 = AIR 2005 SC 1441; and** *Amar Pal Singh v. State of U.P. & Anr.,* **AIR 2012 SC 1995 – referred to.**

5.2. In the instant case, it appears that the third Judge of the High Court has used harsh language against the Chief Minister, after examining the various letters written

by him. At an earlier stage, the Chief Minister had taken a stand to the effect that a retired Judge, who has been given some other assignment, should not be considered for appointment to the post of Lokayukta. However, with respect to the case of another retired Judge, he seems to have taken an altogether different view. This Court is of the view that the Judge, even if he did not approve of the attitude adopted by the Chief Minister, ought to have maintained a calm disposition and should not have used such harsh language against a Constitutional authority, i.e. Chief Minister. [para 73] [67-G; 68-B-C; 69-G-H; 70-A]

Case Law Reference:

(2011) 4 SCALE 252	referred to	para 5
1965 SCR 908	relied on	para 6
JT 2012 (10) SC 422	referred to	para 9
1978 (1) SCR 423	referred to	para 9
1987 (1) SCR 136	referred to	para 9
2003 (1) SCR 593	referred to	para 9
2006 (1) SCR 261	referred to	para 9
AIR 2008 SC 2936	referred to	para 9
2010 (6) SCR 857	referred to	para 9
1970 (2) SCR 666	referred to	para 9
2009 (7) SCR 668	referred to	para 9
2010 (6) SCR 857	referred to	para 9
1970 (2) SCR 666	referred to	para 10
2009 (7) SCR 668	referred to	para 11
1996 (3) SCR 474	referred to	para 11
2004 (6) Suppl. SCR 1065	referred to	para 11

2011 (4) SCR 445	**referred to**	**para 13**
AIR 2002 SC 3578	**referred to**	**para 14**
AIR 2002 Ori 25	**referred to**	**para 14**
1992 (2) Suppl. SCR 389	**referred to**	**para 15**
1975 (1) SCR 814	**referred to**	**para 17**
2004 (5) Suppl. SCR 1020 8	**referred to**	**para 18**
1983 (1) SCR 8	**referred to**	**para 18**
1965 SCR 53	**referred to**	**para 19**
1996 (1) Suppl. SCR 637	**referred to**	**para 19**
1993 (2) Suppl. SCR 659	**referred to**	**para 20**
2005 (1) SCR 279	**referred to**	**para 21**
AIR 1976 Pat 36	**referred to**	**para 22**
AIR 1982 P & H 439	**referred to**	**para 23**
1996 (10) Suppl. SCR 175	**referred to**	**para 24**
1997 (1) SCR 138	**referred to**	**para 25**
2011 (12) SCR 84	**referred to**	**para 25**
AIR 1980 SC 2147	**referred to**	**para 25**
1963 SCR 721	**relied on**	**para 26**
2006 (1) SCR 562	**referred to**	**para 27**
1966 AIR 1987	**referred to**	**para 28**
2011 (12) SCR 496	**referred to**	**para 28**
1995 (2) SCR 1015	**referred to**	**para 30**
2001 (1) Suppl. SCR 621	**referred to**	**para 31**
1974 (1) SCR 697	**referred to**	**para 34**

2000 (5) Suppl. SCR 200	**referred to**	**para 34**
2012 (2) SCR 433	**referred to**	**para 34**
2011 SCR 540	**referred to**	**para 34**
1963 SCR 774	**referred to**	**para 35**
AIR 1970 SC 1002	**referred to**	**para 35**
1980 (3) SCR 1159	**referred to**	**para 35**
2002 (2) SCR 661	**referred to**	**para 35**
1956 SCR 267	**referred to**	**para 55**
1997 (6) Suppl. SCR 595	**referred to**	**para 62**
2000 (1) SCR 579	**referred to**	**para 62**
2012 (10) JT 446	**referred to**	**para 62**
2012 (3) SCR 52	**referred to**	**para 62**
AIR 1979 SC 478	**referred to**	**para 64**
(1940) 3 All E.R. 549	**referred to**	**para 66**
1926 AC 37	**referred to**	**para 66**
1961 SCR 295	**referred to**	**para 67**
1987 (1) SCR 411	**referred to**	**para 67**
1987 (2) SCR 1	**referred to**	**para 67**
1989 (2) SCR 544	**referred to**	**para 67**
2008 (5) SCR 775	**referred to**	**para 67**
2010 (10) SCR 779	**referred to**	**para 67**
1987 (1) SCR 1	**referred to**	**para 73**
1990 (2) SCR 110	**referred to**	**para 73**

(1999) 9 SCC 211	**referred to**	**para 73**
2001 (1) SCR 959	**referred to**	**para 73**
2004 (5) Suppl. SCR 129	**referred to**	**para 73**
2012 (6) SCC 491	**referred to**	**para 73**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8814-8815 of 2012 etc.

From the Judgment & Order dated 10.10.2011 and 18.01.2012 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 12632 of 2011.

WITH

SLP (C) Nos. 2625-2626 & 2687-88 of 2012

Rohintion F. Nariman, S.G., K.K. Venugopal, Mukul Rohtagi, Prakash Jani, Soli J. Sorabjee, Yatin Oza, Dr. Rajeev Dhawan, Mihir J. Thakore, Dr. A. M. Singhvi, Huzefa Ahmadi, Satya Pal Jain, P.P. Rao, Kamal Trivedi, A.G., Sangeeta Vishen, E.C. Agrawala, Mahesh Agarwal, Ankur Saigal, S. Udaya Kumar Sagar, Bina Madhavan, Praseena E. Joseph, Shaunak Kahsypa, Mehernaz Mehta, Unmesh Shukla, Srushti Tula (for M/s. Lawyer's Knit & Co.) Sanjay R. Hegde, Amit M. Panchal, S. Nitin, Anil Kumar Mishra-I, D.N. Ray, Lokesh K. Choudhary, Sumita Ray, Sanjay Kapur, Anmol Chandan, Priyanka Das, Ritin Rai, Ashmi Mohan, Kamini Jaiswal, Ezaz Maqbool, Mrigank Prabhakar, Sakashi Banga, Aniruddha P. Mayee, Charudatta Mahindrakar, Pawan Upadhyay, Sarvjit Partap Singh, Anisha Upadhyay, Sharmila Upadhyay, Naresh K. Sharma, Abhijit P. Medh, Rajiv Nanda, Padma Lakshmi Nigam for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the judgments and orders of the High Court

of Gujarat at Ahmedabad in Special Civil Application No. 12632 of 2011, dated 10.10.2011 and 18.1.2012.

2. The facts and circumstances giving rise to these appeals are as under:

A. The legislature of Gujarat enacted the Gujarat Lokayukta Act 1986 (hereinafter referred to as the, 'Act, 1986'), which provided for the appointment of a Lokayukta, who must be a retired Judge of the High Court. The said statute, was given effect to, and various Lokayuktas were appointed over time, by following the procedure prescribed under the Act, 1986, for the said purpose, i.e., the Chief Minister of Gujarat, upon consultation with the Chief Justice of the Gujarat High Court, and the Leader of Opposition in the House, would make a recommendation to the Governor, on the basis of which, the Governor would then issue requisite letters of appointment.

B. The post of the Lokayukta became vacant on 24.11.2003, upon the resignation of Justice S.M. Soni. The Chief Minister, after the expiry of about three years, wrote a letter dated 1.8.2006 to the Chief Justice, suggesting the name of Justice K.R. Vyas for appointment to the post of Lokayukta. The name of Justice K.R. Vyas was approved by the Chief Justice, vide letter dated 7.8.2006, and the Chief Minister, after completing other required formalities, forwarded the said name, to the Governor on 10.8.2006, seeking his approval, as regards appointment. The file remained pending for a period of 3 years, and was returned on 10.9.2009, as Justice K.R. Vyas had been appointed as Chairman of the Maharashtra State Human Rights Commission, on 21.8.2007.

C. On 29.12.2009, Private Secretary, to the Governor of Gujarat, addressed a letter to the Registrar General of the High Court of Gujarat, requesting that a panel of names be suggested by the Chief Justice, so that the same could be considered by the Governor, with respect to their possible appointment, to the post of Lokayukta.

D. The Chief Minister, also wrote a letter dated 8.2.2010, to the Chief Justice, requesting him to send a panel of names of three retired Judges for the purpose of consideration of one of them to be finally appointed as Lokayukta. The Chief Justice, vide letter dated 24.2.2010, suggested the names of four retired Judges, taking care to stipulate that the said names were not arranged in any order of preference, and that any one of them, could thus, be chosen by the Governor.

E. The Chief Minister after receiving the aforementioned letter, made an attempt to consult the Leader of Opposition, regarding the said names by writing a letter dated 2.3.2010, who vide letter dated 3.3.2010, was of the opinion that under the Act, 1986 the Chief Minister, had no right to embark upon any consultation, with respect to the appointment of the Lokayukta. There was some further correspondence of a similar nature between them on this issue.

F. The Leader of Opposition, vide letter dated 4.3.2010, pointed out to the Chief Minister, that the process of consultation regarding the appointment of the Lokayukta, had already been initiated by the Governor directly, and thus, the Chief Minister should not attempt to interfere with the same. The Leader of Opposition did not attend any meeting held in this regard, and the Governor also did not think it proper to indulge in any further consultation with the Chief Minister with respect to the said issue.

G. In the meantime, as has been mentioned above, not only were the meetings called by the Chief Minister, not attended by the Leader of Opposition, but it also appears that simultaneously, the Council of Ministers had already considered the names as recommended by the Chief Justice, and vide letter dated 24.2.2010, had proceeded to approve the name of Justice J.R. Vora (Retd.), for appointment to the post of Lokayukta, and the file was sent to the Governor for approval and consequential appointment. However, no orders were passed by the Governor.

H. The Governor instead sought the opinion of the Attorney General of India, as regards the nature of the process of consultation, required to be adopted in the matter of appointment of the Lokayukta. The Governor also addressed a letter to the Chief Justice dated 23.4.2010, soliciting his opinion as to who would be a better choice for appointment to the post of Lokayukta, between Justice R.P. Dholakia (Retd.), who was the President of the Gujarat Consumer Disputes Redressal Commission and Justice J.R. Vora (Retd.), from among the panel of names that had been sent by the Chief Justice, vide letter dated 24.2.2010.

I. The Attorney General in his opinion dated 23.4.2010, stated that the Chief Justice ought to have suggested only one name, and that he could not have required to recommend a panel of names. The Chief Justice on 27.4.2010, wrote to the Governor stating that, in his opinion, Justice R.P. Dholakia (Retd.) would be the more appropriate choice. However, despite this, the Governor did not issue a letter of appointment to anyone, and requested the Chief Justice vide letter dated 3.5.2010, to recommend only one name, as opined by the Attorney General, vide his letter dated 23.4.2010.

J. In response to the suggestion made by the Governor, the Chief Justice wrote to the Governor on 29.12.2010, recommending the name of Justice S.D. Dave (Retd.), for appointment to the post of Lokayukta. The Chief Justice also wrote a letter to the Chief Minister on 31.12.2010, recommending the name of Justice S.D. Dave, in place of that of Justice J.R. Vora, as Justice J.R. Vora had already been appointed elsewhere.

K. The Chief Minister wrote a letter dated 21.2.2011, to the Chief Justice by way of which, he re-iterated the request of the State Government, to appoint Justice J.R. Vora as Lokayukta, owing to the fact that the process of consultation was already complete and further that, Justice J.R. Vora had expressed his willingness to accept his appointment to the post

of Lokayukta, if the same was offered to him, and in this regard, the Chief Minister even wrote a second letter, dated 4.5.2011, to the Chief Justice, requesting him to reconsider the said issue.

L. The Chief Justice, vide letter dated 7.6.2011, made a suggestion to the Governor to the effect that, Justice R.A. Mehta (Retd.) be appointed as Lokayukta, and the said recommendation was also sent by the Chief Justice, to the Chief Minister. The Governor, on the same day, i.e. 7.6.2011, requested the Chief Minister to expedite the process for the appointment of Justice R.A. Mehta, as Lokayukta.

M. The Chief Minister, vide letter dated 16.6.2011, requested the Chief Justice to consider certain objections raised by him against the appointment of Justice R.A. Mehta as Lokayukta, which included among other things, the fact that Justice R.A. Mehta was above 75 years of age, as also **his association with NGOs and social activist groups, known for their antagonism against the State Government;** and further, that he possessed a specific biased disposition, against the Government. To support the apprehensions raised by him, the Chief Minister annexed along with his letter, 11 clippings of newspaper.

N. The Chief Justice, vide letter dated 2.8.2011, replied to the aforementioned letter of the Chief Minister, pointing out that Justice R.A. Mehta was not ineligible for appointment to the post of Lokayukta on the basis of any of the points raised by the Chief Minister, and that he was a man of great repute and high integrity. Justice R.A. Mehta had never made any public statement detrimental to the society as a whole, nor had he ever shown any bias either with respect to, or against any government, and finally, that he was not a member of any NGO. Even otherwise, membership of a person of an NGO, or his social activities, cannot be treated as a basis for his disqualification, for being appointed to the post of Lokayukta.

O. The Governor, vide letter dated 16.8.2011, requested the Chief Minister to process the appointment of Justice R.A. Mehta as Lokayukta. The Leader of Opposition also wrote a letter dated 16.8.2011, to the Chief Minister, informing him of the fact that he had already been consulted by the Governor, as regards the said issue, and that in connection with the same, he had agreed to the appointment of Justice R.A. Mehta as Lokayukta. At this juncture, the Governor issued the requisite warrant from her office on 25.8.2011, appointing Justice R.A. Mehta as Lokayukta.

P. The Gujarat Lokayukta (Amendment) Bill, 2011 was passed by the Legislative Assembly of the State of Gujarat on 30.3.2011, which primarily sought to widen the definition of the term, "public functionaries", contained in Section 2(7) of the Act, 1986, by including a large number of other functionaries, within its purview, such as Mayors, Deputy Mayors of the Municipal Corporation, the President or the Vice-President of Municipalities, the Sarpanch and Up-Sarpanch of Village Panchayats etc. The Governor returned the said Bill for reconsideration, as she realised that the Lokayukta, however competent and efficient he may be, would be unable to look into complaints of irregularities made against such a large number of persons.

Q. The Governor also refused to issue an Ordinance to amend the Act, 1986, wherein Section 3 was to be amended, which would have changed the composition of the consultees as contemplated under the Act, 1986, for the purpose of deciding upon the appointment of the Lokayukta, on the ground that there was no grave urgency for bringing in such an Ordinance, all of a sudden.

R. The State of Gujarat filed writ petition No. 12632 of 2011 dated 5.9.2011, in the High Court of Gujarat, challenging the appointment of Justice R.A. Mehta to the post of Lokayukta. The matter was decided vide judgment and order dated 10.10.2011, wherein the two Judges while hearing the case

differed in their views to a certain extent. Accordingly, the matter was then referred to a third Judge, who delivered his judgment dated 18.1.2012, dismissing the said writ petition.

Hence, these appeals.

RIVAL CONTENTIONS:

3. Mr. K.K. Venugopal, Mr. Soli Sorabjee, Dr. Rajeev Dhavan, Mr. Mihir J. Thakore, and Mr. Yatin Oza, learned senior counsel appearing for the appellants, have submitted that the Governor, being a titular head of State, is bound to act only in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister, and that the actions of the Governor, indulging in correspondence with, and issuing directions to other statutory authorities, are contrary to the principles of Parliamentary democracy, and thus, the Governor ought not to have corresponded with, and consulted the Chief Justice of the High Court of Gujarat directly. It was also contended that, the Chief Justice ought to have recommended, a **panel of names** for consideration by the other consultees, i.e., the Chief Minister and Leader of Opposition, and that he could not recommend **only one name**, as the same would cause the entire process to fall within the ambit of **concurrence**, rather than that of **consultation**. Furthermore, consultation by the Governor with the Attorney General of India, who is alien to the Act, 1986, runs contrary to the statutory provisions of the said Act. The Governor is not acting merely as a statutory authority, but as the Head of the State, and hence, the entire procedure adopted by her is in clear contravention of the actual procedure, contemplated by the statute, for the purpose of selection of the Lokayukta. The Chief Justice ought to have taken into consideration, the objections raised by the appellants, qua the recommendation made by the Chief Justice with respect to the appointment of respondent no. 1. The third Hon'ble Judge made unwarranted and uncalled for remarks in carping language in connection with the Chief Minister which tantamount to resounding strictures, and the

same require to be expunged. Thus, the appeals deserve to be allowed and the majority judgments (impugned), set aside.

4. Per contra, Mr. R.F. Nariman, learned Solicitor General of India, Mr. P.P.Rao, Dr. A.M. Singhvi, and Mr. Huzefa Ahmadi, learned senior counsel appearing on behalf of the respondents, have opposed the appeals, contending that the Governor had acted as a statutory authority under the Act, 1986, and not as the head of the State, and thus, she was not required to act in accordance with the aid and advice of the Council of Ministers. Furthermore, no fault can be found with the procedure adopted by the Governor, as the objections raised by the Chief Minister were thoroughly considered by the Chief Justice, and no substance was found therein. The Chief Justice has **primacy** of opinion in the matter of consultation, and therefore, the sending of a panel of names instead of just one name, does not amount to a violation of the scheme of the Act. A perusal of the statute and the sequence of events herein, makes it crystal clear, that the Governor acted in correct perspective, and that no fault can be found with the selection of respondent no. 1 to the post of Lokayukta. The appellants have in fact, been avoiding the appointment of a Lokayukta for a period of more than nine years, for which there can be no justification. The harsh language used by the 3rd Judge was warranted because of the defiant attitude adopted by the Chief Minister which was appalling, and thus, the remarks do not need to be expunged. The appeals hence, lack merit and are liable to be dismissed.

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

These appeals raise legal issues of great public importance, such as, what is the meaning of the term '**consultation**' contained in Section 3 of the Act, 1986, and also whether the opinion of the Chief Justice has **primacy** with respect to the appointment of the Lokayukta.

The twin issues of consultation vis-à-vis concurrence and

primacy, have been debated extensively before this Court and answered by larger benches while interpreting Article 124(2) of the Constitution in matters relating to appointment of Judges of Supreme Court and High Court. The present case also involves the determination of the meaning of the word "consultation" in Section 3 of the Act, 1986 in the said context.

However, a two-Judges bench in the case of *Suraz Trust India v. Union of India & Anr.,* (2011) 4 SCALE 252, has entertained the questions raised while doubting the correctness of the larger bench decisions that is pending consideration before a three-Judges bench presided over by Hon'ble the Chief Justice.

6. In *The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income-tax, Bombay North, Ahmedabad,* AIR 1965 SC 1636, this Court held:

> *"……When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the*

> *question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed ? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good ? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."*

7. It is, therefore, evident that before making a reference to a larger Bench, the Court must reach a conclusion regarding the correctness of the judgment delivered by it previously, particularly that, which has been delivered by a Bench of nine Judges or more, and adjudge the effect of any error therein, upon the public, what inconvenience, hardship or mischief it would cause, and what the exact nature of the infirmity or error that warrants a review of such earlier judgments.

In the instant case, we do not find any such compelling circumstance that may warrant a review, and thus, taking into consideration the facts of the present case, we are not convinced that this matter requires a reference to a larger Bench.

8. Before proceeding with the case, it is necessary to refer to certain relevant **statutory provisions:**

It is evident from the Preamble of the Act, 1986 that the Lokayukta has two duties, firstly, to protect honest public functionaries from false complaints and allegations, and secondly, to investigate charges of corruption filed against public functionaries. Hence, investigation of such charges of corruption against public functionaries is not the only responsibility that the Lokayukta is entrusted with.

Section 2(8) of the Act, 1986, defines the term, "Public servant", as having the same meaning, that has been given to it, under Section 21 of the Indian Penal Code, 1860.

Section 3 (1) of the Act, 1986, reads as under:

> "For the purpose of conducting investigations in accordance with provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta.
>
> Provided that the Lokayukta shall be appointed **after consultation with the Chief Justice of the High Court** and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Article 356 of the Constitution is in operation in the State of Gujarat, after **consultation also with the Leader of the Opposition** in the Legislative Assembly, or if there be no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct." (Emphasis added)

Section 4 prescribes certain disabilities/disqualifications with respect to the appointment of the Lokayukta, and stipulates that he must not be a Member of Parliament or of any State Legislature, and also that he must not hold any office of trust,

or profit and even if he does hold any such post, that he must tender his resignation as regards the same, before he is appointed as Lokayukta, and also further, that he must not be affiliated with any political party.

Section 6 of the said Act, provides that the Lokayukta shall not be removed from office, except under an order made by the Governor, on the grounds of proven misbehaviour, or incapacity, after an inquiry into the same which has been conducted by the Chief Justice of the High Court of the State, or by a Judge nominated by him, in which, the Lokayukta is informed of the charges against him, and has been given, a reasonable opportunity of being heard, with respect to the same.

Section 7 of the Act, 1986 provides for matters which may be investigated by the Lokayukta, against **public functionaries,** which may include the Chief Minister and the Council of Ministers also.

Section 12 of the Act, 1986 provides that the Lokayukta, after investigation of a complaint against the Chief Minister, if any substance is found therein, shall submit a written report, communicating the findings arrived at by him, along with such relevant materials/documents and other evidence, that are in his possession, to the Chief Minister himself. Clause 2 thereof provides that, the Chief Minister shall then place the said report, without any delay, before the Council of Ministers.

Section 19 of the Act, empowers the Governor to confer additional functions upon the Lokayukta, after having consultation with the Lokayukta, in relation to the eradication of corruption, which may be specified, by publishing a notification with respect to the same, in the Official Gazette.

Section 20 of the Act, deals with the power to exclude complaints against certain classes of public functionaries. Under this Section, the State Government, upon a

recommendation made by the Lokayukta, may exclude, by Notification in the Official Gazette, complaints involving allegations against persons belonging to a particular class of public functionaries, as has been specified in the said notification, from under the jurisdiction of the Lokayukta.

CONSULTATION- means:

9. In *State of Gujarat & Anr. v. Gujarat Revenue Tribunal Bar Association & Anr.,* JT 2012 (10) SC 422, this Court held that, the object of consultation is to render its process meaningful, so that it may serve its intended purpose. Consultation requires the meeting of minds between the parties that are involved in the consultative process, on the basis of material facts and points, in order to arrive at a correct, or at least a satisfactory solution. If a certain power can be exercised only after consultation, such consultation must be conscious, effective, meaningful and purposeful. To ensure this, each party must disclose to the other, all relevant facts, for due deliberation. The consultee must express his opinion only after complete consideration of the matter, on the basis of all the relevant facts and quintessence. Consultation may have different meanings in different situations, depending upon the nature and purpose of the statute.

(See also: *UOI v. Sankalchand Himatlal Sheth & Anr.,* AIR 1977 SC 2328; *State of Kerala v. Smt. A. Lakshmikutty & Ors.,* AIR 1987 SC 331; *High Court of Judicature for Rajasthan v. P.P Singh & Anr.,* AIR 2003 SC 1029; *UOI & Ors. v. Kali Dass Batish & Anr.,* AIR 2006 SC 789; *Andhra Bank v. Andhra Bank Officers & Anr.,* AIR 2008 SC 2936; and *Union of India v. R. Gandhi, President, Madras Bar Association,* (2010) 11 SCC 1).

10. In *Chandramouleshwar Prasad v. The Patna High Court & Ors.,* AIR 1970 SC 370, this Court held that, consultation or deliberation can neither be complete nor effective, before the parties thereto, make their respective

points of view, known to the other, or others, and discuss and examine the relative merits of their views. If one party makes a proposal to the other, who has a counter proposal in mind, which is not communicated to the proposer, a direction issued to give effect to the counter proposal, without any further discussion with respect to such counter proposal, with the proposer cannot be said to have been issued after consultation.

11. In *N. Kannadasan v. Ajoy Khose & Ors.,* (2009) 7 SCC 1, this Court considered a case regarding the appointment of the Chairman of a State Consumer Disputes Redressal Commission, under the provisions of the Consumer Protection Act 1986, and examined the communication between the consultant and consultee, i.e. the State Government and the Chief Justice of the High Court, and observed that, where the High Court had placed for consideration, certain material against a person, whose name was proposed by the State Government, for consideration with respect to his appointment to the post of Chairman of the State Commission, and no specific explanation was provided for the non-consideration of such material, then an appointment made in light of such circumstances, cannot be held to be an appointment made after due consultation. The Court held as under:"But, where a decision itself is thickly clouded by non-consideration of the most relevant and vital aspect, the ultimate appointment is vitiated not because the appointee is not desirable or otherwise, but because mandatory statutory requirement of consultation has not been rendered effectively and meaningfully". Thus, in such a situation, even if a person so appointed was in theory, eligible for the purpose of being considered for appointment to the said post, the fact that the process of consultation was vitiated, would render the ultimate order of appointment vulnerable, and liable to questioning. In this case, this Court also considered its earlier decisions, in the cases of *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab & Haryana & Ors.,* AIR 1996 SC 1308; and *Ashok Tanwar & Anr. v. State of H.P. & Ors.,*

AIR 2005 SC 614, and came to the conclusion that, the Chief Justice must send **only one name, and not a panel of names for consideration,** or else, the word '**primacy**' would lose its significance. If the Chief Justice sends a panel of names, and the Governor selects one from them, then it would obviously become the **primacy** of the Governor, and would not remain the primacy of the Chief Justice, which is the requirement under the law.

The concept of primacy in such a situation, has been included, owing to the fact that, the Chief Justice of the High Court of the concerned State, is the most appropriate person to judge the suitability of a retired Judge, who will act as the Lokayukta and the object of the Act would not be served, if the final decision is left to the executive. The opinion of the Chief Justice would be entirely independent, and he would most certainly be in a position to determine who the most suitable candidate for appointment to the said office is. This Court has, therefore, explained that, the primacy of the opinion of the Chief Justice must be accepted, except for **cogent reasons,** and that the term **consultation,** for such purpose shall mean **concurrence**.

12. In *N. Kannadasan* (supra), while interpreting the provisions of Section 16 of the Consumer Protection Act, 1986, this Court held that, consultation under the said Act, cannot be equated with consultation, as contemplated by the Constitution under Article 217, in relation to the appointment of a Judge of the High Court. However, the Court further held, that *primacy will be given to the opinion of the Chief Justice, where such consultation is statutorily required.*

13. In *Centre For PIL & Anr. v. Union of India & Anr.,* AIR 2011 SC 1267, this Court considered the argument of unanimity, or consensus, in the matter of the appointment of the Central Vigilance Commissioner and observed:

"It was further submitted that if unanimity is ruled out then

the very purpose of inducting the Leader of the Opposition in the process of selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority it would always exclude the Leader of the Opposition since the Prime Minister and the Home Minister will always be ad idem.

xx *xx* *xx*

We find no merit in these submissions. To accept the contentions advanced on behalf of the petitioners would mean conferment of a "veto right" on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation."

14. This Court, in *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak & Ors.,* AIR 2002 SC 3578, considered the provisions of Section 3(1)(a) of the Orissa Lokpal and Lokayuktas Act, 1995, which are *pari materia* with those of Section 3 of the Act, 1986. In the aforementioned case, the question that arose was with respect to the meaning of **consultation**, as contemplated under the Orissa Act, which is a verbatim replication of Section 3 of the Gujarat Act, and upon consideration of the statutory provisions of the Act, this Court came to the conclusion that:

"12. *……. The investigation which* ***Lokpal is required to carry out is that of quasi-judicial nature*** *which would envisage not only knowledge of law, but also of the nature and work which is required to be discharged by an administrator. In this context, the word "consultation" used in Section 3(1) proviso (a) would require that consultation with the Chief Justice of the High Court of Orissa is a must or a sine qua non. For such appointment, the Chief Justice of the High Court would be the best person for proposing and suggesting such person for being appointed as Lokpal. His opinion would be totally independent and he would be in a position to*

find out who is most or more suitable for the said office. In this context, ***primacy*** *is required to be given to the opinion of the Chief Justice of the High Court.*

xx xx xx xx xx

16. *Applying the principle enunciated in the aforesaid judgment, scheme of Section 3(1) of the Act read with the functions to be discharged by the Lokpal and the nature of his qualification, it is apparent that the consultation with the Chief Justice is mandatory and* ***his opinion would have primacy****."* (Emphasis added)

The aforesaid appeal was filed against the judgment of the Orissa High Court in *Ram Chandra Nayak v. State of Orissa,* AIR 2002 Ori 25, wherein the High Court had held that the Governor, while appointing a person as Lokpal, must act upon the aid and advice of the Council of Ministers, and that there was no question of him exercising any power or discretion in his personal capacity. The said judgment was reversed by this Court on other grounds, but not on this issue.

15. In *Indian Administrative Service (S.C.S.) Association, U.P. & Ors. v. Union of India & Ors.,* (1993) Supp.1 SCC 730, this Court explained the term 'Consultation', though the same was done in the context of the promotion of certain officials under the provisions of the All India Services Act, 1951. The Court laid down various propositions with respect to consultation, *inter-alia:*

"(6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions, nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is 'after consultation'; 'was, in fact, consulted' or was it a 'sufficient consultation'."

16. Thus, in view of the above, the meaning of **consultation** varies from case to case, depending upon its fact-situation and the context of the statute, as well as the object it seeks to achieve. Thus, no straight-jacket formula can be laid down in this regard. Ordinarily, consultation means a free and fair discussion on a particular subject, revealing all material that the parties possess, in relation to each other, and then arriving at a decision. However, in a situation where one of the consultees has **primacy** of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean **concurrence**. The court must examine the fact-situation in a given case to determine whether the process of consultation, as required under the particular situation did in fact, stand complete.

THE MANNER IN WHICH THE GOVERNOR ACTS:

17. In *Samsher Singh v. State of Punjab & Anr.,* AIR 1974 SC 2192, this Court expounded the universal rule that, the Governor is bound to act **only** in accordance with the aid and advice of the Council of Ministers, headed by the Chief Minister. The Rules of Business and allocation of business among the Ministers, related to the provisions of Article 53 in the case of the President, and Article 154 in the case of the Governor, state that executive power in connection with the same, shall be exercised by the President or the Governor either directly, or through subordinate officers. The President is the formal or Constitutional head of the Executive. The real executive powers, however, are vested in the Ministers of the Cabinet. Wherever the Constitution requires the satisfaction of the President or the Governor, for the purpose of exercise by the President or the Governor, any power or function, such satisfaction is not the personal satisfaction of the President, or of the Governor, in their personal capacity, but the satisfaction of the President or Governor, in the Constitutional sense as contemplated in a Cabinet system of Government, that is, the satisfaction of the Council of Ministers, on whose aid and

advice the President, or the Governor, generally exercise all their powers and functions. The President of India is not a glorified cipher. He represents the majesty of the State, and is at its apex, though only symbolically, and has a different rapport with the people and parties alike, being above politics. His vigilant presence makes for good governance if only he uses, what Bagshot described as, "the right to be consulted, to warn and to encourage".

Whenever the Constitution intends to confer discretionary powers upon the Governor, or to permit him to exercise his individual judgment, it has done so **expressly**. For this purpose, the provisions of "Articles 200; 239(2); 371-A(1)(b); 371-A(1)(a); 371-A(2)(b); and 371-A(2)(f), VI Schedule, Para 9(2) (and VI Schedule, Para 18(3), until omitted with effect from January 21, 1972), may be referred to. Thus, discretionary powers exist only where they are expressly spelt out.

However, the power to grant pardon or to remit sentence (Article 161), the power to make appointments including that of the Chief Minister (Article 164), the Advocate-General (Article 165), the District Judges (Article 233), the Members of the Public Service Commission (Article 316) are in the category where the Governor is bound to act on the aid and advice of the Council of Ministers. Likewise, the power to prorogue either House of Legislature or to dissolve the Legislative Assembly (Article 174), the right to address or send messages to the Houses of the Legislature (Article 175 and Article 176), the power to assent to Bills or withhold such assent (Article 200), the power to make recommendations for demands of grants [Article 203(3)], and the duty to cause to be laid every year the annual budget (Article 202), the power to promulgate ordinances during recess of the Legislature (Article 213) also belongs to this species of power. Again, the obligation to make available to the Election Commission, requisite staff for discharging functions conferred upon it by Article 324(1) and Article 324(6), the power to nominate a member of the Anglo-

Indian Community to the Assembly in certain situations (Article 333), the power to authorise the use of Hindi in proceedings in the High Court [Article 348(2)], are illustrative of the functions of the Governor, qua the Governor.

The Governor shall act with aid and advice of the Council of Ministers, save in a few well known exceptional situations. **Without being dogmatic or exhaustive**, this situation relates to the choice of the Chief Minister, dismissal of the government, and dissolution of the House.

18. In *M.P. Special Police Establishment v. State of M.P. & Ors.,* AIR 2005 SC 325, the question that arose was whether, for the purpose of grant of sanction for the prosecution of Ministers, for offences under the Prevention of Corruption Act and/or, the Indian Penal Code, the Governor, while granting such sanction, could exercise his own discretion, or act contrary to the advice rendered to him by the Council of Ministers. The Court, in this regard, first considered the object and purpose of the statutory provisions, which are aimed at achieving the prevention and eradication of acts of corruption by public functionaries. The Court then also considered, the provisions of Article 163 of the Constitution, and took into consideration with respect to the same, a large number of earlier judgments of this Court, including the cases of *Samsher Singh* (supra); and *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.,* AIR 1982 SC 1249, and thereafter, came to the conclusion that, in a matter related to the grant of sanction required to prosecute a public functionary, the Governor is usually required to act in accordance with the aid and advice rendered to him by the Council of Ministers, and not upon his own discretion. However, an exception may arise while considering the grant of sanction required to prosecute the Chief Minister, or a Minister, where, as a matter of propriety, the Governor may have to act upon his own discretion. Similar would be the situation in a case where, the Council of Ministers disables or disentitles itself from providing such aid and advice. Such a conclusion by the court, was found to be necessary, for the

reason that the facts and circumstances of a case involving any of the aforementioned fact situations, may indicate the possibility of bias on the part of the Chief Minister, or the Council of Ministers.

This Court carved out certain exceptions to the said provision. For instance, where bias is inherent or apparent; or, where the decision of the Council of Ministers is wholly irrational, or, where the Council of Ministers, because of some incapacity or other situation, is disentitled from giving such advice; or, where it refrains from doing so as matter of propriety; or in the case of a complete break down of democracy.

Article 163(2) of the Constitution provides that it would be permissible for the Governor to act without ministerial advice in certain other situations, depending upon the circumstances therein, even though they may not specifically be mentioned in the Constitution as discretionary functions; e.g., the exercise of power under Article 356(1), as no such advice will be available from the Council of Ministers, who are responsible for the break down of Constitutional machinery, or where one Ministry has resigned, and the other alternative Ministry cannot be formed. Moreover, Clause 2 of Article 163 provides that the Governor himself is the final authority to decide upon the issue of whether he is required by or under the Constitution, to act in his discretion. The Council of Ministers therefore, would be rendered incompetent in the event of there being a difference of opinion with respect to such a question, and such a decision taken by the Governor, would not be **justiceable** in any court. There may also be circumstances where, there are matters, with respect to which the Constitution does not specifically require the Governor to act in his discretion, but the Governor, despite this, may be fully justified to act so e.g., the Council of Ministers may advise the Governor to dissolve a House, which may be detrimental to the interests of the nation. In such circumstances, the Governor would be justified in refusing to accept the advice rendered to him, and act in his discretion.

There may even be circumstances where ministerial advice is not available at all, i.e., the decision regarding the choice of Chief Minister under Article 164(1), which involves choosing a Chief Minister after a fresh election, or in the event of the death or resignation of the Chief Minister, or dismissal of the Chief Minister, who loses majority in the House and yet refuses to resign, or agree to dissolution. The Governor is further not required to act on the advice of the Council of Ministers, where some other body has been referred for the purpose of consultation i.e., Article 192(2) as regards decisions on questions related to the disqualification of members of the State Legislature.

19. In *Brundaban Nayak v. Election Commission of India & Anr.,* AIR 1965 SC 1892, this Court held that while dealing with a case under Article 192 of the Constitution, the Governor must act in accordance with advice of the Election Commission, and that he does not require any aid or advice from the Council of Ministers.

(See also: *Election Commission of India & Anr. v. Dr. Subramanian Swamy & Anr.,* AIR 1996 SC 1810).

20. The issue of primacy of the Chief Justice in such cases, has also been considered and approved by this Court in *Ashish Handa* (supra); and *Supreme Court Advocates-on-Record Association & Anr. v. Union of India,* AIR 1994 SC 268.

21. Thus, where the Governor acts as the Head of the State, except in relation to areas which are earmarked under the Constitution as giving discretion to the Governor, the exercise of power by him, must only be upon the aid and advice of the Council of Ministers, for the reason that the Governor, being the custodian of all executive and other powers under various provisions of the Constitution, is required to exercise his formal Constitutional powers, only upon, and in accordance with, the aid and advice of his Council of Ministers. He is, therefore, bound to act under the Rules of Business framed

under Article 166 (3) of the Constitution. (Vide: *Pu Myllai Hlychho & Ors. v. State of Mizoram & Ors.,* AIR 2005 SC 1537).

22. In *Ram Nagina Singh & Ors. v. S.V. Sohni & Ors.,* AIR 1976 Pat 36, the Patna High Court considered the issue involved herein, i.e., the appointment of the Lokayukta, under the Bihar Lokayukta Act, 1974, and held that, ordinarily, when a power is vested, even by virtue of a statute, in the Governor, he must act in accordance with the aid and advice tendered to him by the Council of Ministers, for the simple reason that, he does not cease to be an Executive Head, as mentioned under the Constitution, merely because such authority is conferred upon him by a statute. It would, in fact, be violative of the scheme of the Constitution, if it was held that the mere use of the word, "Governor" in any statute, is sufficient to impute to the legislature, an intention by it, to confer a power, *"eo nomine".* Any interpretation other than the one mentioned above, would therefore, be against the concept of parliamentary democracy, which is one of the basic postulates of the Constitution.

In view of the Rules of Executive Business, the topic involving appointment of the Lokayukta, must be brought before the Council of Ministers. Even if the appointment in question, is not governed by any specific rule in the Rules of Executive Business, such appointment must still be made following the said procedure, for the reason that the Rules of Executive Business cannot be such, so as to override any bar imposed by Article 163(3) of the Constitution.

However, a different situation altogether may arise, where the Governor *ex-officio,* becomes a statutory authority under some statute.

23. In *Hardwari Lal v. G.D. Tapase & Ors.,* AIR 1982 P & H 439, the powers of the Governor, with respect to the appointment/removal of the Vice-Chancellor of Maharshi

Dayanand University, Rohtak under the Maharshi Dayanand University (Amendment) Act, 1980, were considered, wherein a direction was sought with regard to the renewal of the term of the Vice-Chancellor of the said University. Certain promises had been made in connection with the same, while making such appointment. The Court held that, as the Governor was the *ex-officio* Chancellor of the University, therefore, by virtue of his office, he was not bound to act under the aid and advice of the Council of Ministers. Under Article 154 of the Constitution, the executive powers of the State are vested in the Governor, which may be exercised by him either directly, or through officers subordinate to him, in accordance with the provisions of the Constitution. Article 161 confers upon the Governor, a large number of powers including the grant of pardon, reprieves, respites or remissions of punishment etc. Such executive power can be exercised by him, only in accordance with the aid and advice of the Council of Ministers. Article 162 states that the executive power of the State, shall extend to all such matters, with respect to which, the legislature of the State has the power to make laws. Therefore, the said provision, widens the powers of the Governor. Article 166(3) of the Constitution, further bestows upon the Governor the power to make rules for more convenient transactions of business, of the Government of the State, and also for the purpose of allocating among the Ministers of State, such business.

There are several ways by which, a power may be conferred upon the Governor, or qua the Governor, which will enable him to exercise the said power, by virtue of his office as Governor. Therefore, there can be no gainsaying that all the powers that are exercisable by the Governor, by virtue of his office, can be exercised only in accordance with the aid and advice of the Council of Ministers, except insofar as the Constitution expressly, or perhaps by necessary implication, provides otherwise.

Thus, in such a situation, the Statute makes a clear cut

distinction between two distinct authorities, namely, the Chancellor and the State Government. When the legislature intentionally makes such a distinction, the same must also be interpreted distinctly, and while dealing with the case of the Vice-Chancellor, the Governor, being the Chancellor of the University, acts only in his personal capacity, and therefore, the powers and duties exercised and performed by him under a statute related to the University, as its Chancellor, have absolutely no relation to the exercise and performance of the powers and duties by him, while he holds office as the Governor of the State.

24. In *Vice-Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors.,* (1997) 10 SCC 264, this Court dealt with the power of the Governor of the State of U.P. *ex-officio,* with respect to all the Universities established under the provisions of the U.P. State Universities Act, 1973 (hereinafter referred to as 'the Act 1973). Section 68 of the Act, 1973 empowers the Chancellor to entertain any question, related to the appointment, selection, promotion or termination of any employee in the University. In the meanwhile, the Legislature of the State of U.P., enacted the U.P. Public Services (Reservation of Schedule Castes, Tribes and Backward Classes) Act, 1994 (hereinafter referred to as 'the Act 1994), providing for a particular reservation. This Court held that, Section 6 of the Act, 1994 enables the State Government to call for records and direct enforcement of the provisions of the said Act. This Court also held that, when the Governor *ex-officio,* acts as the Chancellor of a University, he acts under Section 68 of the Act, 1973, and discharges statutory duties as mentioned under the Act, 1973, but when the Government calls for the record of appointment of any employee, to examine whether the reservation policy envisaged under the Act, 1994, has been given effect to or not, and takes action in such respect, then he acts in his capacity as Governor, under Article 163 of the Constitution of India and is therefore, bound to act upon the aid and advice of the Council of Ministers.

25. The Constitutional provisions hence, clearly provide that the Governor does not exercise any power by virtue of his office, in his individual discretion. The Governor is aided and advised by the Council of Ministers in the exercise of such powers, that have been assigned to him, under Article 163 of the Constitution. The executive power of the State, is coextensive with the legislative power of the State, and the Governor in the Constitutional sense, discharges the functions assigned to him under the Constitution, with the aid and advice of the Council of Ministers, except insofar as he is, by or under the Constitution, required to exercise such functions in his own discretion. The satisfaction of the Governor for the purpose of exercise of his other powers or functions, as required by the Constitution, does not mean the personal satisfaction of the Governor, but refers to satisfaction in the Constitutional sense, under a Cabinet system of Government. The executive must act, subject to the control of the legislature. The executive power of the State, is vested in the Governor, as he is the head of the executive. Such executive power is generally described as residual power, which does not fall within the ambit of either legislative or judicial power. However, executive power may also partake legislative or judicial actions. All powers and functions of the President, except his legislative powers as have been mentioned, for example, in Article 123, viz., the ordinance making power, and all powers and functions of the Governor, except his legislative power, as also for example, under Article 213, which state that Ordinance making powers are executive powers of the Union, vested in the President under Article 53(1) in one case, and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or clause (3) of Article 77 are not limited in their operation, only with respect to the executive actions of the Government of India, under clause (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 are also not limited in their operation, only with respect to the executive actions of the Government of the State under clause (1) of Article 166. The expression, 'Business of the Government of India' in clause (3)

of Article 77, and the expression, 'Business of the Government of the State' in clause (3) of Article 166, include all executive business. (Vide: *Samsher Singh* (supra); *Ramdas Shrinivas Nayak* (supra); *Bhuri Nath & Ors. v. State of J & K & Ors.,* AIR 1997 SC 1711; and *Narmada Bachao Andolan v. State of Madhya Pradesh,* AIR 2011 SC 3199).

In *Maru Ram, Bhiwana Ram etc. etc. v. Union of India & Ors. etc.,* AIR 1980 SC 2147, a Constitution Bench of this Court held that, "the Governor is but a shorthand expression for the State Government, and the President is an abbreviation for the Central Government".

26. The exceptions carved out in the main clause of Article 163(1), permit the legislature to entrust certain functions to the Governor to be performed by him, either in his discretion, or in consultation with other authorities, independent of the Council of Ministers.

The meaning of the words 'by or under' is well-settled. The expression, `by an Act', would mean by virtue of a provision directly enacted in the statute in question and that, which is conceivable from its express language or by necessary implication therefrom. The words 'under the Act', would in such context, signify that which may not directly be found in the statute itself, but which is conferred by virtue of powers enabling such action(s), e.g., by way of laws framed by a subordinate law making authority competent to do so under the Parent Act. (Vide: *Dr. Indramani Pyarelal Gupta & Ors. v. W.R. Natu & Ors.,* AIR 1963 SC 274).

27. This Court in *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 held:

> ***57.*** *The expression "required" found in Article 163(1) is stated to signify that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been reasoned that the*

> *expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. The Sarkaria Commission Report further adds that such necessity may arise even from rules and orders made "under" the Constitution.*

28. However, there is a marked distinction between the provisions of Articles 74 and 163 of the Constitution.

The provisions of Article 74 of the Constitution, are not *pari materia* with the provisions of Article 163, as Article 74 provides that there shall be a Council of Ministers, with the Prime Minister at their head, to aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice as is rendered to him, provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice that is tendered, after such reconsideration. While Article 163 provides that there shall be a Council of Ministers with the Chief Minister at their head, to aid and advise the Governor, in the exercise of his functions, **an exception has been carved out with respect to situations wherein, he is by, or under this Constitution, required to perform certain functions by exercising his own discretion.**

The exception carved out by the main clause under Article 163(1) of the Constitution, permits the legislature to bestow upon the Governor, the power to execute **certain** functions, that may be performed by him, in his own discretion, or in consultation with other authorities, independent of the Council of Ministers. While dealing with the powers of the Governor with respect to appointment and removal, or imposing punishment for misconduct etc., the Governor is required to act upon the recommendations made by the High Court, and not upon the aid and advice rendered by the Council of Ministers, for the reason that, the State is not competent to render aid and

advice to the Governor with respect to such subjects. While the High Court retains powers of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them during inquiries, and also to impose punishments upon them, formal orders, in relation to questions regarding the dismissal, removal, reduction in rank or the termination of services of judicial officers on any count, must be passed by the Governor upon recommendations made by the High Court. (Vide: *Chandra Mohan v. State of U.P. & Ors.,* AIR 1966 SC 1987; and *Rajendra Singh Verma (dead) thr. Lrs. & Ors. v. Lt. Governor (NCT of Delhi) & Ors.,* (2011) 10 SCC 1).

