GHULAM NABI DAR & ORS.
v.
STATE OF J&K & ORS.
(Civil Appeal Nos.6-7 of 2013)

JANUARY 3, 2013

[ALTAMAS KABIR, CJI, SURINDER SINGH NIJJAR AND J. CHELAMESWAR, JJ.]

Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006 – s. 6 – Notification published under, declaring lands under the possession of appellants to be vested in the Custodian of Evacuee Property – Whether vitiated – Held, Yes, since the appellants had been denied an opportunity of explaining that they were not mere occupants of the property in question, but tenants thereof, in which case, neither r.9 nor r.13-C of the 2008 Rules had any application to the facts of the case – Jammu and Kashmir State Evacuees' (Administration of Property) Rules, 2008 – rr.9 and 13C.

Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006 – s. 16 – Protection under – When available – Held: It is available only in respect of evacuee property after a determination to such effect is made – A unilateral declaration is clearly opposed to the principles of natural justice and administrative fair play and cannot be supported.

Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006 – s. 6 – Notification issued under the Act, declaring the land in question to be evacuee property – Occupants claiming to be tenants-at-will of the said land since before the Act came to be enacted, filed writ petition praying inter alia that the said notification be quashed – Writ petition before High Court – Out of Court settlement entered into

between the parties and filed before the High Court – Occupants of the lands in question had surrendered part of the land in favour of the Custodian of Evacuee property while remaining in possession of the remaining part of the land, which were to be settled with them – Pursuant to the Settlement, the State authorities raised constructions on the surrendered lands – But later took the stand that the Settlement stood vitiated on account of non-compliance with r.13C – Held: The Settlement was lawful and within the scope of Sub-Rule (3) of Or.23 CPC – The special facts of the case set the present Agreement/Settlement apart from the cases of grant of lease of vacant lands in terms of r.13C – Since the lands were not vacant, the very first criterion of r.13C, was not satisfied and the lease of the lands were to be granted as part of the settlement packet, which included surrender of 22 kanals of prime land – r.13C had no application to the Settlement arrived at between the parties and the same was not, therefore, vitiated for not putting the lands to auction to determine the premium to be paid for the leases to be granted in respect thereof – It was nobody's case that the Settlement was the outcome of any fraud or was unlawful and the same, having been signed and acted upon, was binding on the parties and could not be withdrawn unilaterally – Jammu and Kashmir State Evacuees' (Administration of Property) Rules, 2008 – r.13C.

On 21-11-1980, the Custodian of Evacuee Property, Jammu and Kashmir, issued a Notification under Section 6 of the Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006, declaring the land in question to be evacuee property. Persons claiming to be in possession of the said land in the capacity of tenants-at-will since before the aforesaid Act came to be enacted, filed writ petition praying inter alia that the said notification dated 21-11-1980 be quashed. During pendency of the writ petition, the High Court restrained the respondents from raising any construction on the

spot. Aggrieved, the Custodian of Evacuee Property filed LPA. While the matters were pending, an out of court settlement was ultimately arrived at between the parties which was submitted before the Court.

After filing the Settlement in Court and asking the Court to take action thereupon, an application was made on behalf of the Custodian of Evacuee Property for leave to withdraw the settlement on the ground that the Chief Minister had reversed the earlier decision taken on 27/28th March, 2005 and, that, accordingly, the deponent, in the affidavit, was not competent to enter into the Settlement with the occupants of the evacuee property, as the decision to do so had been withdrawn by the competent authority. The State Government took the stand that the Settlement stood vitiated on account of non-compliance with Rule 13-C of the Jammu and Kashmir State Evacuees' (Administration of Property) Rules, 2008.

Dispute arose as to whether having entered into a Settlement, which stood concluded and had been acted upon by the State Government by raising constructions on the surrendered lands, could the Settlement have been withdrawn unilaterally only at the instance of the State Government.