29. In *Bhuri Nath* (supra), the question that arose was in relation to whether the Governor was bound to act in accordance with the aid and advice of the Council of Ministers, or whether he could exercise his own discretion, independent of his status and position as the Governor, by virtue of him being the *ex-officio* Chairman of the Shri Mata Vaishno Devi Shrine Board, under the Shri Mata Vaishno Devi Shrine Act, 1988. The Shrine Board discharges functions and duties, as have been described under the Act, in the manner prescribed therein, and thus, after examining the scheme of the Act, this Court held that, "the decision is his own decision, on the basis of his own personal satisfaction, and not upon the aid and advice of the Council of Ministers. The nature of exercise of his powers and functions under the Act is distinct, and different from the nature of those that are exercised by him formally, in the name of the Governor, under his seal, for which responsibility rests only with his Council of Ministers, headed by the Chief Minister".

30. In *State of U.P. & Ors. etc. v. Pradhan Sangh Kshettra Samiti & Ors. etc.,* AIR 1995 SC 1512, this Court dealt with the position of the Governor in relation to functions of the State and held as under:

> *"Admittedly, the function under Article 243(g) is to be exercised by the Governor on the aid and advice of his*

> *Council of Ministers. Under the Rules of Business, made by the Governor under Article 166(3) of the Constitution, it is in fact an act of the Minister concerned, or of the Council of Ministers, as the case may be. When* ***the Constitution itself thus equates the Governor with the State Government*** *for the purposes of relevant functions,…….Further, Section 3(60)(c) of the General Clauses Act, 1897, defines '****State Government****" to mean* ***"Governor"****, which definition is in conformity with the provisions of the Constitution…The Governor means the Government of the State and all executive functions which are exercised by the Governor, except where he is required under the Constitution to exercise the functions in his discretion, are exercised by him on the aid and advice of Council of Ministers."* (Emphasis added)

31. In *S.R. Chaudhuri v. State of Punjab & Ors.,* AIR 2001 SC 2707, this Court held as under:

> "21. Parliamentary democracy generally envisages (*i*) *representation of the people*, (*ii*) *responsible government*, and (*iii*) *accountability* of the Council of Ministers to the Legislature. The essence of this is to draw a direct line of authority from the people through the Legislature to the executive.
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> xx xx xx xx
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> 40. Chief Ministers or the Governors, as the case may be, must forever remain conscious of their constitutional obligations and not sacrifice either political responsibility or parliamentary conventions at the altar of "political expediency. …. Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency". We should not allow erosion of principles of constitutionalism."

32. The principle of check and balance is a well

established philosophy in the governance of our country, under our Constitution. If we were all to have our way, each person would be allowed to wage a war against every other person, i.e., *Bellum Omnium Contra Omnes*. This reminds us to abide by Constitutional law followed by statutory law, otherwise everybody would sit in appeal against the judgment of everybody.

33. In view of the aforesaid discussion, the law as evolved and applicable herein can be summarised to the effect that the Governor is bound to act on the aid and advice of the Council of Ministers, unless he acts as, "persona designata" i.e. "*eo nomine",* under a particular statute, or acts in his own discretion under the exceptions carved out by the Constitution itself.

BIAS :

34. Absence of bias can be defined as the total absence of any pre-conceived notions in the mind of the Authority/Judge, and in the absence of such a situation, it is impossible to expect a fair deal/trial and no one would therefore, see any point in holding/participating in one, as it would serve no purpose. The Judge/Authority must be able to think dispassionately, and sub-merge any private feelings with respect to each aspect of the case. The apprehension of bias must be reasonable, i.e., which a reasonable person would be likely to entertain. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim - *nemo debet esse judex in causa propria sua.* It applies only when the interest attributed to an individual is such, so as to tempt him to make a decision in favour of, or to further, his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided, or dealt with impartially, but where the circumstances are such, so as to create a reasonable apprehension in the minds of others, that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias.

In the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary pre-condition, for what is relevant, is actually the reasonableness of the apprehension in this regard, in the mind of such party. In case such apprehension exists, the trial/judgment/order etc. would stand vitiated, for want of impartiality, and such judgment/order becomes a nullity. The trial becomes "*coram non judice*".

While deciding upon such an issue, the court must examine the facts and circumstances of the case, and examine the matter from the view point of the people at large. The question as regards, "whether or not a real likelihood of bias exists, must be determined on the basis of probabilities that are inferred from the circumstances of the case, by the court objectively, or, upon the basis of the impression that may reasonably be left upon the minds of those aggrieved, or the public at large". (Vide: *S. Parthasarathi v. State of Andhra Pradesh,* AIR 1973 SC 2701; *State of Punjab v. V.K. Khanna & Ors.,* AIR 2001 SC 343; *N.K. Bajpai v. Union of India & Anr.,* (2012) 4 SCC 653; and *State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc.,* AIR 2012 SC 364).

BINDING EFFECT OF THE JUDGMENT:

35. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, particularly, when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered, taking note of the *ratio decidendi* of the same i.e., the general reasons, or the general grounds upon

which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. (Vide: *Smt. Somavanti & Ors. v. The State of Punjab & Ors.,* AIR 1963 SC 151; *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur,* AIR 1970 SC 1002; *Ambika Prasad Mishra v. State of U.P. & Ors.,* AIR 1980 SC 1762; and *Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.,* AIR 2002 SC 1598).

36. So far as the judgment in *Ram Nagina Singh* (supra), is concerned, para 9 of the said judgment, makes it clear that the High Court had summoned the original record of proceedings, containing communication between the prescribed statutory authorities therein, wherein the Chief Minister had made a note, while writing to the Governor, which reads as under:

> "In this connection, I have already deliberated with you. In my opinion, **it is not necessary to obtain the opinion of the Council of Ministers in this connection"**. (Emphasis added)

In view of this, the counsel for the State took the same stand before the High Court. It was the counsel appearing for the Central Government, who argued otherwise. In fact, the Governor had appointed the Lokayukta acting upon his own discretion, without seeking any aid or advice from the Council of Ministers. The said judgment was approved by this Court in *Bhuri Nath* (supra). Undoubtedly, the provisions of Section 18 of the Act, 1974, which are analogous to the provisions of Section 20 of the Act, 1986, by virtue of which, the Act enables the State Government, to exclude complaints made against certain classes of public servants, were not considered by the court, as the same were not brought to its notice. However, on this basis, it cannot be held that had the said provision been brought to the notice of the court, the result would have been different.

INSTANT CASE :

37. This case must be examined in light of the aforesaid settled legal propositions, and also taking into consideration, the scheme of the Act, as provided in its provisions, that have been referred to hereinabove.

38. The Act, 1986 stipulates that the institution of Lokayukta must be demonstrably independent and impartial. A conjoint reading of Sections 4 and 6 of the Act, 1986, makes it clear that the Lokayukta must be entirely independent and free from all political and commercial associations. Investigation proceedings by the Lokayukta, must be conducted in a formal manner. The appointment must, as far as possible, be non-political and the status of the Lokayukta, must be equivalent to that of the highest judicial functionaries in the State. The Act, 1986 provides for a proviso to sub-section (1) of Section 3 of Act, 1986, which envisages the appointment of the Lokayukta when the Legislative Assembly has been dissolved, or when a Proclamation of Emergency under Article 356 of the Constitution is in operation, upon consultation with the Chief Justice of the State and the Leader of Opposition. However, such consultation with the Leader of Opposition also stands dispensed with, if the Assembly is dissolved or suspended. Thus, it is evident that the Governor can appoint a Lokayukta, even when there is no Council of Ministers in existence.

The aforesaid statutory provisions make it mandatory on the part of the State to ensure that the office of the Lokayukta is filled up without any delay, as the Act provides for such filling up, even when the Council of Ministers is not in existence. In the instant case, admittedly, the office of the Lokayukta has been lying vacant for a period of more than 9 years i.e. from 24.11.2003, when Justice S.M. Soni relinquished the office of Lokayukta, till date.

39. The facts of the case also reveal that the Government, for reasons best known to it, came forward with a request to

the Governor, to issue an Ordinance on 17.8.2011. The said Ordinance would have changed the manner of appointment of the Lokayukta, for, if the manner of selection of the Lokayukta suggested by it would have been accepted, then the institution of the Lokayukta would have vested in not one, but several persons, and selection of such persons would have been done by a committee consisting of the Chief Minister, the Speaker of the Legislative Assembly, Minister (Incharge of Legal Department), a sitting Judge of the High Court, as nominated by the Chief Justice and the Leader of Opposition in the Legislative Assembly.

40. In a democratic set up of government, the successful functioning of the Constitution depends upon democratic spirit, i.e. a spirit of fair play, of self restraint, and of mutual accommodation of different views, different interests and different opinions of different sets of persons. "There can be no Constitutional government unless the wielders of power are prepared to observe limits upon governmental powers".

It is evident that the Governor enjoys complete immunity under Article 361(1) of the Constitution, and that under this, his actions cannot be challenged, for the reason that the Governor acts only upon the aid and advice of the Council of Ministers. If this was not the case, democracy itself would be in peril. The Governor is not answerable to either House of State, or to the Parliament, or even to the Council of Ministers, and his acts cannot be subject to judicial review. In such a situation, unless he acts upon the aid and advice of the Council of Ministers, he will become all powerful and this is an anti-thesis to the concept of democracy. Moreover, his actions, including such actions which may be challenged on ground of allegations of malafides, are required to be defended by the Union/State. In spite of the fact that the Governor is immune from any liability, it is open to him to file an affidavit if anyone seeks review of his opinion, despite the fact that there is a bar against any action of the court as regards issuing notice to, or for the purpose of

impleading, at the instance of a party, the President or the Governor in a case, making him answerable.

41. The Gujarat Government Rules of Business, 1990, have been framed under Article 166 of the Constitution, and under the same, the Governor of Gujarat has made several rules for the convenient transaction of business of the Government of Gujarat, and the subjects allocated in this context, to the General Administration Department include the appointment of High Court Judges (Serial No. 36) and the Lokayukta (Serial No. 316A).

42. Be that as it may, the judgments referred to hereinabove, do not leave any room for doubt with respect to the fact that, when the Governor does not act as a statutory authority, but as the Head of the State, being Head of the executive and appoints someone under his seal and signature, he is bound to act upon the aid and advice of the Council of Ministers. The Governor's version of events, stated in her letter dated 3.3.2010, to the effect that she was not bound by the aid and advice of the Council of Ministers, and that she had the exclusive right to appoint the Lokayukta, is most certainly not in accordance with the spirit of the Constitution. It seems that this was an outcome of an improper legal advice and the opinion expressed is not in conformity with the Rule of Law. The view of the Governor was unwarranted and logically insupportable.

43. All the three learned Judges in the judgment under appeal have recorded the following findings upon the issue with respect to whether the Governor must act on the aid and advice of the Council of Ministers, or not:

(1) Mr. Justice Akil Kureshi came to the conclusion :

"The Governor under Section 3 of the Act acts under the aid and advice of the Council of Ministers."

(2) Ms. Justice Sonia Gokani held as under:

"As provided under Section 3 of the Lokayukta Act, appointment is expressly to be done by the Governor on aid and advice of the Council of Ministers headed by the Chief Minister who are required to so do it after consultation with the Chief Justice and the Leader of the Opposition party."

(3) Mr. Justice V.M. Sahai has recorded his finding as under:

"However, the Chief Minister is the Head of the Council of Ministers. Article 163 of the Constitution of India provides that the Council of Ministers is to aid and advice the Governor in the exercise of all his functions. The exceptions are where the Governor under the Constitution is required to exercise functions in his discretion. Therefore, the Chief Minister as the Head of the Council of Ministers will automatically figure in the matter of appointment of Lokayukta under Section 3 of the Act. The Governor is the constitutional or formal Head of the State, and has to make appointment of Lokayukta with the aid and advice of the Council of Ministers as provided by Article 163 of the Constitution.....The Governor was justified and authorised to act under Section 3 of the Act and exercise her discretionary powers under Article 163 of the Constitution, in the fact-situation of this case in the manner she did while issuing warrant/ notification appointing Justice (Retired) R.A. Mehta as Lokayukta of the Gujarat State without or contrary to the aid and advice of the Council of Ministers headed by the Chief Minister to save democracy and uphold rule of law. I am of the considered opinion that the answer to the second point is that the Governor of the State was authorised to act in a manner she did while issuing warrant/notification appointing Justice R.A. Mehta as Lokayukta of the State without the aid and advice of the Council of Ministers."

44. Such findings have not been challenged by any respondent before this Court. Therefore, the controversy herein, lies within a very narrow compass, as two of the learned Judges have held that the consultation process herein, was in fact complete, and therefore, upon considering the primacy of opinion of the Chief Justice in this regard, they held that the appointment of respondent no.1 to the post of Lokayukta was valid. However, one learned Judge has differed only as regards the factual aspect of the matter, stating that on the basis of such facts, it cannot be said that the consultation process was complete.

45. The facts mentioned hereinabove, make it crystal clear that the process of consultation stood complete as on 2.8.2011, as 3 out of 4 statutory authorities had approved the name of Justice R.A. Mehta and the Chief Justice provided an explanation to the Chief Minister regarding the objections raised by the latter, with respect to the appointment of Justice R.A. Mehta to the post of Lokayukta, vide letter dated 16.6.2011. This is because, the Chief Minister had certain objections regarding the appointment of respondent No.1, as Lokayukta, and his objections were considered by the Chief Justice, after which, it was also explained to the Chief Minister, how the said objections raised by him, were in fact, completely irrelevant, or rather, not factually correct. The position was clarified by the Chief Justice after verifying all relevant facts, which is why, the Chief Justice took six whole weeks to reply to the letter dated 16.6.2011. In the aforesaid letter, it was mentioned that Justice R.A. Mehta was affiliated with certain NGOs, social activist groups etc., and may therefore, have pre-conceived notions, or having prior opinions with respect to certain issues of governance in the State. It was also mentioned that Justice R.A.

Mehta had shared a platform with such persons who are known for their antagonism against the State Government. Moreover, he had been a panelist for such NGOs, social activist groups etc., and had expressed his dissatisfaction as regards the manner in which, the present government in the State was functioning. In support of the allegations regarding the aforesaid associations etc., newspaper cuttings were also annexed to the said letter.

46. We have examined the objections raised by the Chief Minister and the reasons given by the Chief Justice for not accepting the same, and reach the inescapable conclusion that none of the objections raised by the Chief Minister could render respondent no.1 ineligible/disqualified or unsuitable for appointment to the said post. On a close scrutiny, the reasons discussed by the Chief Justice appear to be rational and based on facts involved. This establishes an application of mind and a reasonable approach with hardly any element of perversity to invoke a judicial review of the decision making process. The issue appears to have been dealt with objectively. If a vigilant citizen draws the attention of the State/Statutory authority to the apprehensions of the minority community in that State, then the same would not amount to a biased attitude of such citizen towards the State. Thus, there is no scope of judicial review so far as the process of decision making in this case is concerned.

47. While considering the issue of bias, the Court must bear in mind the impression which the public at large may have, and not that of an individual.

LETTERS OF THE CHIEF MINISTER:

48. A perusal of the Minutes of the Meeting dated 23.2.2010 regarding the discussion upon the subject of consultation for the purpose of appointment of the Lokayukta, between the Leader of Opposition and the Hon'ble Chief Minister reveals that, the Chief Minister expressed his view

stating that **in the event a retired Judge has been given some other assignment, it is not permissible to consider him for the appointment to the post of Lokayukta in the State of Gujarat**. Furthermore, the Chief Minister also expressed his view to the effect that in the process of consultation, the view of the Hon'ble Chief Justice of the Gujarat High Court must be given primacy, as also, the requirement of receiving a name suggested by the Hon'ble Chief Justice, and finally that the Government, owing to the aforementioned reasons, should not restart the process of consultation.

49. However, the letter dated 4.5.2011 reveals that the Hon'ble Chief Minister had changed his view as regards the said issue, and suggested that in spite of the fact that Justice J.R. Vora was presently engaged with another assignment, his name could be considered for the purpose of appointment as Lokayukta, as the same was required in public interest. It is further revealed from this letter that Justice J.R. Vora had even offered to resign if such an offer was made to him.

50. Letter dated 16.6.2011, revealed that while opposing the appointment of Justice R.A. Mehta, the Hon'ble Chief Minister insisted that Justice J.R. Vora may be appointed so that this **long standing issue would finally be resolved.**

51. The Hon'ble Chief Minister in his letter dated 18.8.2011 to the Governor even raised a question as to why the judgment of this Court in *Kannadasan* (Supra) be followed in the State of Gujarat, when the same was not being followed elsewhere, and in light of this, questioned the insistence of the Chief Justice, in following the procedure prescribed in the aforementioned judgment.

52. In the letter dated 18.8.2011, written by Hon'ble Chief Minister to the Chief Justice, a strange situation was created. The relevant part of the letter reads as under:

"……Although, I have no personal reservation against

the name of Hon'ble Mr. Justice (Retired) R.A. Mehta, but as the Head of the State Government, I am afraid, ***I may not be able to accept the name of Hon'ble Mr. Justice (Retired) R.A. Mehta****, who, in my view, cannot be considered the most suitable choice for the august post of Lokayukta, Gujarat State……"*(Emphasis added)

53. From the above, it, thus, becomes evident, that the Hon'ble Chief Minister who had spoken, not only about the **primacy** of the opinion of the Chief Justice, but had also expressed his opinion as regards the **supremacy** of the same, and had expressed his solemn intention to accept the recommendation of a name provided by the Chief Justice, was now **expressing his inability to accept such name.**

54. On 16.8.2011, the process of consultation stood complete as the record reveals, there was nothing left for the consultees to do/discuss.

It is pertinent to note that, in order to delay the appointment of the Lokayukta, an enquiry commission was set up under the Commission of Inquiry Act by the State Government appointing Hon'ble Mr. Justice M.B. Shah, a former Judge of this Court, as Chairman. In the event of the appointment of such an enquiry commission, the Lokayukta is restrained under the provision of the Act, 1986, from proceeding with such cases that the Commission is appointed to look into.

55. The arguments advanced on the basis of the doctrine of bias in the present case, are irrelevant, so far as the facts of the instant case are concerned, for the reason that all the judgments cited at the Bar, relate to the deciding of a case by the court, and are not therefore, applicable, with respect to the issue of appointment of a person to a particular post. Such an apprehension of bias against a person, does not render such person, ineligible/disqualified, or unsuitable for the purpose of being appointed to a particular post, or at least for the purpose of which, the writ of *quo warranto* is maintainable. The Act, 1986

itself provides for statutory safeguards against bias. Section 8(3) of the said Act for instance, provides that in the event of reasonable apprehension of bias in the mind of the person aggrieved, such person is free to raise his grievance, and seek recusal of the person concerned. Thus, prospective investigatees will not be apprehended as potential victims unnecessarily.

Section 4 of the Act, 1986 makes a retired Judge, who is elected as a Member of the Parliament, or of a State Legislature, eligible for the purpose of being appointed as Lokayukta, provided that he resigns from the said House, and severs his relationship with the political party to which he belongs. It is therefore, difficult to imagine a situation where the allegations of bias/prejudice with respect to a person would be accepted, merely on the basis of the fact that such a person has some association with a particular NGO. We do not feel that that objections raised by the State Government, are cogent enough to ignore the primacy of the opinion of the Chief Justice in this regard. Thus, we are of the opinion that the views of the Hon'ble Chief Minister in this regard may not resonate with those of the public at large and thus, such apprehension is misplaced.

The Court has to bear in mind the dicta of this Court in *Bidi Supply Co. v. Union of India & Ors.* AIR 1956 SC 479 which is as under:

> "…..that the Constitution is not for the exclusive benefit of Governments and States …It also exists for the common man for the poor and the humble…for the 'butcher, the baker and the candlestick maker'….It lays down for this land 'a rule of law' as understood in the free democracies of the world."

CHIEF JUSTICE'S OPINION - PRIMACY :

56. Without reference to any Constitutional provision or any

judgment of this Court referred to earlier, even if we examine the statutory provisions of the Act, the statutory construction itself mandates the primacy of the opinion of the Chief Justice for the simple reason that Section 3 provides for the consultation with the Chief Justice. Section 6 provides for the removal of Lokayukta, and lays down the procedure for such removal. The same can be done only on proven misconduct in an inquiry conducted by the Chief Justice/his nominee with respect to specific charges. Section 8(3) further provides for recusal of the Lokayukta in a matter where a public functionary has raised the objection of bias, and whether such apprehension of bias actually exists or not, shall be determined in accordance with the opinion of the Chief Justice.

The purpose of giving primacy of opinion to the Chief Justice is for the reason that he enjoys an independent Constitutional status, and also because the person eligible to be appointed as Lokayukta is from among the retired Judges of the High Court and the Chief Justice is, therefore, the best person to judge their suitability for the post. While considering the statutory provisions, the court has to keep in mind the Statement of Objects and Reasons published in the Gujarat Gazette (Extraordinary) dated 1.8.1986, as here, it is revealed that the purpose of the Act is also to provide for the manner of removal of a person from the office of the Lokayukta, and the Bill ensured that the grounds for such removal are similar to those specified for the removal of the Judges of the High Court.

57. As the Chief Justice has **primacy** of opinion in the said matter, the non-acceptance of such recommendations, by the Chief Minister, remains insignificant. Thus, it clearly emerges that the Governor, under Section 3 of the Act, 1986 has acted upon the aid and advice of the Council of Ministers. Such a view is taken, considering the fact that Section 3 of the Act, 1986, does not envisage unanimity in the consultative process.

58. Leaving the finality of choice of appointment to the Council of Ministers, would be akin to allowing a person who

is likely to be investigated, to choose his own Judge. Additionally, a person possessing limited power, cannot be permitted to exercise unlimited powers.

However, in light of the facts and circumstances of the case, it cannot be held that the process of consultation was incomplete and was not concluded as per the requirements of the Act, 1986.

59. In *M.P. Special Police Establishment* (Supra), this Court held as under:

> *"11…Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is* ***, however, clarified that the exceptions mentioned in the judgment are not exhaustive.*** *It is also recognised that the concept of the Governor acting in his* ***discretion or exercising independent judgment is not alien to the Constitution****. It is recognised that there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.* (Emphasis added)

60. In fact, a five Judge Bench of this Court, in this case has explained the judgment of a seven Judge Bench in *Samsher Singh* (Supra), observing that in exceptional circumstances, the Governor may be justified in acting in his discretion, and that the exceptions enumerated in *Samsher Singh* (Supra) are not exhaustive.

Thus, the view taken by the 3rd learned Judge, in which it has been stated that it had become absolutely essential for the Governor to exercise his discretionary powers under Article 163 of the Constitution, must be read in light of the above-mentioned explanation.

PURPOSIVE CONSTRUCTION:

61. The office of the Lokayukta is very significant for the people of the State, as it provides for a mechanism through which, the people of the State can get their grievances heard and redressed against maladministration. The right to administer, cannot obviously include the right to maladminister. (Vide: *In Re. Kerela Education Bill, 1957*, AIR 1958 SC 956). In a State where society suffers from moral denigration, and simultaneously, from rampant corruption, there must be an effective forum to check the same. Thus, the Lokayukta Act may be termed as a pro-people Act, as the object of the Act, 1986 is to clean up augean stables, and in view thereof, if a political party in power, succeeds in its attempt to appoint a pliant Lokayukta, the same would be disastrous and would render the Act otiose. A pliant Lokayukta may not be able to take effective and required measures to curb the menace of corruption.

62. **Corruption** in a civilised society is a disease like cancer, which if not detected in time, is sure to spread its malignance among the polity of the country, leading to disastrous consequences. Therefore, it is often described as royal thievery. Corruption is opposed to democracy and social order, as being not only anti people, but also due to the fact that it affects the economy of a country and destroys its cultural heritage. It poses a threat to the concept of Constitutional governance and shakes the very foundation of democracy and the rule of law. It threatens the security of the societies undermining the ethical values and justice jeopardizing sustainable development. Corruption de-values human rights, chokes development, and corrodes the moral fabric of society. It causes considerable damage to the national economy,

national interest and the image of the country. (Vide: *Vineet Narain & Ors. v. Union of India & Anr.,* AIR 1998 SC 889; *State of Madhya Pradesh & Ors. v. Shri Ram Singh,* AIR 2000 SC 870; *State of Maharashtra thr. CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar,* JT 2012 (10) SC 446; and *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.,* AIR 2012 SC 1185).

63. The adverse impact of lack of probity in public life leads to a high degree of corruption. Corruption often results from patronage of statutory/higher authorities and it erodes quality of life, and it has links with organized crimes, economic crimes like money laundering etc., terrorism and serious threats to human security to flourish. Its impact is disastrous in the developing world as it hurts the poor disproportionately by diverting funds intended for development. Corruption generates injustice as it breeds inequality and become major obstacle to poverty alleviation and development. United Nation Convention Against Corruption, 2003, envisages the seriousness and magnitude of the problem. December 9 has been designated as International Anti-Corruption Day. India is a party to the said convention with certain reservation.

64. In *re: Special Courts Bill, 1978*, AIR 1979 SC 478, Justice Krishna Iyer observed :

> "Corruption and repression – cousins in such situation - hijack development process and in the long run lagging national progress means ebbing people's confidence in constitutional means to social justice."

65. Corruption in a society is required to be detected and eradicated at the earliest as it shakes "the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society." Liberty cannot last long unless the State is able to eradicate corruption from public life. The corruption is a bigger threat than external threat to the civil society as it corrodes the vitals of our polity and society. Corruption is instrumental in not proper implementation and enforcement of

policies adopted by the Government. Thus, it is not merely a fringe issue but a subject matter of grave concern and requires to be decisively dealt with.

66. In the process of statutory construction, the court must construe the Act before it, bearing in mind the legal maxim *ut res magis valeat quam pereat* – which mean – it is better for a thing to have effect than for it to be made void, i.e., a statute must be construed in such a manner, so as to make it workable. Viscount Simon, L.C. in the case of *Nokes v. Doncaster Amalgamated Collieries Ltd.,* **(**1940) 3 All E.R. 549, stated as follows:

> *"……if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility, the should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."*

Similarly in *Whitney v. Inland Revenue Commissioner,* 1926 AC 37, it was observed as under:

> *"A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable."*

67. The doctrine of purposive construction may be taken recourse to for the purpose of giving full effect to statutory provisions, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute to be unworkable. The rules of interpretation require that construction, which carries forward the objectives of the statute, protects interest of the parties and keeps the remedy alive, should be preferred, looking into the text and context of the statute. Construction

given by the court must promote the object of the statute and serve the purpose for which it has been enacted and not efface its very purpose. "The courts strongly lean against any construction which stands to reduce a statute to futility. The provision of the statute must be so construed so as to make it effective and operative." The court must take a pragmatic view and must keep in mind the purpose for which the statute was enacted, as the purpose of law itself provides good guidance to courts as they interpret the true meaning of the Act and thus, legislative futility must be ruled out. A statute must be construed in such a manner so as to ensure that the Act itself does not become a dead letter, and the obvious intention of the legislature does not stand defeated, unless it leads to a case of absolute intractability in use. The court must adopt a construction which suppresses the mischief and advances the remedy and "to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*". The court must give effect to the purpose and object of the Act for the reason that legislature is presumed to have enacted a reasonable statute. (Vide: *M. Pentiah & Ors. v. Muddala Veeramallappa & Ors.,* AIR 1961 SC 1107; *S.P. Jain v. Krishna Mohan Gupta & Ors.,* AIR 1987 SC 222; *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.,* AIR 1987 SC 1023; *Tinsukhia Electric Supply Co. Ltd. v. State of Assam & Ors.,* AIR 1990 SC 123; *UCO Bank & Anr. v. Rajinder Lal Capoor,* (2008) 5 SCC 257; and *Grid Corporation of Orissa Limited & Ors. v. Eastern Metals and Ferro Alloys & Ors.,* (2011) 11 SCC 334).

68. Governance in terms of Constitutional perceptions and limitations is a basic feature of the Constitution, wherein social, economic and political justice is a Constitutional goal. We must always keep in mind that the Constitution is a living organism and is meant for the people, not just for the government, as it provides for promotion of public welfare.

69. A pliant Lokayukta therefore, would render the Act completely meaningless/ineffective, as he would no doubt reject complaints under Section 7 of the Act, at the instance of the government, taking the prima facie view that there is no substance in the complaint, and further, he may also make a suggestion under Section 20 of the said Act, to exclude a public functionary, from the purview of the Act, which may include the Chief Minister himself. Thus, Section 3 of the Act, 1986 must be construed in the light of meaning given by the courts to the word 'consultation' so as to give effect to the provisions of the statute to make it operative and workable.

ROLE OF THE GOVERNOR :

70. In the facts of this case, it may not be necessary for the court to examine the submissions made on behalf of the appellants that the Governor should neither have directly sought the opinion of the Attorney General of India, nor should have directly solicited the opinion of the Chief Justice on the issue, and further, that after doing so, she should not have asked the Chief Justice to send only one name in the light of the opinion of the Attorney General, as such conduct of the Governor could not be in consonance and conformity with the Constitutional scheme. It appears that the Governor had been inappropriately advised and thus mistook her role, as a result of which, she remained under the impression that she was required to act as a statutory authority under the Act, 1986, and not as the Head of the State. Moreover, the advice of the Attorney General was based on the judgments of this Court, referred to hereinabove, and the Chief Minister was also aware of each and every development in these regards.

LANGUAGE OF THE JUDGMENT :

71. It appears that the third learned Judge has used a harsh language against the Chief Minister, after examining the various letters written by him wherein he contradicted himself as at one place, he admits not just to the **primacy** of the Chief Justice, but to his **supremacy** in this regard, and in another

letter, he states that the recommendation made by the Chief Justice **would not be acceptable** to him, and also revealed his perpetual insistence as regards consideration of the name of Justice J.R. Vora for appointment to the said post of Lokayukta.

At an earlier stage, the Chief Minister had taken a stand to the effect that a retired Judge, who has been given some other assignment, should not be considered for appointment to the post of Lokayukta. However, with respect to the case of Justice J.R. Vora, he seems to have taken an altogether different view.

72. The third learned Judge made numerous observations *inter-alia* that a Constitutional mini crisis had been sparked by the actions of the Chief Minister, compelling the Governor to exercise his discretionary powers under Article 163 of the Constitution, to protect democracy and the rule of law, while appointing respondent no.1 as the Lokayukta; that, there was an open challenge by the Council of Ministers in their non-acceptance of the **primacy** of the opinion of the Chief Justice of the Gujarat High Court, which revealed the discordant approach of the Chief Minister; that, the conduct of the Chief Minister demonstrated deconstruction of democracy and tantamounts to a refusal by the Chief Minister to perform his statutory or Constitutional obligation and, therefore, in light of this, a responsible Constitutional decision was required to be taken by the Governor so as to ensure that democracy thrived, or to preserve democracy and prevent tyranny. The same seem to have been made after examining the attitude of the Chief Minister, as referred to hereinabove.

73. This Court has consistently observed that Judges must act independently and boldly while deciding a case, but should not make atrocious remarks against the party, or a witness, or even against the subordinate court. Judges must not use strong and carping language, rather they must act with sobriety, moderation and restraint, as any harsh and disparaging

strictures passed by them, against any person may be mistaken or unjustified, and in such an eventuality, they do more harm and mischief, than good, therefore resulting in injustice. Thus, the courts should not make any undeserving or derogatory remarks against any person, unless the same are necessary for the purpose of deciding the issue involved in a given case. Even where criticism is justified, the court must not use intemperate language and must maintain judicial decorum at all times, keeping in view always, the fact that the person making such comments, is also fallible. Maintaining judicial restraint and discipline are necessary for the orderly administration of justice, and courts must not use their authority to "make intemperate comments, indulge in undignified banter or scathing criticism". Therefore, while formation and expression of honest opinion and acting thereon, is a necessity to decide a case, the courts must always act within the four-corners of the law. Maintenance of judicial independence is characterized by maintaining a cool, calm and poised mannerism, as regards every action and expression of the members of the Judiciary, and not by using inappropriate, unwarranted and contumacious language. The court is required "to maintain sobriety, calmness, dispassionate reasoning and poised restraint. The concept of *loco parentis* has to take foremost place in the mind of a Judge and he must keep at bay any uncalled for, or any unwarranted remarks." (Vide: *State of M.P. & Ors. etc.etc. v. Nandlal Jaiswal & Ors. etc.etc.,* AIR 1987 SC 251; *A.M. Mathur v. Pramod Kumar Gupta,* AIR 1990 SC 1737; *State of Bihar & Anr. v. Nilmani Sahu & Anr.,* (1999) 9 SCC 211; *In the matter of: "K" a Judicial Officer,* AIR 2001 SC 972; *In the matter of: "RV", a Judicial Officer,* AIR 2005 SC 1441; and *Amar Pal Singh v. State of U.P. & Anr.,* AIR 2012 SC 1995).

Thus, in view of the above, we are of the view that the learned Judge, even if he did not approve of the "my-way or the high way" attitude adopted by the Hon'ble Chief Minister, ought to have maintained a calm disposition and should not have used such harsh language against a Constitutional

authority, i.e. the Chief Minister.

74. **CONCLUSIONS:**

(i) The facts of the case reveal a very sorry state of affairs, revealing that in the State of Gujarat, the post of the Lokayukta has been lying vacant for a period of more than 9 years, as it became vacant on 24.11.2003, upon the resignation of Justice S.M. Soni from the said post. Since then a few half-hearted attempts were made to fill up the post of the Lokayukta, but for one reason or another, the same could not be filled. The present Governor has misjudged her role and has insisted, that under the Act, 1986, the Council of Ministers has no role to play in the appointment of the Lokayukta, and that she could therefore, fill it up in consultation with the Chief Justice of the Gujarat High Court and the Leader of Opposition. Such attitude is not in conformity, or in consonance with the democratic set up of government envisaged in our Constitution. Under the scheme of our Constitution, the Governor is synonymous with the State Government, and can take an independent decision upon his/her own discretion only when he/she acts as a statutory authority under a particular Act, or under the exception(s), provided in the Constitution itself. Therefore, the appointment of the Lokayukta can be made by the Governor, as the Head of the State, only with the aid and advice of the Council of Ministers, and not independently as a Statutory Authority.

(ii) The Governor consulted the Attorney General of India for legal advice, and communicated with the Chief Justice of the Gujarat High Court directly, without taking into confidence, the Council of Ministers. In this respect, she was wrongly advised to the effect that she had to act as a statutory authority and not as the Head of the State. Be that as it may, in light of the facts and circumstances of the present case, it is evident that the Chief Minister had full information and was in receipt of all communications from the Chief Justice, whose opinion is to be given **primacy** as regards such matters, and can only be overlooked, for cogent reasons. The recommendation of the

Chief Justice suggesting only one name, instead of a panel of names, is in consonance with the law laid down by this Court, and we do not find any cogent reason to not give effect to the said recommendation.

(iii) The objections raised by the Chief Minister, have been duly considered by the Chief Justice, as well as by this Court, and we are of the considered view that none of them are tenable, to the extent that any of them may be labeled as cogent reason(s), for the purpose of discarding the recommendation of the name of respondent no.1, for appointment to the post of Lokayukta.

(iv) There are sufficient safeguards in the Statute itself, to take care of the pre-conceived notions in the mind, or the bias, of the Lokayukta, and so far as the suitability of the person to be appointed as Lokayukta is concerned, the same is to be examined, taking into consideration the interests of the people at large, and not those of any individual. The facts referred to hereinabove, make it clear that the process of consultation stood complete, and in such a situation, the appointment of respondent no.1 cannot be held to be illegal.

The appeals lack merit and are accordingly dismissed.

75. Before parting with the case, we would like to mention that as the respondent no.1 did not join the post, because of the pendency of the case, he may join now. Needless to say that the appellants shall provide all facilities/office, staff etc., required to carry out the work of the Lokayukta. More so, we have no doubt that appellants will render all co-operation to respondent no.1 in performance of the work of the Lokayukta.

In view of the above, no separate order is required to be passed in SLP (C) Nos. 2625-2626/2012; and 2687-2688/2012. The said petitions and all IAs, pending, (if any), stand disposed of in terms of the aforesaid judgment.

R.P. Appeals dismissed.

STATE OF GUJARAT & ANR.

v.

HON'BLE MR. JUSTICE (RETD) RAMESH AMRITLAL MEHTA & ORS.

(Review Petition (c) No(s). 362-363 of 2013)

in

(Civil Appeal No(s). 8814-8815 of 2012)

MARCH 14, 2013

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Constitution of India, 1950:

Art. 137 – Review Petition – On the ground of difference of opinion in the judgment under renew and a subsequent judgment – Held: In the light of distinctive features in Gujarat Act and in Karnataka Act which have been clearly spelt out in the judgment under review and in the subsequent judgment and the grounds raised in the review petitions having been dealt with in detail in the judgment under review and concluded by adducing adequate reasons, no case for review is made out and there is no apparent error in the impugned judgment – Review petitions are dismissed – Gujarat Lokayukta Act, 1986 – s.3(1), proviso – Karnataka Lokayukta Act, 1984 – s. 3(2)(a).

Justice K.P. Mohapatra v. Sri Ram Chandra Nayak and Ors. **- 2002 (3) Suppl. SCR 166 = (2002) 8 SCC 1 – relied on**

Mr. Justice Chandrashekaraiah (Retd.) v. Janekere C. Krishna & Ors. **2013 (3) SCC 117 - distinguished**

State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd.) **- 2013 (1) SCR 1 = 2013 (1) SCALE 7 – referred to.**

Case Law Reference:

(2013) 3 SCC 117	**distinguished**	**para 2**
2013 (1) SCR 1	**referred to**	**para 2**
2002 (3) Suppl. SCR 166	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Review Petition (Civil) Nos. 362-363 of 2013.

In

Civil Appeal Nos. 8814-8815 of 2012.

From the Judgment & Order dated 10.10.2011 and 18.01.2012 of the High Court of Gujarat at Ahmedabad in Sepcial Civil Application No. 12632 of 2011.

The following Order of the Court was delivered

ORDER

1. The original appellants in Civil Appeal Nos.8814-8815/ 2012 have filed the present review petitions seeking review of our judgment dated 02.01.2013.

2. We bestowed our serious consideration to the various grounds raised in the review petition. On a detailed reading of the grounds, it is quite apparent that the provocation for filing these review petitions is mainly the subsequent decision of this Court in the case of *Mr. Justice Chandrashekaraiah (Retd.) v. Janekere C. Krishna & Ors.* dated **11.01.2013** in **Civil Appeal Nos.197-199 of 2013 @ SLP (C) Nos.15658-15660 of 2012** which related to appointment of Upa-Lokayukta under Section 3 of the Karnataka Lokayukta Act, 1984. In the said judgment, the judgment under review reported as *State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd.)* - **2013 (1) SCALE 7** was also noted and the clear distinction as between Section 3 of the Karnataka Lokayukta Act and Section 3(1) of Gujarat Lokayukta Act, 1986 was spelt out.

3. By referring to the above later decision in the forefront, the sum and substance of the grounds raised for review herein is three-fold, namely,

(1) there is divergence of views taken by this Court in the impugned judgment and in the later judgment as regards the interpretation of language of Section 3 in both the legislations,

(2) the role of the constitutional authorities involved in the consultation process and;

(3) regarding primacy of the opinion of the Chief Justice vis-à-vis the Chief Minister of the concerned State.

4. At the very outset we find that none of the above grounds have any substance. Since, we find the whole basis for the review by relying upon the later judgment of this Court, it will be necessary to highlight the clear distinction as between the judgment under review and the said later decision of this Court.

5. The later decision of this Court considered the question about the primacy of the views expressed by the Chief Justice of the High Court of Karnataka in making appointment to the post of Lokayukta and Upa-Lokayukta by the Governor of Karnataka in exercise of power conferred on him under Section 3(2)(a) and (b) of the Karnataka Lokayukta Act, 1984 (hereinafter called as "Karnataka Act"). Section 3 of the Karnataka Act reads as under:

"**3**. **Appointment of Lokayukta and Upa-Lokayukta**

(1) For the purpose of conducting investigations and enquiries in accordance with the provisions of this Act, the Governor shall appoint a person to be known as the Lokayukta and one or more persons to be known as the Upa-lokayukta or Upa-lokayuktas.

"2(a) A person to be appointed as the Lokayukta shall be a person who has held the office of a Judge of the Supreme Court or that of the Chief Justice of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High

Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly.

(b) A person to be appointed as an Upa-Lokayukta shall be a person who has held the office of the Judge of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the opposition in the Karnataka Legislative Council and the Leader of the opposition in the Karnataka Legislative Assembly.

(Emphasis added)

(3)xxxxxxxxxx

6. A reading of the sub-clauses 2(a)&(b) disclose that it is for the Chief Minister to advise the Governor for appointment of a Lokayukta after consultation with the Chief Justice of the High Court of Karnataka, the Chairman of Karnataka Legislative Council, the Speaker of Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly. While, as per the provision itself, it is for the Chief Minister to advice the Governor, the collegium for consultation consists of as many as five other members, including the Chief Justice of the High Court. The same is the procedure for appointment of Upa-Lokayukta under Section 3(2)(b) of the Karnataka Act.

7. In the later judgment of this Court, the above statutory stipulation, about the primary role to be played by the Chief Minister in advising the Governor and the collegium of consultation to be made, has been specifically discussed and concluded to the following effect in paragraph 37:

"……Therefore, for the purpose of appointment of

Lokayukta or Upa Lokayukta all the five consultees are common. The appointment has to be made by the Governor on the advice tendered by the Chief Minister in consultation with those five dignitaries."

8. As far as the Gujarat Lokayukta Act is concerned, the proviso to Section 3(1) of the Gujarat Lokayukta Act is relevant which is to the following effect:

"3(1) For the purpose of conducting investigations in accordance with provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta.

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Articles 356 of the Constitution is in operation in the State of Gujarat, after consultation also with the Leader of the Opposition in the Legislative Assembly, or if, there be no such Leader, a person elected in this behalf by the members of the Opposition in that House in such manner as the Speaker may direct."

(Emphasis added)

9. In the light of the specific stipulations contained in the proviso, it was held in the impugned judgment that Section 3(1) read along with proviso envisages the appointment of Lokayukta by the Governor based on the aid and advice of the Council of Ministers after consultation with the Chief Justice of the High Court of Gujarat who in turn to consult with the Leader of Opposition, if the Assembly is in position and in its absence even such consultation by the Chief Justice with the Leader of Opposition is also dispensed with.

10. This distinction, as between the Karnataka Act and Gujarat Act, was specifically noted in the later judgment in paragraph 48, which is to the following effect:

"……Recently, this Court had an occasion to consider the scope of Section 3(1) of the Gujarat Lokayukta Act, 1986 in *State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd.)* reported in 2013 (1) SCALE 7. Interpreting that provision this Court held that the views of the Chief Justice have primacy in the matter of appointment of Lokayukta in the State of Gujarat. Every Statute has, therefore, to be construed in the context of the scheme of the Statute as a whole, consideration of context, it is trite, is to give meaning to the legislative intention according to the terms in which it has been expressed."

11. The later judgment has also considered similar such provisions contained in Andhra Pradesh Lokayukta Act, 1983, Assam Lokayukta and Upalokayukta Act 1985, Bihar Lokayukta Act 1973, Chhattisgarh Lok Aayog Adhyadesh, 2002, Delhi Lokayukta and Upa-Lokayukta Act 1995, Gujarat Lokayukta Act 1986, Jharkhand Lokayukta Act, 2001, Haryana Lokayukta Act, 2002 and Kerala Lokayukta Act, 1999 and held that each State has adopted different eligibility criteria, method of selection, consultative procedures etc., in the matter of appointment of Lokayuktas and Upa-Lokayuktas in their respective States.

12. Apart from referring to the similar provisions relating to appointment of Lokayukta in the above referred to enactments, the later judgment also noted that in the States of Assam, Delhi and in particular Gujarat, the Chief Ministers can participate in the process and could express their views and that the Chief Justices of the respective High Courts alone have PRIMACY in the matter of appointment of Lokayukta and Upa-Lokayukta. It was further noted that while in the States of Chhattisgarh, Haryana etc., the appointment is made by the Governor on the advice of the Chief Minister while in the State of Kerala under the Act the Chief Justice is not even a consultee at all. It, therefore, concluded as under in paragraph 48:

"……Legislatures of the various States, in their wisdom, have, therefore, adopted different sources, eligibility

criteria, methods of appointment etc. in the matter of appointment of Lokayukta and Upa-Lokayuktas."

13. As regards the process of consultation, it was again held in the later judgment that consultation is not a formality but should be meaningful, effective and primacy of opinion is always vested with the High Court or the Chief Justice of the State High Court or the collegium of the Supreme Court or the Chief Justice of India, as the case may be, when a person has to hold a judicial office and discharge functions akin to judicial functions.

14. After holding so, by referring to Section 3(1) of the Orissa Lokpal and Lokayuktas Act which is in *pari materia* with the Gujarat Act, this Court by making specific reference to the decision which came up to this Court in *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak and Ors.* - (2002) 8 SCC 1 has held as under in paragraph 57:

"57. The High Court, in the instant case has, placed considerable reliance on the Judgment of this Court in **K.P. Mohapatra** (supra) and took the view that consultation with the Chief Justice is mandatory and his opinion will have primacy. Above Judgment has been rendered in the context of the appointment of Orissa Lokpal under Section 3 of the Orissa Lokpal and Lokayuktas Act. The proviso to Section 3(1) of the Act says that the Lokpal shall be appointed on the advice of the Chief Justice of the High Court of Orissa and the Leader of the Opposition, if there is any. Consultation with the Chief Justice assumes importance in view of the proviso. The Leader of the Opposition need be consulted, if there is one. In the absence of the Leader of the Opposition, only the Chief Justice remains as the sole consultee. In that context and in view of the specific statutory provision, it has been held that the consultation with the Chief Justice assumes importance and his views has primacy."

(Emphasis added)

15. In the light of the clear distinction in Section 3(2)(a) and (b) of the Karnataka Act and the Orissa Act, it was held that the judgment of this Court in *K.P. Mohapatra* (supra) was inapplicable while construing the provisions of the Karnataka Act, since, the language employed are not *pari materia*. It will be appropriate to state that the provisions of the Gujarat Act and the Orissa Act are identical in so far as it related to the consultation process is concerned and, therefore, it was categorically held that the role of the Chief Justice was primary by virtue of the specific provision contained in the Act. In the light of specific provision contained in Section 3(2)(a) and (b) of the Karnataka Act in the later judgment, it was held as under in paragraph 62:

> "Section 3(2)(a) and (b) when read literally and contextually admits of no doubt that the Governor of the State can appoint Lokayukta or Upa Lokayukta only on the advice tendered by the Chief Minister and that the Chief Justice of the High Court is only one of the consultees and his views have no primacy. The Governor, as per the statute, can appoint only on the advice tendered by the Chief Minister and not on the opinion expressed by the Chief Justice or any of the consultees."

16. In the light of the above distinctive features in the Karnataka Act and in the Gujarat Act which have been clearly spelt out in the impugned judgment under review and in the judgment of **Mr. Justice Chandrashekaraiah (Retd.)** (supra), the ground raised in these review petitions which have been dealt with in detail in the judgment under review and concluded by adducing adequate reasons, we are convinced that no case for review is made out and there is no apparent error in the impugned judgment. These review petitions are, therefore, dismissed.

R.P. Review Petitions dismissed.

VAJRESH VENKATRAY ANVEKAR
v.
STATE OF KARNATAKA
(Criminal Appeal No. 12 of 2013)

JANUARY 3, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Penal Code, 1860 – ss. 498A & 306 – Married woman committed suicide by consuming poison within seven years of marriage – Acquittal of accused-husband by trial court – Reversal of acquittal by High Court – Justification – Held: Justified –Medical evidence and the evidence of PWs revealed that the victim was beaten up prior to the death and she received eye injury and injury on her cheek – The injuries were certainly not self-inflicted – Victim committed suicide within seven years from the date of her marriage in her matrimonial home – Impact of this circumstance was clearly missed by the trial court – Evidence on record established that the victim was subjected to mental and physical cruelty by the appellant in their matrimonial home which drove her to commit suicide – Explanation offered by appellant in his statement u/s.313 CrPC confirms that appellant is not innocent – Circumstances on record clearly establish that the victim received the eye injury in the matrimonial home and the appellant was responsible for it – Appellant unable to rebut presumption u/s.113A of the Evidence Act – Evidence Act, 1872 – s.113A.

Witness – Interested witnesses – Evidence of – Suicide by married woman – Dowry death case – Trial court refused to rely upon the evidence of the parents, brother and brothers-in-law of the victim primarily on the ground that they were interested witnesses – Held: The approach of the trial court was very unfortunate – When a woman is subjected to ill-treatment within the four walls of her matrimonial house, ill-

treatment is witnessed only by the perpetrators of the crime – They would certainly not depose about it – It is common knowledge that independent witnesses like servants or neighbours do not want to get involved – On facts, a maid employed in the matrimonial house of the victim who was examined by the prosecution turned hostile – It is true that chances of exaggeration by the interested witnesses cannot be ruled out and witnesses are prone to exaggeration – However, if the exaggeration is of such nature as to make the witness wholly unreliable, the court would not rely on him – If attendant circumstances and evidence on record clearly support and corroborate the witness, then merely because he is interested witness he cannot be disbelieved because of some exaggeration, if his evidence is otherwise reliable – In this case, no such exaggeration was found qua the accused-husband (appellant) – The witnesses stood the test of cross-examination very well – Injuries suffered by the victim prior to the suicide could not be ignored – The pathetic story of the victim's woes disclosed by her parents, her brother and her brothers-in-law deserved to be accepted and was rightly accepted by the High Court.

FIR – Delay – Suicide committed by married woman by consuming poison – FIR lodged by victim's father after six hours – Effect – Held: When a man looses his daughter due to cyanide poisoning, he is bound to break down – He would take time to recover from the shock – Six hours delay cannot make his case untrue.

Crime against Women – Phenomenal rise in crime – Observation made by Supreme Court that Judges have to be sensitive to women's problems – Protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitized towards women's problems.

The prosecution case was that the daughter of PW1 committed suicide in her matrimonial home by

consuming poison because the victim's husband (A2), father-in-law (A1) and mother-in-law (A3) tortured her. The death took place within seven years of marriage. The said three accused were tried for offences punishable under Sections 498-A, 304-B and 306 read with Section 34 IPC and Sections 3, 4 and 6 of the Dowry Prohibition Act, 1961. The trial court acquitted all the accused. In appeal, High Court confirmed the acquittal of A1 and A3, but reversed the acquittal of A2 and convicted him under Sections 498-A and 306 IPC. Aggrieved, A2 filed the present appeal.

The appellant *inter alia* raised the following contentions before this Court: 1) that the view taken by the trial court while acquitting the accused was a reasonably possible view which ought not to have been interfered with by the High Court; 2) that the High Court erred in relying on the evidence of interested witnesses; 3) that though, evidence shows that several police officers were there at the scene of offence, PW1 did not lodge the complaint immediately and lodged the complaint at 2215 hours, though he got to know about his daughter's death at 2.30 p.m, and the complaint was, therefore, doctored; 4) that demand of dowry was not proved; 5) that there was no credible evidence on the basis of which the appellant could be held guilty of the said offences and further 5) that the explanation offered by the appellant in his statement recorded under Section 313 CrPC established his innocence.

Dismissing the appeal, the Court

HELD:1. Two most vital circumstances which must be kept in mind while dealing with this case are that 'G', the daughter of PW1, had committed suicide in the matrimonial home and her death took place within seven years of her marriage. Presumption under Section 113A of the Indian Evidence Act, 1872 springs into action

which says that when the question is whether the commission of suicide by a woman had been abetted by 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. The question is whether the appellant has been able to rebut this presumption. [Para 6] [92-G-H; 93-A-B]

2. Medical evidence is of great importance in this case. PW7 doctor had done G's post-mortem. She found number of injuries on 'G'. PW7 opined that cyanide poisoning was the cause of death and all the external wounds were caused prior to post-mortem. According to her, the wounds on the right side of head can be sustained if a person is beaten with hands. According to her report, they could be caused by hard and blunt object when the deceased was alive. In the cross-examination, it was suggested to her that if the dead body falls on rough surface, the wounds, which she had seen, could be caused. She denied the suggestion. Thus, it is clear that 'G' was beaten up prior to the death. In the facts of this case, it is difficult and absurd to come to a conclusion that the injuries were self-inflicted. Pertinently, 'G' died in her matrimonial home. It is, therefore, clear that prior to taking cyanide, 'G' was assaulted in her matrimonial home. PW6, the then Tahsildar and Taluka Magistrate who drew the inquest panchnama also referred to blackening of the skin at the wrist and on the left and right side of the cheeks of the dead body. He denied the suggestion that because of the pressure exerted by PW1, it was so stated in the inquest panchnama. [Para 7] [93-C-G-H; 94-A-D]

3. PW20 stated that on 30/5/2002 (about two weeks

prior to the incident) 'G' had visited his nursing home for treatment with her brother. He found number of injuries on her body. 'G' told him that she sustained those injuries because her husband had beaten her. PW20 stated that those injuries were caused within 24 hours and they could be caused due to beating by sticks and pinching. PW20 identified his signature on the injury certificate (Ex. P66). Strangely, the trial court has given no importance to this evidence and has observed that from the evidence of this witness one can only conclude that on 30/5/2002 when 'G' visited him, she had three injuries on her body which were caused 24 hours prior to the treatment and it is for the prosecution to prove that the accused had caused those injuries. The trial court has not disbelieved PW20. 'G' was brought to him by her brother. She told him that her husband had caused those injuries. One fails to understand what more evidence the prosecution could have adduced to prove that those injuries were caused by the appellant. In the peculiar circumstances of the case, only this conclusion can be drawn from PW20's evidence. It is pertinent to note that PW3, a friend of 'G', has supported the case of PW20 that the deceased had visited him in May, 2002. PW3 stated that she met 'G' at PW20's nursing home in May, 2002. 'G' appeared to be disturbed and she complained of body ache. According to PW3, she told her that the appellant and members of his family were beating her and that she was fed up. The trial court discarded the evidence of this witness on the ground that there is a delay in recording her statement. So far as delay is concerned, one cannot lose sight of the fact that the investigation of this case was entrusted to PW24, Deputy Superintendent of Police in COD in Dowry Prohibition Cell on 21/06/2002. Thereafter, she appears to have recorded certain vital statements. In the peculiar facts of this case, delay in recording statements of witnesses cannot be taken against the prosecution. So far as PW3 is concerned, despite the delay in recording

her statement, she is found to be a reliable witness. The High Court rightly relied upon her evidence. [Para 8] [94-E-G-H; 95-A-F]

4. The trial court refused to rely upon the evidence of the parents, brother and brothers-in-law of 'G' primarily on the ground that they are interested witnesses. This approach is very unfortunate. When a woman is subjected to ill-treatment within the four walls of her matrimonial house, ill-treatment is witnessed only by the perpetrators of the crime. They would certainly not depose about it. It is common knowledge that independent witnesses like servants or neighbours do not want to get involved. In fact, in this case, a maid employed in the house of the appellant who was examined by the prosecution turned hostile. It is true that chances of exaggeration by the interested witnesses cannot be ruled out. Witnesses are prone to exaggeration. It is for the trained judicial mind to find out the truth. If the exaggeration is of such nature as to make the witness wholly unreliable, the court would obviously not rely on him. If attendant circumstances and evidence on record clearly support and corroborate the witness, then merely because he is interested witness he cannot be disbelieved because of some exaggeration, if his evidence is otherwise reliable. In this case, no such exaggeration was found *qua* the appellant. The witnesses have stood the test of cross-examination very well. The injuries suffered by 'G' prior to the suicide cannot be ignored. The pathetic story of G's woes disclosed by her parents, her brother and her brothers-in-law deserves to be accepted and has rightly been accepted by the High Court. This Court is not happy with the manner in which trial court has ignored vital evidence. [Para 9] [95-G-H; 96-A-E]

5. PW1 stated how 'G' was harassed mentally and physically. The trial court has recorded a finding that 'G'

did not receive eye injury prior to marriage. PW1 stated that the appellant assaulted 'G' on her face and she received eye injury. This evidence inspires confidence. The story that the appellant had taken her to Dr. Kumta, an eye specialist, appears to have been created to get over PW1's version. In any event, taking 'G' to a doctor after assaulting her does not absolve the appellant of the crime. PW11, brother-in-law of 'G' resides in Bombay. He stated that when 'G' had come to his house along with the appellant she appeared to be frightened. She was not able to talk properly. When she came alone she told him that she was scared of living in the appellant's house. He noticed that her left cheek had become red and the right portion of her face had become dark. PW17, another brother-in-law of 'G' spoke about the ill-treatment meted out to 'G', the eye injury received by her and the assault on her left cheek. PW19, brother of 'G' also deposed as to how 'G' was ill-treated. Despite all this the trial court acquitted the appellant. Surprisingly, six hours delay in lodging the F.I.R. is taken against the prosecution.When a man looses his daughter due to cyanide poisoning, he is bound to break down. He would take time to recover from the shock. Six hours delay cannot make his case untrue. It is also not proper to expect him to give all minute details at that stage. The F.I.R. contains sufficient details. It is not expected to be a treatise. The comments on alleged delay in lodging the F.I.R. and its contents are totally unwarranted. For the same reasons, the submission of the appellant that because PW1 did not tell the police officers who were present at the scene of offence that the appellant was responsible for the suicide his FIR lodged after six hours is suspect, is also rejected. [Para 10] [96-F-H; 97-A-C-F-H; 98-A]

6. The explanation offered by the appellant in his statement recorded under Section 313 CrPC confirms that the appellant is not innocent. After denying the

allegations of ill-treatment, cruelty and demand of dowry, the appellant goes on to paint a rosy picture of his married life. He refers to certain photographs and a Valentine day's card sent by 'G' to him in 2002. Valentine day's card sent by 'G' to the appellant does not help him to probablise his alleged good conduct. In the facts of this case it appears to be an effort made by 'G' to please the appellant. The photographs were produced in the court to show that 'G' was taken to religious places and hill stations. Trial court has rightly not placed reliance on them. As regard the photographs it has observed that in the photographs 'G' is seen standing alone and, therefore, on the basis of these photographs it cannot be said that the appellant had taken her to religious places or for honeymoon. Perhaps to create an impression that 'G' was suffering from depression, the appellant comes out with a story that 'G' used to consume pills everyday and when he enquired about it she used to give evasive answers. According to him she used to lead a life of an introvert and she preferred loneliness. She never watched T.V., she never read any newspapers or books. When he asked her about it she stated that she had an eye problem. He has further gone on to say that he blamed G's parents that they had suppressed her eye trouble from him and got her married to him. He further goes on to say that for this reason she was not willing to give birth to a child. This story is palpably false and is a crude attempt to create an impression that 'G' was mentally unstable. No such evidence is brought on record. In this connection, it must be stated that the trial court has rejected the defence of the appellant that 'G' had lost her eye sight even before her marriage and that this fact was concealed from him. The trial court has observed that 'G' was a graduate. If she had really lost eye sight, the appellant and his parents would have noticed the defect earlier. Further part of the explanation which refers to the appellant's

alleged conduct of getting 'G' examined by Dr. Kumta and allegedly giving her money for operation will have to be understood against the background of above facts. This Court is not inclined to believe that the appellant took 'G' to an eye specialist and if he did take 'G' to an eye specialist there is no doubt that it was too late in the day. The evidence on record clearly indicates that 'G' received injury on her cheek and to her eye after marriage. She had no eye trouble before marriage. The injury was certainly not self-inflicted. Circumstances on record clearly establish that 'G' received the eye injury in the matrimonial home and the appellant was responsible for it. [Para 11] [98-B-H; 99-A-C]

7. Though this Court is wary of passing comments against the subordinate courts because such comments tend to demoralize them, but, in this case, the insensitivity shown by the trial court to a serious crime committed against a hapless woman, cannot be ignored. The tenor of the judgment passed by the trial court suggests that wife beating is a normal facet of married life. It is one thing to say that every wear and tear of married life need not lead to suicide and it is another thing to put it so crudely and suggest that one or two assaults on a woman is an accepted social norm. Judges have to be sensitive to women's problems. Perhaps the trial court wanted to convey that the circumstances on record were not strong enough to drive 'G' to commit suicide. But to make light of slaps given to 'G' which resulted in loss of her eyesight is to show extreme insensitivity. Assault on a woman offends her dignity. What effect it will have on a woman depends on facts and circumstances of each case. There cannot be any generalization on this issue. However, this observation must not be understood to mean that in all cases of assault suicide must follow. The objection is to the tenor of trial court's observations. The

trial court's judgment show a mindset which needs to change. There is a phenomenal rise in crime against women and protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitized towards women's problems. [Paras 12, 14] [99-D-E; 101-C-H; 102-A-B]

8. In the ultimate analysis, it is clear that the appellant has not been able to rebut presumption under Section 113A of the Evidence Act. 'G' committed suicide within seven years from the date of her marriage in her matrimonial home. Impact of this circumstance was clearly missed by the trial court. The evidence on record establishes that 'G' was subjected to mental and physical cruelty by the appellant in their matrimonial home which drove her to commit suicide. The appellant is guilty of abetment of suicide. The High Court rightly reversed the judgment of the trial court acquitting the appellant. [Para 15] [102-B-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 12 of 2013.

From the Judgment & Order dated 09.11.2011 of the High Court of Karnataka Circuit Bench at Dharwad in Criminal Appeal No. 1567 of 2007.

Kiran Suri, Aparna Matto, S.J. Amit, Nakibur Rahman for the Appellant.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. The appellant (original accused 2 – A2) was tried along

with his father Venkatray Narayan Anvekar (original accused 1 – A1) and his mother Smt. Vidyabai Venkatray Anvekar (original accused 3 – A3) for offences punishable under Sections 498-A, 304-B and 306 read with Section 34 of the Indian Penal Code (for short **'the IPC'**) and Sections 3, 4 and 6 of the Dowry Prohibition Act, 1961 by the Sessions Judge, Fast Track Court-II at Karwar in Sessions Case No.59/02. By his judgment dated 30/03/2007 learned Sessions Judge acquitted all the accused. The State of Karnataka carried an appeal to the High Court of Karnataka, Circuit Bench at Dharwad from the said judgment. The High Court by the impugned judgment confirmed the acquittal of A1 and A3. The High Court, however, reversed the acquittal of the appellant and convicted him for the offences punishable under Sections 498-A and 306 of the IPC. For offence punishable under Section 306 of the IPC, the appellant was sentenced to imprisonment for five years and to pay fine of Rs.1,00,000/- and in default of payment of fine, to undergo further imprisonment for one year. For offence punishable under Section 498-A the appellant was sentenced to imprisonment for three years and to pay fine of Rs.10,000/- and in default of payment of fine, to undergo further imprisonment for six months. The substantive sentences were ordered to run concurrently. Fine amount was directed to be paid to the parents of deceased Girija. The appellant was acquitted of the other charges. Being aggrieved by the said judgment, the appellant has filed the present appeal.

3. Admittedly, PW1-Suresh father of Girija stays at Nandangad Karwar. The appellant's family stays at Habbuwada Karwar. Girija was married to the appellant on 17/12/2001 at Karwar. The gist of the prosecution case can be gathered from the F.I.R. lodged by PW1-Suresh. It is stated in the F.I.R. that one month after the marriage the appellant went to Mumbai where he has a jewellery shop along with Girija. About two months prior to the date of the F.I.R. Girija had developed eye problem. Instead of taking her to a doctor the appellant took her to one Swamiji. When the eye ailment could

not be cured, she was brought to Karwar for check-up. When she came to Karwar she told PW1-Suresh that the appellant, her sister-in-law and A1 used to torture her and her sister-in-law used to assault her. They used to wake her up at 5 a.m. and pressurize her to work. At the instigation of her sister-in-law and A1, the appellant used to assault her. They used to ask her to get money from her parents. On 11/06/2002, PW1-Suresh, his son, Girija and the appellant went to Hubli and got Girija's eyes checked from eye specialist Dr. Anant Revankar. On 12/06/2002, Girija informed them that she was being tortured. She stated that when she requested the appellant to take her for honeymoon, he refused and told her that if she continues with the demand, she will have to go to her parent's house. She stated that the appellant tortures her mentally and when she visits Karwar the torture increases. On 12/06/2002, at 4.00 p.m., PW1-Suresh, his son and wife took Girija to the appellant's house at Hubbuwada and informed them that they would take her back next day evening. On 13/06/2002, at 12 noon, he called-up Girija and told her that he would visit her matrimonial home and speak to A1 about the harassment and torture meted out to her. Girija told him that if he visits her house, her in-laws would torture her more and, therefore, he should not come. On 13/06/2002, at 2.30 p.m, the appellant phoned and told him that Girija was not speaking anything. He went to the appellant's house along with his wife and sons. His son Sandeep saw Girija in the bedroom situated on the upper floor. She was not able to speak. Sandeep lifted her and brought her downstairs in order to show her to the doctor. The moment the doctor checked her, he pronounced her dead. PW1-Suresh stated that Girija had committed suicide by consuming poison or some tablets because the appellant, A1 and A3 tortured her. The complaint was lodged at 2215 hours. PW1-Suresh stated that because he had gone to inform about the death of Girija to his relatives there was some delay in lodging the complaint.

4. In support of its case the prosecution examined 24

witnesses. Prominent amongst them are PW1-Suresh and PW18-Anuradha, the parents of the deceased, PW19- Jayant the brother of the deceased, PW2-Manjunath and PW12-Sripad Anvekar who attended appellant's marriage, PW11-Digvijay, PW16-Prasanna Revankar and PW17-Dr. Raj Kumar, the sons-in-law of PW1-Suresh and PW3-Shruti, friend of Girija. The appellant denied the prosecution case and submitted a written explanation. We shall soon advert to it.

5. Assailing the impugned judgment of the High Court Smt. Suri, learned counsel for the appellant, contended that the view taken by the trial court while acquitting the accused was a reasonably possible view which ought not to have been interfered with by the High Court. Counsel submitted that the High Court erred in relying on the evidence of interested witnesses. Counsel submitted that though, evidence shows that several police officers were there at the scene of offence, PW1 did not lodge the complaint immediately. He lodged the complaint at 2215 hours, though he got to know about Girija's death at 2.30 p.m. The complaint is, therefore, doctored. Counsel submitted that the High Court has held that demand of dowry is not proved. The High Court, therefore, could not have proceeded to convict the appellant under Sections 498A and 306 of the IPC by reversing the order of acquittal. There was no credible evidence on the basis of which the appellant could be held guilty of the said offences. Counsel requested us to go through the explanation offered by the appellant in his statement recorded under Section 313 of the Criminal Procedure Code, 1973 (for short '**the Code**') which according to her establishes his innocence. Learned counsel for the State strenuously supported the impugned order.

6. Two most vital circumstances which must be kept in mind while dealing with this case are that Girija had committed suicide in the matrimonial home and her death took place within seven years of her marriage. Presumption under Section 113A of the Indian Evidence Act, 1872 springs into action which says

that when the question is whether the commission of suicide by a woman had been abetted by 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. The question is whether the appellant has been able to rebut this presumption.

7. Medical evidence is of great importance in this case. PW7-Dr. Sailaja had done Girija's post-mortem. She found the following injuries on Girija:

> "1. On right side of head there was little swelling and wound on the forehead.
>
> 2. On the right eye lower eyelid and on the neck there was weal's of specific area and the eye was bleeded.
>
> 3. There was swelling on the right side of neck.
>
> 4. On the right hand thumb bottom there was blue mark having an area 3'x2 ½'.
>
> 5. To the inner side of the arm the blood was clotted having an area of 2' x 1'.
>
> 6. To the inner side of the wrist the skin was blackened having an area 1' x ½'.
>
> 7. Below the thumb the blood was clotted covering an area 2' x 1'."

Dr. Sailaja opined that cyanide poisoning was the cause of death. She stated that all the external wounds were caused prior to post-mortem. According to her, the wounds on the right side of head can be sustained if a person is beaten with hands. According to her report, they could be caused by hard and blunt

object when the deceased was alive. In the cross-examination, it was suggested to her that if the dead body falls on rough surface, the wounds, which she had seen, could be caused. She denied the suggestion. Thus, it is clear that Girija was beaten up prior to the death. In the facts of this case, it is difficult and absurd to come to a conclusion that the injuries were self-inflicted. Pertinently, Girija died in her matrimonial home. We have no hesitation, therefore, in concluding that prior to taking cyanide, Girija was assaulted in her matrimonial home. PW6-Laxman Kudani, the then Tahsildar and Taluka Magistrate Karwar who drew the inquest panchnama also referred to blackening of the skin at the wrist and on the left and right side of the cheeks of the dead body. He denied the suggestion that because of the pressure exerted by PW1-Suresh, it was so stated in the inquest panchnama.

8. It would be appropriate at this stage to go to the evidence of PW20-Dr. Anil Kolvekar. This evidence takes us little backwards. Dr. Kolvekar stated that on 30/5/2002 Girija had visited his nursing home for treatment with her brother. He found following injuries on her body:

> "(1) Contusion on right inner thigh aspect and 1/3rd circular – 3 cm in diameter;
>
> (2) Contusion of left inner thigh aspect and 1/3rd circular zoom diameter;
>
> (3) Contusion over back right side 6 cm injuries. "

She told him that she sustained those injuries because her husband had beaten her. Dr. Kolvekar stated that those injuries were caused within 24 hours and they could be caused due to beating by sticks and pinching. Dr. Kolvekar identified his signature on the injury certificate (Ex. P66). Strangely, learned Sessions Judge has given no importance to this evidence and has observed that from the evidence of this witness one can only conclude that on 30/5/2002 when Girija visited him, she

had three injuries on her body which were caused 24 hours prior to the treatment and it is for the prosecution to prove that the accused had caused those injuries. Learned Sessions Judge has not disbelieved Dr. Kolvekar. Girija was brought to him by her brother. She told him that her husband had caused those injuries. We fail to understand what more evidence the prosecution could have adduced to prove that those injuries were caused by the appellant. In the peculiar circumstances of the case, only this conclusion can be drawn from Dr. Kolvekar's evidence. It is pertinent to note that PW3-Shruti Vernekar, a friend of Girija, has supported the case of PW20-Dr. Kolvekar that the deceased had visited him in May, 2002. PW3-Shruti stated that she met Girija at Dr. Kolvekar's nursing home in May, 2002. Girija appeared to be disturbed and she complained of body ache. According to PW3-Shruti, she told her that the appellant and members of his family were beating her and that she was fed up. Learned Sessions Judge discarded the evidence of this witness on the ground that there is a delay in recording her statement. So far as delay is concerned, we cannot lose sight of the fact that the investigation of this case was entrusted to PW24-A.K. Sidamma, Deputy Superintendent of Police in COD in Dowry Prohibition Cell on 21/06/2002. Thereafter, she appears to have recorded certain vital statements. In the peculiar facts of this case delay in recording statements of witnesses cannot be taken against the prosecution. So far as PW3-Shruti is concerned, despite the delay in recording her statement we find her to be a reliable witness. The High Court has rightly relied upon her evidence.

9. Learned Sessions Judge has refused to rely upon the evidence of the parents, brother and brothers-in-law of Girija primarily on the ground that they are interested witnesses. We find this approach to be very unfortunate. When a woman is subjected to ill-treatment within the four walls of her matrimonial house, ill-treatment is witnessed only by the perpetrators of the crime. They would certainly not depose about it. It is common knowledge that independent witnesses like servants or

neighbours do not want to get involved. In fact, in this case, a maid employed in the house of the appellant who was examined by the prosecution turned hostile. It is true that chances of exaggeration by the interested witnesses cannot be ruled out. Witnesses are prone to exaggeration. It is for the trained judicial mind to find out the truth. If the exaggeration is of such nature as to make the witness wholly unreliable, the court would obviously not rely on him. If attendant circumstances and evidence on record clearly support and corroborate the witness, then merely because he is interested witness he cannot be disbelieved because of some exaggeration, if his evidence is otherwise reliable. In this case, we do not find any such exaggeration qua the appellant. The witnesses have stood the test of cross-examination very well. There are telltale circumstances which speak volumes. Injuries suffered by Girija prior to the suicide cannot be ignored. The pathetic story of Girija's woes disclosed by her parents, her brother and her brothers-in-law deserves to be accepted and has rightly been accepted by the High Court. A1 and A3 have been acquitted by the Sessions Court. That acquittal has been confirmed by the High Court. The State has not appealed against that order. We do not want to therefore go into that aspect. But, we must record that we are not happy with the manner in which learned Sessions Judge has ignored vital evidence.

10. PW1-Suresh the father of Girija stated how Girija was harassed mentally and physically. Learned Sessions Judge has recorded a finding that Girija did not receive eye injury prior to marriage. PW1-Suresh stated that the appellant assaulted Girija on her face and she received eye injury. This evidence inspires confidence. The story that the appellant had taken her to Dr. Kumta appears to have been created to get over PW1-Suresh's version. In any event, taking Girija to a doctor after assaulting her does not absolve the appellant of the crime. PW11-Digvijay Kudtarkar, brother-in-law of Girija resides in Bombay. He stated that when Girija had come to his house along with the appellant she appeared to be frightened. She

was not able to talk properly. When she came alone she told him that she was scared of living in the appellant's house. He noticed that her left cheek had become red and the right portion of her face had become dark. PW17-Rajkumar Diwakar, another brother-in-law of Girija spoke about the ill-treatment meted out to Girija, the eye injury received by her and the assault on her left cheek. PW19-Jayant, brother of Girija also deposed as to how Girija was ill-treated. Despite all this learned Sessions Judge acquitted the appellant. Surprisingly, six hours delay in lodging the F.I.R. is taken against the prosecution. Learned Sessions Judge also finds the F.I.R. cryptic. Learned Sessions Judge's observation need to be quoted:

> *"… … …When the death of the deceased had come to the knowledge of P.W.1, it was around 2.30 p.m. and that house of the accused in which deceased committed suicide was hardly 2 K.Ms. away from the P.S. I feel that P.W.1, reaching the police station as late at 22.15 hours., is a delay and this delay is not explained. The possibility of P.W.1Suresh discussing with his relatives also to net in the in-laws as A-1 and 3 with oblique motive cannot be ruled out. Therefore this delay of 5 to 6 hours which is un-explained is a fatal to the case of prosecution. … … …"*

We are amazed at this observation. When a man looses his daughter due to cyanide poisoning, he is bound to break down. He would take time to recover from the shock. Six hours delay cannot make his case untrue. It is also not proper to expect him to give all minute details at that stage. The F.I.R. contains sufficient details. It is not expected to be a treatise. We feel that the comments on alleged delay in lodging the F.I.R. and its contents are totally unwarranted. For the same reasons, we also reject the submission of counsel for the appellant that because PW1-Suresh did not tell the police officers who were present at the scene of offence that the appellant was

responsible for the suicide his FIR lodged after six hours is suspect.

11. We have carefully gone through the explanation offered by the appellant in his statement recorded under Section 313 of the Code as requested by his counsel. It confirms our view that the appellant is not innocent. After denying the allegations of ill-treatment, cruelty and demand of dowry, the appellant goes on to paint a rosy picture of his married life. He refers to certain photographs and a Valentine day's card sent by Girija to him in 2002. Valentine day's card sent by Girija to the appellant does not help him to probablise his alleged good conduct. In the facts of this case it appears to us to be an effort made by Girija to please the appellant. The photographs were produced in the court to show that Girija was taken to religious places and hill stations. Trial court has rightly not placed reliance on them. As regard the photographs it has observed that in the photographs Girija is seen standing alone and, therefore, on the basis of these photographs it cannot be said that the appellant had taken her to religious places or for honeymoon. Perhaps to create an impression that Girija was suffering from depression, the appellant comes out with a story that Girija used to consume pills everyday and when he enquired about it she used to give evasive answers. According to him she used to lead a life of an introvert and she preferred loneliness. She never watched T.V., she never read any newspapers or books. When he asked her about it she stated that she had an eye problem. He has further gone on to say that he blamed Girija's parents that they had suppressed her eye trouble from him and got her married to him. He further goes on to say that for this reason she was not willing to give birth to a child. This story is palpably false and is a crude attempt to create an impression that Girija was mentally unstable. No such evidence is brought on record. In this connection, at the cost of repetition, it must be stated that the trial court has rejected the defence of the appellant that Girija had lost her eye sight even before her marriage and that this fact was concealed from him. The trial

court has observed that Girija was a graduate. If she had really lost eye sight, the appellant and his parents would have noticed the defect earlier. Further part of the explanation which refers to the appellant's alleged conduct of getting Girija examined by Dr. Kumta, an eye specialist and allegedly giving her money for operation will have to be understood against the background of above facts. We are not inclined to believe that the appellant took Girija to an eye specialist and if he did take Girija to an eye specialist we have no manner of doubt that it was too late in the day. The evidence on record clearly indicates that Girija received injury on her cheek and to her eye after marriage. She had no eye trouble before marriage. The injury was certainly not self-inflicted. Circumstances on record clearly establish that Girija received the eye injury in the matrimonial home and the appellant was responsible for it.

12. We are wary of passing comments against the subordinate courts because such comments tend to demoralize them. But, in this case, we will be failing in our duty if we ignore the insensitivity shown by learned Sessions Judge to a serious crime committed against a hapless woman. We need to quote certain extracts from learned Sessions Judge's judgment which will show why we are so anguished.

> *"The other allegations in Ex-P1 complaint is that the deceased was asked to get up at 5.00 a.m. early in the morning and she was asked to attend to house-hold work. Even the accused had asked the deceased to attend to house hold chorus, that is not the act of cruelty, so as to drive the deceased to commit suicide…… ……Conduct of the accused in reprimanding the deceased for her lethargic habits, strongly advising her to be more compatible with members of the family and to evince interest in the domestic shores cannot be considered as acts of cruelty."*

It is pertinent to note that even in this case Girija was asked

to wake-up at 5.00 a.m. and start work. This kind of orders may not always be innocuous.

13. Learned Sessions Judge further observes as under:

> *"In 1995, Cri. L.J. Page -2472, (Neelakanth Patil vs. State of Orissa), it is held that; mere statement that the deceased wife was not happy with the husband-accused, is not sufficient. Particularly in the absence of any direct evidence, oral or documentary about ill treatment <u>one or two incident of assault by the accused-husband is not likely to drive the wife to commit suicide</u>. Therefore, the Hon'ble High Court held the conviction of the husband was not proper*." (emphasis supplied)

Reproduction of Orissa High Court's judgment does not appear to be accurate. Learned Sessions Judge further observes as under:

> *"PW-11 has not stated the particular day of the noticing face of the deceased turning brownish and right eye upper portion blackening. He has not stated particular day on which he found deceased to be panic. He has not stated particular day on which he found the deceased physically weak. Therefore, again these imputations are all general allegations. <u>As I said earlier even if upper eye portion or face of Girija had changed their colour because of A-2 giving beatings, that alone as I said earlier is not the act of cruelty driving the deceased to commit suicide</u>."* (emphasis supplied)

> *"As I said earlier A-1 and 3 are the ordinary residents of Karwar. In between the date of the marriage and the death of the deceased on 13.6.2002 she was very much staying with her husband A-2 in Bombay. <u>Therefore, giving one or two beating is not cruelty to drive the deceased to commit suicide</u>."* (emphasis supplied)

"The learned Public Prosecutor has argued that blackening of skin on various parts of the body of the deceased is proved. Therefore, court has to believe those injuries to hold the accused responsible for the sake of argument, it is assumed that those injuries were inflicted by the accused, they are not sufficient to bring death in the ordinary course. One or two beats are not sufficient in the ordinary course of woman to commit suicide." (emphasis supplied)

14. The tenor of the judgment suggests that wife beating is a normal facet of married life. Does that mean giving one or two slaps to a wife by a husband just does not matter? We do not think that that can be a right approach. It is one thing to say that every wear and tear of married life need not lead to suicide and it is another thing to put it so crudely and suggest that one or two assaults on a woman is an accepted social norm. Judges have to be sensitive to women's problems. Perhaps learned Sessions Judge wanted to convey that the circumstances on record were not strong enough to drive Girija to commit suicide. But to make light of slaps given to Girija which resulted in loss of her eyesight is to show extreme insensitivity. Assault on a woman offends her dignity. What effect it will have on a woman depends on facts and circumstances of each case. There cannot be any generalization on this issue. Our observation, however, must not be understood to mean that in all cases of assault suicide must follow. Our objection is to the tenor of learned Sessions Judge's observations. We do not suggest that where there is no evidence the court should go out of its way, ferret out evidence and convict the accused in such cases. It is of course the duty of the court to see that an innocent person is not convicted. But it is equally the duty of the court to see that perpetrators of heinous crimes are brought to book. The above quoted extracts add to the reasons why learned Sessions Judge's judgment can be characterized as perverse. They

show a mindset which needs to change. There is a phenomenal rise in crime against women and protection granted to women by the Constitution of India and other laws can be meaningful only if those who are entrusted with the job of doing justice are sensitized towards women's problems.

15. In the ultimate analysis we are of the opinion that the appellant has not been able to rebut presumption under Section 113A of the Evidence Act. Girija committed suicide within seven years from the date of her marriage in her matrimonial home. Impact of this circumstance was clearly missed by the trial court. The evidence on record establishes that Girija was subjected to mental and physical cruelty by the appellant in their matrimonial home which drove her to commit suicide. The appellant is guilty of abetment of suicide. The High Court has rightly reversed the judgment of the trial court acquitting the appellant. Appeal is, therefore, dismissed.

B.B.B. Appeal dismissed.

N. KANNAPAN

v.

STATE (UNION TERRITORY) ANDAMAN & NICOBAR ISLANDS

(Special Leave Petition (Crl.) No. 7532 of 2012)

JANUARY 3, 2013

[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.]

BAIL:

Clandestine transportation, supply and unauthorized use of huge quantity of "specific category explosive substances" – Petition for bail – Rejected by High Court – Held: There is prima facie material to establish involvement of petitioners in activities violating the provisions of Explosive Substances Act – Consequences of such violation are extremely serious – Some of the accused are still absconding – Releasing the petitioners on bail at this juncture when the prosecution has not even commenced to examine the main witnesses could prove detrimental to eventual outcome of trial – Accordingly, the orders of High Court are affirmed – However, it is open to the petitioners to move fresh application for bail after the material witnesses are examined – Explosive Substance Act, 1908.

An FIR was registered at Police Station, Port Blair on 21.06.2011 that a cargo ship had sailed from Chennai to Port Blair with huge quantity of unauthorized substances. Accordingly, a raiding party comprising police personnel reached the destination of the cargo ship. Some independent persons were also associated. The raiding party located the container unloaded from the cargo ship which was being loaded into a truck. With the assistance of the manager of the Shipping Company,

another container was also located. Huge quantity of gelatine sticks, electronic detonators and "imported coated drilled ammonium nitrate" was recovered from the two containers. The petitioners were arrested. Their bail applications having been rejected by the trial court, they approached the High Court. Though some of the petitioners claimed that they were genuine quarry operators, possessing valid licences for carrying out quarry operations and the confiscated explosive materials were to be used in quarry operations, it was the case of the prosecution that firstly, the goods seized were "special category explosive substances", use whereof without due authorization in quarry operations would be infringement of the provisions of the Explosive Substances Act, 1908; and secondly, the goods were shipped in a clandestine manner in as much as gelatine sticks and electronic detonators were described as 'grease' and ammonium nitrate was described as 'salt' in the declaration manifest relating thereto. The High Court declined bail to the petitioners.

Dismissing the petitions, the Court

HELD: 1.1. There is *prima facie* **material to establish the involvement of the petitioners in activities violating the provisions of the Explosive Substances Act, 1908. The consequences of such violation are extremely serious. The minimum punishment on conviction is 10 years rigorous imprisonment. For more serious activities, the punishment can extend to imprisonment for life, and even to death penalty. Some of the accused are still absconding. Obviously, all the accused are financially well placed. Releasing them from jail at this juncture, when the prosecution has not even commenced to examine the main witnesses, could prove detrimental to the eventual outcome of the trial. Atleast till the culmination of the evidence of the material witnesses, it**

would not be proper to release the petitioners on bail. The impugned orders passed by the High Court are accordingly affirmed. [Para 15] [113-G-H; 114-A-C]

1.2. It would be just and appropriate to direct the prosecution to first examine the material witnesses. It shall be open to the petitioner(s) to move a fresh application for bail, after the examination of all the material witnesses. [Para 16] [114-D]

CRIMINAL APPELLATE JURISDICTION : SLP Criminal No. 7532 of 2012.

From the Judgment & Order dated 30.08.2012 of the High Court of Calcutta, Circuit Bench, Port Blair in CRM No. 21 of 2012.

WITH

SLP (Crl.) Nos. 8286, 8730 & 8876 of 2012.

H.P. Raval, ASG, Gopal Subramanium, Uday U. Lalit, Amrendra Sharan, Ram Jethmalani, R. Chandrachud, D. Ilango, N. Shoba, Sri Ram J. Thalapathy, V. Adhimoolam, Sanjay Sarin, Nipu Patiri, Hemraj Bahadur, Gangandeep Kaur, Rajiv Talwar, Ashok Kumar Singh, Naresh Kumar Gaur, K.C.S. Balaji, Ranjana Narayan, Neeraj Kr. Sharma, Alok Kumar, Narayan, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. On a complaint made by H.L. Tiwari FIR No.546 was registered at Police Station CCS, Port Blair on 21.6.2011. The FIR and the action taken thereupon indicate, that a cargo ship (christianed, Gati Zipp) had set sail from Chennai and was to reach Port Blair on 20.6.2011. It was alleged, that the aforesaid cargo ship was carrying cartons shipped by VMR Shipping Agency. It was also alleged, that the cartons of VMR Shipping Agency contained

unauthorized substances. At the time of the receipt of the information, the cargo ship was allegedly berthed at Haddo Jetty, Port Blair. Based on the said information recorded in the First Information Report, a raiding party comprising of one Inspector, one Sub-Inspector, two Head Constables, two Constables, one police driver (of the rank of Head Constable) and one official photographer was organized. On reaching Haddo Jetty the raiding party associated with itself, one Sub Inspector, three Head Constables and one Constable of the SB-CID staff stationed there. Two independent persons Nikhi Sakar, a Tally Clerk at Port Blair and Manoj Kumar were also associated with the raiding party.

2. The raiding party, having reached Haddo Jetty, started looking for the cartons/containers shipped by VMR Shipping Agency, which had arrived at Port Blair in Gati Zipp. The raiding party identified a container belonging to VMR Shipping Agency, which had been unloaded from the concerned cargo ship (Gati Zipp). The container in question, was further being loaded into a truck bearing registration no.AN-01E-1847. G..S. Babu was supervising the loading operations of the aforesaid container. As per the declaration in the manifest list, the carton in question, contained four drums of grease. The four drums found in the container were photographed by the official photographer. The said drums were then checked in the presence of independent witnesses. The alleged contents of the four drums (revealed upon search by the raiding party) are being summarized hereunder:

(i) First drum: Three packets of grease, 406 pieces of gelatine sticks and 122 bundles of electronic detonators (each bundle containing 25 detonators, i.e., in all 3000 detonators).

(ii) Second drum: 405 gelatine sticks and 120 bundles of electronic detonators (in all 3000 detonators)

(iii) Third drum: 823 gelatine sticks

(iv) Fourth drum: 823 gelatine sticks.

The drums as well as the explosive substances recovered from the drums, were counted and seized, in the presence of independent witnesses. Before that, five gelatine sticks were taken from the first drum and secured in a separate packet for chemical analysis. Likewise, five electronic detonators were taken from the first drum and secured in a separate packet for chemical examination. The person who was supervising the reloading of the container into the truck bearing registration no. AN-01E-1847 allegedly identified himself as G.S. Babu. He also disclosed, that he was employed as Manager by VMR Shipping Agency.

3. With the assistance of G.S. Babu, and in the presence of the official photographer and the independent witnesses, the raiding party allegedly identified another container belonging to VMR Shipping Agency. The said carton/container had also been off-loaded from Gati Zipp. As per its declaration in the manifest list, the second carton, contained salt. The aforesaid container was also opened in the presence of independent witnesses. It was found, that the contents of the instant container were enclosed in a large plastic bag. The large plastic bag in turn contained smaller plastic bags. The small plastic bags had the inscription "imported coated drilled ammonium nitrate" and "net weight 50 kilograms" printed on them. 200 such small bags were allegedly found in the second container. The official photographer also clicked photographs of the contents of the second container. The aforesaid bags contained in all, 10,000 kgs of ammonium nitrate. The aforesaid ammonium nitrate was taken into possession. Two samples of the contents of the small bags, weighing 50 grams each, were taken for chemical analysis.

4. Based on the recovery of the aforesaid explosive substances, further investigations were carried out. These investigations allegedly revealed inter alia, the names of the petitioners before this Court. Consequent upon the discovery

of the petitioners involvement with the consignment of unauthorized explosive substances, they were arrested. Applications filed by the petitioners for bail remained unsuccessful. The impugned orders in these petitions is the last such unsuccessful attempt, made on behalf of the petitioners. It is therefore, that the petitioners are now before us, praying for bail.

5. In order to support their claim for release on bail, it was the vehement contention of the learned counsel for S. Namochivayama (petitioner in SLP (Crl.) no.8876 of 2012), that the petitioner runs a grocery shop, and cannot be associated with the allegations narrated in the First Information Report, as also, the alleged recovery of explosive substances.

6. In so far as N. Kannapan, R. Chidambaram and Sanjay Choudhary [petitioners in SLP (Crl.) no. 7532 of 2012, SLP(Crl.) no. 8286 of 2012, and SLP (Crl.) no. 8730 of 2012, respectively] are concerned, the principal submission is, that they are all genuine quarry operators, possessing valid licences for carrying out quarrying operations. They are officially issued explosives by the Andaman Public Works Department, which they use for extraction of boulders from their respective quarries, over which they have valid licences. Their contention in nutshell is, that the action of the petitioners in possessing and using explosive substances is legal and legitimate. As such, the aforesaid three petitioners contend, that they are not involved in any unauthorized activity. All the petitioners therefore pray for their release on bail.

7. In support of their prayer for bail, it was pointed out, that the First Information Report in this case was registered as far back as on 21.6.2011, the first chargesheet in the case was filed on 24.8.2011. Thereafter, three supplementary chargesheets were filed on 30.1.2012, 10.4.2012 and 7.7.2012. It was the pointed submission of all learned counsel, that based on the successive filing of the supplementary charge-sheets, their detention in jail was being unduly and intentionally

prolonged, for extraneous considerations. It was also pointed out by the learned counsel for the petitioners, that all the petitioners have already been in jail for periods exceeding one year and, as such, they should be extended the concession of bail.

8. It was also the contention of the learned counsel for the petitioners, that the confiscated explosive materials, even according to the contents of the First Information Report, and the three chargesheets referred to above, were admittedly being used for quarrying operations. It was submitted, that there is no allegation against any of the accused, that the contraband detained in Port Blair was for use in any terrorist or like activity/ activities. It was submitted, that keeping in mind the tenor of the insinuations contained in the First Information Report, as also, the allegations contained in the chargesheets, the petitioners should not be dealt with as if they are terrorists or are associated with terrorists.

9. Additionally, it was the contention on behalf of all the petitioners, that no explosive materials were recovered from the premises of any of the petitioners, and accordingly, none of the petitioners could be associated with the recovery of explosives allegedly made from the shipping yard at Port Blair. It was submitted, that the petitioners have been detained, only on the basis of telephone conversations, and deposit of cash in bank accounts, which have no nexus with the recoveries of explosives made at Port Blair.

10. We shall endeavour to deal with the pointed allegations levelled against each of the petitioners hereinafter. We shall deal with the petitioners, in the same sequence, in which submissions on their behalf, were addressed at the Bar.