The main plank of the submissions made on behalf of the appellants is that the lands in question are not evacuee property, and, that, the appellants were tenants thereof since before the Act came into force. In fact, it is the case of some of the appellants that their predecessors-in-interest were in occupation of the lands in question even prior to 1st March, 1947, and 14th August, 1947, which clearly excluded the appellants from the operation of the provisions of the 2006 Act and the 2008 Rules. The appellants claimed that as "protected tenants", they were entitled to continue in possession of

the lands and, particularly so, in view of the Settlement arrived at between the Appellants and the State authorities.

Disposing of the appeals, the Court

HELD: 1. Section 16 of the of the Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006 deals with occupancy and tenancy rights. It is clear from Section 16 that on account of the non-obstante clause, the provisions of Section 16 will prevail over any other law for the time being in force and the right of occupancy in any land of an evacuee shall not be extinguished. Accordingly, in the event the tenants were enjoying occupancy rights in respect of the lands in their possession, they could not be evicted therefrom by virtue of the Notification published under Section 6 of the 2006 Act. However, the protection under Section 16 will be available only in respect of evacuee property after a determination to such effect is made. A unilateral declaration is clearly opposed to the principles of natural justice and administrative fair play and cannot be supported. [Para 32] [899-C, F-H; 900-A]

2. The Notification published on 21st November, 1980, under Section 6 of the 2006 Act, declaring the lands under the possession of the Appellants to be vested in the Custodian of Evacuee Property, stood vitiated, as the appellants had been denied an opportunity of explaining that they were not mere occupants of the property in question, but tenants thereof, in which case, neither the provisions of Rule 9 nor Rule 13-C of the 2008 Rules would have any application to the facts of this case. [Para 34] [900-C-D]

3. Apart from the above, the Settlement entered into, was dependent on several factors, including the fact that the occupants of the lands in question had surrendered

22 kanals of prime land out of 37 kanals and 5 marlas in favour of the Custodian Department while remaining in possession of 15 kanals and 5 marlas, which were to be settled with them. While, on the one hand, the State authorities took advantage of the Settlement and constructions were raised on the surrendered lands, a stand was later taken on behalf of the State Government that the Settlement stood vitiated on account of non-compliance with the provisions of Rule 13-C of the 2008 Rules. The fact situation of this case is different from the circumstances contemplated under Rule 13-C of the 2008 Rules. In the present case, the lands covered by the Settlement were not vacant and were not, therefore, within the ambit of Rule 13-C when the Settlement was at the gestation stage. It is only under the Settlement that the claims and rights, if any, of the writ petitioners were required to be surrendered and, therefore, the question of actual surrender of possession of 22 kanals of land out of 37 kanals and 5 marlas, was to follow, leaving a balance of 15 kanals and 5 marlas to be allotted to the occupancy rights and tenants-at-will in respect thereof. [Para 35] [900-E-H; 901-A-B]

4. The special facts of the case set the present Agreement/Settlement apart from the cases of grant of lease of vacant lands in terms of Rule 13-C and has, therefore, to be treated differently. Firstly, as the lands were not vacant, the very first criterion of Rule 13-C, was not satisfied and the lease of the lands were to be granted as part of the settlement packet, which included surrender of 22 kanals of prime land. In the special facts of this case, Rule 13-C of the 2008 Rules would have no application to the Settlement arrived at between the parties and the same were not, therefore, vitiated for not putting the lands to auction to determine the premium to be paid for the leases to be granted in respect thereof. It was nobody's case that the Settlement was the outcome

of any fraud or was unlawful and the same, having been signed and acted upon, was binding on the parties and could not be withdrawn unilaterally. [Para 36] [901-B-E]

5. The Settlement arrived at between the parties and filed before the High Court for acceptance is lawful and within the scope of Sub-Rule (3) of Order 23 of the Code of Civil Procedure. It cannot be held that the Settlement was contrary to the provisions of Rule 13-C of the 2008 Rules. The High Court shall proceed to pass appropriate orders for acceptance of the out-of-Court settlement and for adjustment of the rights of the parties in terms thereof. [Para 37] [901-F-G, H; 902-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6-7 of 2013.

From the Judgment & Order dated 25.03.2008 of the High Court of Jammu & Kashmir at Srinagar in CMP Nos. 128 and 525 of 2006 in LPA No. 169 of 2004.

WITH

C.A. Nos. 8-9 of 2013.

Bhaskar Gupta, Zaffar Ahmad Shah, Purnima Bhat for the Appellants.

Sunil Fernandes, Vernika Tomar, Astha Sharma, Insha Mir for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Leave granted.

2. The disputes between the parties relate to lands measuring 37 Kanals 5 marlas comprised in several survey numbers forming the subject matter of OWP No. 480 of 2003 and OWP No. 454 of 2005. On 21st November, 1980, the Custodian of Evacuee Property, Kashmir, issued a Notification

under Section 6 of the Jammu and Kashmir State Evacuees' (Administration of Property) Act, 2006, hereinafter referred to as "the 2006 Act", declaring the aforesaid land to be evacuee property, being in the ownership of one Qamar-ud-Din and other evacuees. Inasmuch as, the writ petitioners in OWP No. 480 of 2003, claiming to the tenants-at-will of the land involved in the writ petition, commenced earth filling, they were stopped from doing so by the Evacuee Department. It is the case of the writ petitioners that when they made inquiries, they were able to lay their hands on records indicating that the lands measuring 11 kanals 6 marlas out of the land comprised in the said survey numbers had been taken over by the Evacuee Department and placed at the supurdnama of the Custodian vide three seizure memos dated 22nd January, 2003 and 1st February, 2003. Claiming that they were in possession of the land in the capacity of tenants-at-will since before the aforesaid Act came to be enacted, the petitioner in OWP No. 480 of 2003 prayed for the following reliefs:-

"(i) it be declared that Section 6 of the J&K Evacuee (Administration of Property) Act, 2006 is unconstitutional;

(ii) it be declared that Section 3 of the Agrarian Reforms Act, 1976 in so far as it excludes the application of Sections 4 and 8 of the tenants of evacuee land is *ultra vires* the Constitution.

(iii) That by an appropriate writ, direction or order including the writ in the nature of certiorari following notification/ communication be quashed:-

1. Notification dated 21.11.1980

2. Communication No. CEPS/GE/2002/2766-70 dated 17.12.2002.

3. Communication No.CG(EP)1020/ 2003/ 167-Misc. K dated 23.1.2003

4. Three seizure memo dated 2.2.2003

5. Communication No. CEPE-JE/2002/3347-50 dated 6.2.2003

6. Communication No. DFI/SG/378 dated 22.2.2003

(iv) That by an appropriate writ, direction or order including a writ in the nature of prohibition respondents be restrained from interfering in the rights of possession of the petitioners in the land and in their levelling of land and from fencing.

(v) ....."

Along with the writ petition, the petitioners also filed a miscellaneous petition seeking interim relief in which it was ordered that the Respondents were not to dispossess the petitioners from the lands in dispute, till the next date. The petitioners were also restrained from raising any construction or changing the nature and character of the said lands during the said period. However, when during the pendency of the writ petition, the Custodian started construction of a shopping complex, in violation of the said order of injunction, the petitioners filed another CMP in which notice was issued on 22nd April, 2004, returnable within four weeks, and till then the parties were directed to maintain status quo. Subsequently, by an order dated 30th September, 2004, the Registrar (Judicial) of the High Court was appointed as Commissioner to visit and submit a report which he did on 7th October, 2004.

3. On receipt of the report and on being satisfied that construction work had been undertaken by the Custodian on the aforesaid lands and was being proceeded with, the High Court by its order dated 19th November, 2004, restrained the Respondents from raising any construction on the spot. Since its earlier orders had been violated by the Custodian, the Station House Officer of the concerned Police Station was

directed to see that the order of the Court was duly complied with, till the petition was considered for admission, or until further orders.

4. Aggrieved by the aforesaid order of the learned Civil Judge, the Custodian of Evacuee Property filed LPA No. 169 of 2004. Other writ petitioners, who also claimed to be in possession of their lands as tenants-at-will and as "protected tenants", have also challenged the validity of the provisions of Section 6 of the Jammu and Kashmir Evacuee (Administration of Property) Act, 2006 and Section 3 of the Agrarian Reforms Act, 1976, insofar as it excludes the application of Sections 4 and 8 to the tenants of evacuee properties.