11. First and foremost, the allegations against S. Namochivayama (petitioner in SLP (Crl.) no.8876 of 2012). According to learned counsel representing the respondent state, G.S. Babu who was arrested when the contraband was

recovered at Haddo Jetty, Port Blair, as also, the driver Pankriacius Ekka (of the vehicle bearing registration No.AN-01E-1847) revealed, that the bags (200 bags) of ammonium nitrate seized by the raiding party on 21.6.2011, were booked in the name of M/s.Karpaga Vinagar Stores, whose proprietor is the petitioner S. Namochivayama. The investigations conducted by the police also revealed, that consignments of ammonium nitrate used to be distributed by S. Namochivayama, to the other co-accused, who are involved in quarrying operations. Even the driver, named above, had expressly indicated, that it was at the directions of the petitioner S. Namochivayama, that he had gone to Haddo Jetty, Port Blair, for collecting the consignment under reference. According to the evidence allegedly collected by the investigating agency, Muthuraja and Sadasivam are the proprietors of VMR Shipping Agency. They were responsible for shipping the containers from Chennai to Port Blair. Both the aforesaid Muthuraja and Sadasivam are related to the petitioner S. Namochivayama. It is also the case of the prosecution, that another accused Raghavan, also a consignee of the gelatine sticks and detonators, was related to petitioner S. Namochivayama. It is also asserted by the learned counsel for the respondents, that the evidence collected by the investigating agency clearly demonstrates the involvement of the petitioner S. Namochivayama, inasmuch as, the instant consignment was not a stray incident. The petitioner S. Namochivayama is believed to have been indulging in such activities in the ordinary course of his business. In view of the petitioner S. Namochivayama being the distributor of ammonium nitrate, gelatine sticks and electronic detonators at Port Blair, he was perceived as the kingpin of the alleged activity, at Port Blair. And therefore, a prime accused in the alleged conspiracy. Finally, it was the contention of the learned counsel for the respondents, that procurement of explosives of the nature in question (which were recovered by the police party on 21.6.2011), and their unauthorized sale and use, is a matter of serious concern, not only for environmental purpose, but also for national security. It

was pointed out, that explosives of the nature recovered at Port Blair on 21.6.2011, can easily be used for other allied unauthorized purposes, with disastrous consequences.

12. The name of N. Kannapan (petitioner in SLP (Crl.) no.7532 of 2012), allegedly came to light, from the statement of witnesses recorded under Section 164 of the Code of Criminal Procedure. According to the statement of Magesh, the petitioner N. Kannapan had paid a sum of Rs.3,20,000/- to him. The aforesaid amount was deposited by the aforestated Magesh in the account of Selvam. The bank account of Selvam affirmed the truthfulness of the aforesaid assertion. Call details reveal, regular conversation between the petitioner N. Kannapan and Selvam, which establishes their relationship. N. Kannapan was also found to be associated in the matter, as Shanmugam in his statement under Section 164 of the Code of Criminal Procedure affirmed, that the petitioner N. Kanappan was using ammonium nitrate for quarrying operations. In this behalf it was pointed out, that the Andaman Public Works Department had not issued any ammonium nitrate to N. Kannapan, but the investigation revealed, that he was using the same for quarrying purposes, at his own quarry. It was also submitted, that the findings of the forensic science laboratory indicate, that the seized goods were "special category explosive substances", and as such, the petitioner N. Kannapan had actually used such explosive substances, without due authorization in quarrying operations, and was liable for infringement of the provisions under the Explosive Substances Act, 1908. It was also contended, that the explosive substances under reference, were brought in a ship in a clandestine manner. In this behalf it was pointed out, that in the declaration manifest of one of the cartons, the gelatine sticks and the electronic detonators were described as grease. The other container with ammonium nitrate, was described as salt (in the declaration manifest relating thereto). It was submitted, that if the intentions of the petitioner N. Kannapan, were bonafide and genuine, there was no reason for clandestine

transportation of the ceased explosives from Chennai to Port Blair. The explosives in question, according to the learned counsel for the respondents, could be used for extraneous considerations, and had the potential of a massive disaster, not only to life but also to property, on the Andaman or neighbouring islands. It was also pointed out, that the petitioner N. Kannapan had a regular relationship with the other co-accused in the transaction. The aforesaid relationship was allegedly established from call data registers, depicting a relationship between the petitioner N. Kannapan and the other co-accused.

13. R. Chidambaram (petitioner in SLP (Crl.)no.8286 of 2012) is admittedly a quarry operator. For quarrying operations, he is admittedly in possession of a valid quarry licence. He was issued 15 kgs. of gelatine sticks and 60 detonators for quarrying operations by the Andaman Public Works Department. According to the inferences drawn, from expert opinion sought on the issue, it had emerged, that the gelatine sticks and detonators officially issued to the petitioner R. Chidamabaram, would result in excavation of 450 metric tonnes of boulders, whereas, the petitioner R. Chidambaram is stated to have extracted 1590 metric tonnes of boulders. This, according to learned counsel, was evident from the transport permits used by R. Chidambaram, for transportation of the boulders. According to the learned counsel for the respondents, the boulders excavated by petitioner R. Chidambaram, were three folds more than what he could have, by using the explosives issued to him by the Andaman Public Works Department. It was also the contention of the learned counsel for the respondents, that the petitioner R. Chidamabaram was using ammonium nitrate for quarrying activities, in the area over which he had a lease. It is pointed out, that R. Chidambaram was not issued any ammonium nitrate by the concerned authority. It is further submitted, that the statements of Armugam, Ganeshan, Sashi, Shanmugam, Mageshwaram and Karupaiah, recorded under Section 164 of the Code of Criminal Procedure,

also revealed, the involvement of petitioner R. Chidambaram in the procurement of illegal explosive substances, and of their use in his quarrying activities. It was also submitted, that the aforestated Mageshwaram, during the course of his statement recorded under Section 164 Cr.P.C. had stated, that he (Mageshwaram) used to collect money from the petitioner R. Chidamabaram, and used to deposit the same in the account of Selvam. It is therefore submitted, that the involvement of petitioner R. Chidambaram is based on concrete and unrefutable evidence.

14. In the case of Sanjay Choudhary (petitioner in SLP (Crl.) no.8730 of 2010), it was submitted by the learned counsel for the respondents, that his (of Sanjay Choudhary) position, was exactly the same as that of R. Chidambaram, and as such, the factual position projected in the case of R. Chidamabaram, should be considered as against Sanjay Choudhary as well. It is pointed out, that the said similarity is on the following aspects. The money collected by Nagesh and deposited in Selvam's account. The use of ammonium nitrate without allotment of the same by the competent authority. The statements of Shamugam, Ganesh and Sashi under Section 164 Cr.P.C. And the fact, that although he was allotted only 15 kgs. of gelatine sticks and 60 electronic detonators, which could at best result in excavation of 450 metric tonnes of boulders; he was found to have extracted and transported 1905 metric tonnes of boulders, i.e., more than four times the amount which he could have excavated on the basis of the allotted explosives.

15. Having considered the assertions made at the hands of the rival parties, we are satisfied, that there is prima facie material, to establish the involvement of the petitioners in activities violating the provisions of the Explosive Substances Act, 1908. The consequences of such violation are extremely serious. The minimum punishment on conviction, is 10 years rigorous imprisonment. For more serious activities, the

punishment can extend to imprisonment for life, and with death penalty. In the pleadings, and during the course of hearing, we were informed, that some of the accused are still absconding. Obviously all the accused are financially well placed. Releasing them from jail at the present juncture, when the prosecution has not even commenced to examine the main witnesses, could prove detrimental to the eventual outcome of the trial. Atleast till the culmination of the evidence of the material witnesses, it is not proper to order the release of the petitioners on bail. In the facts and circumstances noticed hereinabove, we hereby decline the prayer for bail made by the petitioners. The impugned orders passed by the High Court are accordingly affirmed.

16. Having disposed of the matter in the manner expressed hereinabove, we consider it just and appropriate to direct the prosecution to first examine the material witnesses. It shall be open to the petitioner(s) to move a fresh application for bail, after the examination of all the material witnesses. Observations made in the instant order, on the merits of the controversy, shall not prejudice any of the parties during the course of the trial or thereafter.

17. Disposed of in the aforesaid terms.

R.P. SLPs dismissed.

ASHABAI & ANR.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1062 of 2008)

JANUARY 4, 2013

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PENAL CODE 1860:

ss. 302/34 and 498-A/34 – Death of a married woman caused by burn injuries – Dying declaration and oral evidence establishing ill-treatment to deceased and role of accused persons in causing her death – Medical evidence and oral evidence supporting prosecution version – Conviction of mother-in-law (who died during pendency of appeal before Supreme Court) and two sisters-in-laws (appellants) of deceased and sentence of life imprisonment – Affirmed by High Court – Held: There is no infirmity in the order of conviction and sentence recorded by trial court and affirmed by High Court – Evidence Act, 1872 – s.32 – Sentence/ Sentencing.

EVIDENCE ACT, 1872:

s. 32(1) – Multiple dying declarations – Held: When there are multiple dying declarations, each one has to be assessed and evaluated independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other – In the instant case, prosecution relied on four dying declarations of the deceased – At the time of recording of these statements, medical officers on duty had certified that the deceased was fully conscious and was in a fit state of mind to make the same – Though, in one of the statement, the deceased implicated two more persons (who were acquitted by trial court) she was consistent about the role

played by her mother-in-law and sisters-in-law (appellants) – The Court fully endorses the view expressed by trial court and affirmed by High Court about acceptability of four dying declarations implicating the appellants.

CRIME AGAINST WOMEN:

Punishment – Held: In the cases of bride burning, cruelty, suicide, sexual harassment, rape, suicide by married women etc. a complete overhaul of the system is a must in the form of deterrent punishment for the offenders – Sentence/ Sentencing – Punishment.

Consequent upon the death of a woman by burn injuries received by her in her matrimonial home, her two sisters-in-law (A-2 and A-3, the appellants) the mother-in-law (A-1) and two others faced trial. The case of the prosecution was that the deceased was ill-treated by A-1, A-2 and A-3 as she could not conceive a child; that on the date of occurrence, on the instigation of A-2 and A-3, A-1 poured kerosene on her and set her on fire. Four dying declarations were recorded of the victim on the day of incident and the following day. The victim succumbed to her injuries after 1½ months of the incident. The trial court convicted A-1, A-2 and A-3 u/ss 498-A/34 and 302/ 34 IPC and sentenced them to one year's imprisonment u/s 498-A/34 IPC and imprisonment for life u/s 302/34 IPC. The High Court affirmed the conviction and the sentence. A-2 and A-3 filed Crl. A. No. 1062 of 2008 whereas A-1 filed Crl. A. No. 1063 of 2008. A-1 died during the pendency of the appeal and her appeal was dismissed as abated.

It was contended for the appellants that there were four dying declarations in the instant case and there were contradictions and improvements which were not mentioned in the first two dying declarations, and as the version of the incident given in all the four dying

declaration was inconsistent, no reliance could be placed on them.

Dismissing the appeal, the Court.

HELD: 1.1. The statement made by the deceased by way of a declaration is admissible in evidence u/s 32(1) of the Evidence Act. It is not in dispute that her statement relates to the cause of her death. In that event, it qualifies the criteria mentioned in s. 32(1) of the Evidence Act. There is no particular form or procedure prescribed for recording a dying declaration nor is it required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. [para 12] [126-G-H; 127-A-B]

1.2. It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. The law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. [para 12] [127-B-E]

1.3. When there are multiple dying declarations, each one has to be assessed and evaluated independently on

its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other. [para 12] [127-E-F]

1.4. In the instant case, though, in one of the statement, the deceased implicated two more persons (who were acquitted by the trial Court) she was consistent about the role played by her mother-in-law and her sisters-in-law (the appellants). It is relevant to note that the incident took place in the bedroom of the deceased. It is also clear that she was subjected to torture as she had not conceived a child even after three years of the marriage and in all the four dying declarations, she was conscious in mentioning the role of her mother-in-law and sisters-in-law. There is no contradiction as to the main aspect, namely, implicating her mother-in-law and sisters-in-law as well as the role played by them. [para 11] [125-F-H]

1.5. At the time of recording of the statements of the victim, medical officers on duty had certified that she was fully conscious and was in a fit state of mind to make the same. The persons who recorded the four dying declarations were examined and were also cross-examined about the statement made by the deceased and recorded by them. In such circumstances, this Court fully endorses the view expressed by the trial court and affirmed by the High Court about the acceptability of four dying declarations implicating the mother-in-law and sisters-in-law (the appellants). [para 13] [127-G; 128-A-B]

1.6. As regards oral evidence, PW-1 is the mother of the deceased. She explained about the marriage of her daughter and the strained relationship with her family members including the appellants. PW-2, the elder brother of the deceased, deposed about the torture and ill-treatment meted out to the deceased in her matrimonial home, and the burn injuries sustained by her. He also

stated that when he met her in the hospital, she was conscious and disclosed that her mother-in-law and sisters-in-law put her on fire. The analysis of the oral evidence of PWs and medical evidence clearly shows that the deceased was in a fit state of mind to make dying declarations and her statements in those dying declarations are consistent and truthful. There is no infirmity in the order of conviction and sentence recorded by the trial Judge and affirmed by the High Court. [para 14,15 and 17] [128-C-D; F-G; 129-B-C]

1.7. In view of clinching evidence led in by the prosecution, there cannot be any leniency in favour of the appellants, who are sisters-in-law of the deceased and at whose instance the deceased was burnt at the hands of her mother-in-law. Accordingly, the conviction of the appellants u/ss. 302/34 and 498-A/34 IPC and sentence of life imprisonment awarded by trial court and affirmed by High Court are upheld. [para 2, 18] [121-C; 129-F]

2. In spite of stringent legislations in order to curb the deteriorating condition of women across the country, the cases relating to bride burning, cruelty, suicide, sexual harassment, rape, suicide by married women etc. a complete overhaul of the system is a must in the form of deterrent punishment for the offenders so that the problem can be affectively dealt with. [para 18] [129-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1062 of 2008.

From the Judgment & Order dated 11.04.2007 of the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 252 of 2005.

Sudhanshu S. Choudhari, Rajshree Dubey, Naresh Kumar, Sunil Kumar Verma for the Appellants.

Aprajita Singh, Asha Gopalan Nair, Ravindra Keshavrao Adsure for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the judgment and order dated 11.04.2007 passed by the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 252 of 2005 whereby the High Court dismissed the appeal filed by the appellants herein and confirmed the order dated 30.03.2005 passed by the Court of IInd Ad-hoc Additional Sessions Judge, Jalgaon in Sessions Case No. 165 of 2003.

2. **Brief facts:**

(a) On 28.02.2000, Vandana Raghunath Tayade (since deceased) was married to one Raghunath Puna Tayade at Village Khirwad, Taluq Raver, Dist. Jalgaon, Maharashtra. After marriage, she was staying at her matrimonial home in a joint family consisting of her husband, Kesharbai (A-1) mother-in-law, father-in-law and two sisters-in-law, viz., Ashabai and Kavita (appellants herein). Since there was no issue from the marriage, she was ill-treated by her mother-in-law and sisters-in-law. On that count, they used to harass her and both the families were not in good terms.

(b) On 05.03.2003, at about 1645 hrs., when Vandana was in her matrimonial home, Kesharbai (mother-in-law), in order to get rid of her, poured kerosene on her body and Ashabai and Kavita (appellants herein) – sisters-in-law instigated Kesharbai to lit the fire by using a matchstick. She started shouting and caught hold of her mother-in-law in the burnt condition. Vandana and Kesharbai, both were taken to the Railway Hospital, Bhusawal and her statement was recorded on the very same day. Between 05.03.2003 to 06.03.2003, the injured gave, in all, 4 dying declarations one by one to the authorities concerned. On 18.04.2003, she succumbed to her injuries and the post-mortem was conducted on the same day and a case being A.D. No. 15 of 2003 was registered.

(c) After investigation, charge sheet was filed against six accused persons, i.e., Kesharbai (A-1), Ashabai Puna Tayade (A-2) and Kavita Ajay Medhe (A-3)-appellants herein, Puna Mitharam Tayade, Shobha Sitaram Tayade and Sitaram Ramaji Tayade and the case was committed to the Court of the IInd Ad-hoc Additional Sessions Judge, Jalgaon and numbered as Sessions Case No. 165 of 2003. The Additional Sessions Judge, by order dated 30.03.2005, convicted A-1, A-2 and A-3 under Section 498-A read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC') and sentenced them to undergo RI for 1 year along with a fine of Rs. 1,000/- each, in default, to further undergo RI for 3 months. They were also convicted under Section 302 read with Section 34 of IPC and sentenced to suffer imprisonment for life along with a fine of Rs. 2,000/- each, in default, to further undergo RI for 6 months and acquitted the other accused persons.

(d) Challenging the said judgment, the appellants herein filed Criminal Appeal No. 252 of 2005 before the High Court. By impugned order dated 11.04.2007, the High Court, dismissed the appeal filed by the appellants herein and confirmed their conviction and sentence passed against them by the trial Court.

3. Heard Mr. Sudhanshu S. Choudhari, learned counsel for the appellants-accused and Ms. Aprajita Singh, learned counsel for the State.

Discussion:

4. The present appeal is by Ashabai (A-2) and Kavita Ajay Medhe (A-3), both sisters-in-law of the deceased. Kesharbai (A-1) - mother-in-law of the deceased, who was also convicted and sentenced to RI for life filed a separate appeal being Criminal Appeal No. 1063 of 2008 before this Court. Since she died on 10.02.2012, by order dated 13.12.2012, this Court dismissed her appeal as abated. Therefore, we are concerned about the present appellants, namely, Ashabai (A-2) and Kavita Ajay Medhe (A-3) respectively.

5. The marriage of the deceased Vandana with one Raghunath was solemnized on 28.02.2000 and her death occurred on 18.04.2003, i.e., her married life came to an end within 3 years of her marriage. The entire prosecution case lies on 4 dying declarations made by the deceased and the oral evidence of PWs 1, 2, 3 and 11.

Dying Declaration No. 1 (Exh.76):

6. The first dying declaration was recorded by Shri Dhondu (PW-14), Sub-inspector of Police, Sarkarwade P.S., Nasik on 05.03.2003. In her statement before PW-14, she narrated that her marriage was solemnized on 28.02.2000 at Khirwar and she was residing at Shantinagar, Someshwar Colony, Bhusawal along with her husband-Raghunath, Punna - father-in-law, Kesharbai - mother-in-law, Ashabai and Kavita - sisters-in-law. She further stated that her husband was working as an Assistant Station Master at Bhusawal, her father-in-law retired from Railways and she along with her mother-in-law and sisters-in-law stayed at home. As she was not able to conceive even after 3 years of marriage, her mother-in-law and sisters-in-law always used to abuse her that she was 'barren'. They used to say that she should not stay in the house and better she would die. On 04.01.2003, all the three assaulted her in front of her brother. On 05.03.2003, at about 7 o'clock in the morning, when she entered into the house along with her husband after their return from Mumbai, her mother-in-law and sisters-in-law, viz., Ashabai and Kavita shouted that the barren lady has come and telling her husband that he should not keep the unproductive lady in their house. After quarrelling with her mother-in-law, her husband went for duty. At about 4.45 p.m., when she came to her bedroom after taking a wash and was standing facing towards east in the place in between the cupboard and the cot, at that time, her mother-in-law – Kesharbai (A-1) came from behind with her sisters-in-law Ashabai and Kavita. She was holding a tin of kerosene in her hands and she poured kerosene

on her from neck to legs. While doing so, her sisters-in-law directed her mother-in-law to light the matchstick. Accordingly, the mother-in-law lit the matchstick. On seeing this, her father-in-law and sisters-in-law poured water on her and extinguished the fire. The above statement is duly certified by the Doctor on duty- Shri T.F. Ramesh that she was conscious and able to give a statement. It is clear that in this declaration she has not implicated her husband and father-in-law. On the other hand, she asserted that she was tortured by her mother-in-law (A-1) and sisters-in-law (A-2 and A-3). She also specified that it was her mother-in-law who poured kerosene on the direction of her sisters-in-law.

Dying Declaration No.2 (Exh. 45):

7. This statement was made by the deceased before the Executive Magistrate, Bhusawal on 05.03.2003 at 11.10 p.m. which was marked as Exh. 45 and is in the form of questions and answers. When the Executive Magistrate asked what had happened on that day, she answered that "my mother-in-law by name, Kesharbai Puna Tayde poured kerosene on me and burnt". She further mentioned that the said incident took place at about 4.30 to 5.00 p.m. on 05.03.2003. In respect of another question by the Magistrate, namely, who were there in the house, she answered that her mother-in-law and sisters-in-law, by name, Ashabai and Kavita were there in the house and they told to light the matchstick. She also mentioned that at the relevant time, her husband and father-in-law were not in the house. The very same doctor, who certified her condition in the statement recorded by PW-14 also certified that the declarant was conscious to give a statement. He also mentioned the date and time as 05.03.2003 at 11.10 p.m. This declaration, which was duly recorded by the Executive Magistrate, Bhusawal (PW-7) clearly shows that it was her mother-in-law who poured kerosene on her on the direction of her sisters-in-law (A-2 and A-3).

Dying Declaration No.3 (Exh. 47):

8. On 06.03.2003, injured Vandana again made a statement before the Executive Magistrate, Bhusawal at 19:25 hrs. Here again, her statement was recorded in the form of questions and answers. The said document has been marked as Exh.47. After narrating that her marriage took place on 28.02.2000 at Khirwar, she informed that her mother-in-law and father-in-law used to quarrel with her and her husband never used to say anything. No doubt, in this statement, she mentioned that she was threatened by Shobha Sitaram Tayade (sister-in-law) and Sitaram Ramji Tayade (husband of Shobha Sitaram Tayade). After mentioning their names, (both of them were acquitted by the trial Court) she further narrated that amongst them, her mother-in-law poured kerosene on her and sisters-in-law (Ashabai and Kavita) were standing by closing the door. For another question, namely, whether she had suspicion on anyone, she answered that she was tried to be burnt by her mother-in-law Kesharbai, Ashabai, Shobha, Kavita, Sitaram Ramji Tayade. While recording the above statement, here again, duty Doctor Dr. C.N. Pimprikar certified that Vandana was fully conscious to give a statement. He also mentioned the time and date of recording of the above statement as 7:25 p.m. dated 06.03.2003.

9. Learned counsel for the appellants pointed out certain contradictions and improvements which were not mentioned in her first two statements. It is true that in the third statement made before the Executive Magistrate, she implicated Shobha and Sitaram Ramji Tayade and according to her, they also threatened her along with her mother-in-law and sisters-in-law. Merely because she mentioned two other names, who were acquitted by the trial Court, it cannot be presumed that her earlier statements were unacceptable. However, it is to be noted that even in the third statement before the Executive Magistrate duly recorded by him, she mentioned the role of her mother-in-law and sisters-in-law. There is no reason to

disbelieve or reject the above statement as claimed by learned counsel for the appellants.

Dying Declaration No.4 (Exh. 36):

10. On 06.03.2003 itself, at about 7.30 p.m., again the injured Vandana made a statement before Shri Dilip, Sub-Inspector of Police who was examined as PW-6 and the statement was marked as Exh. 36. Here again, in respect of the questions put by the recording officer, she answered by implicating her mother-in-law and sisters-in-law. For a specific question, namely, on 05.03.2003, whether she was at home and how she got burn injuries and who was responsible for the same, she answered that "on 05.03.2003, I was at home only. At about 5 o'clock, her mother-in-law, sisters-in-law poured kerosene and burnt". Here again, she specifically implicated her mother-in-law and sisters-in-law for pouring kerosene and litting fire.

11. Learned counsel for the appellants argued that the version of incident as given by the deceased in all the four dying declarations is inconsistent and no reliance can be placed on it. We have already referred to the persons who recorded all the four statements, her condition and the certificate issued by the doctor as well as the contents of the statements. Though, in one of the statement, she implicated two more persons (who were acquitted by the trial Court) she was consistent about the role played by her mother-in-law and her sisters-in-law (appellants before us). It is relevant to note that the incident took place in the bedroom of the deceased. It is also clear that she was subjected to torture as she had not conceived a child even after three years of the marriage and in all the four dying declarations, she was conscious in mentioning the role of her mother-in-law and sisters-in-law. We are satisfied that there is no contradiction as to the main aspect, namely, implicating her mother-in-law and sisters-in-law as well as the role played by them.

Evidentiary value of Dying Declaration:

12. About the evidentiary value of dying declaration of the deceased, it is relevant to refer Section 32(1) of the Indian Evidence Act, 1872, which reads as under:-

> **"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.-** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
>
> **(1) when it relates to cause of death.-** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> (2) ....
>
> ....
>
> (8) ...."

It is clear from the above provision that the statement made by the deceased by way of a declaration is admissible in evidence under Section 32(1) of the Evidence Act. It is not in dispute that her statement relates to the cause of her death. In that event, it qualifies the criteria mentioned in Section 32(1) of the

Evidence Act. There is no particular form or procedure prescribed for recording a dying declaration nor it is required to be recorded only by a Magistrate. As a general rule, it is advisable to get the evidence of the declarant certified from a doctor. In appropriate cases, the satisfaction of the person recording the statement regarding the state of mind of the deceased would also be sufficient to hold that the deceased was in a position to make a statement. It is settled law that if the prosecution solely depends on the dying declaration, the normal rule is that the courts must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused had no opportunity to test the veracity of the statement of the deceased by cross-examination. As rightly observed by the High Court, the law does not insist upon the corroboration of dying declaration before it can be accepted. The insistence of corroboration to a dying declaration is only a rule of prudence. When the Court is satisfied that the dying declaration is voluntary, not tainted by tutoring or animosity, and is not a product of the imagination of the declarant, in that event, there is no impediment in convicting the accused on the basis of such dying declaration. When there are multiple dying declarations, each dying declaration has to be separately assessed and evaluated and assess independently on its own merit as to its evidentiary value and one cannot be rejected because of certain variation in the other.

13. We have already noted that in the present case, prosecution relied on four dying declarations of the deceased. We have also noted that at the time of recording of these statements, medical officers on duty had certified that the deceased was fully conscious and was in a fit state of mind to make the same. As a matter of fact, the deceased has given proper replies to the questions put to her by various authorities. Further, it is not in dispute that the incident occurred on 05.03.2003 and she sustained 54% burns and, ultimately, she died only on 18.04.2003. In other words, she survived for about 1 ½ (one and a half) month which speaks for the fitness of the

declarant to make a statement. The persons who recorded the four dying declarations were examined as PWs 14, 7 and 6 and they were also cross-examined about the statement made by the deceased and recorded by them. In such circumstances, we fully endorse the view expressed by the trial Court and affirmed by the High Court about the acceptability of four dying declarations implicating the mother-in-law and sisters-in-law (appellants herein).

Oral Evidence of PWs 1, 2 and 11:

14. Malatabai (PW-1) is the mother of the deceased Vandana. She explained about the marriage of her daughter and the strained relationship with her family members including the present appellants. Sanjay (PW-2) - elder brother of the deceased Vandana, in his evidence has stated that he along with her mother took the deceased to her matrimonial home on 04.01.2003 and as soon as the deceased entered into the house A-1, A-2, A-3 and A-5 assaulted her in their presence. He also stated that when he protested, they also assaulted him and, thereafter, he informed his parents about the same. In response to this information, his father and maternal uncle came to the matrimonial home of the deceased but none of them were allowed to enter the house to meet the deceased.

15. PW-11, maternal uncle of the deceased, also narrated about the marriage of the deceased with her husband. He also said that on receipt of information about the incident of burning, he rushed to the Railway Hospital, Bhusawal and enquired about the deceased. He noticed that Vandana sustained burn injuries. However, she was conscious and he asked her as to what had happened. She disclosed that her mother-in-law and sisters-in-law put her on fire. PW-11 also stated that Vandana was in the Hospital for about one and a half month.

16. Apart from the above witnesses, prosecution has also examined the doctors who certified her fitness while making the

statement, the doctor who conducted her post-mortem and I.Os., who completed the investigation and filed charge sheet.

Conclusion:

17. The above analysis clearly shows that the deceased was in a fit state of mind to make dying declarations and her statements in those dying declarations are consistent and truthful. In addition to the same, the prosecution also examined PWs 1, 2 and 11 as well as the Doctors, I.Os., and other witnesses in support of their claim. We do not find any infirmity in the order of conviction and sentence recorded by the trial Judge and affirmed by the High Court.

18. In spite of stringent legislations in order to curb the deteriorating condition of women across the country, the cases related to bride burning, cruelty, suicide, sexual harassment, rape, suicide by married women etc. have increased and are taking place day by day. A complete overhaul of the system is a must in the form of deterrent punishment for the offenders so that we can effectively deal with the problem. In the case on hand, Vandana died within 3 years of her marriage at the instance of her mother-in-law and sisters-in-law due to the harassment meted out to her because of the inability to conceive a child and she was poured kerosene and burnt to death. Even though, the mother-in-law, who also filed a separate appeal, died on 10.02.2012, in view of clinching evidence led in by the prosecution, there cannot be any leniency in favour of the appellants, who are sisters-in-law of the deceased and at whose instance the deceased was burnt at the hands of her mother-in-law.

19. Accordingly, while agreeing with the conclusion arrived at by the trial Court and affirmed by the High Court, we find no merit in the appeal. Consequently, the same is dismissed.

R.P. Appeal dismissed.

CINE EXHIBITION PVT. LTD.

v.

COLLECTOR, DISTRICT GWALIOR AND OTHERS

INTERLOCUTORY APPLICATION NOS.5 AND 6 OF 2012

IN

(Civil Appeal Nos. 281-282 of 2012)

JANUARY 04, 2013

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

Supreme Court Rules, 1966 – Order XL and Order XVIII, rule 5 – Review power – Under Order XL of the Rules, a review application has to first go before the Judges in circulation and it is for the Court to consider whether the application is to be rejected without an order giving an oral hearing or whether notice is to be issued to the opposite party – Practice of overcoming the provision for review under Order XL of the Rules by filing application for re-hearing/modification/ clarification deprecated by Supreme Court – Held: Many a times, applications are filed for clarification /modification/recall or rehearing not because of any clarification/modification is found necessary but because the applicant in reality wants a review and also wants hearing by avoiding circulation of the same in Chambers – A party cannot be permitted to circumvent or by-pass this circulation procedure and indirectly obtain a hearing in the open Court – What cannot be done directly, cannot be permitted to be done indirectly – Generally an application for correction of a typographical error or omission of a word etc. in a Judgment or order would lie, but a petition which is intended to review an order or Judgment under Order XLVII Rule 1 of CPC and in criminal proceedings except on the ground of an error apparent on the face of the record, could not be achieved by filing an application for clarification /modification/recall or rehearing, for which a properly constituted review is the remedy.

Sone Lal and others v. State of Uttar Pradesh **(1982) 2 SCC 398 and** *Delhi Administration v. Gurdip Singh Urban and others* **(2000) 7 SCC 296: 2000 (2) Suppl. SCR 496 – relied on.**

Delhi Administration v. Gurdip Singh Uban **(1999) 7 SCC 44 – referred to.**

Case Law Reference:

(1982) 2 SCC 398	**relied on**	**Para 5**
2000 (2) Suppl. SCR 496	**relied on**	**Para 6**
(1999) 7 SCC 44	**referred to**	**Para 6**

CIVIL APPELLATE JURISDICTION : INTERLOCUTORY APPLICATION NOs.5 AND 6 OF 2012

IN

Civil Appeal Nos.281-282 of 2012.

From the Judgment & Order dated 28.03.2008 and 22.09.2010 of the High Court of Madhya Pradesh, Bench at Gwailor in Writ Appeal No. 234 of 2007 and Review Petition No. 83 of 2010.

Dr. Rajeev Dhavan, B.S. Banthia, Mishra Saurabh, Puneet Jain, Sushil Kumar Jain, Anurag Gohil, Ruchika Gohil, Niraj Sharma for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. These applications have been preferred under Order XVIII Rule 5 of the Supreme Court Rules, 1966 (for short 'the Rules) against the order of the Registrar dated 28.8.2012, alleging that the applications under Order XVIII Rule 5 of the Rules lodging the applications for clarification/modification of

the Judgment dated 11.1.2012 of this Court in Civil Appeal Nos.281-282 of 2012 cannot be sustained in law. Applications for clarification/modification were filed on 21.2.12 seeking the following reliefs:

(a) Clarify/modify the observations contained in paragraphs 21 and 22 of the Judgment dated 11.1.2012 in view of the Notifications being produced by the Applicant herein along with the present application specially Notification dated 20.9.1965 issued by the State Government in exercise of powers under Section 52 of the Madhya Pradesh Town Improvement Trusts Act, 1960;

(b) Clarify/modify operative directions in the Judgment dated 11.1.2012 by which it has been held that the Gwalior Development Authority did not have authority or power to execute the lease in favour of the applicant herein;

(c) Direct the Appellant to produce before this Hon'ble Court the official records in respect of Scheme 2-B framed by the then Gwalior Improvement Trust including the Notifications and orders issued by the State Government in respect thereto photocopies of some of which are being produced along with the present applications; and

(d) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case."

Applications were rejected holding those applications filed would amount to seeking review of the Judgment and order passed by this Court on 11.1.2012. It was noticed that on the pretext of application for clarification/modification, applicant, in fact, sought nothing but recalling of the Judgment and order dated 11.1.2012 and substitution of the directions contained

therein which, according to the Registrar, would amount to a prayer for reviewing the Judgment. Applications were, therefore, rejected placing reliance on the Judgment of this Court in *Delhi Administration v. Gurdip Singh Urban and others* (2000) 7 SCC 296.

2. Dr. Rajeev Dhawan, learned senior counsel appearing for the applicants submitted that the respondent-State of Madhya Pradesh had suppressed various documents which had substantial bearing on the outcome of the appeals. According to the learned senior counsel the following are some of the documents which were suppressed from this Court:

(i) "Gazette Notification dated 27th September, 1963 formulating Housing Scheme under Section 46 of the Madhya Pradesh Town Improvement Trust Act, 1960 (Act of 1960).

(ii) Gazette Notification dated 4th October, 1963 for Housing Schemes

(iii) Details of the Acquisition of land and structure of village Ghospura and Mehra (Annexure R-1/3)

(iv) Gazette Notification under Section 52(1)(s) of the Act of 1960 sanctioning the Scheme"

3. Learned senior counsel submitted that the only argument urged before the Bench was that since the property in question was Government land which had not been transferred by it to Gwalior Development Authority, the authority could not have dealt with such land by executing a lease which had been in favour of the applicants. Learned senior counsel submitted that various statements made by the State were couched with malice, fraud and material suppression of facts. Consequently, it was stated that the Registrar should have entertained the applications for modification/clarification and were wrongly lodged.

4. We fully endorse the view expressed by the Registrar that the prayers made in the applications would clearly fall in the realm of an application for review of the Judgment of this Court dated 11.1.2012 on the ground of fraud and material suppression of documents and there is no question of clarification/modification of the Judgment of this Court dated 11.1.2012.

5. We are of the view that the practice of overcoming the provision for review under Order XL of the Rules by filing an application for re-hearing/ modification/ clarification has to be deprecated. Registrar of this Court earlier in an application for re-hearing took the same stand in the year 1981. This Court dismissed a Criminal Appeal No.220 of 1974 on 3.4.1981. Appellant therein filed an application for re-hearing of the appeal on 20.4.1981. The counsel was informed by the Registry that since appeal had been disposed of after hearing the counsel for the parties, no application for re-hearing would lie and, if he so advised, could file a review petition under the Rules. Consequently, the application was not registered. The order of the Registrar is reported in *Sone Lal and others v. State of Uttar Pradesh* (1982) 2 SCC 398.

6. The above mentioned order of the Registrar was later endorsed by this Court in *Delhi Administration v. Gurdip Singh Uban and others* (2000) 7 SCC 296. In that case Civil Appeal Nos.4656-57 of 1999 were allowed by a two Judge Bench Judgment of this Court reported in *Delhi Administration v. Gurdip Singh Uban* (1999) 7 SCC 44 and the appeals of Delhi Administration and Delhi Development Authority were allowed. The appellant in Civil Appeal No.4656 of 1999 was the Delhi Administration while the appellant in CA No.4657 of 1999 was Delhi Development Authority. After the appeals were allowed by this Court on 20.8.1999, Review Petition Nos.1402-03 of 1999 were filed in the two appeals by Gurdip Singh Uban and they were dismissed in circulation by a reasoned order on 24.11.1999. Another Review Petition No.21 of 2000 filed by

another person was not listed on that date. IA No.3 of 1999 was later listed along with IA Nos.4 & 5 filed by Gurdip Singh Uban on 23.12.1999. Gurdip Singh Uban, it may be noted had filed IA Nos.4 & 5 in spite of dismissal of his review petition on 24.11.1999. IA Nos.4 & 5 were listed before the Court and a preliminary objection was raised stating that the applications couched as applications for "clarification", modification" or for "recall" could not be entertained once the review petitions filed by the applicant were dismissed. This Court examined the question in detail in *Gurdip Singh Uban* (supra) and held as follows:

> "**16**. At the outset, we have to refer to the practice of filing review applications in large numbers in undeserving cases without properly examining whether the cases strictly come within the narrow confines of Rule XL of the Supreme Court Rules. In several cases, it has become almost everyday experience that review applications are filed mechanically as a matter of routine and the grounds for review are a mere reproduction of the grounds of special leave and there is no indication as to which ground strictly falls within the narrow limits of Rule XL of the Rules. We seriously deprecate this practice. If parties file review petitions indiscriminately, the time of the Court is unnecessarily wasted, even it be in chambers where the review petitions are listed. Greater care, seriousness and restraint is needed in filing review applications.
>
> **17.** We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

Order XL Rule 3 states as follows:

> "3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party...."

In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in *Sone Lal v*. *State of U.P.* deprecating a similar practice.)

18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the

application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers.

19. What we have said above equally applies to such applications filed after rejection of review applications particularly when a second review is not permissible under the Rules. *Under Order XL Rule 5* a second review is not permitted. The said Rule reads as follows:

"5. Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter."

20. We should not however be understood as saying that in no case an application for "clarification", "modification" or "recall" is maintainable after the first disposal of the matter. All that we are saying is that once such an application is listed in Court, the Court will examine whether it is, in substance, in the nature of review and is to be rejected with or without costs or requires to be withdrawn with leave to file a review petition to be listed in chambers by circulation. Point 1 is decided accordingly.

7. We are of the view that the ratio laid down in the above-mentioned Judgment squarely applies to the facts of this case as well. Generally an application for correction of a typographical error or omission of a word etc. in a Judgment or order would lie, but a petition which is intended to review an order or Judgment under Order XLVII Rule 1 of the Code of Civil Procedure and in criminal proceedings except on the ground of an error apparent on the face of the record, could not be achieved by filing an application for clarification/modification/ recall or rehearing, for which a properly constituted review is the remedy. Review power is provided under Order XL of the Rules, which reads as follows:

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

2. An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.

3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.

4. Where on an application for review the Court reverses or modifies its former decision in the case on the ground of mistake of law or fact, the Court, may, if it thinks fit in the interests of justice to do so, direct the refund to the petitioner of the court-fee paid on the application in whole or in part, as it may think fit.

5. Where an application for review of any judgment and order has been made and disposed of, no further application for review shall be entertained in the same matter."

8. Under Order XL of the Rules a review application has first to go before learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without an order giving an oral hearing or whether notice is to be issued to the opposite party. Many a times, applications are

filed for clarification/modification/recall or rehearing not because of any clarification/modification is found necessary but because the applicant in reality wants a review and also wants hearing by avoiding circulation of the same in Chambers. We are of the view that a party cannot be permitted to circumvent or by-pass this circulation procedure and indirectly obtain a hearing in the open Court, what cannot be done directly, cannot be permitted to be done indirectly.

9. We are, therefore, of the view that the Registrar has rightly ordered for lodgment of the applications. However, we make it clear that the dismissal of these applications would not stand in the way of the applicants in filing review petitions with additional documents, stated to have been suppressed by the opposite side, which would be dealt with in accordance with law. The interlocutory applications are dismissed.

B.B.B. I.As dismissed.

EXTRA JUDICIAL EXECUTION VICTIM FAMILIES ASSOCIATION (EEVFAM) AND ANOTHER

v.

UNION OF INDIA & ANOTHER

(Writ Petition (Criminal) No. 129 of 2012)

JANUARY 4, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Constitution of India, 1950 – Article 32 – Unlawful killings – Extra Judicial Execution – Writ petitions raising disquieting issues pertaining to the State of Manipur – Statement made that, over the years, large number of Indian citizens, have been killed by the Manipur Police and other security forces while they were in custody or in stage-managed encounters or in ways broadly termed as 'extra-judicial executions' and that for a very long time, the State of Manipur is declared as "disturbed area" and is put under the Armed Forces (Special Powers) Act, 1958, subverting the civil rights of the citizens of the State and making it possible for the security forces to kill innocent persons with impunity – Three member high powered commission appointed by Supreme Court to make thorough enquiry in the first six cases filed by the petitioners and record a finding regarding the past antecedents of the victims and the circumstances in which they were killed – State Government and all other concerned agencies directed to hand over to the Commission, without any delay, all records, materials and evidences relating to the cases, as directed above, for holding enquiry – It will be open to the Commission to take statements of witnesses in connection with the enquiry conducted by it and it will be free to devise its own procedure for holding the enquiry – In light of the enquiries made by it, the Commission to also address the larger question of the role of the State Police and the security forces in Manipur – Commission to also make a report

regarding the functioning of the State Police and security forces in the State of Manipur and in case it finds that the actions of the police and/or the security forces transgress the legal bounds, the Commission shall make recommendations for keeping the police and the security forces within the legal bounds without compromising the fight against insurgency – Commission to give its report within twelve weeks – Central Government and the Government of the State of Manipur to extend full facilities, including manpower support and secretarial assistance as may be desired by the Commission to effectively and expeditiously carry out the task assigned to it by the Court – Matter to be put up on receipt of the report by the Commission – Armed Forces (Special Powers) Act, 1958.

People's Union for Civil Liberties v. Union of India and another **(1997) 3 SCC 433 – referred to.**

Case Law Reference:

(1997) 3 SCC 433 referred to Para 8

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 129 of 2012.

Under Article 32 of the Constitution of India.

WITH

Writ Petition (C) No. 445 of 2012.

Menaka Guruswamy (Amicus Curiae), Paras Kuhad, ASG, Colin Gonsalves, Jaideep Gupta, Ranjit Kumar, V. Giri, Bipin Aspatwar, Surabhi Shukla, Raeesa Vakil, Jubli, Jyoti Mendiratta, Sapam Biswajit Meitei, Ashok Kumar Singh, Neeraj K. Sharma, Ashok Dhamija, B.K. Prasad, Khwairakpam Nobin Singh, Shobha, Mehak for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. These two writ petitions, each filed under Article 32 of the Constitution of India, raise some disquieting issues pertaining to the State of Manipur. In writ petition (criminal) No.129 of 2012, it is stated that, over the years, a large number of people, Indian citizens, have been killed by the Manipur Police and other security forces while they were in custody or in stage-managed encounters or in ways broadly termed as 'extra-judicial executions'. In writ petition (civil) No.445 of 2012, it is stated that for a very long time, the State of Manipur is declared as "disturbed area" and is put under the Armed Forces (Special Powers) Act, 1958, subverting the civil rights of the citizens of the State and making it possible for the security forces to kill innocent persons with impunity.

2. In this order, we deal with the first writ petition, i.e., writ petition (criminal) No.129/2012.

3. In this writ petition it is stated that during the period May, 1979 to May, 2012, 1528 people were killed in Manipur in extra-judicial execution. The statement is mainly based on a memorandum prepared by 'Civil Society Coalition on Human Rights in Manipur and the UN' and submitted to one Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to India, 19-30 March, 2012. The Memorandum compiles the list of 1528 people allegedly killed unlawfully by the State Police or the security forces. The writ petitioners later on filed "Compilation 1" and "Compilation 2". In "Compilation 1" details are given of ten (10) cases relating to the killings of eleven (11) persons (out of the list of 1528); in "Compilation 2", similarly details are given of thirteen (13) cases in which altogether seventeen (17) persons (out of the list of 1528) are alleged to have been killed in extra judicial executions.

4. A counter affidavit is filed on behalf of the State of Manipur. In the counter affidavit there is not only a complete

denial of the allegations made in the writ petition but there also seems to be an attempt to forestall any examination of the matter by this Court. The plea is taken that the National Human Rights Commission (NHRC) is the proper authority to monitor the cases referred to in the writ petition. It is stated that in regard to all the ten (10) cases highlighted in "Compilation 1" filed by the petitioners, reports have been submitted to it and in none of those cases the NHRC has recorded any finding of violation of human rights. It is stated that the occasion for this Court to examine those cases would arise only if it holds that the NHRC had failed to perform its statutory functions in safeguarding the human rights of the people in the State. This Court should not examine this matter directly but should only ask the NHRC to indicate the status of the cases listed and highlighted in the writ petition. We are unable even to follow such a plea. The course suggested by the State will completely dissipate the vigour and vitality of Article 32 of the Constitution. Article 21 coupled with Article 32 of the Constitution provides the finest guarantee and the most effective protection for the most precious of all rights, namely, the right to life and personal liberty of every person. Any indication of the violation of the right to life or personal liberty would put all the faculties of this Court at high alert to find out the truth and in case the Court finds that there has, in fact, been violation of the right to life and personal liberty of any person, it would be the Court's bounden duty to step-in to protect those rights against the unlawful onslaught by the State. We, therefore, see no reason not to examine the matter directly but only vicariously and second-hand, through the agency of the NHRC.

5. A reference is next made in the counter affidavit to an appeal pending before this Court against the judgment of the Bombay High Court and a writ petition, also pending before this Court, filed by the State of Gujarat on the subject of fake encounters and it is stated that this case should be tagged with those other two cases to be heard together. We fail to see any relevance of the two cases referred to in the counter affidavit and, in our view, the plea that these two writ petitions should

only be heard along with those two cases is meant to detract from consideration the grave issues raised in the writ petition.

6. It is thirdly stated in the counter affidavit that the State of Manipur is faced with the menace of insurgency for many years and details are given of policemen and civilians killed and injured by the insurgents. There are about 30 extremist organizations in the State out of which six are very powerful and they are armed with sophisticated weapons. Their aim and object is to secede from the Republic of India and to form an independent State of Manipur. For realization of their objective they have been indulging in violent activities, including killing of civilians and members of security forces. It is stated in the counter affidavit that during the period 2000 to October, 2012, 105 policemen, 260 security forces personnel, and 1214 civilians were killed; the number of injured during the same period is 178 for the policemen, 466 for members of security forces and 1173 for civilians.

7. There is no denying that Manipur is facing the grave threat of insurgency. It is also clear that a number of the insurgent groups are operating there, some of which are heavily armed. These groups indulge in heinous crimes like extortion and killing of people to establish their hegemony. It is also evident from the counter affidavit filed by the State that a number of police personnel and members of security forces have laid down their lives or received serious injuries in fighting against insurgency. But, citing the number of the policemen and the security forces personnel and the civilians killed and injured at the hands of the insurgents does not really answer the issues raised by the writ petitioners.

8. In *People's Union for Civil Liberties v. Union of India and another*[1], this Court earlier dealt with a similar issue from Manipur itself. In that case, it was alleged that two persons along with others were seized by the police and taken in a truck to a

1. (1977) 3 SCC 433.

distant place and shot there. In an inquiry by the District and Sessions Judge, Manipur (West), held on the direction of this Court, the allegation was found to be correct. In that case, dealing with question of the right to life in a situation where the State was infested with terrorism and insurgency, this Court in paragraphs 5 and 6 of the judgment observed as follows:

> "5. It is submitted by Ms S. Janani, the learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organizations, that they have been indulging in a number of crimes affecting the public order — indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on a number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.
>
> 6. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal

> with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. **All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas**. If the police had information that terrorists were gathering at a particular place and if they had surprised them and arrested them, the proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them."
>
> (emphasis added)

9. We respectfully reiterate what was earlier said by the Court in *People's Union for Civil Liberties.*

10. In 1997, in the *Peoples' Union for Civil Liberties* this Court, dealing with the case of killing of two persons in Manipur had cautioned the State against "Administrative liquidation".

But, after 15 years in this case, we are faced with similar allegations on a much larger scale.

11. For this Court, the life of a policeman or a member of the security forces is no less precious and valuable than any other person. The lives lost in the fight against terrorism and insurgency are indeed the most grievous loss. But to the State it is not open to cite the numbers of policemen and security forces killed to justify custodial death, fake encounter or what this Court had called "Administrative liquidation". It is simply not permitted by the Constitution. And in a situation where the Court finds a person's rights, specially the right to life under assault by the State or the agencies of the State, it must step-in and stand with the individual and prohibit the State or its agencies from violating the rights guaranteed under the Constitution. That is the role of this Court and it would perform it under all circumstances. We, thus, find that the third plea raised in the counter affidavit is equally without substance.

12. Lastly, the counter affidavit, and the Supplementary Counter Affidavit filed by the State give the State's version of the 10 cases highlighted in the Compilation 1, filed by the petitioners. But on that we would not like to make any comment at this stage.

13. The Union of India has also filed a separate counter affidavit. It is a more responsible affidavit in that it does not evade the issues nor does it try to dissuade the Court from examining the cases of alleged extra-judicial executions brought to its notice by the writ petitioners. In the counter affidavit filed by the Union, first a reference is made to different legal provisions (Section 146 and Sections 129 to 132 of the Criminal Procedure Code, Sections 99 to 106 in Chapter IV of the Indian Penal Code and Section 4 of the Armed Forces (Special Powers) Act, 1959) and it is contended that subject to the conditions stipulated in those provisions, killing of a person by a police officer or a member of the armed forces

may not amount to an offence and may be justified in law. It is stated in the counter affidavit that all the cases listed and/or highlighted in the writ petition and described as extra-judicial executions are cases of persons who died during counter-insurgency operations or in performance of other lawful duties by the police and the personnel of the armed forces. It is emphasized that in most of the cases the so-called victims might have been killed in the lawful exercise of the powers and/or in discharge of official duties by the police and the armed forces personnel. It is further said that "public order" and, by implication, the maintenance of "law and order" are primarily State subjects and the role of the Central Government in deploying the armed forces personnel in the State is only supportive in aid of the law and order machinery of the State. The State of Manipur has the primary duty to deal with the issue of investigation in relevant cases, except where provided to the contrary in any other law for the time being in force. It is stated that the "very gloomy picture" of the State of Manipur sought to be presented by the writ petitioners is incorrect and misleading. It is asserted that Manipur is fully and completely integrated with the rest of the country and it is pointed out that in the 1990 elections the voting turnout for the 60 assembly seats in the State was 89.95%. Similarly, during the recent 2012 assembly elections, the voting turnout was 83.24%. It is added that the voting percentage in Manipur is amongst the highest in the country as a whole and it clearly shows that the people of Manipur have taken active participation in the elections showing their full faith in the Constitution and the constitutional process.

14. Coming to the issue of insurgency, it is stated in the counter affidavit as under:

> "It is only a handful of disgruntled elements who have formed associations/ groups that indulge in militant and unlawful activities in order to retain their influence and hegemony in the society. These groups also challenge the

sovereignty and integrity of the country by following aims and objectives which are secessionist in nature. It is emphasized that only around 1500 militants are holding a population of 23 lakhs in Manipur to ransom and keeping the people in constant fear. The root cause of militancy in Manipur is the constant endeavour of these insurgent groups so that they can continue to extort money and the leaders of such groups can continue to lead luxurious life in foreign countries. The tribal divide and factions in the society and the unemployed youth are being exploited by these militant outfits to fuel tension in the society."

15. It is further stated in paragraph 13 of the counter affidavit as under:

"It may also be submitted that the ethnic rivalries amongst the different tribal groups viz. Meities, Kukis and Nagas are deep-rooted and the militant groups fervently advance their ideologies by taking advantage of the porous international border with Myanmar which is 256 km long, heavily forested and contains some of the most difficult terrain. The border area is inhabited by the same tribes on either side. These tribes have family relations and for social interactions a free movement regime for the locals to move up to 16 kms on both sides is permitted. Taking advantage of this situation the militant outfits utilize the other side of the border (which is beyond the jurisdiction of the Indian Armed Forces) for conveniently conducting their operations of extortions/ kidnapping/ killing/ looting and ambushing the security forces."

16. The counter affidavit goes on to explain that the operations of not only the State Police but the different security forces under the control of the Central Government are being strictly monitored and kept within the parameters set out by the different laws under which those forces operate. It is stated that different statutory agencies acting as watchdog ensure that the

armed forces do not overstep the Constitutional or the legal limits in carrying out the anti-insurgency operations.

17. Ms. Guruswamy, the learned *amicus* has, on the other hand, presented before us tables and charts showing the inconsistencies in the materials produced by the State of Manipur itself concerning the 10 cases highlighted in "Compilation 1" filed by the petitioners. She also submitted that though enquiries were purported to be held by an Executive Magistrate in the 10 cases described in "Compilation 1", in none of those cases the kin of the victims came before the Magistrate to give their statements even though they were approaching the court, complaining that the victims were killed in fake encounters. She further pointed out that in some of the cases even the police/security forces personnel who were engaged in the killings did not turn up, despite summons issued by the Magistrate, to give their version of the occurrence and the Magistrate closed the enquiry, recording that there was nothing to indicate that the victims were killed unlawfully. In some cases the Magistrate, even while recording the finding that the case did not appear to be one of fake encounter made the concluding observation that it would be helpful to sensitize the police/armed forces in human rights. She submitted that the so-called enquiries held by the Magistrate were wholly unsatisfactory and no reliance could be placed on the findings recorded in those enquiries.

18. Apart from the criticisms made by the *amicus* against the Magisterial enquiries held in the 10 cases of "Compilation 1" it is important to note that a number of cases cited by the petitioners had gone to the Gauhati High Court and on the direction of the High Court, inquires, of a judicial nature, were made into the killings of (1) Azad Khan, age 12 years (according to the State, 15 years) (from "Compilation 1"), (2)Nongmaithem Michael Singh, age 32 years, (3) Ningombam Gopal Singh, age 39 years, (4) (i) Salam Gurung alias Jingo, age 24 years, (ii) Soubam Baocha alias Shachinta, age 24

years (5) (i) Mutum Herojit Singh, age 28 years (ii) Mutum Rajen, age 22 years (6) Ngangbam Naoba alias Phulchand Singh, age 27 years (7) Sapam Gitachandra Singh, age 22 years (8) (i) Kabrambam Premjit Singh, (ii) Elangbam Kanto Singh (9) Longjam Uttamkumar Singh, age 34 years (10) Loitongbam Satish @ Tomba Singh, age 34 years (11) Thockhom Inao @ Herojit Singh, age 31 years, (12) Khumallambam Debeshower Singh (13) (i) Km. Yumnam Robita Devi (ii) Angom Romajitn Singh (14) Thoudem Shantikumar Singh (all from "Compilation 2").

19. In all those cases the judicial inquiry found that the victims were not members of any insurgent or unlawful groups and they were killed by the police or security forces in cold blood and stage-managed encounters.

20. It is stated on behalf of the petitioners that though it was established in the judicial enquiry that those persons were victims of extra-judicial executions, the High Court simply directed for payment of monetary compensation to the kins of the victims. Learned Counsel for the petitioners submitted that payment of rupees two to four lakhs for killing a person from funds that are not subjected to any audit, instead of any accountability for cold blooded murder, perfectly suits the security forces and they only get encouraged to carry out further killings with impunity.

21. On a careful consideration of the averments made in the writ petition and the counter affidavits filed by the respondents and on hearing Ms Guruswamy, the *amicus*, Mr. Gonsalves the learned counsel appearing for the writ petitioners, Mr. Kuhad, the Additional Solicitor General appearing for the Union of India, Mr. Ranjit Kumar, senior advocate appearing for the State of Manipur and Ms. Shobha, advocate appearing for the NHRC, we find it impossible to overlook the matter without further investigation. We are clearly of the view that this matter requires further careful and deeper consideration.

22. The writ petitioners make the prayer to constitute a Special Investigation Team comprising police officers from outside Manipur to investigate the cases of unlawful killings listed in the writ petition and to prosecute the alleged offenders but at this stage we are not inclined to appoint any Special investigation Team or to direct any investigation under the Code of Criminal Procedure. Instead, we would first like to be fully satisfied about the truth of the allegations concerning the cases cited by the writ petitioners. To that end, we propose to appoint a high powered commission that would tell us the correct facts in regard to the killings of victims in the cases cited by the petitioners. We, accordingly, constitute a three-member commission as under:

1. Mr. Justice N. Santosh Hegde, a former Judge of the Supreme Court of India, as Chairperson

2. Mr. J. M. Lyngdoh, former Chief Election Commissioner, as Member

3. Mr. Ajay Kumar Singh, former DGP and IGP, Karnataka.

23. We request the Commission to make a thorough enquiry in the first six cases as detailed in "Compilation 1", filed by the petitioners and record a finding regarding the past antecedents of the victims and the circumstances in which they were killed. The State Government and all other concerned agencies are directed to hand over to the Commission, without any delay, all records, materials and evidences relating to the cases, as directed above, for holding the enquiry. It will be open to the Commission to take statements of witnesses in connection with the enquiry conducted by it and it will, of course, be free to devise its own procedure for holding the enquiry. In light of the enquiries made by it, the Commission will also address the larger question of the role of the State Police and the security forces in Manipur. The Commission will also make a report regarding the functioning of the State Police and

security forces in the State of Manipur and in case it finds that the actions of the police and/or the security forces transgress the legal bounds the Commission shall make its recommendations for keeping the police and the security forces within the legal bounds without compromising the fight against insurgency.

24. The Commission is requested to give its report within twelve weeks from today.

25. The Central Government and the Government of the State of Manipur are directed to extend full facilities, including manpower support and secretarial assistance as may be desired by the Commission to effectively and expeditiously carry out the task assigned to it by the Court.

26. The Registry is directed to furnish a copy of this order and complete sets of briefs in both the writ petitions to each of the members of the Commission forthwith.

27. Put up on receipt of the report by the Commission.

B.B.B. Matter pending.

PARBIN ALI AND ANOTHER
v.
STATE OF ASSAM
(Criminal Appeal No. 1037 of 2008)

JANUARY 07, 2013

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

Penal Code, 1860:

s. 302/34 – Murder – Oral dying declaration made to witnesses naming the accused – Conviction and sentence of life imprisonment affirmed by High Court – Held: Conviction can be founded solely on the basics of dying declaration if the same inspires full confidence – In the instant case, the witnesses have deposed in a categorical manner that the deceased was in a fit state of health to speak and make a statement and, in fact, he did make a statement as to who assaulted him – Nothing has been suggested to these witnesses about the condition of the deceased – The doctor, who had performed the post mortem, has not been cross-examined – Absence of any real discrepancy or material contradiction or omission and additionally non cross-examination of the doctor in this regard makes the dying declaration absolutely credible and conviction based thereon cannot be faulted – Evidence – Dying Declaration.

FIR:

Delay in lodging the FIR – Held: In the instant case, "ezahar" had been lodged at the police station prior to registration of the FIR – Trial court has analysed this aspect in an extremely careful and cautious manner which is found to be impeccable.

The two appellants faced trial for causing the death of the husband of PW 2. The prosecution case was that

at 9:00 PM on 17.01.1994, PW 2, her father (PW 5) and some other persons saw the deceased lying injured on the road side. The injured told the witnesses that he was assaulted by the two appellants and one 'A'. The witnesses could not arrange any conveyance to carry the injured to hospital and he died at 11:00 PM. PW5 went to the Police Station and got recorded an "ezahar". FIR was lodged the following day. 'A' died during the investigation. The trial court convicted both the appellants and u/s. 302/34 IPC and sentenced them to imprisonment for life, and the High Court upheld the same.

It was contended for the appellants that the oral dying declaration said to have been made by the deceased was highly unnatural and did not inspire confidence; and that though the Police Station was quite nearby, there was delay in lodging the FIR. It was, therefore, submitted that both the factors cast a doubt on the prosecution case.

Dismissing the appeal, the Court

HELD: 1.1. The final opinion of PW4, the doctor, who conducted the post-mortem is that the death was caused due to shock and haemorrhage as a result of the ante mortem injuries in the abdomen caused by sharp weapon and homicidal in nature. The said opinion was not challenged either before the trial Judge or before the High Court. The said witness has not been at all cross-examined. Whether a person receiving such injuries would be in a position to speak or not has not been brought out in the evidence. [Para 10] [162-A-C]

1.2. The law is well settled that the conviction can be founded solely on the basis of dying declaration if the same inspires full confidence. [Para 12] [162-F]

Khushal Rao vs. State of Bombay **AIR 1958 SC 22;** *Kusa vs. State of Orissa* **AIR 1980 SC 559;** *Meesala Ramakrishnan vs. State of A.P.* **(1994) 4 SCC 182;** *Ranjit Singh v. State of Punjab* **(2006) 13 SCC 130 – relied on**

1.3. The witnesses who have deposed in respect of the oral dying declaration are PW-2 and 5, the wife and father-in-law, respectively, of the deceased, PW-1, a relative and PW-3. These witnesses have clearly stated that the deceased had informed them about the names of the assailants. Nothing worth has been elicited in the cross-examination. They have deposed in a categorical manner that by the time they arrived at the place of occurrence, the deceased was in a fit state of health to speak and make a statement and, in fact, he did make a statement as to who assaulted him. Nothing has been suggested to these witnesses about the condition of the deceased. PW-4, the doctor, who had performed the post mortem, has not been cross-examined. In this backdrop, it can safely be concluded that the deceased was in a conscious state and in a position to speak. Thus, it is difficult to accept that the wife, the father-in-law and other close relatives would implicate the accused-appellants by attributing the oral dying declaration to the deceased. That apart, the absence of any real discrepancy or material contradiction or omission and additionally non cross-examination of the doctor in this regard, makes the dying declaration absolutely credible and the conviction based on the same really cannot be faulted. [Para 10, 11 and 20] [162-C-D; 166-G-H; 167-A-C]

Nanhau Ram v. State of M.P. **1988 Supp SCC 152;** *Laxman v. State of Maharashtra* **(2002) 6 SCC 710; and** *Pothakamuri Srinivasulu alias Mooga Subbaiah v. State of A.P.* **(2002) 6 SCC 399 – relied on**

Puran Chand v. State of Haryana **(2010) 6 SCC 566;**

Prakash and another v. *State of Madhya Pradesh* **(1992) 4 SCC 225; and** *Darshana Devi* v. *State of Punjab* **1995 Supp (4) SCC 126 – referred to.**

2. As regards the delay in lodging of the F.I.R, it is perceptible from the evidence that the father-in-law of the deceased had gone to the police station and lodged the ezahar and, thereafter, an FIR was lodged. The trial court has analysed the said aspect in an extremely careful and cautious manner and on a closer scrutiny, the analysis made by it is found to be impeccable. [Para 21] [167-D]

Case Law Reference:

AIR 1958 SC 22	**relied on**	**para 12**
AIR 1980 SC 559	**relied on**	**para 12**
(1994) 4 SCC 182	**relied on**	**para 12**
(2006) 13 SCC 130	**relied on**	**para 13**
1988 Supp SCC 152	**relied on**	**para 13**
(2002) 6 SCC 710	**relied on**	**para 14**
(2010) 6 SCC 566	**referred to**	**para 15**
(1992) 4 SCC 225	**referred to**	**para 16**
1995 Supp (4) SCC 126	**referred to**	**para 18**
(2002) 6 SCC 399	**relied on**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1037 of 2008.

From the Judgment & Order dated 19.1.2006 of the High Court of Gauhati at Assam in Criminal Appeal Nos. 52 and 53 of 1999.

Mithlesh Kumar Singh (AC), Tarun Verma for the Appellants.

Avijit Roy (For Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal by special leave is directed against the judgment of conviction and order of sentence passed by the Gauhati High Court in Criminal Appeal Nos. 52(J) of 1999 and 53(J) of 1999 whereby the Division Bench of the High Court gave the stamp of approval to the conviction recorded by the learned Additional Sessions Judge, Silchar in Sessions Case No. 28/96 under Section 302/34 of the Indian Penal Code (for short "the IPC") and order of sentence sentencing the accused-appellants to imprisonment for life and to pay a fine of Rs.500/-, in default, to suffer further rigorous imprisonment for one month. It may be mentioned here that the accused-appellants (hereinafter referred to as "the accused") had preferred two separate appeals against the common judgment but a joint appeal has been preferred from jail.

2. The facts giving rise to this appeal are that on 17.7.1994, about 9.00 p.m., deceased, Sakat Ali, was found lying injured on the road side. Coming to know about the same, a large number of persons including the father-in-law of the deceased, his wife and others came to the spot and at that juncture, the injured Sakat Ali told them that he was assaulted by the accused persons along with one Asiquddin. He remained lying on the road side as neither the relatives nor his wife could arrange any conveyance for carrying him to the hospital and, eventually, he succumbed to the injuries around 11.00 p.m. While he was on the road, his father-in-law went to the police station wherein an "ezahar" was recorded. After the injured died, an FIR was lodged on 18.7.1994. After the criminal law was set in motion, the accused were arrested, the dead body of the deceased was sent for post mortem, statements of nine witnesses were recorded under Section 161 of the Code of Criminal Procedure and, eventually, after completing the investigation, the charge-sheet was placed before the

competent Court under Section 302/34 of the IPC against the accused persons. The learned magistrate dropped the case against Asiquddin as he had died by that time and committed the matter to the Court of Session and ultimately the case was tried by the learned Additional Sessions Judge, Cachar at Silchar.

3. The accused abjured their guilt and desired to face the trial. During the trial, the prosecution, in order to establish its case, examined nine witnesses and brought on exhibit number of documents. After completion of the prosecution evidence, the accused persons were examined under Section 313 CrPC. They had not put forth any substantial plea except a bald denial and chose not to adduce any evidence.

4. The learned trial judge, considering the entire evidence, placing reliance on the oral dying declaration of the deceased and taking note of the weapon used and the nature of the injury caused, came to hold that the prosecution had been able to substantiate the charge beyond reasonable doubt and, accordingly, convicted them and imposed the sentence.

5. In appeal, the High Court took note of the fact that there was no direct evidence to implicate the accused and the minor omissions or contradictions and discrepancies which had been highlighted by the defence did not create any kind of dent in the prosecution version; that ample explanation had been offered by the prosecution for not getting the dying declaration recorded as the deceased was lying on the road side and could not be taken to a hospital; and that there was no reason to disbelieve the oral dying declaration, and the same being absolutely credible, the judgment and conviction rendered by the learned trial Judge did not warrant any interference.

6. We have heard Mr. Mithlesh Kumar Singh, learned counsel for the accused-appellants, and Mr. Avijit Roy, learned counsel appearing for the respondent-State.

7. Questioning the correctness of the conviction, it is urged by Mr. Singh, learned counsel for the appellants, that the learned trial Judge as well as the High Court has gravely erred in placing reliance on the oral dying declaration as it does not inspire confidence, for it is highly unnatural that the wife and the father-in-law of the deceased coming to the spot could not take the injured to any nearby hospital for treatment though he lived for few hours after the assault. That apart, submitted Mr. Singh, though the police station is quite nearby, yet there was delay in lodging the FIR which casts a doubt in the case of the prosecution and, eventually, creates a concavity in the testimonies of PWs-1, 2, 3, 5 and 6 who have testified about the oral dying declaration.

8. Mr. Avijit Roy, learned counsel appearing for the State, on the contrary, contended that the material on record do clearly show that the father-in-law had rushed to the police station and lodged the “ezahar” which was registered and after the death, an FIR was registered under Section 302/34 of I.P.C. and, hence, the plea of delay in lodging the FIR has no legs to stand upon. It is urged by him that by the time the witnesses arrived on the scene, he was conscious but despite the best efforts, the relatives could not arrange a conveyance to remove the deceased to a hospital for treatment and there is no justification to discard the said version in the absence of any kind of contradiction or discrepancy in their evidence. The learned counsel for the State would emphatically put forth that the present case is one where the courts below have justifiably given credence to the oral dying declaration as it inspires unimpeachable and unreproachable confidence.

9. Before we proceed to dwell upon the issue of acceptability of oral dying declaration in the case at hand, it is apposite to refer to the post mortem report which has been proven by PW-4, Dr. K.K. Chakraborty, who has stated the injuries on the body of the deceased that has caused the death. They are as follows: -

"Injuries:

(1) Bandage of right elbow joint remove and found a cut injury on right elbow medialy and along with crease of elbow measuring 4 c.m. x 2 c.m. x 1 c.m. with cut in muscles, margins of the wound regular.

(2) Cut injury along the 11th Thorax vertebrae on left side 1 c.m. away from the mid line measuring 3 c.m. x 1 c.m. x 1 c.m. margins of the wound regular.

(3) Cut injury on back side 5 c.m. above the iliac creast and 6 c.m. lateral to the 3rd lumber vertebrae with prolapse of intestine through the wound measuring 6 c.m. x 2 c.m. x abdominal cavity deep. Margins of the wounds are regular and inverted.

(4) Cut injury in front of the abdominal wall ½ c.m. below the neivous 1 c.m. away from the mid line to right side through which intestine prolapsed. Measuring 3 c.m. x 2 c.m. x abdominal cavity deep. Margins are inverted and regular.

All the injuries are fresh and antemortem caused by sharp pointed weapon.

THORAX - All healthy.

ABDOMEN – Peritoneal cavity contain about 2 ½ litrs. of liquid and clotted blood. Stomach congested. Mouth, pharynx, ocsophagus healthy. Cut injury in the small intestine n the three parts are present. Liver, splin, kidneys are all healthy. Scalp, skull, vertebrae membrane, brain – all healthy.

MUSCLES, BONES & JOINTS :

Muscles injury as described. Fracture – not found. Fresh no abnormality found."

10. The final opinion of the doctor is that the death was caused due to shock and haemorrhage as a result of the ante mortem injuries in the abdomen caused by sharp weapon and homicidal in nature. The said opinion was not challenged either before the trial Judge or before the High Court. We may fruitfully note here that the said witness has not been at all cross-examined. Whether such a person receiving certain injuries would be in a position to speak or not has not been brought out any where in the evidence. In this backdrop, the testimonies of the witnesses who have deposed in respect of the oral dying declaration are to be scrutinized.

11. PW-1, Mooti Mia, a relative, PW-2, Sarifun Meesa, wife of the deceased, PW-3, Mohd. Abdul Wajid Ali, and PW-5, Aftaruddin, the father-in-law of the deceased, have deposed that the deceased had named three accused persons as assailants. PW-6, Arafan Ali, who came later to the place of occurrence, had found that the deceased was not in a position to speak. PW-8, Faizuluddin, did not support the prosecution case in entirety. Thus, the real witnesses to the oral dying declaration are PWs-1, 2, 3 and 5 and hence, the veracity of their version is required to be scrutinised.

12. Before we proceed to scrutinize the legal acceptability of the oral dying declaration, we think it seemly to refer to certain decisions in regard to the admissibility and evidentiary value of a dying declaration. In *Khushal Rao v. State of Bombay*[1]*, Kusa v. State of Orissa*[2] and in *Meesala Ramakrishan v. State of A.P.,*[3] it has been held that the law is well settled that the conviction can be founded solely on the basis of dying declaration if the same inspires full confidence.

13. In *Ranjit Singh v. State of Punjab*[4]*,* it has been held

1. AIR 1958 SC 22.
2. AIR 1980 SC 559.
3. (1994) 4 SCC 182.
4. (2006) 13 SCC 130.

that the conviction can be recorded on the basis of dying declaration alone, if the same is wholly reliable, but in the event there exists any suspicion as regards the correctness or otherwise of the said dying declaration, the courts, in arriving at the judgment of conviction, shall look for some corroborating evidence. In this context, we may also notice the judgment in *Nanhau Ram v. State of M.P.*[5] wherein it has been stated that normally, the court, in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration, looks up to the medical opinion. But where the eye witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

14. While dealing with the evidence of the declarant's mind, the Constitution Bench, in *Laxman v. State of Maharashtra,*[6] has laid down thus: -

> **"3.** The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

5. 1988 Supp SCC 152.

6. (2002) 6 SCC 710.

15. In this context, it will be useful to refer to the decision in *Puran Chand v. State of Haryana*[7] wherein it has been stated that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous and it is the duty of the court to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court further opined that the law is now well settled that a dying declaration which has been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused.

16. Regard being had to the aforesaid principles, we shall presently advert how to weigh the veracity of an oral dying declaration. As has been laid down in *Laxman* (supra) by the Constitution Bench, a dying declaration can be oral. The said

7. (2010) 6 SCC 566.

principle has been reiterated by the Constitution Bench. Here we may refer to a two-Judge Bench decision in *Prakash and another v. State of Madhya Pradesh*[8] wherein it has been held as follows: -

> "In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instance case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with."

17. It is worthy to note that in the aforesaid case this Court had laid down that when it is not borne out from the evidence of the doctor that the injuries were so grave and the condition of the patient was so critical that it was unlikely that he could make any dying declaration, there was no justification or warrant to discard the credibility of such a dying declaration.

18. In *Darshana Devi v. State of Punjab,*[9] this Court referred to the evidence of the doctor who had stated that the deceased was semi-conscious, his pulse was not palpable and his blood pressure was not recordable and had certified that he was not in a fit condition to make a statement after the police had arrived at the hospital and expressed the view that the deceased could not have made an oral statement that he had been burnt by his wife. Thus, emphasis was laid on the physical

8. (1992) 4 SCC 225.

9. 1995 Supp (4) SCC 126.

and mental condition of the deceased and the veracity of the testimony of the witnesses who depose as regards the oral dying declaration.

19. In *Pothakamuri Srinivasulu alias Mooga Subbaiah* v. *State of A.P.*,[10] this Court, while dealing with the issue whether reliance on the dying declaration made by the deceased to PWs-1, 2 and 3 therein could be believed, observed thus: -

> **"7.** We find no reason to disbelieve the dying declaration made by the deceased to the witnesses PWs 1, 2 and 3. They are all residents of the same village and are natural witnesses to the dying declaration made by the deceased. No reason is assigned, nor even suggested to any of the three witnesses, as to why at all any of them would tell a lie and attribute falsely a dying declaration to the deceased implicating the accused-appellant. Though each of the three witnesses has been cross-examined but there is nothing brought out in their statements to shake their veracity."

We may also note with profit that the Court did not accept that the injured could not have been in a conscious state on the ground that no such suggestion had been made to any of the witnesses including the doctor who conducted the post mortem examination of the deceased.

20. Coming to the case at hand, the wife, the father-in-law and the two other relatives have clearly stated that the deceased had informed them about the names of the assailants. Nothing worth has been elicited in the cross-examination. They have deposed in a categorical manner that by the time they arrived at the place of occurrence, the deceased was in a fit state of health to speak and make a statement and, in fact, he did make a statement as to who assaulted him. Nothing has been suggested to these witnesses about the condition of the deceased. As has been mentioned

10. (2002) 6 SCC 399.

earlier, PW-4, the doctor, who had performed the post mortem, has not been cross-examined. In this backdrop, it can safely be concluded that the deceased was in a conscious state and in a position to speak. Thus, it is difficult to accept that the wife, the father-in-law and other close relatives would implicate the accused-appellants by attributing the oral dying declaration to the deceased. That apart, in the absence of any real discrepancy or material contradiction or omission and additionally non cross-examination of the doctor in this regard makes the dying declaration absolutely credible and the conviction based on the same really cannot be faulted.

21. Having said that the discrepancies which have been brought out are not material, we may address to the issue of delay in lodging of the F.I.R. It is perceptible from the evidence that the father-in-law of the deceased had gone to the police station and lodged the ezahar and, thereafter, an FIR was lodged. The learned trial Judge has analysed the said aspect in an extremely careful and cautious manner and on a closer scrutiny, we find that the analysis made by him is impeccable.

22. In view of our aforesaid analysis, we conclude and hold that the appeal is sans substratum and, accordingly, the same has to pave the path of dismissal which we direct.

R.P. Appeal dismissed.

RAJ PAL

v.

STATE OF HARYANA

(Criminal Appeal No. 517 of 2008)

JANUARY 7, 2013

[DR. B. S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860:

s.302/34 – Murder – Conviction and sentence of life imprisonment awarded by trial court – Affirmed by High Court – Held: The fatal injuries sustained by deceased could not have been self-inflicted – Once the death was found to be homicidal, the evidence of eye-witnesses becomes relevant and the same being consistent in narrating the manner in which the deceased was attacked by accused and co-accused, with specific reference made to weapons used and further supported by the medical evidence, there is no infirmity in the verdict of courts below – Evidence – FIR.

Evidence:

Testimony of related witnesses – Murder committed in a farm house – Brother and sister of deceased witnessed the incident – Held: When the deceased was in one part of the house, while the witnesses and other blood relatives were in some other portion, there would not have been any difficulty for them in rushing to the deceased, who was making a frantic call for help on being attacked by accused with dangerous weapons – Their version was cogent, natural and convincing and there was no good ground to reject their version on the sole ground that they were interested witnesses.

FIR:

Delay in registration of FIR – Murder committed late in the night – Victim brought to hospital injured and unconscious – Held: Trial court has held that there was in fact, no delay in carrying out various formalities with regard to the receipt of 'ruka', holding of inquest, recording the statement of the witnesses, registration of FIR and forwarding special report to the magistrate and concluded that the same was carried out within a reasonable time – Further, keeping in view the distance of hospital and Police Station from the place of occurrence, no exception can be taken with regard to the alleged delay in registration of complaint, in order to hold any infirmity in the case of the prosecution – Delay/Laches.

The appellant and the co-accused were prosecuted for murder of the brother of the complainant (PW6). The prosecution case was that there was a dispute between the appellant and the deceased over a ridge. On the date of occurrence there was an exchange of hot words between the two in this regard. In the late night, PW 6, his sisters and mother heard cries of the deceased from the adjoining "Kotha". When they rushed there, they saw that the appellant and the co-accused were pouncing upon the deceased with a "Pharsa" and a "Kulhari". Soon thereafter, the assailants ran away. The injured was taken to the hospital, where he succumbed to his injuries. The trial court convicted the appellant and the co-accused and sentenced them to imprisonment for life and the same was affirmed by the High Court. The appeal of the co-accused had been dismissed.

Dismissing the appeal, the Court

HELD: 1.1. At the very outset it may be noted that the deceased was attended on by the doctor (P.W.4), when he was admitted in the hospital. P.W.4 has stated that the patient was unconscious and collapsed within about half an hour. In the injury report, he mentioned the incision

in the trachea, which was exposed and transparent. Post mortem was conducted by P.W.5. A combined reading of the evidence of P.Ws. 4 and 5 discloses that there was nothing to suspect either of the versions, having regard to the specific role played by P.W.4 whose main concern was to take every effort to save the life of the person rather than noting down the injuries in detail, as compared to the role played by the post mortem doctor (P.W.5), whose prime duty was to record the details of all the injuries found on the body along with determining the cause of death. According to P.W.5, injury Nos. 1 and 2 were fatal and could not have been self-inflicted. Once the death of the deceased was found to be homicidal, then the other evidence became relevant to find out as to who was responsible for the death. In that respect there is the evidence of P.Ws. 6 and 7, the brother and sister of the deceased, who were the eye witnesses. [para 12-13] [177-A-B-C-H]

1.2. As far as the plea that P.Ws. 6 and 7 could not have witnessed the incident as narrated, it is evident that the occurrence took place in the farm house where the deceased, his mother, brother and sisters were living together. Therefore, when the deceased was in one part of the house, while the witnesses and other blood relatives were in some other portion, there would not have been any difficulty for them in rushing to the deceased, who, on being attacked by the accused with "Pharsa" and a "Kulhari", was making a frantic call for help. In view of the versions of P.Ws.6 and 7 being consistent in narrating the manner in which the deceased was attacked at the behest of the accused and the co-accused, with specific reference made to the weapons used, adding to which the medical report also confirmed the use of such weapons, there is no infirmity in the case of the prosecution as narrated and the consequent verdict of the courts below. [para 14-16] [178-A-D-F-H;179-A-B]

1.3. Though P.Ws.6 and 7 are the brother and sister of the deceased, inasmuch as their version was cogent, natural and convincing, there was no reason to reject their version on the sole ground that they were interested witnesses. Once the said conclusions reached by the court below are unassailable, the other discrepancies attempted to be pointed out by the appellant were all trivial in nature. [para 17] [179-C]

1.4. As regards the plea that immediate steps were not taken to report the matter at the Police Station the trial court has held that there was in fact, no delay in carrying out various formalities with regard to the receipt of 'ruka', holding of inquest, recording the statement of the witnesses, the registration of FIR and forwarding the same to the magistrate, and concluded that the same was carried out within a reasonable time. The witnesses and other relatives were aware that a responsible police officer had taken cognizance of the crime and the initiative to hold the inquest. There was, thus, no necessity for them to rush to the police station or the outpost to register the complaint. If P.W. 12 took some time to record the statements of the witnesses, no blame can be attributed to the complainant for any alleged delay in getting the same registered. Further, keeping in view the distance of the hospital and the Police Station from the place of occurrence, this Court is also of the considered opinion that no exception can be taken with regard to the alleged delay in recording of the statements and registration of the complaint, in order to hold any infirmity in the case of the prosecution. [para 19] [179-E-G; 180-B-E]

1.6. With regard to the semi-digested food found in the stomach of the deceased, in view of the decision of this Court in *Jitender Kumar,* **no exception can be taken to the conviction on this ground. [para 20] [180-F]**

Jitender Kumar vs. State of Haryana **2012 (6) SCC 204 – relied on**

Maharaj Singh vs. State of U.P. **1994 (5) SCC 188 – cited.**

Case Law Reference:

1994 (5) SCC 188	**cited**	**para 10**
2012 (6) SCC 204	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 517 of 2008.

From the Judgment & Order dated 23.11.2007 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 198-DB of 1998.

R.K. Das, Suchit Mohanty, G. Biswal, Anupam Lal Das for the Appellant.

Kamal Mohan Gupta, Tarjit Singh, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal is directed against the judgment of the Division Bench of the High Court of Punjab and Haryana dated 23.11.2007, in Crl.A.Nos.198-DB of 1998. The High Court by order dated 23.11.2007, dismissed Crl.A.No.198-DB of 1998 and Crl.A.No.426-DB of 1998. The present appellant was the appellant in the Crl.A.No.198-DB of 1998. As far as the appellant in Crl.A.No.426-DB of 1998 is concerned, it is stated that by an order dated 14.07.2009 his S.L.P. (Crl.) 5039 of 2009 was dismissed.

2. The case of the prosecution as narrated in the impugned judgment was that two to three months prior to the date of

occurrence an altercation took place between the appellant and the complainant party, over the "Mial" (Ridge), which was however subsequently compromised at the intervention of the relatives.

3. On 29.12.1995, in the evening it is stated that there was an exchange of hot words between the appellant Raj Pal and the deceased over the aforesaid Ridge. The appellant stated to have nurtured a grievance over the same. Late in the night, on that date after dinner, when the complainant P.W.6 along with his mother and sisters was taking rest in their house, the deceased who was lying in the "kotha" adjoining their house cried for help, to which the complainant, his sister and mother rushed to the "kotha" where they found the appellant and the co-accused pouncing upon the deceased with a "Pharsa" and "Kulhari" (axe). According to P.W.6, the appellant gave a "Pharsa" blow on the frontal portion of the neck of the deceased, while the co-accused inflicted an axe blow on the deceased, which hit him on the left hand below the elbow. It was also stated that when P.W.6 and others tried to apprehend the assailants, they fled away from the scene of occurrence along with their weapons.

4. P.W.6 is stated to have left his mother and sisters to take care of the deceased and went out to fetch his elder brother Sita Ram and cousin Sube who also reached the spot. Thereafter, the deceased was stated to have been taken to the village and from there to the General Hospital in a four-wheeler, where he succumbed to the injuries.

5. The case was investigated by P.W.12 Ran Singh, Sub-Inspector of Police, Badhra Police Station, who was then working as Asst. Sub-Inspector in the said station. After completion of the investigation, the appellant and the co-accused were charged for offences under section 302 read with section 34 of the Indian Penal Code, 1860. Before the Trial Court, the prosecution examined 13 witnesses. When the incriminating circumstances were put to the appellant in the

questioning under Section 313 Cr.P.C, the appellant denied the same and stated that he was a +2 student studying in a different village, that the co-accused was not related to him in any manner, that he was not their share cropper at any point of time and also that there was no enmity between him and the complainant party over the ridge as alleged. He also stated to have denied the recovery of weapons and according to him it was a blind murder with no witnesses. It was also stated by him that the so-called eyewitnesses were introduced later and that some of them were inimical towards him.

6. On the defense side, D.Ws.1 to 3 were examined. The Trial Court having convicted the appellant and the co-accused, imposed the punishment of life sentence and the same having been confirmed by the High Court, the appellant is now before us.

7. We heard Mr. R.K. Das, learned senior counsel for the appellant. The learned senior counsel after referring to the sketch marked before the Trial Court, contended that the so called eyewitnesses, P.Ws-6 and 7, who are the brother and sister of the deceased could not have witnessed the occurrence as stated by them. According to the learned senior counsel, on a perusal of the sketch marked before the Trial Court, where the abode of the eye-witnesses and the place where the deceased was lying at the time of occurrence, it is hard to believe their version that they were able to witness the occurrence as deposed by them. By referring to page 331 of the record placed before the Court, learned senior counsel contended that the deceased was lying in a different room away from the place where P.Ws. 6 and 7 were staying and, therefore, the claim that they saw the assailants assaulting the deceased, cannot be a true statement. The learned senior counsel then contended that going by the statement of P.W.6 by around 4 to 4.40 a.m., when the complainant party reached the hospital, the deceased was very much alive but yet, no dying declaration was recorded. He then contended that though the

deceased survived for about 35 minutes, no dying declaration was recorded i.e. till 5.15 a.m., when he was reported to have died according to P.W.4. He also submitted that when P.W.12 the investigating officer, on being informed, held the inquest at 6.05 a.m. when P.W.6, his older brother, cousin and other relatives were in the hospital and that their statements came to be recorded only by 11.30 a.m., which was subsequently forwarded to the police station for registration of F.I.R. According to the learned senior counsel such a time delay in recording of statements and registration of F.I.R. disclosed that the whole case was cooked up against the appellant out of personal vendetta by the members of the deceased party. The learned senior counsel further contended that even according to the prosecution, after the incident when the mother of the deceased entered the room, the deceased asked for a paper to write something, which was exhibited as P.21.

8. The learned senior counsel referred to the report of the P.W.4 doctor, as well as Exhibit P.21 and submitted that there was no reference to any particular individual's name in the report though it was mentioned therein that he was informed by persons accompanying the deceased that the assault was made by some persons. He also pointed out that though P.W.6 was present at the outpost police station, which was located in the hospital, nobody reported the matter to the police. It was then contended that according to the Doctor, P.W.5, who conducted the Post Mortem found semi-digested food in the stomach of the deceased, in which event the time of occurrence as stated to have occurred on 29.12.1995 would not have been a true statement. The learned senior counsel submitted that undigested food would not have remained for nearly eight hours, inasmuch as according to P.W.6, they had their dinner 1 ½ hours before the occurrence i.e. around 9.00 p.m.

9. The learned senior counsel pointed out that the mother of the deceased was not examined, who would have been a relevant witness to corroborate the writing of the deceased as

claimed in Ex.P-21. It was then contended that investigation was made on 04.01.1996 and the "Pharsa" was recovered under Ex. PJ/2, which however did not disclose any blood stain in the chemical examination, in as much in the report it was stated that it was disintegrated.

10. As far as P.W.8 was concerned, it was contented that though he was claimed to be an independent witness, as he belonged to a place other than where the weapons were recovered, his version could not be relied upon. The learned senior counsel while referring to the delay involved in recording the statement of the witnesses, stated that it was sufficient to demonstrate that the case was a cooked up one. In support of his contention, he relied upon a judgment of this Court in *Meharaj Singh Vs. State of U.P.* reported in (1994) 5 SCC 188.

11. As against the above submissions, Mr. Gupta learned counsel appearing for the State submitted that the case is covered by the principles laid down by this Court in *Jitender Kumar Vs. State of Haryana* reported in (2012) 6 SCC 204 and further submitted that the case depended upon various factors and that the case of the prosecution cannot be faulted. With regard to the semi-digested food in the post mortem report, the learned counsel for the State stated that nothing was put to the doctor relating to that aspect and, therefore, based on the said factor, the offence found proved against the appellant cannot be doubted. The learned counsel for the State also submitted that the submissions based on the alleged delay in filing of the F.I.R. was satisfactorily explained by the Trial Court in *para* 15 of the judgment and, therefore, on that ground also, no interference can be made. As far as the evidence of P.W.6 was concerned, the learned counsel submitted that he was a young boy of 17 to 18 years who was present on the date and time of occurrence along with his mother and sisters. Therefore, the version spoken to by him having been accepted by the Trial Court, being a cogent one, the same does not call for interference.

12. Having heard the learned counsel for the parties and having perused the judgments of the Courts below and the material papers, at the very outset we find that the deceased was attended by P.W.4 Dr. A.S. Gupta when he was in an injured condition. P.W.4 has stated in his report that at the time when the deceased was admitted in the hospital, he was able to notice his physical condition and also stated that the patient was unconscious. It was also stated that all his endeavour at that point of time was to save the life of the deceased and was not to keep notes as to the nature of injuries, though in his injury report he mentioned the incision in the trachea, which was exposed and transparent. It was also noted that there was a clot over the wound. There was also a contusion below the elbow and for both the injuries the advice given was to get the opinion of a surgeon. As the patient collapsed within about half an hour, after the time of admission, Post Mortem was conducted and the Post Mortem report authored by P.W.5, Dr.PK Charaiya, revealed as many as four injuries.

13. The combined reading of the evidence of P.Ws. 4 and 5 disclose that there was nothing to suspect either of the versions, having regard to the specific role played by P.W.4 who attended on the deceased at that time when he was brought to the hospital in an injured condition and was unconscious, at which point of time his main concern was to take every effort to save the life of the person rather than noting down the injuries in detail, as compared to the role played by the Post Mortem Doctor P.W.5, whose prime duty was to record the details of all the injuries found on the body along with determining the cause of death. According to P.W.5, injury Nos. 1 and 2 were fatal and could not have been self-inflicted. Once the death of the deceased was found to be homicidal, then the other evidence became relevant to find out as to who was responsible for the death. In that respect the courts below were concerned with the evidence of P.Ws. 6 and 7, the brother and sister of the deceased, who were the eye witnesses.

14. As far as the versions of P.Ws. 6 and 7 are concerned, it was the contention of the appellant to suggest that in the first place they could not have witnessed the event. It was argued that having regard to the location as described in the sketch relating to the place where the deceased was taking rest and considering that P.W. 6, his mother and other sisters were staying in a different place at the relevant point of time, it was impossible for them to have witnessed the incident as narrated.

15. Having noted the submissions of the learned counsel for the parties and having bestowed our serious consideration, after going through the record and other material papers, we find that the said submission does not merit any consideration, as in our opinion the same was highly technical in nature. The occurrence took place in the farmhouse where the deceased, his mother, brother and sisters were living together. We can easily discern that in such a farmhouse every member of the family would have access to every other place at times of calling and it cannot be said that it would be strenuous for anyone living in one portion of the farmhouse to reach the other part of the house at times of emergency. To put it differently, being a member of the family of a farmhouse, it is needless to state that every one of them can have easy access to any other part of the farmhouse without any hurdle, especially when any one of the member of the family makes a distress call seeking for help. We fail to understand as to what would have been the difficulty for the other members of the family to reach the concerned person at a time of distress, to extend a helping hand. Therefore, when the deceased was lying in one part of the house, while the witnesses and other blood relatives were living in some other portion, there would not have been any difficulty for them in rushing to the place where the deceased was lying, who was making a frantic call for help and that too when he was being attacked by the accused with the such dangerous weapons, namely, a “Pharsa” and a “Kulhari”.

16. When the versions of P.Ws.6 and 7 was consistent in

narrating the manner in which the deceased was attacked at the behest of the accused and the co-accused, with specific reference made to the weapons used, adding to which the Medical report also confirmed the use of such weapons, we do not find any infirmity in the case of the prosecution as narrated and the consequent verdict of the courts below.

17. Though P.Ws.6 and 7 are the brother and sister of the deceased, inasmuch as, their version was cogent, natural and convincing, there was no good ground to reject their version on the sole ground that they were interested witnesses. Once the said conclusions reached by the court below are unassailable, the other discrepancies attempted to be pointed out by the appellant in our considered opinion were all trivial in nature.

18. It was contended by the appellant that though there was a police outpost present at the hospital and though relatives were present right from the time the deceased was admitted, immediate steps were not taken to report the matter to the personnel in the Police Station. On that ground we do not find any infirmity in the case of the prosecution because, even admittedly the issue was brought to the notice of P.W. 12, by the hospital authorities who conducted the inquest by 6.05 a.m. Only the witnesses and other relatives were aware that a responsible police officer had taken cognizance of the crime and the initiative to hold the inquest. Hence, there was no necessity for them to rush to the police station or the outpost to register the complaint. If P.W. 12 took some time to record the statement of the witnesses, no blame can be attributed to the complainant for any alleged delay in registering the same. In this respect, it was rightly pointed by the learned counsel for the State that the Trial Court has noted in Para 15 that P.W. 4 who attended on the deceased at a time when he was in an injured condition, sent the "Ruka" Exhibit PD at 4.40 a.m. on 30.12.1995 and subsequently, after his death, sent Ex. PD 11 at 5.15 am to the police post. The Police Incharge of the post in the hospital, sent Ex. PT, to the Vadhra Police station which was recorded on 30.12.1995 in the Police Station. It was only

thereafter, P.W. 12 arrived at 6.05 a.m. and after conducting inquest and the other formalities, recorded the statement of the witnesses at 11.30 a.m. and forwarded the same as PH 1 to the police station. Thereafter, PH2 FIR was recorded at 1.30 p.m. and the special report was sent to the Magistrate at his residence at 4.30 p.m. The distance between the place of occurrence and Bhiwani was stated to be 40 kms and between Badhwar Police station and Chakui Dadhi was 35 kms, while the distance between the place of occurrence and the police station was 12 kms.