5. While the matters were pending, serious efforts were made by the parties for an out of court settlement which ultimately fructified in terms of a settlement which was submitted before the Court by way of CMP No. 128 of 2006. The Settlement presented before the Court was duly signed by the Custodian of Evacuee Property, Kashmir and by all the writ petitioners and their counsel. While the above miscellaneous petition was pending consideration, the Advocate General filed an application on 23rd May, 2006, praying that the Settlement be not accepted, which application was later withdrawn. In the meantime, there was a change in the Government and the Custodian was also transferred. The new Custodian took a decision to refer the matter back to the State Government. On 10th October, 2006, the Custodian filed an application praying for withdrawal of the Settlement contained in CMP No. 128 of 2006, and in support of such application, the Custodian placed reliance upon a letter of the Revenue Department in which it was stated that the Revenue Minister had accorded approval for reversing the earlier decision taken on 27/28th March, 2005, for entering into a settlement with the occupants of the evacuee property. The said application for withdrawal of the Settlement filed by the Custodian came to be registered as CMP No. 525 of 2006.

6. The two miscellaneous petitions, being CMP No. 128 of 2006, filed by the parties for disposing of the appeal and writ petitions in terms of the compromise and CMP No. 525 of 2006, filed by the Custodian for withdrawal of the Settlement, came up for consideration before the Division Bench of the Hon'ble Mr. Justice H. Imtiaz Hussain and the Hon'ble Mr. Justice Mansoor Ahmad Mir, on 15th September, 2007. As indicated hereinbefore, the Hon'ble Judges differed on the relief prayed for. While H. Imtiaz Hussain, J. held that the Settlement violated Rule 13-C of the Jammu and Kashmir State Evacuees' (Administration of Property) Rules, 2008, hereinafter referred to as "the 2008 Rules" and could not, therefore, be accepted by the Court, Mansoor Ahmad Mir J. held that the aforesaid Rule did not apply to the facts of the case and that it was nobody's case, that the Settlement arrived at was the outcome of fraud or unlawful. His Lordship was also of the view that the Settlement having been duly signed and acted upon by the parties, the same was binding on the parties and could not be withdrawn unilaterally. His Lordship, therefore, dismissed CMP No. 525 of 2006, filed by the Custodian for withdrawal of the Settlement and directed the listing of LPA No. 169 of 2004 and CMP No. 128 of 2006, for further arguments. In view of such differences, the matter was referred to Hon'ble the Chief Justice in terms of Rule 36(2) of the Jammu and Kashmir High Court Rules, for referring the matter to a Third Judge.

The learned third Judge framed three questions for consideration, namely,

(a) whether Rule 13-C of the 2008 Rules is attracted to the Settlement arrived at bythe parties?

(b) whether the Settlement contravenes Rule 13-C?

(c) whether the Custodian can withdraw from the Settlement unilaterally?

7. Before the learned third Judge it was sought to be urged

on behalf of the State that the chunk of the land in question belonged to one Qamar-ud-Din who had two brothers, namely, Ahmad Din and Imam Din. In the disturbances of 1947, Qamar-ud-Din left the State and became an evacuee and his property was declared as evacuee property. In 1949 or 1950 there was no such record available in the Custodians Department. Subsequently, Ahmad Din submitted three applications dated 11th Assuj 2009, before the Custodian of Evacuee properties with a request that three bungalows along with the premises be declared as non-evacuee property as the entire property was held by the three brothers, Qamar-ud-Din, Ahmad Din and Imam Din. The said three applications were dismissed on grounds of default on 28th July, 1956. An application for review of the said order was filed on 20th November, 1956, which was disposed of by the Custodian by his Order dated 5th September, 1963, whereby the close relatives of the evacuees were appointed as managers of the properties provided they gave an undertaking that they would submit yearly accounts of income and expenditure to the Department and deposit the income from the properties regularly so that the same could be credited against the names of the evacuees. It was, therefore, contended on behalf of the State that in terms of the above Orders, the property came under the control of the Evacuee Department and was being administered through its allottees and managers appointed by it. It was also the stand of the State that once the Custodian came into control of the evacuee properties, he decided to construct a Shopping Mall over the land and allotted the work of construction to a contractor, who started raising the construction thereupon. It was also urged that notwithstanding the claim of the writ petitioners to be in possession of the lands as tenants, their rights, if any, in the land, were extinguished once the Evacuee Property Act came into effect and in any case by virtue of the declaration issued under Section 6 of the 2006 Act.