19. The trial court having noted the above factors has held that there was in fact, no delay in carrying out various formalities with regard to the receipt of 'ruka', holding of inquest, recording the statement of the witnesses, the registration of FIR and forwarding the same to the magistrate and concluded that the same was carried out within a reasonable time. Having perused the reasoning of the Trial Court in dealing with the above, we are also of the considered opinion that no exception can be taken with regard to the alleged delay in the recording of the statements and the registration of the complaint, in order to hold any infirmity in the case of the prosecution.

20. With this when we come to the other submission with regard to the semi-digested food found at the time of occurrence, we wish to rely on the decision of this court in *Jitender Kumar (supra)*. *Para* 50 of the said decision reads as under:

> "the entire basis for this submission is the statement of PW 3, Dr. L.L. Bundela, who stated that the stomach of the deceased contained some semi-digested food. It is worthwhile to note that the statement of this very witness that the death of Indra could have taken place between 1.00 to 1.30 a.m. remained unchallenged. Furthermore, it cannot be stated as a rule of universal application that after a lapse of two to three hours stomach of every individual, without exception, would become empty. It would depend

upon a number of other factors like the caloric content and character of the solid food. Further, addition of fats, triglycerides and carbohydrates such as glucose, fructose and xylose to a solid meal can delay its emptying from the stomach, presumably because of their effect on the initial lag phase of digestion of solid foods. Furthermore, the presence of liquids in the stomach prolongs this initial lag phase of solid emptying. In fact, ingestion of a liquid bolus 90 minutes after a solid meal can induce a second lag phase of solid emptying from the stomach."

21. In the light of the said principles stated, which we find applies on all fours, to the case on hand, no exception can be taken to the conviction on this ground. Having regard to our above conclusion, we do not find any merit in this appeal. Appeal fails and the same is dismissed.

R.P. Appeal dismissed.

THE SECRETARY, KERALA PUBLIC SERVICE COMMISSION

v.

SHEEJA P. R. AND ANOTHER

(Civil Appeal No. 129 of 2013)

JANUARY 08, 2013

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

KERALA PUBLIC SERVICE COMMISSION RULES OF PROCEDURE:

r. 13 – Rank list – Life of – 'Supplementary list' of reserved category candidates prepared with main list – Expiry of – Non-Joining Duty (NJD) vacancy reported after the rank list had been exhausted – Claim of reserve category candidate next below the candidate in the supplementary list who did not join – Held: Once the main list becomes empty or drains out on the advice of all the candidates, it loses its life; consequently supplementary list also automatically vanishes – The Commission could advise candidates only on receiving intimation with regard to the non-joining duty vacancies before the main list got exhausted – In the instant case, NJD vacancy was received by Commission one year after the main list got exhausted – Consequently, the supplementary list has no life any longer – Division Bench of High Court erred in directing the Commission to operate supplementary list.

Respondent no. 1, who figured as rank 3 in supplementary list (of reserved category candidates), filed a writ petition before the High Court seeking a direction to the State Public Service Commission to issue an advise memo for his appointment to the post of Higher Secondary School Teacher – English (Junior) in a vacancy due to non-joining of respondent no. 2. The

Single Judge of the High Court dismissed the writ petition holding that once the main list got exhausted, the supplementary list could not be kept alive. However, the Division Bench of the High Court allowed the appeal of respondent no. 1.

Allowing the appeal filed by the Commission, the Court

HELD: 1.1. Rule 13 of the K.P.S.C. Rules of Procedure says that the rank list published by the Commission shall remain in force for a period of one year from the date on which it was brought into force. The list can also remain in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier. [Para 11] [189-G]

1.2. Once the main list becomes empty or drains out on the advice of all the candidates, it loses its life; consequently, supplementary list also automatically vanishes. The Commission could advise candidates only on receiving intimation with regard to the non-joining duty vacancies before the main list got exhausted. Further, it may also be clarified that there is no provision in the Rules of procedure to prepare a supplementary list for the general category candidates. Supplementary list is prepared only in relation to the reserved category candidates so as to see that the reservation principle is properly and effectively implemented. [Para 10 and 11] [189-B; 190-A-C]

Nair Service Society vs. District Officer, Kerala Public Service Commission **2003 (5) Suppl. SCR 551 = 2003 (12) SCC 10 - relied on**

1.3. The point of distinction between the candidates of the reservation group included in the main list and their counter-parts of the supplementary list, is that former are eligible to be considered both on merit and against

reservation turns depending upon the number of vacancies and their placement in the main list, while the latter are intended to fill in the groups in the reserved turns caused by the paucity of candidates entitled to reservation in the main list. The supplementary list is always subject to the main list. Therefore, once the main list is exhausted, the supplementary list automatically loses its significance. A supplementary list has no separate existence, *dehors* the main list. [Para 12] [190-D-F]

1.4. In the instant case, the rank list prepared on 27.4.2009 had expired on 28.9.2010, on the advice of the last candidate from the main list. The intimation from the Appointing Authority/Director, Kerala Higher Secondary Education regarding non-joining of the vacancy was received by the Commission only on 12.9.2011, i.e. one year after the main list got exhausted. Once the main list got exhausted, the supplementary list has no life of its own, as has been held in *N.S.S. case*. The Division Bench of the High Court has committed an error in directing the Commission to operate the supplementary list. The judgment of the High Court is set aside. [Para 9 and 13] [189-B-D; 190-G-H]

Case Law Reference:

2003 (5) Suppl. SCR 551 relied on para 5

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 129 of 2013.

From the Judgment & Order dated 8.11.2011 of the High Court of Kerala at Eranakulam in W.A. No. 817 of 2011.

V. Giri, Vipin Nair, U. Banerjee (for Temple Law Firm) for the Appellant.

Jogy Scaria, Sudheesh K.K., Usha Nandini V. for the Respondents.

The Judgment of the Court was delivered by

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

2. The Kerala Public Service Commission (in short "the Commission") has approached this Court aggrieved by the directions given by the Division Bench of the Kerala High Court, to operate the supplementary list after the main list got exhausted.

3. The 1st Respondent herein, who figured as rank no. 3 in the Supplementary list, filed Writ Petition No. 34851 of 2010 seeking a *Writ of Mandamus*, directing the Commission to issue an advise memo for his appointment for the post of Higher Secondary School Teacher-English (Junior) in a vacancy occurred due to non-joining of 2nd respondent herein. Learned Single Judge of the High Court dismissed the writ petition on 9.12.2010 holding that once the main list got exhausted, the supplementary list could not be kept alive. Review Petition No. 89 of 2011 filed against the judgment was also dismissed.

4. Aggrieved by the said judgment, 1st respondent herein filed Writ Appeal No. 871 of 2011 before the Division Bench of the Kerala High Court. It was contended that 1st respondent had secured 3rd rank in the supplementary list and he was entitled to get appointment in the reservation quota of Ezhava community. Further, it was also pointed out that 2nd respondent belonging to the same community, though advised, did not join duty since she had got another employment. The claim of 1st respondent was that, since he was the next candidate, was eligible to get advise memo from the Commission so that he could joint in that non-joining vacancy. The Division Bench of the High Court took the view that since 2nd respondent did not join, the 1st respondent should have been issued the advise memo by the Commission. Holding so, the writ appeal was allowed and the order passed in Review Petition No. 89 of 2011 and the judgment passed in Writ Petition No. 34581 of 2010, were set aside. Aggrieved by the said judgment, the Commission has come up with this appeal.

5. Shri V. Giri, learned senior counsel appearing for the Commission, submitted that the issue raised in this case is squarely covered by the judgment of this Court in *Nair Service Society v. District Officer, Kerala Public Service Commission* (2003) 12 SCC 10 (N.S.S. case). Referring to paragraphs 25 and 36 of that judgment, learned senior counsel submitted that once the main list is exhausted, the supplementary list has no life and that the Division Bench has not properly appreciated paragraph 23 of *N.S.S.* case. Learned senior counsel also submitted that the Division Bench has not properly appreciated the scope, meaning and significance of the supplementary list which has been prepared after complying with the Rules of Reservation. Learned senior counsel pointed out that if sufficient number of candidates belonging to the reserved groups, including scheduled castes and scheduled tribes, are not there in the rank list, it is possible that the communities would not be adequately represented in the services as envisaged in the rules. The Commission has, therefore, evolved a procedure of preparing supplementary lists for the reserved groups by lowering the marks at the elimination stage of selection, which has been incorporated in Part I of the Rules of Procedure of the Commission, published with the concurrence of the Government.

6. Shri Jogy Scaria, learned counsel appearing for the 1st respondent, on the other hand, contended that the Division Bench has correctly granted the relief and directed the Commission to appoint 1st respondent in a non-joining vacancy. Learned counsel pointed out that the vacancy arose while the main list was in force due to non-joining of the 2nd respondent and hence the 1st respondent has a claim over that vacancy. Learned counsel also pointed out that the Division Bench has correctly applied the principle laid down by this Court in *N.S.S. case* (supra).

7. We are of the view that the Division Bench has completely overlooked the ratio laid down by this Court in *N.S.S. case* (supra). Paragraph 19 of the judgment has clearly

interpreted Rule 2(g) of the Kerala Public Commission Rules and Procedures, which is extracted below for easy reference:

> **19.** The above definition shows that there is only one ranked list. Therefore, the supplementary list prepared by KPSC to satisfy the rules of reservation has, in fact, no statutory backing. For that reason when the main list is exhausted or expired, supplementary list cannot be allowed to operate. If the supplementary list alone is allowed to operate it would amount to giving greater sanctity to it and long life than the main list prepared in accordance with the Rules. Secondly, after the expiry or exhaustion of the main list if the supplementary list is operated it would violate the first proviso to Rule 15(*c*) of the General Rules. The reason is that the NJD vacancies in respect of OBC candidates cannot be filled up after the expiry or exhaustion of the main list and only reserved candidates can be advised from the supplementary list which would violate 50% rule as no OC category candidates could be advised. As rightly contended by Mr Venugopal, it would adversely affect the OC category candidates and violate the statutory rule. The reason given by the Division Bench that if any NJD vacancy arises in the OC category, the same could be filled up in the next batch of appointment thereby, the rights of OC candidates can very well be protected without any violation of the proviso to Rule 15 of KS&SSR is not legally acceptable. The above reasoning, in our opinion, is equally applicable to NJD vacancies which arise in the reserved categories as well. By advising candidates from the supplementary list, without any opportunity of balancing the advice with an open competition candidate the consequence would have been a violation of 50:50 rule with a tilt in favour of the reserved candidates lasting their quota above 50%. The net result is that there will be excess reservation over 50% in the year.

8. The reason for preparation of supplementary list was

also considered by this Court in the above mentioned judgment in paragraphs 23 and 24. The same are also extracted below for easy reference:

> **23.** With a view to secure adequate representation of reserved communities in the selection and thereby to effectuate the policy of reservation, KPSC prepares what it calls supplementary list of candidates for the different reserved communities who will be entitled to appointment, comprising of a number equal to half the number of turns as per the quota to each reservation group. Thus if Muslims were entitled to ten turns in the list, the supplementary list of Muslims will comprise of at least five Muslims. The advantage of this procedure was that no reservation turn will be passed over to open competition and reservation groups will get the representation due to them, at the same time maintaining the balance of 50:50 between open competition and reservation candidates.
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> **24.** The supplementary list was only in respect of reservation categories. There was no supplementary list prepared in relation to open competition merit candidates for the reason that where the last of the candidates has been advised from the rank list in the open competition, there was no further scope for drawing on the supplementary list or advising from that list, as all the advice hitherto was on the basis of one open competition followed by reservation, thereby keeping the balance of 50:50. If any more candidates are advised from the supplementary list, the number of reservation candidates will go up and the 50:50 rule will be violated.

9. This Court has specifically held that once the main list is exhausted, the supplementary list has no survival of its own. In the light of the principles laid down by this Court in *N.S.S. case* (supra), we have to examine the various issues raised before us. The Commission on 27.4.2009 finalized the rank list for the post of Higher Secondary School Teachers-English

(Junior), Kerala Higher Secondary Education. The main list consisted of 145 candidates, including persons from open merit, OBCs, Muslims, Sports and other reservation categories. 1st respondent was placed in the supplementary list as rank no. 3 under the category of Ezhava falling under Other Backward Classes (OBC). 2nd respondent was placed above 1st respondent as rank no.2 in the supplementary list. The rank list prepared on 27.4.2009 had expired on 28.9.2010, on the advice of the last candidate from the main list. The intimation from the Appointing Authority/the Director, Kerala Higher Secondary Education regarding non-joining of the vacancy was received by the Commission only on 12.9.2011, i.e. one year after the main list got exhausted. Once the main list got exhausted, going by the judgment in *N.S.S. case* (supra), the supplementary list has no life of its own. The writ petition was preferred by the 1st respondent only on 16.11.2010 after the expiry of one year from the date on which the main rank list got exhausted.

10. We are of the view that the situation would have been different, had the NJD vacancies were reported before the main list got exhausted i.e. on 28.9.2010. The Commission could advise candidates only on receiving intimation with regard to the non-joining duty vacancies before the main list got exhausted. So far as this case is concerned, NJD vacancy was reported and received by the Commission only on 12.9.2011, by that time, the main list got exhausted. In the absence of the main list, there is no independent existence of the supplementary list.

11. Rule 13 of the K.P.S.C. Rules of procedure says that the ranked lists published by the Commission shall remain in force for a period of one year from the date on which it was brought into force. The list can also remain in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier. Rule 13 has five other provisos. It is unnecessary to refer to those provisos as far as the present case is concerned. We

are in this case mainly concerned with the question whether the main list got exhausted or not. Once the main list becomes empty or drains out on the advice of all the candidates, it loses its life; consequently supplementary list also automatically vanishes. It was pointed out that the Commission has got the power to extend the life of the main list upto three years but that power has not been exercised in the present case. Further, we may also clarify that there is no provision in the Rules of procedure to prepare a supplementary list for the general category candidates. Supplementary list is prepared only in relation to the reserved category candidates so as to see that the reservation principle is properly and effectively implemented. We, therefore, do not agree with the view expressed by Justice S.B. Sinha in the concurring judgment in *N.S.S. case*, that a supplementary list has to be prepared for the open category candidates also as per the proviso to Rules 4 and 12.

12. The point of distinction between the candidates of the reservation group included in the main list and their counter-parts of the supplementary list, is that former are eligible to be considered both on merit and against reservation turns depending upon the number of vacancies and their placement in the main list, while the latter are intended to fill in the groups in the reserved turns caused by the paucity of candidates entitled to reservation in the main list. The supplementary list is always subject to the main list. Therefore, once the main list is exhausted, the supplementary list automatically loses its significance. A supplementary list has no separate existence, *dehors* the main list.

13. We are, therefore, of the view that the contention of the learned senior counsel appearing for the appellant that the Division Bench of the High Court has committed an error in directing the Commission to operate the supplementary list is sustainable. Appeal is, therefore, allowed and the judgment of the Division Bench of the High Court is set aside.

R.P. Appeal allowed.

SUBHASH CHAND
v.
STATE (DELHI ADMINISTRATION)
(Criminal Appeal No.50 of 2013)

JANUARY 8, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Code of Criminal Procedure, 1973 – s.378 (as amended by Act 25 of 2005) – Complaint case filed by State / State Authority – Appeal from order of acquittal of the Magistrate – Whether would lie to the Sessions Court u/s.378(1)(a) CrPC or to the High Court u/s.378(4) CrPC –Held: A complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court – In the instant case the complaint alleging offences punishable u/ s.16(1)(1A) r/w s.7 of the PFA Act and the PFA Rules was filed against the appellant complainant Local Health Authority through Delhi Administration but the appellant was acquitted by the Metropolitan Magistrate – The complainant could challenge the order of acquittal by filing an application for special leave to appeal in the High Court and not in the Sessions Court – Therefore, impugned order holding that the case was not governed by s.378(4) CrPC quashed and set aside – Prevention of Food Adulteration Act, 1954 – s.16(1)(1A) r/w s.7 – Prevention of Food Adulteration Rules, 1955.

The High Court, by the impugned judgment, dismissed petition filed by the appellant holding that an appeal filed by the State against an order of acquittal shall lie to the Sessions Court under Section 378(1) CrPC and not under Section 378(4) CrPC to the High Court.

The question which arose for consideration in the instant appeal was whether in a complaint case, an

appeal from an order of acquittal of the Magistrate would lie to the Sessions Court under Section 378(1)(a) CrPC or to the High Court under Section 378(4) CrPC.

Allowing the appeal, the Court

HELD:1.1. To understand the controversy, it is necessary to have a look at Section 378 CrPC prior to its amendment by Act 25 of 2005 and Section 378 amended thereby. [Para 10] [202-C]

1.2. Under earlier un-amended Section 378(1) CrPC, the State Government could, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court or an order of acquittal passed by the Court of Session in revision. Section 378(2) covered cases where order of acquittal was passed in any case in which the offence had been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. In such cases, the Central Government could also direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal. Section 378(3) stated that appeals under sub-sections (1) and (2) of Section 378 of the Code could not be entertained except with the leave of the High Court. Sub-section (4) of Section 378 of the Code provided for orders of acquittal passed in any case instituted upon complaint. According to this provision, if on an application made to it by the complainant, the High Court grants special leave to appeal from the order of acquittal, the complainant could present such an appeal to the High Court. Sub-section (5) of Section 378 of the Code provided for a period of limitation. Sub-section (6) of Section 378 of the Code stated that if in any case, the application under sub-section (4) for the grant of special

leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-sections (1) or (2). Thus, if the High Court refused to grant special leave to appeal to the complainant, no appeal from that order of acquittal could be filed by the State or the agency contemplated in Section 378(2). It is clear from these provisions that earlier an appeal against an order of acquittal could only lie to the High Court. Sub-section (4) was aimed at giving finality to the orders of acquittal. [Para 11] [203-G-H; 204-A-F]

1.3. Post the amendment of Section 378 CrPC, by Act 25 of 2005, on analysis of Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court. [Para 16] [208-G-H; 209-A-C]

1.4. Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High

Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-Section (6) is important. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation. [Para 17] [209-C-G]

1.5. A police report is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under

Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA (Prevention of Food Adulteration Act, 1954), cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code. [Para 18] [209-H; 210-A-H; 211-A]

1.6. Act No.25 of 2005 brought about a major amendment in the Code. It introduced Section 378(1)(a) which permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable

offence. For the first time a provision was introduced whereunder an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. Clause 37 of the 154th Report of the Law Commission of India and Clause 37 of the Code of Criminal Procedure (Amendment) Bill, 1994 state that in order to guard against the arbitrary exercise of power and to reduce reckless acquittals Section 378 was sought to be amended to provide appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence. Thus, this step was taken by the legislature to check arbitrary and reckless acquittals. It appears that being conscious of rise in unmerited acquittals, in case of certain acquittals, the legislature has enabled the District Magistrate to direct the Public Prosecutor to present an appeal to the Sessions Court, thereby avoiding the tedious and time consuming procedure of approaching the State with a proposal, getting it sanctioned and then filing an appeal. [Para 19] [211-C-H; 212-A-B]

1.7. Till Section 378 was amended by Act 25 of 2005 the State could prefer appeals against all acquittal orders. But the major amendment made in Section 378 by Act 25 of 2005 cannot be ignored. It has a purpose. It does not

throw the concern of security of the community to the winds. In fact, it makes filing of appeals against certain types of acquittal orders described in Section 378(1)(a) easier, less cumbersome and less time consuming. [Para 20] [212-C-D]

1.8. A complainant can, thus, file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. In the instant case the complaint alleging offences punishable under Section 16(1)(1A) read with Section 7 of the Prevention of Food Adulteration Act, 1954 and the Prevention of Food Adulteration Rules, 1955 was filed by complainant Local Health Authority through Delhi Administration. The appellant was acquitted by the Metropolitan Magistrate. The complainant can challenge the order of acquittal by filing an application for special leave to appeal in the High Court and not in the Sessions Court. Therefore, the impugned order holding that this case is not governed by Section 378(4) CrPC is quashed and set aside. [Para 21] [212-E-H]

Khemraj v. State of Madhya Pradesh **1976 (1) SCC 385: 1976 (2) SCR 753;** *State (Delhi Adminsitration) v. Dharampal* **2001(10) SCC 372: 2001 (4) Suppl. SCR 448;** *Akalu Ahir & Ors. v. Ramdeo Ram* **1973 (2) SCC 583: 1974 (1) SCR 130;** *State v. Ram Babu & Ors.* **1970 AWR 288;** *Food Inspector v. Moidoo* **1988 (2) KLT 205;** *Prasannachary v. Chikkapinachari & Anr.* **1959 AIR (Kant) 106;** *State of Maharashtra v. Limbaji Sayaji Mhaske, Sarpanch Gram Panchayat* **1976 (Mah.) LJ 475;** *State of Punjab & Anr. v. Jagan Nath* **1986 (90) PLR 466 and** *State of Orissa v. Sapneswar Thappa* **1987 Cri.L.J. 612 – held inapplicable.**

Law Commission of India, **154th report and 221st report – referred to.**

Case Law Reference:

1976 (2) SCR 753	**held inapplicable**	**Para 9**
2001 (4) Suppl. SCR 448	**held inapplicable**	**Para 9**
1974 (1) SCR 130	**held inapplicable**	**Para 9**
1970 AWR 288	**held inapplicable**	**Para 9**
1988 (2) KLT 205	**held inapplicable**	**Para 9**
1959 AIR (Kant) 106	**held inapplicable**	**Para 9**
1976 (Mah.) LJ 475	**held inapplicable**	**Para 9**
1986 (90) PLR 466	**held inapplicable**	**Para 9**
1987 Cri.L.J. 612	**held inapplicable**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 50 of 2013.

From the Judgment & Order dated 07.01.2011 of the High Court of Delhi at New Delhi in Criminal Misc. No. 427 of 2009.

Sidharth Luthra (Amicus Curiae), P.P. Malhotra, ASG, Devina Sehgal, Meenakshi Lekhi, Harish Pandey, Sachin Jain, Yasir Rauf, Ranjana Narayan (for Anil Katiyar) for the appearing parties.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. This appeal, by special leave, is directed against judgment and order dated 07/01/2011 passed by the High Court of Delhi in Criminal Misc. Case No.427 of 2009 whereby the High Court dismissed the petition filed by the appellant holding that an appeal filed by the State against an order of acquittal shall lie to the Sessions Court under Section 378(1)

of the Code of Criminal Procedure, 1973 (for short, "**the Code**") and not under Section 378(4) of the Code to the High Court.

3. The appellant is the supplier-cum-manufacturer of the food article namely Sweetened Carbonated Water. He is carrying on business in the name and style of M/s. Subhash Soda Water Factory. On 6/6/1989 at about 4.15 p.m., one P.N. Khatri, Food Inspector, purchased a sample of sweetened carbonated water for analysis from one Daya Chand Jain, Vendor-cum-Contractor of Canteen at Suraj Cinema, Dhansa Road, Najafgarh, Delhi. After following the necessary procedure, the sample was sent to the Public Analyst for analysis. On analysis, the Public Analyst opined that the sample does not conform to the prescribed standard. After conclusion of the investigation, the respondent–State through its Local Health Authority - P.K. Jaiswal filed a Complaint bearing No.64 of 1991 against the appellant and Daya Chand in the Court of the Metropolitan Magistrate, New Delhi alleging that the appellant and the said Daya Chand had violated the provisions of Sections 2(ia), (a), (b), (f), (h), (l), (m), Section 2(ix) (j), (k) and Section 24 of the Prevention of Food Adulteration Act, 1954 (for short, "**PFA Act**") and Rule 32, Rule 42 (zzz)(i) and Rule 47 of the Prevention of Food Adulteration Rules, 1955 (for short, "**the Rules**") and committed an offence punishable under Section 16(1)(1A) read with Section 7 of the PFA Act and the Rules. Since Daya Chand died during the pendency of the case, the case abated as against him. The appellant was tried and acquitted by learned Magistrate by order dated 27/2/2007.

4. Being aggrieved by the said order dated 27/2/2007, the respondent-State preferred Criminal Appeal No.13 of 2008 in the Sessions Court under Section 378(1)(a) of the Code. The appellant raised a preliminary objection in regard to the maintainability of the said Appeal before the Sessions Court in view of Section 378(4) of the Code. He contended that an appeal arising from an order of acquittal in a complaint case

shall lie to the High Court. The said objection was rejected by the Sessions Court by order dated 4/2/2009.

5. Aggrieved by the said order dated 4/2/2009, the appellant preferred Criminal Misc. Case No.427 of 2009 before the High Court. By order dated 9/7/2009, the High Court held that the Sessions Court has no jurisdiction to entertain an appeal filed in a complaint case and directed that the appeal be transferred to it. Accordingly, Criminal Appeal No.13 of 2008 pending before the Sessions Court was transferred to the High Court and re-numbered as Criminal Appeal No.642 of 2009.

6. The respondent-State carried the said order dated 9/7/2009 to this court by Special Leave Petition (Crl.) No.9880 of 2009 (Criminal Appeal No.1514 of 2010). By order dated 13/8/2010, this court remanded the matter to the High Court and directed that the matter be decided afresh after taking into consideration Sections 378(1) and 378(4) of the Code and the relevant provisions of the PFA. On remand, the High Court passed the impugned judgment and order dated 7/1/2011.

7. The short point which arises for consideration in this appeal is whether in a complaint case, an appeal from an order of acquittal of the Magistrate would lie to the Sessions Court under Section 378(1) (a) of the Code or to the High Court under Section 378(4) of the Code.

8. At our request, Mr. Sidharth Luthra, learned Additional Solicitor General has assisted us as Amicus Curiae. We have heard Ms. Meenakshi Lekhi, learned counsel appearing for the petitioner and Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the State. Written submissions have been filed by the counsel which we have carefully perused. Mr. Luthra took us through the relevant excerpts of Law Commission's reports. He took us through the Code of Criminal Procedure (Amendment) Bill, 1994 (Bill No. XXXV of 1994). He also took us through un-amended and amended Section 378 of the Code. After analyzing the relevant provisions,

Mr. Luthra submitted that no appeal lies against an order of acquittal in cases instituted upon a complaint to the Sessions Court. Ms. Lekhi also adopted similar line of reasoning.

9. Mr. Malhotra learned Additional Solicitor General adopted a different line of argument and therefore, it is necessary to note his submissions in detail. Counsel pointed out how the law relating to appeals against orders of acquittal has evolved over the years. Counsel submitted that under the Code of Criminal Procedure, 1861 no appeal against an order of acquittal could be filed. The Code of Criminal Procedure, 1872 permitted only the State Government to file an appeal against acquittal order. Section 417 of the Criminal Procedure Code, 1898 permitted only the State to file an appeal against acquittal order. In 1955 it was amended so as to permit the complainant to file an appeal against acquittal order. Under the Code of Criminal Procedure, 1973, Section 417 was substituted by Section 378. Counsel pointed out that under Section 378(4) a complainant could prefer appeal against order of acquittal, if special leave was granted by the High Court. However, in all cases the State could present appeal against order of acquittal. Counsel then referred to Section 378 of the Code as amended by Act No. 25 of 2005 and submitted that the only change in sub-section (1) is adding clauses (a) and (b) to it. Counsel described this change as minor and submitted that the State's right to file appeal against orders of acquittal remains intact and is not taken away. Counsel relied on the words 'State Government may, in any case' and submitted that these words preserve the State's right to file appeal against acquittal orders of all types. There is no limitation on this right whatsoever. This right is preserved according to the counsel because the State is the protector of people. Safety and security of the community is its concern. Even if a complainant does not file an appeal against an order of acquittal, the State Government can in public interest file it. Counsel also addressed us on the question of plurality of appeals. That issue is not before us. It is, therefore, not necessary to refer to that

submission. In support of his submissions counsel placed reliance on *Khemraj v. State of Madhya Pradesh*[1], *State (Delhi Adminsitration) v. Dharampal*[2], *Akalu Ahir & Ors. v. Ramdeo Ram*[3], *State v. Ram Babu & Ors.*[4], *Food Inspector v. Moidoo*[5], *Prasannachary v. Chikkapinachari & Anr.*[6], *State of Maharashtra v. Limbaji Sayaji Mhaske*[7], *Sarpanch Gram Panchayat, State of Punjab & Anr. v. Jagan Nath*[8] and *State of Orissa v. Sapneswar Thappa*[9].

10. To understand the controversy, it is necessary to have a look at Section 378 of the Code prior to its amendment by Act 25 of 2005 and Section 378 amended thereby.

11. Section 378 of the Code prior to its amendment by Act 25 of 2005 read as under:

"Appeal in case of acquittal.

378. Appeal in case of acquittal. (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court 2*[or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case

1. 1976 (1) SCC 385.
2. 2001 (10) SCC 372.
3. 1973 (2) SCC 583.
4. 1970 AWR 288.
5. 1988 (2) KLT 205.
6. 1959 AIR (Kant) 106.
7. 1976 (Mah.) LJ 475.
8. 1986 (90) PLR 466.
9. 1987 Cri.L.J. 612.

in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub-section (2)."

Thus, under earlier Section 378(1) of the Code, the State Government could, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a

High Court or an order of acquittal passed by the Court of Session in revision. Section 378(2) covered cases where order of acquittal was passed in any case in which the offence had been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. In such cases, the Central Government could also direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal. Section 378(3) stated that appeals under sub-sections (1) and (2) of Section 378 of the Code could not be entertained except with the leave of the High Court. Sub-section (4) of Section 378 of the Code provided for orders of acquittal passed in any case instituted upon complaint. According to this provision, if on an application made to it by the complainant, the High Court grants special leave to appeal from the order of acquittal, the complainant could present such an appeal to the High Court. Sub-section (5) of Section 378 of the Code provided for a period of limitation. Sub-section (6) of Section 378 of the Code stated that if in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-sections (1) or (2). Thus, if the High Court refused to grant special leave to appeal to the complainant, no appeal from that order of acquittal could be filed by the State or the agency contemplated in Section 378(2). It is clear from these provisions that earlier an appeal against an order of acquittal could only lie to the High Court. Sub-section (4) was aimed at giving finality to the orders of acquittal.

12. Before we proceed to analyze the amended Section 378 of the Code, it is necessary to quote the relevant clause in the 154th Report of the Law Commission of India, which led to the amendment of Section 378 by Act 25 of 2005. It reads thus:

"6.12. ***Clause 37:*** *In order to guard against the*

arbitrary exercise of power and to reduce reckless acquittals, Section 378 is sought to be amended providing an appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence filed on a police report to the Court of Session as directed by the District Magistrate. In respect of all other cases filed on a police report, an appeal shall lie to the High Court against an order of acquittal passed by any other court other than the High Court, as directed by the State Government. The power to recommend appeal in the first category is sought to be vested in the District Magistrate and the power in respect of second category would continue with the State Government."

The Code of Criminal Procedure (Amendment) Bill, 1994 has the same note on Clause 37.

13. Though, the Law Commission's 154th report indicated that Section 378 was being amended to provide that an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence filed on a police report would lie to the court of Sessions, the words "police report" were not included in the amended Section 378. In this connection, it is necessary to refer to the relevant extract from the Law Commission's 221st report of April, 2009. After noting amendment made to Section 378 the Law Commission stated as under:

"2.9 All appeals against orders of acquittal passed by Magistrates were being filed in High Court prior to amendment of Section 378 by Act 25 of 2005. Now, with effect from 23.06.2006, appeals against orders of acquittal passed by Magistrates in respect of cognizable and non-bailable offences in cases filed on police report are being filed in the Sessions Court, vide clause (a) of sub-section (1) of the said section. But, appeal against order of acquittal passed in any case instituted upon complaint continues to be filed in the High Court, if special leave is

granted by it on an application made to it by the complainant, vide sub-section (4) of the said section.

2.10 Section 378 needs change with a view to enable filing of appeals in complaint cases also in the Sessions Court, of course, subject to the grant of special leave by it."

These two extracts of the Law Commission's report make it clear that though the words 'police report' are not mentioned in Section 378(1) (a), the Law Commission noted that the effect of the amendment was that all appeals against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence in cases filed on police report are being filed in the Sessions Court. The Law Commission lamented that there is no provision enabling filing of appeal in complaint cases in the Sessions Court subject to the grant of special leave by it. Thus, the Law Commission acknowledged that there is no provision in the Code under which appeals in complaint cases could be filed in the Sessions Court. We agree with this opinion for reasons which we shall now state.

14. Having analysed un-amended Section 378 it is necessary to have a look at Section 378 of the Code, as amended by Act 25 of 2005. It reads as under:

"378. Appeal in case of acquittal.

[(1) Save as otherwise provided in sub-section (2) and subject to the provisions of subsections (3) and (5), -

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court

from an original or appellate order of acquittal passed by any court other than a High Court [not being an order under clause (a)] [or an order of acquittal passed by the Court of Session in revision].

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code. [the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal] passed by the Court of Session in revision.]

(3)[No appeal to the High Court] under subsection (1) or subsection (2) shall be entertained except with the leave of the High Court.

(4) If such an order of' acquittal is passed in any case instituted upon Complaint and the High Court, on an application made to it by the complainant in this behalf, grants, special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under subsection (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and

sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under subsection (2)."

15. At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court under Section 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and non-bailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the court of Sessions. Sub-Section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.
Sub-Section(2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to sub-section(1) except that here the words 'State Government' are substituted by the words 'Central Government'.

16. If we analyse Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-

bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

17. Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-Section (6) is important. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub-section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate not the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

18. Since the words 'police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined under Section 2(r) of the Code to mean a

report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs & Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under

Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code.

19. Mr. Malhotra is right in submitting that it is only when Section 417 of the Criminal Procedure Code, 1898 was amended in 1955 that the complainant was given a right to seek special leave from the High Court to file an appeal to challenge an acquittal order. Section 417 was replaced by Section 378 in the Code. It contained similar provision. But, Act No.25 of 2005 brought about a major amendment in the Code. It introduced Section 378(1)(a) which permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. For the first time a provision was introduced whereunder an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. We have already noted Clause 37 of the 154th Report of the Law Commission of India and Clause 37 of the Code of Criminal Procedure (Amendment) Bill, 1994 which state that in order to guard against the arbitrary exercise of power and to reduce reckless acquittals Section 378 was sought to be amended to provide appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence. Thus, this step is taken by the legislature to check arbitrary and

reckless acquittals. It appears that being conscious of rise in unmerited acquittals, in case of certain acquittals, the legislature has enabled the District Magistrate to direct the Public Prosecutor to present an appeal to the Sessions Court, thereby avoiding the tedious and time consuming procedure of approaching the State with a proposal, getting it sanctioned and then filing an appeal.

20. It is true that the State has an overall control over the law and order and public order of the area under its jurisdiction. Till Section 378 was amended by Act 25 of 2005 the State could prefer appeals against all acquittal orders. But the major amendment made in Section 378 by Act 25 of 2005 cannot be ignored. It has a purpose. It does not throw the concern of security of the community to the winds. In fact, it makes filing of appeals against certain types of acquittal orders described in Section 378(1)(a) easier, less cumbersome and less time consuming. The judgments cited by Mr. Malhotra pertain to Section 417 of the Criminal Procedure Code, 1898 and Section 378 prior to its amendment by Act 25 of 2005 and will, therefore, have no relevance to the present case.

21. In view of the above, we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. In the instant case the complaint alleging offences punishable under Section 16(1)(1A) read with Section 7 of the PFA Act and the Rules is filed by complainant Shri Jaiswal, Local Health Authority through Delhi Administration. The appellant was acquitted by the Metropolitan Magistrate, Patiala House Courts, New Delhi. The complainant can challenge the order of acquittal by filing an application for special leave to appeal in the Delhi High Court and not in the Sessions Court. Therefore, the impugned order holding that this case is not governed by Section 378(4) of the Code is quashed and set aside. In the circumstances the appeal is allowed.

B.B.B. Appeal allowed.

NAND KISHORE MISHRA
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 377-378 of 2013)

JANUARY 8, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Army Act, 1950:

s.9 read with Ministry of Defence Notification dated 29.11.1962 – 'Active service' – Army Medical Corps – Short Service Commission – Denied to appellant being categorized under medical category SHAPE-II – Held: Amputation of ring finger of appellant was as a result of injury sustained while on duty – On the basis of Notification dated 29.11.1962, appellant must be held to have received the injury while on active service – His case is fully covered by the medical criterion regarding eligibility as stipulated in Notification dated 29.11.1962 for grant of Commission and his case should have been considered under Medical Category SHAPE-II – Directions given to authorities concerned to consider appellant's case accordingly and to grant him Commission – Government of India, Ministry of Defence Notification dated 29.11.1962 – Armed Forces – Army.

Balbir Singh & Anr. v. State of Punjab, **1994 (5) Suppl. SCR 422 = (1995) 1 SCC 90 – relied on**

Case Law Reference:

1994 (5) Suppl. SCR 422	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 377-378 of 2013.

From the Judgment & Order dated 05.08.2010 &

06.10.2010 of the Armed Forces Tribunal, regional Bench, Lucknow in TA 157 of 2009 and in R.P. No. 17 of 2010.

S.G. Hasnen, Varinder Kumar Sharma for the Appellant.

Ashok Panda, Wasim A. Qadri. D.K. Thakur, Anil Katiyar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The appellant was a candidate for grant of Permanent/ Short Service Commission in the Army Medical Corps(AMC)(Non-Technical) for which applications were invited *vide* Notification No.32433/PC/SSC/AMC(NT)/07/DGAFMS/ DG-1A(1) dated January 19, 2007. Though successful in the selection and recommended for the grant of Short Service Commission in the AMC, he was denied the Commission on the ground that he was not eligible being in Medical Category SHAPE-II.

3. In the counter affidavit filed on behalf of the respondents before the Armed Forces Tribunal, the reason assigned for denial of Commission to the appellant was stated as under:

> "(a) No 13989183K L/NK/HA Nand Kishor Mishra who has been recommended for grant of Short Service Commission in AMC (NT) by 17 SSB was found medically unfit by the SMB, CH(AF) Banglore on 24 Dec.07 on account of disability 'Amputation Ring Finger Left Hand' Individual is in Low Medical Category SIHI A2(P) PIEI since 1998 for the disability."

4. It may be explained here that the fitness of a person for medical classification is assessed under five factors indicted by the acronym SHAPE. The acronym stands for: **S**-

Psychological, **H**-Hearing, **A**-Appendages, **P**-Physical Capacity and **E**-Eye-Sight.

5. From the counter affidavit of the respondents, it, thus, appears that the appellant was in Category-I under the other four factors but on account of the loss of the left ring finger he was put in Category-II under the factor Appendages and, hence, was assigned the Medical Classification SHAPE-II.

6. Mr. S.G. Hasnen, learned senior advocate appearing for the appellant, submitted that the respondent-authorities wrongly applied the criterion of medical eligibility and contended that in terms of the Notification for the grant of commission the case of the appellant should have been considered under medical category SHAPE-II. He pointed out that the medical criterion regarding eligibility, as stated in the Notification dated January 19, 2007, was as under:-

> "(ii) The candidate must be in medical category SHAPE-ONE at the time of final selection for grant of PC. In case of those who possess exceptional merit or *those who have suffered disability owing to active service or a war casualty, the medical category upto grade TWO, under any of the SHAPE factors, except "S", will be acceptable,* on merit of each case, provided it is a result of the same disability."

7. Learned counsel stated that on July 5, 1998, while the appellant was working as a Nursing Assistant in the Army Medical Corps, he was travelling from Lucknow to Allahabad on his motorcycle to join his duty at 181, Military Hospital, Allahabad. On the way he was attacked by some miscreants who wanted to snatch away his motorcycle. He put up resistance whereupon one of the miscreants fired a shot at him causing injury to his left ring finger. As a result of the injury, his left ring finger had to be amputated.

8. In the Court of Inquiry, it was found and held that the

appellant had received the injury while on duty *vide* Annexure P-2 and the appellant's Commanding Officer had also noted that the injury was caused when the appellant was shot by unknown miscreants while he was coming to join his duty and further that the injury sustained by him was not due to any neglect or misconduct on his part. From the findings of the Court of Inquiry and from the opinion of the Commanding Officer, it is clear that the appellant received injuries while he was on duty.

9. The issue for consideration now is, whether being on duty would satisfy the terms of the Notification where the expressions used are *'active service'* or *'war casualty'*. The appellant does not claim to come under the expression *'war casualty'*, but he claims to be covered by the expression *'active service'.*

10. The expression *'active service'* is defined in Section 3(1) of the Army Act, 1950 as under:

> "3. Definitions. - In this Act, unless the context otherwise requires. -
>
> (i) "*active service",* as applied to a person subject to this Act, means the time during which such person -
>
> (a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or
>
> (b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or
>
> (c) is attached to or forms part of a force which is in military occupation of a foreign country;
>
> xx xx xx"

Section 9 of the Act empowers the Central Government to declare persons to be on active service. Section 9 reads as under:

"9. Power to declare persons to be on active service. - Notwithstanding anything contained in clause (I) of section 3, the Central Government may, by notification, declare that any person or class of persons subject to this Act shall, with reference to any area in which they may be serving or with reference to any provision of this Act or of any other law for the time being in force, be deemed to be on active service within the meaning of this Act."

11. In exercise of the power under Section 9, the Ministry of Defence issued a Notification dated November 29, 1962, which was published in the Gazette of India (Extra.) Part II – Section 4 No.6. The Gazette Notification reads as follows:

"S.R.O. 6.E – New Delhi, the 28th November 1962 – In exercise of the powers conferred by section 9 of the Army Act, 1950 (46 of 1950), the Central Government hereby declares that all persons subject to that Act, who are not on active service under clause (I) of section 3 thereof, shall, wherever they may be serving, be deemed to be on active service within the meaning of that Act for the purposes of the said Act and of any other law for the time being in force."

12. It is to be seen that the Notification is in very wide terms and covers all persons wherever they may be serving.

13. It may further be noticed that a similar Notification issued under Section 9 of the Air Force Act, 1950 came under consideration before this Court in *Balbir Singh & Anr. v. State of Punjab*, (1995) 1 SCC 90. In that case this Court held that by virtue of the Notification issued under Section 9 of the Air Force Act, a person, even while on casual leave, would be deemed to be on *'active service'*. In paragraphs 13 and 14 of the judgment, it was held and observed as follows:

"13. Thus, the effect of the notification is that whether or not a person is covered by the definition of "active service"

as spelt out in Section 4(i) of the Act they still would be deemed to be so wherever they may be 'serving'. Can a person governed by the Act be deemed to be "on active service" while on casual leave? The answer to the question can only be found by a reference to the leave rules governing the armed forces read with the provisions of the Act.

14. The Central Government has framed certain rules regarding the conditions of leave of the persons subject to Army Act and it would be profitable to refer to some of the relevant rules dealing with "casual leave". Relevant portion of Rule 9 of the Rules of the service provides as follows:

"9. Casual leave counts as duty except as provided for in Rule 10(a)."

Rule 9 of the Rules (*supra*) thus specifically states that casual leave counts as duty except as provided for in Rule 10(a). It therefore follows that a person subject to the Act would be deemed to be "on active service" even when he is on *casual leave*. Learned counsel for the parties, in view of this legal position, did not dispute that the appellant, though on casual leave, would be deemed to be on "active service" in view of the notification dated 5-12-1962 (*supra*)."

14. On the basis of the Notification dated November 29, 1962, therefore, the appellant must be held to have received the injury while on active service.

15. He was undeniably in Medical Category SHAPE-II and, therefore, his case ought to have been considered by the authorities under that category for having received the injury while on active service.

16. We have carefully gone through the order of the Tribunal and it appears to us that the attention of the Tribunal was not

drawn to the Notification, dated November 29, 1962 issued by the Government of India under Section 9 of the Army Act and it was on account of that omission that the Tribunal did not accept the appellant's case and rejected his application.

17. On hearing counsel for the parties and on a careful consideration of the materials on record, we are satisfied that the appellant's case is fully covered by the medical criterion regarding eligibility, as stipulated in the Notification for the grant of Commission dated January 19, 2007 and his case ought to have been considered under Medical Category SHAPE-II.

18. We, accordingly, allow the appeals, set aside the order of the Tribunal and direct the concerned authorities to consider the case of the appellant under Medical Category SHAPE-II and since he was otherwise selected for the grant of Commission, to grant him the Commission in terms of the Notification.

19. No costs.

R.P. Appeals allowed.

MUNICIPAL CORPORATION RAJASTHAN

v.

SANJEEV SACHDEVA AND OTHERS

(Civil Appeal No.240 of 2013)

JANUARY 8, 2013

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

Rajasthan Municipalities Act 1959 [as amended by the Rajasthan Municipalities Amendment Act 1999 (Act No.19 of 1999)] – s.173-A – Interpretation of – Power of the State Government to allow change in use of land on payment of conversion charges – Respondents filed application on 16.7.2003 for change of land use from residential to commercial – Corporation issued public notice inviting objections – Later, the Land Use Committee met and approved the conversion for which a demand notice was raised by the Corporation on 2.4.2004 – Validity of the demand – Challenge to – High Court following the judgment of Supreme Court in Pareshar Soni's case held that the Municipal Corporation was not empowered to demand any amount for change of use of the land – Whether the judgment in Pareshar Soni's case would apply to the demand notices issued by the Municipal Corporation on the basis of s.173-A, as amended by Act No. 19 of 1999 – Held: High Court erred in applying the judgment in Pareshar Soni's case which was dealing with the un-amended provision of s.173-A – In terms of the un-amended s.173-A(1), conversion for change of Land Use charges could only be realized if the land was allotted by the Municipality or the State Government and there was a condition for restraining use for a particular purpose only – Therefore, in the absence of land being allotted by the State Government/ Municipality and in absence of any specific stipulation regarding use of land, the conversion charges could not be claimed – This was the ratio laid down in

Pareshar Soni's case interpreting the un-amended s.173-A – The Legislature, with a view to ensure planned and regulated development of the urban area felt it necessary to charge for the change of use in certain circumstances of those lands which were not sold or allotted by municipality or by the State Government – Further it also felt that such a change of user be permitted only "in public interest" –Amendment was necessitated since the State Legislature thought the provision of s.173-A (un-amended) stood as an impediment for proper planning of urban areas – With a view to ensure planned and regulated development of urban areas, it was felt that some restrictions have to be imposed and it was for that purpose that s.173-A was amended – In the case at hand, the demand was legal and valid and in accordance with the provisions of s.173-A, as inserted by Amendment Act 19 of 1999 read with the 2000 Rules – Rajasthan Municipalities (Change of Land Use) Rules, 2000 – Rule 4(1).