8. It was also the case of the State that any allotment of lands belonging to the State could not have been settled without

complying with the provisions of Rule 13-C of the 2008 Rules and such contravention invalidated the Settlement which was, therefore, illegal and was rightly declared to be so by H. Imtiaz Hussain, J.

On the other hand, it was contended by Mr. Shah, appearing for the writ petitioners, that the Settlement between the parties was in the nature of a contract and had been arrived at by the parties who enjoyed the freedom to contract. It was also submitted by him that Rule 13-C could have applied if the land to be allotted was vacant. According to Mr. Shah, since the writ petitioners were holding the land as tenants, it was not vacant for the purposes of Rule 13-C of the Rules. According to Mr. Shah, the views expressed by the Hon'ble Justice Mansoor Ahmad Mir was in consonance with Rule 13-C, which in the facts of the case, could not have any application to the lands in question.

9. It was also contended by Mr. Shah that even assuming that Rule 13-C was applicable, even then there was no violation of its provisions as the premium was fixed in the present case by taking into consideration the fact that the writ petitioners were surrendering all their rights in respect of the whole land. The premium was fixed by the members of a committee headed by none else than the Minister-in-Charge of the Custodian Department. Mr. Shah also submitted before the learned third Judge that the rate of Rs.30 lakhs per kanal, as indicated by the Appellants, was not based on any relevant material.

10. As mentioned hereinbefore, the controversy in this case related to the applicability of Rule 13-C in regard to the land in question.

In his judgment and order dated 25th March, 2008, the learned third Judge, Y.P. Nargotra. J. agreed with the view taken by H. Imtiaz Hussain, J. that the parties had violated Rule 13-C of the above-mentioned Rules and the Custodian was, therefore, competent to unilaterally withdraw the same. The

Learned Judge came to such a conclusion on the ground that in terms of the Settlement arrived at, the writ petitioners would have to surrender all their rights over the entire land, which would render the land vacant within the meaning of Rule 13-C.

11. On the question as to whether the Settlement contravened Rule 13-C, the learned third Judge was of the view that the premium to be paid for the lease to be granted to the respondents/writ petitioners under the Settlement had not been determined by putting the lease to an open auction which was in contravention of the mandatory requirement of Rule 13-C. The learned Judge, therefore, held that the Settlement contravened Rule 13-C on the point of determining the premium payable.

12. On the third question as to whether the Custodian could withdraw from the Settlement unilaterally, the learned third Judge held that Rule 3 of Order 23 CPC, which related to compromise of suits, would have application provided it was proved to the satisfaction of the Court that the suit had been adjusted wholly or in part by any lawful agreement or compromise. In such case, the Court would have the discretion to order such agreement or compromise to be recorded and shall pass a decree in accordance therewith in so far as it related to the parties to the suit. The learned third Judge took note of the Explanation to Rule 3 of Order 23 CPC, which provides that an agreement or compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the Rule. Accordingly, in terms of the above Explanation, an agreement not found to be lawful, could be rejected by the Court for the purpose of passing a decree.

The learned third Judge then referred to Section 23 of the Contract Act, 1872, whereby any agreement which the Court regards as immoral or opposed to public policy, is void. The learned third Judge held that the Settlement was directly hit by Section 23 of the Contract Act as it defeated the object of Rule 13-C and was, therefore, unlawful for the purposes of Rule 3

of Order 23 CPC. The Learned Third Judge held that the Settlement being unlawful, the Custodian was entitled to withdraw from the Settlement unilaterally. Agreeing with the views expressed by H. Imtiaz Hussain, J., the learned third Judge observed that by consent or agreement, the parties cannot achieve what is contrary to law and that the Settlement arrived at between the parties could not be accepted.