State of Rajasthan and others v. Pareshar Soni **(2007) 14 SCC 144 – held inapplicable.**

Mewa Ram v. State of Rajasthan **2007 (1) WLC (Raj) 1 – referred to.**

Case Law Reference

(2007) 14 SCC 144	**held inapplicable**	**Para 5,8,9,11,12,13,15**
2007 (1) WLC (Raj) 1	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 240 of 2013.

From the Judgment & Order dated 02.02.2009 of the High Court of Rajasthan at Jodhpur in D.B. Civil Special Appeal No. 159 of 2009.

WITH

C.A. Nos. 242 & 241 of 2013.

Dr. Manish Singhvi, AAG, Dharmendra Kumar Sinha, Amit Lubhaya, Milind Kumar for the Appellant.

Sushil Kumar Jain, Sachdeva, Pratibha Jain, Vikas Mehta for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Delay condoned.

2. Leave granted.

3. Heard learned counsel on either side.

4. We are in these cases concerned with the interpretation of Section 173-A of the Rajasthan Municipalities Act 1959, as amended by the Rajasthan Municipalities Amendment Act 1999 (Act No.19 of 1999), which deals with the power of the State Government to allow change in use of land on payment of conversion charges.

5. The Division Bench of the Rajasthan High Court, following the judgment of this Court in *State of Rajasthan and others v. Pareshar Soni* (2007) 14 SCC 144, disposed of all the appeals, holding that the Municipal Corporation is not empowered to demand any amount for change of use of the land. We may refer to the facts in Civil Appeal No.240 of 2013 @ SLP(C) 11907 of 2009 for disposal of all these appeals, since common questions arise for consideration in all these appeals.

6. Respondents herein purchased a plot of land, with a house, on 9.9.2002, situated in a residential area by way of a registered sale deed. Later, an application under the Rajasthan

Municipalities (Change of Land Use) Rules, 2000 (for short '2000 Rules") was preferred for conversion of land use from residential to commercial. They also deposited self-assessment amount of Rs.10,500/- for the said purpose. Municipal Corporation, while considering the said application gave a public notice on 22.7.2003 inviting objections, if any, under Rule 4(1) of the 2000 Rules. The Land Use Change Committee of the Corporation, on 23.2.2004, approved the request for conversion of land use. Municipal Corporation then demanded an amount of Rs.5,70,300/- as land use conversion charges in accordance with the 2000 Rules read with Section 173-A, as amended.

7. Respondents herein filed a Writ Petition No.1844 of 2004 challenging the vires of amended Section 173-A of the Act and to quash the demand notice dated 2.4.2004. In the meanwhile another Writ Petition No.879 of 2003 was also filed by one Mewa Ram challenging the vires of the amended Section 173-A. The Division Bench of the Rajasthan High Court vide its judgment in *Mewa Ram v. State of Rajasthan* reported in 2007 (1) WLC (Raj) 1, was pleased to upheld the vires of Section 173-A as inserted by Act No. 19 of 1999. Following that judgment, the Division Bench of the Rajasthan High Court, on 28.11.2007, remanded the matter to the learned single Judge to decide whether the writ petition be entertained or not. The case was later registered as D.B.C. Writ Petition No.430 of 2008.

8.The learned Single Judge, however, placing reliance on the judgment in *Pareshar Soni's case* (supra) allowed the writ petition and the notice dated 2.4.2004 was quashed, though it was contended by the Corporation that the applicability of Section 173-A (evidently as amended) was neither argued nor considered by this Court in *Pareshar Soni* case. The Municipal Corporation then took the matter in appeal before the Division Bench in DB Civil Special Appeal No.159 of 2009. The court dismissed the appeal holding that the issue raised stood covered by the judgment in *Pareshar Soni's* case (supra).

9. Dr. Manish Singhvi, learned Additional Advocate General, appearing for the State of Rajasthan submitted that the High court has committed an error in taking the view that the issue raised stood covered by the judgment of this Court in *Pareshar Soni's* case (supra). Learned counsel pointed out that this Court was dealing with the un-amended Section 173-A of the Act in that case, but, so far as the present appeals are concerned, applications have to be considered by the amended Section 173-A read with 2000 Rules.

10. Mr. Sushil Kumar Jain, learned counsel appearing for the respondents, on the other hand, submitted that there is no illegality in the judgment of the Division Bench of the High Court of Rajasthan warranting interference by this Court. Learned counsel submitted, in any view of the matter, the land in question falls in a commercial area as per the latest approved Master Plan and hence there is no question of paying any conversion charges.

11. We are, in these cases, concerned with the question whether the judgment of this Court in *Pareshar Soni's* case (supra) would apply to the demand notices issued by the Municipal Corporation on the basis of Section 173-A, as amended by Act No. 19 of 1999.

12. We may, at the very outset, point out that this Court in *Pareshar Soni's* case (supra) was dealing with the un-amended Section 173-A of the Act. For a proper consideration of the question raised, it would be profitable to refer to the un-amended Section 173-A as well as the amended Section 173-A of the Act. Section 173-A of the Act, prior to its amendment, reads as follows:

"**173-A (Power of the State Government to allow change in the use of land)**

(1) Notwithstanding anything contained in this Act, where any land has been allotted or sold to any person by a

municipality or the State Government subject to the condition of restraining its use for a particular purpose, the State Government may, if it is satisfied so to do in public interest, allow the owner or holder of such land to use it for any other purpose other than the purpose for which it was originally allotted or sold, on payment of such conversion charges as may be prescribed.

Provided that the rates of conversion charges may be different for different areas and for different purposes.

(2) The conversion charges so realized shall be credited to the Consolidated Fund of the State or to the fund of the Municipality as may be determined by the State Government.

(3) Such charges shall be the first charge on the interest of the person liable in the land the use of which has been changed and shall be recoverable as arrears of land revenue."

Section 173-A of the Act as amended by the Amending Act No. 19 of 1999 reads as follows:

"**Section 173-A – Restriction on change of use of land and power of the State Government to allow change of use of land**:

(1) No person shall use or permit the use of any land situated in any municipal area, for the purpose other than that for which such land was originally allotted or sold to any person by the State Government, any municipality, and other local authority or any other body of authority in accordance with any law for the time being in force or, otherwise than as specified under a Master Plan, wherever it is in operation.

(2) In the case of any land not allotted or sold as aforesaid and not covered under sub-section (1), no person shall use

or permit the use of any such land situated in a municipal, area for the purpose other than that for which such land-use was or is permissible, in accordance with the Master Plan, wherever it is in operation, or under any law for the time being in force.

(3) Notwithstanding anything contained in sub-section (1) of sub-section (2), the State Government or any authority authorized by it by notification in the Official Gazette, may allow the owner or holder of any such land to have change of use thereof, if it is satisfied so to do in public interest, on payment of conversion charges at such rates and in such manner as may be prescribed with respect to the following changes in use:-

(i) From residential to commercial or any other purpose; or

(ii) From commercial to any other purpose; or

(iii) From industrial to commercial or any other purpose; or

(iv) From cinema to commercial or any other purpose;

Provided that rates of conversion charges may be different for different areas and for different purpose.

(4) Any person who has already changed the use of land in violation of the provisions of this Act in force at the time of change of use, shall apply to the State Government or any authority authorized by it under sub-section (3), within six months from the date of commencement of the Rajasthan Municipalities (Amendment) Act, 1999 (Act No.19 of 1999) for regularization of said use and upon regularization of the change of use of land he shall deposit the amount contemplated under sub-section (3).

(5) Where the State Government or the authority authorized

by it under sub-section (3) is satisfied that a person who ought to have applied for permission or regularisation under this Section, has not applied and that such permission can be granted or the use of land can be regularized, it may proceed to determine the conversion charges after due notice and hearing the party/parties and the charges so determined shall become due to the municipality and be recoverable under sub-section (7).

(6) The conversion charges so realized shall be credited to the fund of the municipality.

(7) Charges under section shall be the first charge on the interest of the person liable to pay such charges with respect to the land, the use of which has been changed and shall be recoverable as arrears of land revenue."

13. On a bare reading of un-amended Section 173-A(1) of the Act would indicate that the conversion for change of Land Use charges could only be realized if the land was allotted by the Municipality or the State Government and there was a condition for restraining use for a particular purpose only. Therefore, in the absence of land being allotted by the State Government/Municipality and in absence of any specific stipulation regarding use of land, the conversion charges could not be claimed. This was the ratio laid down in *Pareshar Soni's* case (supra) interpreting the un-amended Section 173-A of the Act. The Legislature, with a view to ensure planned and regulated development of the urban area felt it necessary to charge for the change of use in certain circumstances of those lands which were not sold or allotted by municipality or by the State Government. Further it is also felt that such a change of user be permitted only "in public interest". In this connection, we may refer to the Statement of Objects and Reasons of the Amendment Act, 1999, which reads as under:

"**Statement of Objects and Reasons:**

The existing provisions contained in Section 173-A of the Rajasthan Municipalities Act, 1959 provide that where any land has been allotted or sold subject to the condition of restraining its use for a particular purpose, to any person by a Municipality or the State Government, the State Government may, if it is satisfied so to do in public interest, allow the owner or holder of the land, to use it for any other purpose other than the purpose for which it was originally allotted or sold, on payment of such conversion charge as may be prescribed.

With a view to ensure planned and regulated development of the urban areas it is necessary to restrict and bar the change of use in certain circumstances of those lands also which were not sold or allotted by Municipality or the State Government. However, the power of the State Government or any other authority authorized by it, to allow change of use of land, on payment of conversion charges is sought to be retained.

With a view to achieve the aforesaid objective, the existing section 173-A of the Rajasthan Municipalities Act, 1959 is proposed to be substituted."

14. Amended Section 173-A not only restricts the change of use of land, as the same has been allotted by the municipality or the State Government, but also put restrictions if the land has been allotted by any other local authority. Section 173-A(2) covers the cases which are not even covered by Section 173-A(1) and brings in its fold even the change of use of land which is not in consonance with the Master Plan. Further Section 173-A(1) (2) and (3) also contemplates a situation wherein the State Government is entitled to levy conversion charges if the change in use from one purpose to other purpose. Amendment was necessitated since the State Legislature thought the provision of Section 173-A (un-amended) stood as an impediment for proper planning of urban areas. In other words, with a view to ensure planned and regulated development of urban areas, it

was felt that some restrictions have to be imposed and it was for that purpose that Section 173-A was amended.

15. We may, in this respect, also indicate that, in exercise of powers conferred under Section 297 read with Section 173-A of the 1959 Act, 2000 Rules were promulgated. It is under the above-mentioned Rules that the respondents filed an application on 16.7.2003 for change of land use from residential to commercial. Following those Rules, the Corporation issued public notice inviting objections. Later, the Land Use Committee met and approved the conversion for which a demand notice of Rs.5,70,300/- was raised by the Corporation on 2.4.2004. We are of the view that the demand is legal and valid and in accordance with the provisions of Section 173-A, as inserted by Amendment Act 19 of 1999 read with 2000 Rules. We are also of the view that the Rajasthan High Court has committed an error in applying the Judgment of this Court in *Pareshar Soni's* case (supra) which was dealing with the un-amended provision of Section 173-A.

16. Learned counsel appearing for the respondents, however, submitted that the area in question is notified as commercial area under the Master Plan and, therefore, there is no question of any conversion of the residential property to commercial. We notice that this point was not raised before the High Court and we are, therefore, not called upon to decide that question. However, the respondents, if so advised, may take up this issue before the Corporation and it is for the Corporation to consider that issue in accordance with law. Appeals are accordingly allowed and the judgments of the High Court are set aside. However, there will be no order as to costs.

B.B.B. Appeals allowed.

A. SRIMANNARAYANA

v.

DASARI SANTAKUMARI & ANR.

(Civil Appeal Nos. 368 of 2013)

JANUARY 09, 2013

[SURINDER SINGH NIJJAR AND ANIL R. DAVE, JJ.]

*Judgment – Complaint against doctors – Before District Consumer Forum – Alleging medical negligence – Notice issued – Challenged by the doctors on the ground that complaint could not have been registered without seeking opinion of an expert in terms of decision in *Martin F. D'Souza's case – National Commission, by impugned judgment rejected the challenge relying on **V. Kishan Rao's case wherein Martin F.D'Souza's case was held per incuriam – On appeal, held: The judgment in Martin F. D'Souza has been correctly declared per incuriam by the judgment in V. Krishna Rao's case as the law laid down in Martin F. D'Souza's case was contrary to the law laid down in ***Jacab Mathew's case – Impugned judgment does not call for interference – Appeals dismissed – Medical Negligence.*

Martin F. D'Souza vs. Mohd. Ishfaq* **(2009) 3 SCC 1: 2010 (5)SCR 1; ***V. Kishan Rao vs. Nikhil Super speciality Hospital and Anr.* **(2010) 5 SCC 513: 2009 (3) SCR 273;** **** Jacob Mathew vs. State of Punjab and Anr*. **(2005) 6 SCC 1– referred to.**

Case Law Reference:

2009 (3) SCR 273	**Referred to**	**Para 6**
2010 (5) SCR 1	**Referred to**	**Para 6**
(2005) 6 SCC 1	**Referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 368 of 2013.

From the Judgment & Order dated 15.07.2010 of National Consumer Disputes Redressal Commission at New Delhi in R.P. No. 2032 of 2010.

WITH

C.A. No. 369 of 2013.

A.D.N. Rao, A. Ramesh, D. Geetha, R. Chandrachud, A. Venayagam Balan for the Appellant.

K.K. Kishore, Rameshwar Prasad Goyal for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Delay condoned

2. Leave granted.

3. These appeals arising out of the aforesaid special leave petitions have been filed against the judgment and order dated 15.07.2010 in R.P. No. 2032 of 2010 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as "the National Commission"), New Delhi.

4. Relevant facts are taken from Special Leave Petition (C) No.26043 of 2010.

5. The appellant and respondent No.2, who are doctors, conducted an operation on the left leg of the husband of the complainant. Sometime after the operation, the patient died on 13.07.2008. Respondent No. 1, wife of the deceased, filed a complaint against the appellant and respondent No.2, before the District Consumer Forum. We may notice here that respondent No.2 is the appellant in Civil Appeal No.……of 2013 arising out of SLP(C) No.1495 of 2011. The complaint was duly registered and notice was issued to the appellant and respondent No.2. Against the issuance of the notice, the appellant filed a revision petition

before the State Consumer Disputes Redressal Commission, Hyderabad on the ground that the complaint could not have been registered by the District Forum without seeking an opinion of an expert in terms of the decision of the Supreme Court reported in *Martin F. D'Souza Vs. Mohd. Ishfaq* (2009) 3 SCC 1. In this revision petition, respondent No.2 filed IA No.2240 of 2009 praying for stay of proceedings before the District Consumer Forum. The State Commission rejected the revision petition by granting liberty to the appellant to file the necessary application before the District Forum to refer the matter to an expert. He did not file any application before the District Forum, but challenged the aforesaid order of the State Commission by filing revision petition No. 2032 of 2010 before the National Commission. The revision petition has been dismissed by the National Commission by relying upon the subsequent judgment of this Court in *V. Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.* (2010) 5 SCC 513, wherein this Court has declared that the judgment rendered in *Martin F. D'Souza* (supra) is *per incuriam*. Hence the present special leave petitions challenging the aforesaid order of the National Commission dated 15.07.2010.

6. Heard Mr. Rao, learned counsel appearing on behalf of the appellant and respondent No.2 and Mr. K.K. Kishore, learned counsel appearing on behalf of the respondent No.1, at length.

7. Mr. Rao has tried to persuade us that the judgment of this Court in the case of *V. Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.* (supra), has erroneously declared the earlier judgment of this Court in the case of *Martin F. D'Souza Vs. Mohd. Ishfaq* (supra) as *per incuriam,* on a misconception of the law laid down by a three-Judge Bench of this Court in *Jacob Mathew Vs. State of Punjab & Anr.,* (2005) 6 SCC 1. We are not inclined to accept the submission made by Mr. Rao. The judgment in *Jacob Mathew* (supra) is clearly confined to the question of medical negligence leading to criminal prosecution, either on the basis of a criminal complaint

or on the basis of an FIR. The conclusions recorded in paragraph 48 of *Jacob Mathew* (supra) leave no manner of doubt that in the aforesaid judgment this Court was concerned with a case of medical negligence which resulted in prosecution of the concerned doctor under Section 304A of the Indian Penal Code. We may notice here the relevant conclusions which are summed up by this Court as under:

xxx xxx xxx xxx

xxx xxx xxx xxx

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

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

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of evidence and

operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

8. The guidelines in Paragraph 48 were laid down after rejecting the submission that in both jurisdictions i.e. under civil law and criminal law, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. It was observed that :-

"12.……
The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky

hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

9. The aforesaid observations leave no manner of doubt that the observations in *Jacob Mathew* (supra) were limited only with regard to the prosecution of doctors for the offence under Section 304A IPC.

10. The aforesaid observations and conclusions leave no manner of doubt that the judgment rendered by a two-Judge Bench of this Court in the case of *Martin F. D'Souza* (supra) has been correctly declared *per incuriam* by the judgment in *V. Kishan Rao* (supra) as the law laid down in *Martin F. D'Souza* (supra) was contrary to the law laid down in *Jacob Mathew* (supra).

11.In view of the above, we are of the opinion that the conclusions recorded by the National Commission in the impugned order does not call for any interference. The civil appeals are dismissed.

K.K.T. Appeals dismissed.

ASHOK KUMAR SHARMA

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 817 of 2008)

JANUARY 9, 2013

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

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s.50 – Search of person of suspect / accused – Procedure – Nature of – Conviction of accused u/ss.8 and 21 – Held: It is mandatory on the part of the authorized officer to make the accused aware of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance – In the instant case, accused had been only informed that he could be searched before a Magistrate or a Gazetted Officer, if he so wished – Thus, there being non-compliance of the mandatory provision, conviction and sentence awarded by courts below, set aside – Maxim "ignorantia juris non excusat".

The appellant was convicted and sentenced to 10 years RI and a fine of Rs. 1 lakh u/ss. 8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as he was stated to have been found in possession of two packets of smack of 344 gm. each. His appeal was dismissed by the High Court.

In the instant appeal it was contended for the accused-appellant that his conviction was vitiated for non-compliance of the procedure laid down u/s. 50 of the NDPS Act, as he was not informed by the empowered officer of his right to be searched before a Magistrate or a Gazetted Officer.

Allowing the appeal, the Court

HELD: 1.1. This Court in *Vijaysingh Chandubha Jadeja*'s **case has held that u/s. 50 of the NDPS Act, it is mandatory on the part of the authorized officer to make the accused/suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. Thus, an obligation is cast on the officer concerned u/s. 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate. Therefore, the general maxim** "*ignorantia juris non excusat*" **has no application. [Para 7 and 9] [240-D-E; 241-E-H; 242-A]**

Vijaysingh Chandubha Jadeja v. State of Gujarat **2010 (13) SCR 255 = (2011) 1 SCC 609 – relied on.**

1.2. In the instant case, the statement of PW1 would clearly indicate that he had only informed the accused that he could be searched before a Magistrate or a Gazetted Officer if he so wished. The fact that the accused person has a right u/s. 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate was not made known to him. This Court, therefore, is of the view that non-compliance of the mandatory procedure prescribed u/s. 50 has vitiated the entire proceedings initiated against the accused-appellant. The Special Court as well as the High Court, have committed an error in not properly appreciating the scope of s. 50 of the NDPS Act. Consequently, the conviction and sentence imposed by the courts below is set aside. [Para 8, 10] [241-B-C; 242-B-C]

Case Law Reference:

2010 (13) SCR 255	**relied on**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 817 of 2008.

From the Judgment & Order dated 09.02.2007 of the High Court of Rajasthan, Jaipur Bench in SB Crl. A.No. 1157 of 2003.

C.K. Sucharita for the Appellant.

Amit Lubhaya, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The short question that has come up for consideration in this appeal is whether the empowered officer, acting under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') is legally obliged to apprise the accused of his right to be searched before a Gazetted Officer or a Magistrate and whether such a procedure is mandatory under the provisions of the NDPS Act.

2. PW1, Additional Superintendent of Police (Crimes), Jaipur City, Jaipur got secret information that on 25.2.2001 one Ashok Kumar, the appellant herein would be selling smack to a person near Nandipur under Bridge. After completing the formalities PW1 along with two independent witnesses reached near Nandpuri under Bridge. At about 4.55 P.M. a person came on a scooter, who was stopped by the police force and was questioned. Exhibit P-3, notice was given by PW1 under Section 50 of the NDPS Act to the appellant to get himself searched either before a Magistrate or a Gazetted officer. The appellant gave his consent in writing on Ex.P-3 itself stating that he has full confidence in him and agreed for search. Upon search two packets had been recovered from the right and left pockets of the pant of the appellant. The contra-banned was weighed by PW7, goldsmith and the total weight of the packets was 344 gms. From each packet two samples of 10 gms. were taken and sealed and remaining packets were sealed separately. The appellant was then arrested and the scooter was seized.

3. PW1 gave a written report to the Station House Officer, Malviya Nagar Police Station, Jaipur to register FIR No.112/ 2001 under Section 8 and 21 of the NDPS Act. Ex-P-19, report of the Public Analyst of the Rajasthan State Forensic Laboratory, Jaipur showed that the samples contained the presence of diacetylmorphine (Heroin). On completion of the investigation, challan was filed against the accused. Learned Special Judge, NDPS framed the charge under Sections 8 and 21 of the NDPS Act. Before the Special Judge, prosecution examined 14 witnesses and produced Ex. P1 to P19. The accused-appellant in his statement under Section 313 of the Code of Criminal Procedure stated that false case had been foisted against him.

4. The Sessions Court after having found guilty, convicted the appellant and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lakh and, in default, to further under go simple imprisonment for one year. The appellant preferred Criminal Appeal No.1157 of 2003 before the High Court under Section 374 of the Code of Criminal Procedure. The appeal was, however, rejected by the High Court on 9.2.2007 against which this appeal has been preferred by way of special leave.

5. Ms. C.K. Sucharita, learned amicus curiae appearing for the appellant-accused submitted that the High Court has committed a grave error in not appreciating the fact that the conviction was vitiated by the non-compliance of the procedure laid down in Section 50 of the NDPS Act. Learned counsel took us to the evidence of PW1 and submitted that PW1 had not disclosed the fact that the accused had a right to be searched before a Gazetted Officer or a Magistrate, if so required by him. According to the learned counsel non-compliance of that procedure vitiated the entire proceedings initiated against the appellant. In support of her contention reliance was placed on a Judgment of this court in *Vijaysingh Chandubha Jadeja v. State of Gujarat* (2011) 1 SCC 609.

6. Mr. Amit Lubhaya, learned counsel appearing for the State of Rajasthan, on the other hand, contended that the Sessions Court has rightly convicted the appellant and there has been a substantial compliance of the procedure laid down under Section 50 of the - NDPS Act. Learned counsel further submitted that the High Court in a well considered order has affirmed the conviction as well as the sentence imposed by the Special Judge.

7. We are in this case concerned only with the question whether PW1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down under Section 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five Judge Bench. This Court in *Vijaysingh Chandubha Jadeja* (supra) answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. This Court also held that it is mandatory on the part of the authorized officer to make the accused aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer concerned, an obligation is cast on him under Section 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW1 assumes importance, which reads as follows:

> "He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any Gazetted Officer if he wished. He gave his consent in written and said that I have faith on you, you can search

me. Fard regarding apprising and consent is Ex.P-3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused."

8. The above statement of PW1 would clearly indicate that he had only informed the accused that he could be searched before any Magistrate or a Gazetted Officer if he so wished. The fact that the accused person has a right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate was not made known to him. We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a Gazetted Officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.

9. We may, in this connection, also examine the general maxim "*ignorantia juris non excusat*" and whether in such a situation the accused could take a defence that he was unaware of the procedure laid down in Section 50 of the NDPS Act. Ignorance does not normally afford any defence under the criminal law, since a person is presumed to know the law. Indisputedly ignorance of law often in reality exists, though as a general proposition, it is true, that knowledge of law must be imputed to every person. But it must be too much to impute knowledge in certain situations, for example, we cannot expect a rustic villager, totally illiterate, a poor man on the street, to be aware of the various law laid down in this country i.e. leave aside the NDPS Act. We notice this fact is also within the knowledge of the legislature, possibly for that reason the legislature in its wisdom imposed an obligation on the authorized officer acting under Section 50 of the NDPS Act to inform the suspect of his right under Section 50 to be searched

in the presence of a Gazetted Officer or a Magistrate warranting strict compliance of that procedure.

10. We are of the view that non-compliance of this mandatory procedure has vitiated the entire proceedings initiated against the accused-appellant. We are of the view that the Special Court as well as the High Court has committed an error in not properly appreciating the scope of Section 50 of the NDPS Act. The appeal is, therefore, allowed. Consequently the conviction and sentence imposed by the Sessions Court and affirmed by the High Court are set aside. The accused-appellant, who is in jail, to be released forthwith, if not required in connection with any other case.

R.P. Appeal allowed.

RAVINDER SINGH
v.
SUKHBIR SINGH & ORS.
(Criminal Appeal No. 67 of 2013)

JANUARY 11, 2013

[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]

Code of Criminal Procedure, 1973:

s.482 – Quashing of criminal proceedings – Contempt petition for filing two criminal writ petitions on same facts and for same relief – High Court closed the proceedings – Criminal complaint u/s 3(1)(viii) of 1989 Act filed for filing the said two criminal writ petitions – Held: High Court in contempt petition has dealt with the issue involved and the matter stood closed at the instance of complainant himself – Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh – Inherent power of court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done –Thus, it is a judicial obligation on court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process – It may be so necessary to curb the menace of such criminal prosecution – Complaint filed u/s 3(1)(viii) of 1989 Act is quashed – Scheduled Castes and Scheduled Tribes (Prevention of Attrocities) Act, 1989 – s.3(1)(viii) – Code of Criminal Procoedure, 1898 – s. 403(2).

CRIMINAL LAW:

Issued estoppel – Explained – Code of Criminal Procedure, 1898 – s.403(2).

Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989:

s.3(1)(viii) – Prosecution for filing of false, malicious or vexatious or criminal or other legal proceedings – Expressions, 'false', 'malafides' and 'vexatious – Connotation of – Held: Merely because the victim/complainant belongs to a Scheduled Caste or Scheduled Tribe, the same cannot be the sole ground for prosecution, for the reason that the offence mentioned under the Act should be committed against him on the basis of the fact that such a person belongs to a Scheduled Caste or a Scheduled Tribe – An unsuccessful application for the purpose of quashing the FIR lodged by complainant does not mean that a false case was filed against him.

The appellant was arrested in connection with FIR No. 254/2005 for offences punishable u/ss 427, 447 and 506 read with s.34 IPC filed by respondent no. 1. On his release on bail, he engaged respondent no.2 as his advocate and filed W. P. (Crl.) No. 1667 of 2005, inter alia, seeking to quash FIR No. 254/2005. It was the case of the appellant that he was the owner and in possession of 1 bigha and 4 biswas of agricultural land with regard to which respondent no. 1 made an attempt to take forcible possession and also filed the criminal case. The said writ petition was dismissed. However, final report u/ss.173 and 169 CrPC was submitted in the court in FIR No. 254; and the claim of respondent no.1 for inclusion of his name in revenue records as a person in possession/ occupation was also rejected. Thereafter, W. P. (Crl.) No. 2657/2006 came to be filed by respondent no. 2 in the name of the appellant, containing the same averments as made in the first writ petition and seeking the same relief. This writ petition was dismissed in default. Thereafter respondent no.1 filed Contempt Case (Crl.) No. 10/2007 before the High Court against the appellant for filing the said two criminal writ petitions. The appellant filed a reply expressing his ignorance regarding the filing of the second criminal writ petition. Respondent no. 2 also

tendered an unconditional apology. The High Court accepted the version of the appellant and the apology of respondent no.2 and, by order dated 16.02.2009, closed the criminal proceedings. Respondent no.1 then filed a criminal complaint u/s 3(1)(viii) of the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989 against the appellant for filing the said two criminal writ petitions. The Metropolitan Magistrate by his order dated 13.08.2009 dismissed the complaint. However, the revision of respondent no. 1 was allowed. The petition of the appellant u/s. 482 CrPC seeking to quash the criminal complaint having been dismissed by the High Court, he filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 In *Masumsha Hasanasha Musalman's* **case, this Court has held that merely because the victim/ complainant belongs to a Scheduled Caste or a Scheduled Tribe, the same cannot be the sole ground for prosecution, for the reason that the offence mentioned under the Scheduled Castes and Scheduled Tribes (Prevention of atrocities) Act, 1989 (the Act) should be committed against him on the basis of the fact that such a person belongs to a Scheduled Caste or a Scheduled Tribe. [Para 9] [258-E-G]**

Masumsha Hasanasha Musalman v. State of Maharashtra, **2000 (1) SCR 1155 = AIR 2000 SC 1876 – relied on**

1.2 The word 'false', in clause (viii) of s.3 (1) of the Act is used to cover only unlawful falsehood. It means something that is dishonestly, untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. In jurisprudence, the word 'false' is used to characterise a wrongful or criminal act, done intentionally and knowingly, with knowledge, actual or constructive.

The word false may also be used in a wide or narrower sense. [Para 11] [259-C-E]

Commissioner of Sales Tax, Uttar Pradesh v. Sanjiv Fabrics, **2010 (11) SCR 627 = (2010) 9 SCC 630 – relied on.**

1.3 Mala fides, where it is alleged, depending upon its own facts and circumstances, in fact has to be proved. It is a deliberate act in disregard of the rights of others. It is a wrongful act done intentionally without just cause or excuse. Legitimate indignation does not fall within the ambit of a malicious act. In almost all legal inquiries, intention as distinguished from motive is the all important factor. In common parlance, a malicious act has been equated with an intentional act without just cause or excuse. [Para 14 and 16] [260-C-D; 261-D]

Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant & Ors., **2000 (4) Suppl. SCR 248 = AIR 2001 SC 24 – relied on.**

West Bengal State Electricity Board v. Dilip Kumar Ray, **2006 (9) Suppl. SCR 554 = AIR 2007 SC 976;** *State of Punjab v. V.K. Khanna & Ors.* **2000 (5) Suppl. SCR 200 =AIR 2001 SC 343;** *State of A.P. & Ors. v. Goverdhanlal Pitti,* **2003 (2) SCR 908 =AIR 2003 SC 1941;** *Prabodh Sagar v. Punjab SEB & Ors.,* **2000 (3) SCR 866 = AIR 2000 SC 1684; and** *Chairman and MD, BPL Ltd. v. S.P. Gururaja & Ors.,* **2003 (4) Suppl. SCR 587 = AIR 2003 SC 4536 – referred to**

1.4 The word "vexatious" means 'harassment by the process of law', 'lacking justification' or with 'intention to harass'. It signifies an action not having sufficient grounds and which, therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to

inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court. Such proceedings are different from those that involve ordinary and proper use of the process of the court. [Para 17] [261-E-H]

1.5 In the event that the appellant preferred an application for the purpose of quashing the FIR lodged by respondent no.1, and was unsuccessful therein, the same does not mean that the appellant had filed a false case against respondent No. 1. There is a difference between the terms 'not proved' and 'false'. Merely because a party is unable to prove a fact, the same cannot be categorized as false in each and every case. [Para 13] [260-A-B]

A. Abdul Rashid Khan (dead) & Ors. v. P.A.K.A. Shahul Hamid & Ors., **2000) 10 SCC 636 – relied on.**

2.1 The principle of issue-estoppel is also known as 'cause of action estoppel' and the same is different from the principle of double jeopardy or; *autre fois acquit,* **as embodied in s. 403 Cr.P.C (1898). This principle applies where an issue of fact has been tried by a competent court on a former occasion, and a finding has been reached in favour of an accused. If the cause of action was determined to exist, i.e., judgment was given on it, the same is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per *rem judicatam.* [Para 18] [262-A-B-F-G]**

Manipur Administration, Manipur v. Thokchom, Bira Singh **1964 (7) SCR 123 = AIR 1965 SC 87;** *Piara Singh v. State of Punjab,* **1969 (3) SCR 236 =AIR 1969 SC 961;** ***State of*** *Andhra Pradesh v. Kokkiligada Meeraiah & Anr.,* **1969 (2) SCR 626 = AIR 1970 SC 771;** *Masud Khan v. State*

of U.P., **1974 (1) SCR 793 = AIR 1974 SC 28;** *Ravinder Singh v. State of Haryana,* **1975 (3) SCR 453 =AIR 1975 SC 856;** *Kanhiya Lal Omar v. R.K. Trivedi & Ors.,* **1985 (3) Suppl. SCR 1 = AIR 1986 SC 111;** *Bhanu Kumar Jain v. Archana Kumar & Anr.,* **AIR 2004 (6) Suppl. SCR 1104 = 2005 SC 626; and** *Swamy Atmananda and Ors. v. Sri Ramakrishna Tapovanam and Ors.,* **2005 (3) SCR 556 =AIR 2005 SC 2392;** *Shiv Shankar Singh v. State of Bihar & Anr.*, **2011 (13) SCR 247 = (2012) 1 SCC 130;** *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* **1962 Suppl. SCR 297 = AIR 1962 SC 876;** *Jatinder Singh & Ors. v. Ranjit Kaur* **2001 (1) SCR 707 = AIR 2001 SC 784;** *Mahesh Chand v. B. Janardhan Reddy & Anr.,* **2002 (4) Suppl. SCR 566 = AIR 2003 SC 702;** *Poonam Chand Jain & Anr. v. Fazru* **2004 (5) Suppl. SCR 525 = AIR 2005 SC 38 – referred to.**

2.2 In the instant case, the complaint in dispute filed by respondent no.1 is based on the ground that there has been a false declaration by the appellant while filing the second writ petition as he suppressed the truth that earlier for the same relief a writ petition had been filed and it was done so to gain a legal advantage and, therefore, it was a false, vexatious and malicious one attracting the provisions of s. 3(1)(viii) of the Act. The High Court while dealing with the contempt case did not record such a finding. The first writ petition was dismissed *in limine* while the second was dismissed in default. The issue of filing a false affidavit has been dealt with by the High Court in contempt case which respondent no.1 did not press further. [Para 23] [264-G-H; 265-A-B]

2.3 So far as Contempt Case (Crl.) No.10 of 1007 is concerned, the order of the High Court makes it crystal clear that the appellant had been guided by his counsel, namely, respondent no. 2, and further that the High Court had accepted the unqualified apology tendered by

respondent no.2, and had decided to drop the said proceedings, as respondent no.1 did not wish to pursue his remedy any further. The petition was disposed of, as not pressed. The High Court has dealt with the issue involved and the matter stood closed at the instance of respondent no.1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. [Para 6, 8 and 25] [256-H; 258-C-E; 266-B]

2.4 The facts on record make it evident that the land on which both parties claim title/interest had initially been allotted under the 20 Point Programme of the Government of India, to a member of the Schedule Caste community, who transferred the same. The land further changed hands and was finally sold to the appellant in the year 2005. Respondent No. 1, who at the relevant time was holding a very high position in the Central Government, claimed that initial transfer by the original allottee was illegal and further that as the said land had been encroached upon by his father, he had a right to get his name entered in the revenue record. Transfer by the original allottee at initial stage, even if illegal, would not confer any right in favour of respondent no.1. Thus, he adopted intimidatory tactics by resorting to revenue as well as criminal proceedings against the appellant without realising that even if the initial transfer by the original allottee was illegal, the land may revert back to the Government and not to him merely because his father had encroached upon the same. [Para 24] [265-C-F; G-H]

2.5 The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary

judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. In such a fact-situation, the court must not hesitate to quash criminal proceedings. *Ex debito justitiae* is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint. Therefore, the judgments of the High Court and the revisional court are set aside. Order of the Metropolitan Magistrate dated 13.8.2009 is restored. The complaint filed by respondent no.1 under the provisions of s. 3(1)(viii) of the Act is quashed. [Para 25] [266-B-F]

Chandrapal Singh & Ors. v. Maharaj Singh & Anr., **AIR 1982 SC 1238 – relied on**

Smt. Somavanti & Ors. v. The State of Punjab & Ors. **1963 SCR 774 =AIR 1963 SC 151;** *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur,* **AIR 1970 SC 1002;** *Ambika Prasad Mishra v. State of U.P. & Ors*., **AIR 1980 SC 1762; and** *Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr*., **2002 (2) SCR 661 = AIR 2002 SC 1598;** *The Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors.*, **1990 (2) SCR 900 = AIR 1990 SC 1607;** *Daryao & Ors. v. State of U.P. & Ors.,* **1962 SCR 574 = AIR 1961 SC 1457; and** *Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.), Andheri & Ors.* **1985 (3) Suppl. SCR 766 = AIR 1986 SC 391 – referred to**

Case Law Reference:

2000 (1) SCR 1155	**relied on**	**Para 9**

2010 (11) SCR 627	**relied on**	**Para 12**
(2000) 10 SCC 636	**relied on**	**Para 13**
2000 (4) Suppl. SCR 248	**relied on**	**Para 14**
2006 (9) Suppl. SCR 554	**referred to**	**para 15**
2000 (5) Suppl. SCR 200	**referred to**	**Para 16**
2003 (2) SCR 908	**referred to**	**Para 16**
2000 (3) SCR 866	**referred to**	**Para 16**
2003 (4) Suppl. SCR 587	**referred to**	**Para 16**
1964 SCR 123	**referred to**	**Para 18**
1969 (3) SCR 236	**referred to**	**Para 18**
1969 (2) SCR 626	**referred to**	**Para 18**
1974 (1) SCR 793	**referred to**	**Para 18**
1975 (3) SCR 453	**referred to**	**Para 18**
1985 (3) Suppl. SCR 1	**referred to**	**Para 18**
2004 (6) Suppl. SCR 1104	**referred to**	**Para 18**
2005 (3) SCR 556	**referred to**	**Para 18**
2011 (13) SCR 247	**referred to**	**Para 19**
1962 Suppl. SCR 297	**referred to**	**Para 19**
2001 (1) SCR 707	**referred to**	**Para 19**
2002 (4) Suppl. SCR 566	**referred to**	**Para 19**
2004 (5) Suppl. SCR 525	**referred to**	**Para 19**
AIR 1982 SC 1238	**relied on**	**Para 20**
1963 SCR 774	**referred to**	**para 21**
AIR 1970 SC 1002	**referred to**	**para 21**

AIR 1980 SC 1762	**referred to**	**para 21**
2002 (2) SCR 661	**referred to**	**para 21**
1990 (2) SCR 900	**referred to**	**para 22**
1962 SCR 574	**referred to**	**para 22**
1985 (3) Suppl. SCR 766	**referred to**	**para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 67 of 2013.

From the Judgment & Order dated 14.12.2011 of the High Court of Delhi at New Delhi in Cr.M.C. No. 1262 of 2011.

Shekhar Naphade, Shubhangi Tuli, Parvinder Chouhan for the Appellant.

Rakesh Khanna, ASG, Mukul Sharma, Prasoon Kumar, V.K. Sidharthan, Vivek Narayan Sharma, Raji Joseph, D.S. Mahra, B.V. Balaram Das, Abhishek Atrey for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 14.12.2011, passed by the High Court of Delhi in Crl.M.C. No. 1262 of 2011, by way of which the High Court has dismissed the said application preferred by the appellant for quashing the criminal proceedings launched by respondent no. 1 under Section 3(1)(viii) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'Act 1989').

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

A. The appellant claims to be the owner of agricultural land measuring 1 bigha and 4 biswas, situated in the revenue estate of village Nangli Poona, Delhi. Respondent no.1 allegedly

made an attempt to take forcible possession of the said land, and also filed FIR No. 254 of 2005 on 6.4.2005 under Sections 427, 447 and 506, read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). Though the appellant was arrested in pursuance of the said FIR, however, subsequently he was enlarged on bail.

B. Aggrieved, the appellant filed a complaint against respondent no.1, as well as against the police officials involved and in view thereof, FIR No.569 of 2005 under Sections 447, 323, 429 and 34 IPC was registered. The appellant engaged one Pradeep Rana, Advocate, respondent no.2 and filed Writ Petition (Crl.) No. 1667 of 2005, *inter-alia,* seeking a direction for quashing of FIR No. 254 of 2005. The said writ petition was dismissed *in limine* vide order dated 29.9.2005. In the meantime, in the criminal proceedings launched by the appellant, a charge sheet was filed against respondent no.1 in December, 2005.

C. After investigating the allegations made in FIR No. 254 of 2005 against the appellant, the police submitted a final report dated 20.2.2006, under Sections 173 and 169 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'), in the court of the Metropolitan Magistrate, Delhi. Respondent no.1 approached the revenue authorities i.e. Tahsildar, Narela, seeking the inclusion of his name in the revenue record as a person in possession/occupation of the said land. However, his claim was rejected by the Tahsildar vide order dated 22.6.2006.

D. It is at this time, Writ Petition (Crl.) No. 2657 of 2006 was filed in the name of the appellant by Pradeep Rana, respondent no.2 as counsel on 18.11.2006, on the basis of the averments made in the first writ petition i.e. Writ Petition (Crl.) No. 1667 of 2005, and seeking the same relief sought therein. The said writ petition was dismissed in default vide order dated 17.8.2007. Meanwhile, respondent no.1 tried to get his name recorded in the revenue record as being in cultivatory

possession, but the same was rejected again by the Tahsildar, Narela, vide order dated 13.8.2007.

E. Respondent no.1 filed another complaint under Section 107/150 Cr.P.C. on 18.9.2007, and filed a fresh FIR No.16 of 2007 on 21.9.2007 under Sections 379, 427 and 34 IPC, and subsequently added the provisions of Section 3(1)(v) of the Act 1989. Respondent no.1 also filed an appeal against the order of the Tahsildar, rejecting his application made for the purpose of recording his name in the revenue records.

F. Respondent no.1 also filed Contempt Case (Crl.) No.10 of 2007 before the High Court of Delhi against the appellant for filing two criminal writ petitions seeking the same relief, and for not disclosing the fact that he had filed the first writ petition, while filing the second writ petition, owing to which, the said writ petition stood dismissed in default vide order dated 17.8.2007.

G. On receiving notice from the High Court, the appellant filed a reply expressing his ignorance regarding the filing of the second criminal writ petition, and further stated that he was an illiterate person, owing to which, he had given all requisite papers to Pradeep Rana, Advocate, respondent no. 2, and that respondent no.2 might have filed the said petition, in collusion with respondent no.1. Notice was then issued to Pradeep Rana, respondent no.2 by the High Court, who appeared and tendered an apology for filing the second petition, without disclosing such facts pertaining to the filing and dismissal of the first petition.

H. The appellant filed a complaint before the Bar Council of Delhi against respondent no.2 for filing the second writ petition in collusion with respondent no.1 on 15.12.2008. The High Court accepted the version of events submitted by the appellant, and simultaneously, also the apology tendered by respondent no.2 and thereafter, it closed the said criminal proceedings at the instance of respondent no.1, vide order dated 16.2.2009.

I. After a period of six months thereof, respondent no.1 filed a criminal complaint under Section 3(1)(viii) of the Act 1989, for the filing of a false criminal writ petition by the appellant in the High Court of Delhi, and further and more particularly, the second writ petition, without disclosing the factum of filing and dismissal of the aforementioned first writ petition. The Metropolitan Magistrate rejected the said complaint vide order dated 13.8.2009 on the ground that the High Court had closed the contempt proceedings initiated against the appellant, as well as against respondent no.2, at the instance of respondent no.1.

J. Aggrieved, respondent no.1 filed Revision Petition No.23 of 2009 before the ASJ, Rohini Court, Delhi. As regards FIR No. 16 of 2007, the Special Judge (SC/ST) refused to proceed against the appellant and others, making serious comments regarding the conduct of respondent no.1, as well as that of the investigating officer. The revision petition filed by respondent no.1 against order dated 13.8.2009, was allowed by the revisional court vide order dated 25.10.2010, which was then challenged by the appellant, before the High Court by way of him filing a petition under Section 482 Cr.P.C. as Crl.M.C. No.1262 of 2011, which has been dismissed by impugned judgment and order dated 14.12.2011.

Hence, this appeal.

3. Shri Shekhar Naphade, learned senior counsel appearing on behalf of the appellant, has submitted that filing the instant complaint case amounts to abuse of process of the court. The criminal complaint is barred by the principle of issue estoppel, as the same issue has been fully adjudicated by the High Court in a criminal contempt case before it, and the High Court was fully satisfied that the fault lay in the actions of Pradeep Rana, respondent no.2, counsel for the appellant. The High Court even accepted the apology of the respondent no.2 thereafter, and closed the said criminal proceedings at the instance of respondent no.1. As the issue has already been

adjudicated, and finally closed by the High Court, the Magistrate court cannot sit in appeal against the said order passed by the High Court, closing the said case of criminal contempt, as the subject matter and allegations of the case before him, are *verbatim* and have already been adjudicated.

To invoke the provisions of the Act 1989, it is not enough that the complainant belongs to a Scheduled Caste or Scheduled Tribe, as it must further be established that the alleged offence was committed with the intention to cause harm to the person belonging to such category. Moreover, the term false, malicious and vexatious proceedings must be understood in a strictly legal sense and hence, intention (*mens rea)*, to cause harm to a person belonging to such category must definitely be established. Where genuine civil matter is *sub-judice,* and parties are settling their disputes in revenue courts, such proceedings must not be entertained. The High Court therefore, committed an error in rejecting the application for quashing criminal proceedings.

4. Per contra, Shri Mukul Sharma, learned counsel appearing for respondent no.1, has defended the impugned judgment and order and submitted that the findings recorded in the case of criminal contempt cannot preclude respondent no.1 from initiating such criminal proceedings and that whether the same are false, malicious and vexatious, is yet to be established during trial. This is not the stage where any inference in this regard can be drawn. Furthermore, pendency of the issue regarding the ownership of the said land before the revenue court, is no bar so far as criminal proceedings are concerned. Thus, the appeal is liable to be dismissed.