13. As a result of the above, while the two miscellaneous petitions were disposed of by the High Court, LPA No. 169 of 2004 and OWP No. 480 of 2003, filed by the Appellants challenging the Notification dated 21st November, 1980, are still pending decision in the High Court.

14. These two Appeals arise from the final judgment and order dated 25th March, 2008, passed by the learned third Judge of the Jammu & Kashmir High Court at Srinagar, in the said miscellaneous applications.

15. Briefly stated, the grievance of the Appellants is directed against the order passed by H. Imtiaz Hussain, J., holding that the Settlement violated Rule 13-C of the 2008 Rules and could not, therefore, be accepted by the Court.

16. Appearing for the Appellants, Mr. Zaffar Ahmad Shah, learned senior counsel, reiterated the submissions made before the High Court and submitted that, although, the Evacuee Department issued the Notification dated 21st November, 1980, the same was neither gazetted nor implemented till 1999, when an entry was made in the Revenue Records in that regard. Mr. Shah urged that all the Appellants were occupancy tenants in respect of the lands in which they were in possession and such possession was protected under Section 16 of the 2006 Act. The impugned order of the Custodian General, being contrary to the said provisions, was illegal and liable to be quashed.

17. Mr. Shah contended that the lands in question and the

lands comprised in the surrounding areas were agricultural lands and had been utilised for cultivation of paddy for decades. There was a change in user of the surrounding lands, when a bye-pass road and a new airport was constructed. As a result of such developments and the expansion of the city, a large number of residential houses and commercial establishments came to be constructed in and around the area called Hyder Pora. On account of such unrestrained construction activities, the level of land used in construction work was raised considerably on account of earth filling. The lands of the Appellants, on the other hand, continued to be low-lying and gradually became receptacles of water, making them unfit for cultivation. In order to render the lands usable, the Appellants also resorted to earth filling to prevent collection and stagnation of water. It is, at this stage, that the functionaries of the Evacuee Department intervened and stopped the Appellants continuing with earth filling of the lands in question.

18. Mr. Shah submitted that after purported *ex parte* enquiries were made by the Custodian General's Office, letters were issued to the Custodian of Evacuee Property directing him to resume possession of the lands under the occupation of the Appellants. However, the Appellants were kept completely in the dark regarding such enquiry and the procedure adopted by the Office of the Custodian General, in arriving at a final conclusion regarding the status of the land behind the back of the Appellants, was without legal sanction and was liable to be quashed.

19. Mr. Shah urged that the Appellants and their predecessors-in-interest had been holding and possessing the lands in question much before 14th August, 1947, in their capacity as tenants and are, therefore, protected in law against any action of the Respondents. Mr. Shah urged that, although, the Respondents claimed that the property in question belongs to one Qamer-ud-Din, he was never in possession of the lands as on 1st March, 1947, or on 14th August, 1947 and the

predecessors-in-interest of the Appellants were all along in occupation of the property as tenants and, at no stage, did they cease to occupy the said property.

20. Mr. Shah urged that under Section 5 of the 2006 Act, all evacuee property situated in the State would be deemed to have vested in the Custodian. However, in order to vest in the Custodian, the properties had to be evacuee property. Mr. Shah submitted that in the instant case, Qamer-ud-Din was not an evacuee within the meaning of Section 2(c) of the above Act, nor did he acquire the property in the manner indicated in Section 2(c)(iii) thereof. Mr. Shah submitted that the property has not been registered as evacuee property by the Custodian, in terms of Section 5 of the 2006 Act.

21. The learned counsel then submitted that Section 6 of the 2006 Act was unconstitutional and was liable to be struck down. It was urged that before issuing a notification under Section 6 of the 2006 Act, it was only incumbent upon the authorities to ensure that the principles of natural justice were followed.