5. We have considered the rival submissions, and heard both, Shri Rakesh Khanna, learned ASG for the State of Delhi, and Shri Prasoon Kumar, Advocate, for respondent no.2, and have also perused the record.

6. So far as Contempt Case (Crl.) No.10 of 1007 is

concerned, it is evident that the appellant, after becoming aware of the fact that a second writ petition was filed in his name, filed a complaint before the Bar Council of Delhi, through its Secretary against respondent no.2 on 29.12.2007 (Annx. P/11), wherein it was stated that the said second writ petition No. 1667 of 2005 was filed without his instructions, using papers signed by him in good faith, in the office of respondent no.2, at his instance. Upon considering the reply of the appellant, the High Court issued notice to Pradeep Rana, Advocate, respondent no.2 in Contempt Case (Crl.) No. 10 of 2007, and thereafter, respondent no.2 filed his reply, wherein he submitted that even though the second writ petition was filed on the instructions of the appellant, however, he inadvertently, failed to mention the fact that he had filed the earlier writ petition and that the same had been dismissed, for which he tendered absolute and unconditional apology.

7. The High Court, vide judgment and order dated 16.2.2009 disposed of the said contempt proceedings. The order reads as under:

> "Learned counsel for Ravinder Singh admits that Crl. Writ Petition No. 1667/2005 and Crl. Writ Petition No.2657/ 2006 were filed under his signatures but states that he being not well-versed in English would sign the petition and supporting affidavits in Hindi and that he was being guided by his counsel with respect to the contents of the petition.
>
> Mr. Pradeep Rana, learned counsel for Mr. Ravinder Singh express his regrets and tenders an unqualified apology for filing two identical petitions one after the other and not disclosing in the second petition that the first petition was filed and was dismissed.
>
> Keeping in view the young age of Mr. Pradeep Rana, learned counsel for the petitioner states that in view of the fact that Mr. Ravinder Singh has admitted that both petitions were filed under his signatures and given an explanation as to what had happened, **the petitioner does not want to pursue the remedy against the counsel, the instant petition may be disposed of as not pressed.**
>
> **We dispose of the petition as not pressed."**

(Emphasis added)

8. The aforesaid order hence, makes it crystal clear that the High Court was satisfied that the appellant had been guided by his counsel and that he himself was not well-versed with the English language and had also filed his supporting affidavit in Hindi and further that it had accepted the unqualified apology tendered by Pradeep Rana, respondent no.2, and that considering the fact that the advocate was of a young age, even though both petitions had been filed under the signature of the appellant, it had decided to drop the said proceedings, as respondent no.1 did not wish to pursue his remedy any further. Hence, the petition was disposed of, as the same was not pressed.

9. In *Masumsha Hasanasha Musalman v. State of Maharashtra,* AIR 2000 SC 1876, this Court has dealt with the application of the provisions of the Act 1989, and held that merely because the victim/complainant belongs to a Scheduled Caste or Scheduled Tribe, the same cannot be the sole ground for prosecution, for the reason that the offence mentioned under the said Act 1989 should be committed against him on the basis of the fact that such a person belongs to a Scheduled Caste or Scheduled Tribe. In the absence of such ingredient, no offence under Section 3 (2)(v) of the Act is made out.

10. Section 3(1)(viii) of the Act 1989 reads as under:

> "Punishment for offences of atrocities:(1) Whoever, not being a member of Scheduled Caste or a Scheduled Tribe,-

(i) xx xx xx

(viii) institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe;

(ix) xx xx xx

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

11. The dictionary meaning of word 'false' means that, which is in essence, incorrect, or purposefully untrue, deceitful etc. Thus, the word 'false', is used to cover only unlawful falsehood. It means something that is dishonestly, untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. In jurisprudence, the word 'false' is used to characterise a wrongful or criminal act, done intentionally and knowingly, with knowledge, actual or constructive. The word false may also be used in a wide or narrower sense. When used in its wider sense, it means something that is untrue whether or not stated intentionally or knowingly, but when used in its narrower sense, it may cover only such falsehoods, which are intentional. The question whether in a particular enactment, the word false is used in a restricted sense or a wider sense, depends upon the context in which it is used.

12. In *Commissioner of Sales Tax, Uttar Pradesh v. Sanjiv Fabrics,* (2010) 9 SCC 630, this Court, after relying upon certain legal dictionaries, explained that the word false describes an untruth, coupled with wrong intention or an intention to deceive. The Court further held that in case of criminal prosecution, where consequences are serious, findings of fact must be recorded with respect to *mens rea* in case a falsehood as a condition precedent for imposing any punishment.

13. In the event that the appellant preferred an application for the purpose of quashing the FIR lodged by respondent no.1, and was unsuccessful therein, the same does not mean that the appellant had filed a false case against respondent No. 1. There is a difference between the terms 'not proved' and 'false'. Merely because a party is unable to prove a fact, the same cannot be categorized as false in each and every case. (Vide: *A. Abdul Rashid Khan (dead) & Ors. v. P.A.K.A. Shahul Hamid & Ors.,* (2000) 10 SCC 636).

14. Legitimate indignation does not fall within the ambit of a malicious act. In almost all legal inquiries, intention as distinguished from motive is the all important factor. In common parlance, a malicious act has been equated with an intentional act without just cause or excuse. (Vide: *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant & Ors.,* AIR 2001 SC 24).

15. In *West Bengal State Electricity Board v. Dilip Kumar Ray,* AIR 2007 SC 976, this Court dealt with the term "malicious prosecution" by referring to various dictionaries etc. as :

'Malice in the legal sense imports (*1*) the absence of all elements of justification, excuse or recognised mitigation, and (*2*) the presence of either (*a*) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (*b*) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.

'MALICE' consists in a conscious violation of the law to the prejudice of another and certainly has different meanings with respect to responsibility for civil wrongs and responsibility for crime.

Malicious prosecution means - a desire to obtain a collateral advantage. The principles to be borne in mind in the case of actions for malicious prosecutions are these:—Malice is not merely the doing of a wrongful act

intentionally but it must be established that the defendant was actuated by *malus animus*, that is to say, by spite or ill will or any indirect or improper motive. But if the defendant had reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause,' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.

16. Mala fides, where it is alleged, depends upon its own facts and circumstances, in fact has to be proved. It is a deliberate act in disregard of the rights of others. It is a wrongful act done intentionally without just cause or excuse. (See : *State of Punjab v. V.K. Khanna & Ors.,* AIR 2001 SC 343; *State of A.P. & Ors. v. Goverdhanlal Pitti,* AIR 2003 SC 1941; *Prabodh Sagar v. Punjab SEB & Ors.,* AIR 2000 SC 1684; and *Chairman and MD, BPL Ltd. v. S.P. Gururaja & Ors.,* AIR 2003 SC 4536).

17. The word "vexatious" means 'harassment by the process of law', 'lacking justification' or with 'intention to harass'. It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary.

The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court. Such proceedings are different from those that involve ordinary and proper use of the process of the court.

18. The principle of issue-estoppel is also known as 'cause of action estoppel' and the same is different from the principle of double jeopardy or; *autre fois acquit,* as embodied in Section 403 Cr.P.C. This principle applies where an issue of fact has been tried by a competent court on a former occasion, and a finding has been reached in favour of an accused. Such a finding would then constitute an estoppel, or *res judicata* against the prosecution but would not operate as a bar to the trial and conviction of the accused, for a different or distinct offence. It would only preclude the reception of evidence that will disturb that finding of fact already recorded when the accused is tried subsequently, even for a different offence, which might be permitted by Section 403(2) Cr.P.C. Thus, the rule of issue estoppel prevents re-litigation of an issue which has been determined in a criminal trial between the parties. If with respect to an offence, arising out of a transaction, a trial has taken place and the accused has been acquitted, another trial with respect to the offence alleged to arise out of the transaction, which requires the court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial, is prohibited by the rule of issue estoppel. In order to invoke the rule of issue estoppel, not only the parties in the two trials should be the same but also, the fact in issue, proved or not, as present in the earlier trial, must be identical to what is sought to be re-agitated in the subsequent trial. If the cause of action was determined to exist, i.e., judgment was given on it, the same is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per *rem judicatam.* (See: *Manipur Administration, Manipur v. Thokchom, Bira Singh,* AIR 1965 SC 87; *Piara Singh v. State of Punjab,* AIR 1969 SC 961; *State of Andhra Pradesh v. Kokkiligada Meeraiah & Anr.,* AIR 1970 SC 771; *Masud Khan v. State of U.P.,* AIR 1974 SC 28; *Ravinder Singh v. State of Haryana,* AIR 1975 SC 856; *Kanhiya Lal Omar v. R.K. Trivedi & Ors.,* AIR 1986 SC 111; *Bhanu Kumar Jain v. Archana Kumar & Anr.,* AIR 2005 SC

626; and *Swamy Atmananda and Ors. v. Sri Ramakrishna Tapovanam and Ors.,* AIR 2005 SC 2392).

19. While considering the issue at hand in *Shiv Shankar Singh v. State of Bihar & Anr.,* (2012) 1 SCC 130, this Court, after considering its earlier judgments in *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* AIR 1962 SC 876; *Jatinder Singh & Ors. v. Ranjit Kaur* AIR 2001 SC 784; *Mahesh Chand v. B. Janardhan Reddy & Anr.,* AIR 2003 SC 702; *Poonam Chand Jain & Anr. v. Fazru* AIR 2005 SC 38 held:

> "It is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit."

20. In *Chandrapal Singh & Ors. v. Maharaj Singh & Anr.,* AIR 1982 SC 1238, this court has held that it is equally true that chagrined and frustrated litigants should not be permitted to give vent to their frustration by enabling them to invoke the jurisdiction of criminal courts in a cheap manner. In such a fact-situation, the court must not hesitate to quash criminal proceedings.

21. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, particularly, when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said

judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered, taking note of the *ratio decidendi* of the same i.e., the general reasons, or the general grounds upon which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. (Vide: *Smt. Somavanti & Ors. v. The State of Punjab & Ors.,* AIR 1963 SC 151; *Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur,* AIR 1970 SC 1002; *Ambika Prasad Mishra v. State of U.P. & Ors.,* AIR 1980 SC 1762; and *Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr.*, AIR 2002 SC 1598).

22. In *The Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors.,* AIR 1990 SC 1607, a Constitution Bench of this Court has taken a similar view, observing that the binding nature of a judgment of a court of competent jurisdiction, is in essence a part of the rule of law on the basis of which, administration of justice depends. Emphasis on this point by the Constitution is well founded, and a judgment given by a competent court on merits must bind all parties involved until the same is set aside in appeal, and an attempted change in the form of the petition or in its grounds, cannot be allowed to defeat the plea. (See also: *Daryao & Ors. v. State of U.P. & Ors.,* AIR 1961 SC 1457; and *Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.), Andheri & Ors.* AIR 1986 SC 391).

23. The instant case is required to be decided taking into consideration the aforesaid settled legal propositions.

The complaint in dispute filed by the respondent no.1 is based on the ground that there has been a false declaration by the appellant while filing the second writ petition as he

suppressed the truth that earlier for the same relief a writ petition had been filed and it was done so to gain a legal advantage and therefore, it was a false, vexatious and malicious one attracting the provisions of Section 3(1)(viii) of the Act 1989. The High Court while dealing with the contempt case did not record such a finding. The first writ petition was dismissed *in limine* while the second was dismissed in default. The issue of filing a false affidavit has been dealt with by the High Court in contempt case which the respondent no.1 did not press further.

24. The facts on record make it evident that the land on which both parties claim title/interest had initially been allotted to one Anant Ram, a member of the Schedule Caste community, under the 20 Point Programme of the Government of India (Poverty Elevation Programme) and he sold it to one Ram Lal Aggarwal in the year 1989, who further transferred it to his son Anil Kumar Aggarwal in the year 1990. Anil Kumar Aggarwal sold the same to appellant Ravinder Singh in the year 2005. Respondent No. 1, who at the relevant time was holding a very high position in the Central Government, claimed that initial transfer by Anant Ram, the original allottee, in favour of Ram Lal Aggarwal was illegal and he could not transfer the land allotted to him by the Government under Poverty Elevation Programme and further that as the said land had been encroached upon by his father, he had a right to get his name entered in the revenue record. Thus, it is clear that the respondent no. 1, became the law unto himself and assumed the jurisdiction to decide the legal dispute himself to which he himself had been a party being the son of a rank trespasser. Transfer by the original allottee at initial stage, even if illegal, would not confer any right in favour of the respondent no.1. Thus, he adopted intimidatory tactics by resorting to revenue as well as criminal proceedings against the appellant without realising that even if the initial transfer by the original allottee Anant Ram was illegal, the land may revert back to the Government, and

not to him merely because his father had encroached upon the same.

25. The High Court has dealt with the issue involved herein and the matter stood closed at the instance of respondent no.1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. *Ex debito justitiae* is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint.

In view of the above, the judgment of the High Court impugned herein dated 14.12.2011 as well as of the Revisional Court is set aside. Order of the Metropolitan Magistrate dated 13.8.2009 is restored. The complaint filed by respondent no.1 under the provisions of Section 3(1)(viii) of the Act 1989 is hereby quashed. The appeal is thus allowed.

Before parting with the case, it may be necessary to observe that any of the observations made herein shall not affect by any means either of the parties in any civil/revenue case pending before an appropriate authority/court.

R.P. Appeal allowed

M/S BANGALORE CLUB

v.

COMMISSIONER OF INCOME TAX & ANR.

(Civil Appeal No. 124 of 2007)

JANUARY 14, 2013

[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]

INCOME TAX ACT, 1961:

s. 2 (24) (vii) – Interest earned by assessee-Club on surplus funds invested in fixed deposits with corporate member-Banks – Exemption from income tax claimed on the basis of doctrine of mutuality – Held: The amount of interest earned by assessee from member banks will not fall within the ambit of mutuality principle and will, therefore, be exigible to Income-Tax in the hands of assessee-Club.

Doctrines/principles – 'Mutuality principle' in the context of s.2(24)(vii) of Income Tax Act – Explained.

The assessee appellant Club, an unincorporated Association of Persons (AOP), sought exemption from payment of income tax on the interest earned by it on the fixed deposits kept with certain banks, which were corporate members of the assessee, on the basis of doctrine of mutuality. The claim was rejected by the assessing officer, but allowed by the Commissioner of Income Tax as also by the Income Tax Appellate Tribunal. However, the High Court upheld the view of the assessing officer.

In the instant appeal, filed by the assessee-Club, the question for consideration before the Court was: whether or not the interest earned by the assessee on the surplus funds invested in fixed deposits with the corporate member banks was exempt from levy of Income Tax,

based on the doctrine of mutuality?

Dismissing the appeals, the Court

HELD: 1.1. Doctrine of mutuality relates to the notion that a person cannot make a profit from himself. An amount received from oneself is not regarded as income and is, therefore, not subject to tax; only the income which comes within the definition of s. 2(24) of the Income Tax Act, 1961 is subject to tax (income from business involving the doctrine of mutuality is denied exemption only in special cases covered under clause (vii) of s. 2 (24) of the Act). The concept of mutuality has been extended to defined groups of people who contribute to a common fund, controlled by the group, for a common benefit. Any amount surplus to that needed to pursue the common purpose is said to be simply an increase of the common fund and as such neither considered income nor taxable. [Para 7] [277-F-H; 278-A]

1.2. Mutuality is not a form of organization, even if the participants are often called members. Any organization can have mutual activities. A common feature of mutual organizations in general and of licensed clubs in particular, is that participants usually do not have property rights to their share in the common fund, nor can they sell their share. And when they cease to be members, they lose their right to participate without receiving a financial benefit from the surrender of their membership. A further feature of licensed clubs is that there are both membership fees and, where prices charged for club services are greater than their cost, additional contributions. It is these kinds of prices and/or additional contributions which constitute mutual income. [Para 7] [278-B-D]

1.3. The doctrine of mutuality finds its origin in common law. In *Styles*' case, three features were found

essential to attract the doctrine. The *first* condition requires that there must be a complete identity between the contributors and participators; the particular label or form by which the mutual association is known is of no consequence. The *second* feature demands that the actions of the participators and contributors must be in furtherance of the mandate of the association. In the case of a club, it would be necessary to show that steps are taken in furtherance of activities that benefit the club, and in turn its members. The mandate of the club is a question of fact and can be determined from the memorandum or articles of association, rules of membership, rules of the organization, etc. However, the mandate must not be construed myopically. While in some situations, the benefits may be evident directly in the short-run, in others, they may be accruable to an organization indirectly, in the long-run. Space must be made for both such forms of interactions between the organization and its members. *Thirdly*, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. [Para 8, 12 ,15 and 19-21] [278-E; 281-D-E; 283-C; 285-B-C-D-F; 286-A]

Commissioner of Income-Tax, Bombay City Vs. Royal Western India Turf Club Ltd **1954 SCR 289 = AIR 1954 SC 85; *CIT v. Firozepur Ice Manufacturers' Association* 84 ITR 607;** *Chelmsford Club Vs. Commissioner of Income Tax, Delhi* **(2000) 3 SCC 214;** *Thomas Vs. Richard Evans & Co. Ltd.* **(1927) 11 TC 790;** *Commissioner of Income Tax, Madras Vs. Kumbakonam Mutual Benefit Fund Ltd* **AIR 1965 SC 96 – referred to**

Styles (Surveyor of Taxes) Vs. New York Life Insurance Co. **1889 2 TC 460;** *The Commissioners of Inland Revenue Vs. The Cornish Mutual Assurance Co. Ltd*. **1926 12 T.C. 841 (H.L.);** *The Bohemians Club Vs. The Acting Federal Commissioner of Taxation* **(1918) 24 CLR 334;** *Municipal*

Mutual Insurance Ltd. Vs. Hills **(1932) 16 TC 430, 448 (HL);** *Carlisle and Silloth Golf Club v. Smith,* **(1913) 3 K.B. 75 ;** *Jones Vs. South-West Lancashire Coal Owners' Association Ltd*. **1927 AC 827;** *The English & Scottish Joint Co-operative Wholesale Society Ltd. Vs. The Commissioner of Agricultural Income Tax, Assam* **AIR 1948 PC 142 (E);** *National Association of Local Government Officers Vs. Watkins* **(1934) 18 TC 499; 503, 506;** *Commissioner of Income Tax, Bihar Vs. Bankipur Club Ltd.* **(1997) 5 SCC 394 – referred to.**

Halsbury's Laws of England, 4th Edition; *Simon's Taxes*, **Vol. B, 3rd Edn., *Kanga & Palkhivala* on** *"The Law and Practice of Income Tax"* **(8th Edn. Vol. I, 1990);** *British Tax Encyclopedia (I*), **1962 Edn. (edited by G.S.A. Wheatcroft) at pp. 1201 – referred to**

1.4. In the instant case, the assessee-Club is an AOP. The banks concerned are all corporate members of the Club. The interest earned from fixed deposits kept with non-member banks was offered for taxation and the tax due was paid. As regards the interest earned by assessee on fixed deposits kept with member banks, firstly, the arrangement lacks a complete identity between the contributors and participators. Till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Therefore, in the instant case, with the funds of the mutuality, member-banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of

mutuality' and, consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the instant case, the first condition for a claim of mutuality is not satisfied. [Para 25-26] [289-C-H]

1.5. Secondly, the surplus funds were not used for any specific service, infrastructure, maintenance or for any other direct benefit for the members of the club. These were taken out of mutuality when the member-banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality. This contract lacked the degree of proximity between the club and its member, which may in a distant and indirect way benefit the club, nonetheless, it cannot be categorized as an activity of the club in pursuit of its objectives. It needs little emphasis that the second condition postulates a direct step with direct benefits to the functioning of the club, stands violated. [Para 27] [290-B-E]

1.6. Thirdly, though the funds do return to the club, however, before that, they are expended on non-members i.e. the clients of the bank. The banks generate revenue by paying a lower rate of interest to club-assessee, that makes deposits with them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons snaps the link of mutuality and, thus, breaches the third condition. There is nothing on record which shows that the banks made separate and special provisions for the funds that came from the club, or that they did not loan them out. Therefore, clearly, the club did not give, or get, the treatment a club gets from its members; the interaction between them clearly reflected one between a bank and its client. This directly contravenes the third condition. If

profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. [Para 28- 29] [290-F-H; 291-A-C]

Styles (Surveyor of Taxes) Vs. New York Life Insurance Co. **1889 2 TC 460;** *Commissioner of Income Tax, Madras Vs. Kumbakonam Mutual Benefit Fund Ltd* **AIR 1965 SC 96;** *Thomas Vs. Richard Evans & Co. Ltd.* **(1927) 11 TC 790 – referred to Para 29**

1.7. Thus, the interest accrues on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank. The interest earned by the assessee even from the member banks on the surplus funds deposited with them had the taint of commerciality, fatal to the principle of mutuality. [Para 29 and 31] [292-B; 293-B]

Commissioner of Income Tax, Madras Vs. Kumbakonam Mutual Benefit Fund Ltd **AIR 1965 SC 96 – relied on**

1.8. Besides, the assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. A façade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality. [Para 32] [293-C-E]

Commissioner of Income Tax, Bihar Vs. Bankipur Club Ltd. **(1997) 5 SCC 394 – referred to**

1.9. The amount of interest earned by the assessee from the four banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to

Income-Tax in the hands of the assessee-club. [Para 33] [294-D]

Case Law Reference:

1889 2 TC 460	**referred to**	**Para 8, 29**
1926 12 T.C. 841 (H.L.)	**referred to**	**Para 9**
(1918) 24 CLR 334	**referred to**	**Para 10**
1954 SCR 289	**referred to**	**Para 11**
(1932) 16 TC 430, 448 (HL)	**referred to**	**Para 12**
1927 AC 827	**referred to**	**Para 17**
(1934) 18 TC 499; 503, 506	**referred to**	**para 20**
(1997) 5 SCC 394	**referred to**	**para 20**
(1997) 5 SCC 394	**referred to**	**para 32**
(1927) 11 TC 790	**referred to**	**Para 21**
(1927) 11 TC 790	**referred to**	**Para 29**
AIR 1965 SC 96	**referred to**	**para 22**
AIR 1965 SC 96	**referred to**	**Para 29**
AIR 1965 SC 96	**relied on**	**para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 124 of 2007.

From the Judgment & Order dated 21.07.2006 of the High Court of Karnataka at Bangalore in I.T.A. No. 70 of 2000.

WITH

C.A. Nos. 125 of 2007, 272, 273, 274, 275, 276-277 & 278 of 2013.

Joseph Vellapally, Dayan Krishnan, Gautam Naryana (for Nikhil Nayyar), Asmita Singh, Shivendra Singh for the Appellant.

A.S. Chandhiok, ASG, Gurpreet S. Parwanda, Monika Tyagi, Reena Singh, Yatinder Chaudhary, R. Nedumaran, Anil Katiyar (for B.V, Balaram Das) for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted in Special Leave Petitions.

2. This batch of appeals arises from a common judgment and order pronounced by the High Court of Karnataka, in Income Tax Appeals No. 115 of 1999 along with 70 of 2000, 3095 of 2005, 1547 of 2005, 1548 of 2005, 3091 of 2005, 3089 of 2005 along with 3093 of 2005, and 3088 of 2005. Since these appeals entail the same issue, they are being disposed of by this common judgment.

3. The facts necessary for the purpose of appreciating the controversy involved in the appeal are as follows:

The Bangalore Club (hereinafter referred to as the "assessee"), the appellant herein, is an unincorporated Association of Persons, (AOP). In relation to the assessment years 1989-90, 1990-91, 1993-94, 1994-95, 1995-96, 1996-97, 1997-98, 1998-99 and 1999-2000, the assessee sought an exemption from payment of income tax on the interest earned on the fixed deposits kept with certain banks, which were corporate members of the assessee, on the basis of doctrine of mutuality. However, tax was paid on the interest earned on fixed deposits kept with non-member banks.

The assessing officer rejected the assessee's claim, holding that there was a lack of identity between the contributors and the participators to the fund, and hence treated the amount received by it as interest as taxable business income. On appeal by the assessee, the Commissioner of Income Tax (Appeals)-II, Bangalore ("CIT (A)" for short) reversed the view taken by the assessing officer, and held that the

doctrine of mutuality clearly applied to the assessee's case. On appeal by the revenue the Income-Tax Appellate Tribunal (for short "the Tribunal"), affirmed the view taken by the CIT (A), observing thus (ITA No. 2440/Ban/1991):

> "7. In the instant case, the funds of the club are given in the form of deposits for earning income from the corporate members, namely, the banks here and, therefore, the earning of interest is clearly had risen out of the concept of mutuality only. The decisions relied upon by the DR have nowhere touch (*sic*) upon the fact as to whether it was with corporate members or not. Apparently, they had dealt with the situation where the transactions of interest are from persons who are not the members of the club. During the argument, the DR had admitted that the assessee had shown interest from certain other banks as its income which also goes to show that wherever the concept of mutuality was absent, the assessee had offered the same as income."

On an application by the Commissioner of Income Tax, Bangalore under Section 260A of the Income Tax Act, 1961 (for short "the Act"), the High Court entertained the appeal and framed the following two substantial questions of law for its adjudication :-

> "(1) Whether, a sum of Rs. 7,87,648/- received by the assessee as interest from fixed deposit made by the assessee in four banks who are members in the assessee club amounted to its income and constituted a revenue receipt as per the provision of Income Tax Act.
>
> (2) Whether, the principle of mutuality can be made applicable to the fund deposited in the four banks who are also members of assessee club, especially when the fund is raised from contribution of several members including the four banks and the interest derived from it is utilized by several members of the assessee club?"

Answering both the questions in favour of the revenue, the High Court held:-

> "12. On the facts of this case and in the light of the legal principles it is clear to us that what has been done by the club is nothing but what could have been done by a customer of a Bank. The principle of 'no man can trade with himself' is not available in respect of a nationalised bank holding a fixed deposit on behalf of its customer. The relationship is one of a banker and a customer."

Consequently, the High Court reversed the decision of the Tribunal and restored the order of the assessing officer. Hence, this appeal by the assessee.

4. Thus, the short question for determination is whether or not the interest earned by the assessee on the surplus funds invested in fixed deposits with the corporate member banks is exempt from levy of Income Tax, based on the doctrine of mutuality?

5. Mr. Joseph Vellapally, learned senior counsel appearing for the assessee strenuously urged that the assessee meets all the requirements, as laid down in *The English & Scottish Joint Co-operative Wholesale Society Ltd. Vs. The Commissioner of Agricultural Income Tax, Assam*[1], as affirmed by this Court in *Chelmsford Club Vs. Commissioner of Income Tax, Delhi*[2] in order to fall within the ambit of the principle of mutuality. According to the learned counsel, there is a complete identity between the contributors to the fund and the assessee and the recipients from the funds, in as much as the interest earned by the assessee from the surplus fund invested in fixed deposits with member banks are always available and are used for the benefit of members alike. It was asserted that there is no commercial motive involved in the

1. AIR 1948 PC 142 (E).
2. (2000) 3 SCC 214.

dealings of the assessee with its members, including the banks concerned. It was also argued that the interest earned on such deposits with the member banks was always available for use and benefit of the members of the assessee, in as much as the said interest merged with the common fund of the club.

6. Mr. A.S. Chandhiok, learned Additional Solicitor General of India, on the other hand, contended that the fundamental principle for applicability of the doctrine of mutuality is a complete identity between the contributors and the participators, which is missing in this case. It was submitted that in the present case, the surplus funds in the hands of the assessee were placed at the disposal of the corporate members *viz.* the banks, with the sole motive to earn interest, which brings in the commerciality element and thus, the interest so earned by the assessee has to be treated as a revenue receipt, exigible to tax. It was pleaded that transaction between the assessee and the member banks concerned was in the nature of parking of funds by the assessee with a corporate member and was nothing but what could have been done by a customer of a bank and therefore, the principle that "no man could trade with himself" is not applicable.

7. Before we evaluate the rival stands, it would be necessary to appreciate the general understanding of doctrine of mutuality. The principle relates to the notion that a person cannot make a profit from himself. An amount received from oneself is not regarded as income and is therefore not subject to tax; only the income which comes within the definition of Section 2(24) of the Act is subject to tax (income from business involving the doctrine of mutuality is denied exemption only in special cases covered under clause (vii) of Section 2 (24) of the Act). The concept of mutuality has been extended to defined groups of people who contribute to a common fund, controlled by the group, for a common benefit. Any amount surplus to that needed to pursue the common purpose is said to be simply an increase of the common fund and as such neither

considered income nor taxable. Over time, groups which have been considered to have mutual income have included corporate bodies, clubs, friendly societies, credit unions, automobile associations, insurance companies and finance organizations. Mutuality is not a form of organization, even if the participants are often called members. Any organization can have mutual activities. A common feature of mutual organizations in general and of licensed clubs in particular, is that participants usually do not have property rights to their share in the common fund, nor can they sell their share. And when they cease to be members, they lose their right to participate without receiving a financial benefit from the surrender of their membership. A further feature of licensed clubs is that there are both membership fees and, where prices charged for club services are greater than their cost, additional contributions. It is these kinds of prices and/or additional contributions which constitute mutual income.

8. The doctrine of mutuality finds its origin in common law. One of the earliest modern judicial statements of the mutuality principle is by Lord Watson in the House of Lords, in 1889, in *Styles (Surveyor of Taxes) Vs. New York Life Insurance Co*[3]**.** (hereinafter referred to as the "Styles case"). The appellant in that case was an incorporated company. The company issued life policies of two kinds, namely, participating and non-participating. The members of the mutual life insurance company were confined to the holders of the participating policies, and each year, the surplus of receipts over expenses and estimated liabilities was divided among them, either in the form of a reduction of future premiums or of a reversionary addition to the policies. There were no shares or shareholders in the ordinary sense of the term but each and every holder of a participating policy became *ipso facto* a member of the company and as such became entitled to a share in the assets and liable for a share in the losses. The company conducted a calculation of the probable death rate amongst the members

3. [1889] 2 TC 460.

and the probable expenses and liabilities; calls in the shape of premiums were made on the members accordingly. An account used to be taken annually and the greater part of the surplus of such premiums, over the expenditure referable to such policies, was returned to the members i.e. (holders of participating policies) and the balance was carried forward as a fund in hand to the credit of the general body of members. The question was whether the surplus returned to the members was liable to be assessed to income tax as profits or gains. The majority of the Law Lords answered the question in the negative. It may be noticed that in that case the members had associated themselves together for the purpose of insuring each other's life on the principle of mutual assurance, that is to say, they contributed annually to a common fund out of which payments were to be made, in the event of death, to the representatives of the deceased members. Those persons were alone the owners of the common fund and they alone were entitled to participate in the surplus. This surplus was obtained partly from the profits arising from non-participating policies and other business. It was held that that portion of the surplus which arose from the excess contributions of the holders of participating policies was not an assessable profit. It was therefore, held to be a case of mutual assurance. The individuals insured and those associated for the purpose of receiving their dividends and meeting other stipulated requisites under the policies were identical. It was held that that identity was not destroyed by the incorporation of the company. Lord Watson even went to the extent of saying that the company in that case did not carry on any business at all, which perhaps was stating the position a little too widely as pointed out by Viscount Cave in a later case; but, be that as it may, all the Noble Lords, who formed the majority, were of the view that what the members received were not profits but their respective shares of the excess amount contributed by themselves. They held thus:

> "... when a number of individuals agree to contribute funds for a common purpose ... and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them. I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits."

9. Lord Watson's statement was explained by the House of Lords in *The Commissioners Of Inland Revenue Vs. The Cornish Mutual Assurance Co. Ltd.*[4] wherein it was held that a mutual concern may be held to carry on a business or trade with its members, though the surplus arising from such trade is not taxable income or profit.

10. The High Court of Australia first considered the mutuality principle in *The Bohemians Club Vs. The Acting Federal Commissioner of Taxation*[5] in 1918:

> "A man is not the source of his own income ... A man's income consists of moneys derived from sources outside of himself. Contributions made by a person for expenditure in his business or otherwise for his own benefit cannot be regarded as his income ... The contributions are, in substance, advances of capital for a common purpose, which are expected to be exhausted during the year for which they are paid. They are not income of the collective body of members any more than the calls paid by members of a company upon their shares are income of the company. <u>If anything is left unexpended it is not income or profits, but savings, which the members may claim to have returned to them.</u>"
>
> (Emphasis added)

11. One of the first Indian cases that dealt with the principle was *Commissioner of Income-Tax, Bombay City Vs. Royal Western India Turf Club Ltd.*[6]. It quoted with approval three

4. [1926] 12 T.C. 841 (H.L.)
5. (1918) 24 CLR 334.
6. AIR 1954 SC 85.

conditions stipulated in *The English & Scottish Joint Co-operative Wholesale Society Ltd.* (supra), which were propounded after referring to various passages from the speeches of the different Law Lords in *Styles case* (supra). Lord Normand, who delivered the judgment of the Board summarized the grounds of the decision in *Styles case* (supra) as follows:

> "From these quotations it appears that the exemption was based on (1) the identity of the contributors to the fund and the recipients from the fund; (2) the treatment of the company, though incorporated, as a mere entity for the convenience of the members and policy holders, in other words, as an instrument obedient to their mandate; and (3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves."

12. We will consider each of these conditions in detail before proceeding to the facts of the case. The *first* condition requires that there must be a complete identity between the contributors and participators. This was first laid down by Lord Macmillan in *Municipal Mutual Insurance Ltd. Vs. Hills*[7] wherein he observed:

> "The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators."

13. On this aspect of the doctrine, especially with regard to the non-members, *Halsbury's Laws of England*, 4th Edition, Reissue, Vol. 23, paras 161 and 162 (pp. 130 and 132) states:

"Where the trade or activity is mutual, the fact that, as

7. (1932) 16 TC 430, 448 (HL); *CIT v. Firozepur Ice Manufacturers' Association* 84 ITR 607.

regards certain activities, certain members only of the association take advantage of the facilities which it offers does not affect the mutuality of the enterprise.

* * *

Members' clubs are an example of a mutual undertaking; but, where a club extends facilities to non-members, to that extent the element of mutuality is wanting...."

14. *Simon's Taxes*, Vol. B, 3rd Edn., paras B1.218 and B1. 222 (pp. 159 and 167) formulate the law on the point, thus:

> "..it is settled law that if the persons carrying on a trade do so in such a way that they and the customers are the same persons, no profits or gains are yielded by the trade for tax purposes and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered....
>
> * * *
>
> It has been held that a company conducting a members' (and not a proprietary) club, the members of the company and of the club being identical, was not carrying on a trade or business or undertaking of a similar character for purposes of the former corporation profits tax.
>
> * * *
>
> A members' club is assessable, however, in respect of profits derived from affording its facilities to non-members.

Thus, in *Carlisle and Silloth Golf Club v. Smith*, (1913) 3 K.B. 75, where a members' golf club admitted non-members to play on payment of green fees it was held that it was carrying on a business which could be isolated and defined, and the profit of which was assessable to income tax. But there is no liability in respect of profits made from members who avail themselves of the facilities provided for members."

(Emphasis supplied)

15. In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. *Kanga & Palkhivala* explain this concept in *"The Law and Practice of Income Tax"* (8th Edn. Vol. I, 1990) at p. 113 as follows:

"...The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid." The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves : it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects...."

(Emphasis supplied)

16. *British Tax Encyclopedia (I*), 1962 Edn. (edited by G.S.A. Wheatcroft) at pp. 1201, dealing with "mutual trading operations", the law is stated as under:

"For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, so that there is complete identity between contributors and participators. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate; it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in...."

(Emphasis supplied)

17. In *Jones Vs. South-West Lancashire Coal Owners' Association Ltd.*[8], Viscount Cave LC held that "sooner or later, in meal or in malt, the whole of the associations" receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them and the association does not in any true sense make any profit out of their contributions.

18. Therefore, in the case of *Royal Western India Turf Club Ltd.* (supra), since the club realized money from both members and non- members, in lieu of the same services rendered in the course of the same business, the exemption of mutuality could not be granted. This Court held thus:

"As already stated, in the instant case there is no mutual dealing between the members inter se and no putting up of a common fund for discharging the common obligations to each other undertaken by the contributors for their mutual benefit. On the contrary, we have here an incorporated company authorised to carry on an ordinary business of a race course company and that of licensed victuallers and refreshment purveyors and in fact carrying on such a business. There is no dispute that the dealings

8. 1927 AC 827.

of the company with non-members take place in the ordinary course of business carried on with a view to earning profits as in any other commercial concern."

(Emphasis supplied)

19. The *second* feature demands that the actions of the participators and contributors must be in furtherance of the mandate of the association. In the case of a club, it would be necessary to show that steps are taken in furtherance of activities that benefit the club, and in turn its members. Therefore, in *Chelmsford Club* (supra), since the appellant provided recreational facilities exclusively to its members and their guests on "no-profit-no-loss" basis and surplus, if any, was used solely for maintenance and development of the club, the Court allowed the exception of mutuality.

20. The mandate of the club is a question of fact and can be determined from the memorandum or articles of association, rules of membership, rules of the organization, etc. However, the mandate must not be construed myopically. While in some situations, the benefits may be evident directly in the short-run, in others, they may be accruable to an organization indirectly, in the long-run. Space must be made for both such forms of interactions between the organization and its members. Therefore, as Finlay J. observed in *National Association of Local Government Officers Vs. Watkins*[9], where member of a club orders dinner and consumes it, there is no sale to him. At the same time, as in case of *Commissioner of Income Tax, Bihar Vs. Bankipur Club Ltd.*[10], where a club makes 'surplus receipts' from the subscriptions and charges for the various conveniences paid by members, even though there is no direct benefit of the receipts to the customers, the fact that they will eventually be used in furtherance of the services of the club must be considered as a furtherance of the mandate of the club.

9. (1934) 18 TC 499; 503, 506.

10. (1997) 5 SCC 394.

21. *Thirdly*, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. The locus classicus pronouncement comes from Rowlatt, J's observations in *Thomas Vs. Richard Evans & Co. Ltd.*[11] wherein, while interpreting *Styles case* (supra), he held that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. He observed thus:

> "But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders - even if it limited to trading with them - makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people - it does not matter whether they are called members of the company, or participating policy holders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand the New York case, there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the New York case."

(Emphasis supplied)

11. (1927) 11 TC 790

22. In *Commissioner of Income Tax, Madras Vs. Kumbakonam Mutual Benefit Fund Ltd.,*[12] this Court differentiated the facts of the case before it from those of *Styles case* (supra) and denied the exemption of mutuality because of the taint of commerciality. It was observed thus:

> "It seems to us that it is difficult to hold that Style's case applies to the facts of the case. A shareholder in the assessee company is entitled to participate in the profits without contributing to the funds of the company by taking loans. He is entitled to receive his dividend as long as he holds a share. He has not to fulfil any other condition. His position is in no way different from a shareholder in a banking company, limited by shares. Indeed, the position of the assessee is no different from an ordinary bank except that it lends money to and receives deposits from its shareholders. This does not by itself make its income any the less income from business within S. 10 of the Indian Income Tax Act."

23. However, at what point mutuality ends and commerciality begins is a difficult question of fact. It is best summarized in *Bankipur Club* (supra) wherein this Court echoed the following views:

> "…if the object of the assessee company claiming to be a "mutual concern" or "club", is to carry on a particular business and money is realised both from the members and from non-members, for the same consideration by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit earning motive and are alike tainted with commerciality. In other words, the activity carried on by the assessee in such cases, claiming to be a "mutual concern" or "members' club" is a trade or an adventure in the nature of trade and the transactions entered into with the members or non-members alike is a trade/business/ transaction and the resultant surplus is certainly profit - income liable to tax. We should also state, that "at what point, does the relationship of mutuality end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a 'mutual club' or carrying on a trading activity or an adventure in the nature of trade", is largely a question of fact [Wilcock's case - 9 Tax Cases 111, (p.132); C.A. (1925) (1) KB 30 at p. 44 and 45]."

12. AIR 1965 SC 96.

24. In *Royal Western India Turf Club Ltd.* (supra), this Court made similar observations, holding that it is not always the case that a legal entity cannot make profits out of its members. It held as follows :

> "14…The principle that no one can make a profit out of himself is true enough but may in its application easily lead to confusion. There is nothing 'per se' to prevent a company from making a profit out of its own members. Thus a railway company which earns profits by carrying passengers may also make a profit by carrying its shareholders or a trading company may make a profit out of its trading with its members besides the profit it makes from the general public which deals with it but that profit belongs to the members as shareholders and does not come back to them as persons who had contributed them.
>
> Where a company collects money from its members and applies it for their benefit not as shareholders but as persons who put up the fund the company makes no profit. In such cases where there is identity in the character of those who contribute and of those who participate in the surplus, the fact of incorporation may be immaterial and the incorporated company may well be regarded as a mere instrument, a convenient agent for carrying out what the

members might more laboriously do for themselves. But it cannot be said that incorporation which brings into being a legal entity separate from its constituent members is to be disregarded always and that the legal entity can never make a profit out of its own members…"

(Emphasis supplied)

25. This brings us to the facts of the present case. As aforesaid, the assessee is an AOP. The concerned banks are all corporate members of the club. The interest earned from fixed deposits kept with non- member banks was offered for taxation and the tax due was paid. Therefore, we are required to examine the case of the assessee, in relation to the interest earned on fixed deposits with the member banks, on the touchstone of the three cumulative conditions, enumerated above.

26. Firstly, the arrangement lacks a complete identity between the contributors and participators. Till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Hence, in the present case, with the funds of the mutuality, member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of mutuality', and consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the case before us the first condition for a claim of mutuality is not satisfied.

27. As aforesaid, the second condition demands that to claim an exemption from tax on the principle of mutuality, treatment of the excess funds must be in furtherance of the object of the club, which is not the case here. In the instant case, the surplus funds were not used for any specific service, infrastructure, maintenance or for any other direct benefit for the member of the club. These were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality. This contract lacked the degree of proximity between the club and its member, which may in a distant and indirect way benefit the club, nonetheless, it cannot be categorized as an activity of the club in pursuit of its objectives. It needs little emphasis that the second condition postulates a direct step with direct benefits to the functioning of the club. For the sake of argument, one may draw remote connections with the most brazen commercial activities to a club's functioning. However, such is not the design of the second condition. Therefore, it stands violated.

28. The facts at hand also fail to satisfy the third condition of the mutuality principle i.e. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. This principle requires that the funds must be returned to the contributors as well as expended solely on the contributors. True, that in the present case, the funds do return to the club. However, before that, they are expended on non- members i.e. the clients of the bank. Banks generate revenue by paying a lower rate of interest to club-assessee, that makes deposits with them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons, in our opinion, snaps the link of mutuality and thus, breaches the third condition.

29. There is nothing on record which shows that the banks made separate and special provisions for the funds that came from the club, or that they did not loan them out. Therefore, clearly, the club did not give, or get, the treatment a club gets from its members; the interaction between them clearly reflected one between a bank and its client. This directly contravenes the third condition as elucidated in *Styles* and *Kumbakonam Mutual Benefit Fund Ltd.* cases (supra). Rowlatt J., in our opinion, correctly points out that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. In *Thomas Vs. Richard Evans & Co.* (supra), at pp. 822-823, he observed thus:

> "But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders - even if it limited to trading with them - makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people - it does not matter whether they are called members of the company, or participating policy holders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand the New York case, there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the New York case."

(Emphasis supplied)

In the present case, the interest accrues on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank.

30. An almost similar issue arose in *Kumbakonam Mutual Benefit Fund Ltd.* case (supra). The facts in that case were that the assessee, namely, Kumbakonam Mutual Benefit Fund Ltd., was an incorporated company limited by shares. Since 1938, the nominal capital of the assessee was Rs.33,00,000/- divided into shares of Rs.1/- each. It carried on banking business restricted to its shareholders, i.e., the shareholders were entitled to participate in its various recurring deposit schemes or obtain loans on security. Recurring deposits were obtained from members for fixed amounts to be contributed monthly by them for a fixed number of months as stipulated at the end of which a fixed amount was returned to them according to published tables. The amount so returned, covered the compound interest of the period. These recurring deposits constituted the main source of funds of the assessee for advancing loans. Such loans were restricted only to members who had, however, to offer substantial security therefor, by way of either the paid up value of their recurring deposits, if any, or immovable properties within a particular district. Out of the interest realised by the assessee on the loans which constituted its main income, interest on the recurring deposits aforesaid was paid as also all the other outgoings and expenses of management and the balance amount was divided among the members *pro rata* according to their share-holdings after making provision for reserves, etc., as required by the Memorandum or Articles aforesaid. It was not necessary for the shareholders, who were entitled to participate in the profits to either take loans or make recurring deposits.

31. On these facts, as already noted, the Court distinguished *Styles case* (supra) and opined that the position of the assessee was no different from an ordinary bank except that it lent money and received deposits from its shareholders. This did not by itself make its income any less income from business. In our opinion, the ratio of the said decision is on all fours to the facts at hand. The interest earned by the assessee even from the member banks on the surplus funds deposited with them had the taint of commerciality, fatal to the principle of mutuality.

32. We may add that the assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. A façade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality. We feel that the present case is a clear instance of what this Court had cautioned against in *Bankipur Club* (supra), when it said:

> "… if the object of the assessee company claiming to be a "mutual concern" or "club", is to carry on a particular business and money is realised both from the members and from non-members, for the same consideration by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit earning motive and are alike tainted with commerciality. In other words, the activity carried on by the assessee in such cases, claiming to be a "mutual concern" or Members' club" is a trade or an adventure in the nature of trade and the transactions entered into with the members or non-members alike is a trade/business/transaction and the resultant surplus is certainly profit - income liable to tax.

> We should also state, that "at what point, does the relationship of mutuality end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a "mutual club" or carrying on a trading activity or an adventure in the nature of trade" is largely a question of fact [Wilcock's case - 9 Tax Cases 111, (132) C.A. (1925) (1) KB 30 at 44 and 45]."
>
> (Emphasis supplied)

33. In our opinion, unlike the aforesaid surplus amount itself, which is exempt from tax under the doctrine of mutuality, the amount of interest earned by the assessee from the afore-noted four banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to Income-Tax in the hands of the assessee-club.

34. In light of the afore-going discussion, these appeals are bereft of any merit and are thus, liable to be dismissed. Accordingly, we dismiss all the appeals with costs.

R.P. Appeals dismissed.