22. Mr. Shah contended that the 2008 Rules provide that in respect of any evacuee property which vests in the Custodian, but is in the possession of some other person having no lawful title to such possession, the Custodian may evict the person from such property in the manner indicated in the 2006 Act and the 2008 Rules.

23. Mr. Bhaskar Gupta, learned Senior Advocate, who appeared for the Appellants, Ghulam Mohammad Dar and others, emphasised the use of the expression "vacant" in Rule 13-C of the 2008 Rules. Mr. Gupta submitted that the expression "vacant" has been defined in Black's Law Dictionary to mean "empty, unoccupied, absolutely free, and unclaimed". Accordingly, land in possession of any person prior to coming into force of the Act and the Rules, could not be said to be

vacant land and, accordingly, Rule 13-C of the 2008 Rules would have no application to the lands in question at all.

24. Mr. Gupta submitted that in terms of the Settlement which has been arrived at between the Appellants and the State agencies, the Appellants had surrendered possession of 22 kanals of prime land out of 37 kanals and 5 marlas in favour of the Custodian Department and the Appellants continued to be in possession of the remaining lands. Furthermore, according to Mr. Gupta, by the raising of constructions on the surrendered land, the Settlement had been duly acted upon and the State could not, therefore, now resile therefrom. It was no longer open for the State to contend that they had wrongly arrived at the Settlement. Mr. Gupta also pointed out that the fact that the Appellants were and continued to be in possession of the lands in question, would be evident also from a letter written on behalf of the State Government, in its Revenue Department, to the Custodian General on 10th October, 2006 regarding the Settlement to be filed in LPA No. 169 of 2004 and OWP No. 480 of 2003. It was pointed out that, in the said letter, the State Government had acknowledged the fact that the Appellants were the occupants of the property in question, even though such occupation was referred to as illegal. Mr. Gupta submitted that what was important was the acknowledgement of the fact that the Appellants were in actual possession of the lands in question.

25. It was lastly submitted that Rule 3 of Order 23 CPC permits compromise of suits and where it is proved to the satisfaction of the Court that the same had been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the Court shall order such agreement, compromise or satisfaction to be recorded and then proceed to pass a decree.

26. Mr. Sunil Fernandes, learned counsel, who appeared for the State of Jammu and Kashmir, submitted that the two writ petitions regarding resumption of possession of the lands in

question were still pending before the High Court and the validity of Section 6 of the 2006 Act was the subject matter of challenge therein. The ambit of the dispute between the parties before the High Court was confined to the question of validity of Section 6 of the 2006 Act, as also the challenge to the Settlement arrived at between the parties.

27. Mr. Fernandes urged that the view of the learned third Judge represented the majority view in the matter, which did not warrant any interference. These appeals were, therefore, liable to be dismissed.

28. The main plank of the submissions made on behalf of the Appellants is that the lands in question are not evacuee property, and, that, the Appellants were tenants thereof since before the Act came into force. In fact, it is the case of some of the Appellants that their predecessors-in-interest were in occupation of the lands in question even prior to 1st March, 1947, and 14th August, 1947, which clearly excluded the Appellants from the operation of the provisions of the 2006 Act and the 2008 Rules. On the other hand, as "protected tenants", the Appellants were entitled to continue in possession of the lands and, particularly so, in view of the Settlement arrived at between the Appellants and the State authorities.

29. That, there was a settlement arrived at between the parties is not in issue. It is also not in issue that after filing the Settlement in Court and asking the Court to take action thereupon, an application was made on behalf of the Custodian of Evacuee Property, Jammu and Kashmir, for leave to withdraw CMP No. 128 of 2006 on the ground that the Chief Minister had reversed the earlier decision taken on 27/28th March, 2005 and, that, accordingly, the deponent, in the affidavit, was not competent to enter into the Settlement, as the decision to do so had been withdrawn by the competent authority.

30. The question to be decided is whether having entered

into a Settlement, which stood concluded and had been acted upon by the State Government by raising constructions on the surrendered lands, could the Settlement have been withdrawn unilaterally only at the instance of the State Government?

31. The other branch of submissions made on behalf of the Appellants, which merits consideration, is whether on Section 8 of the 2006 Act having been declared *ultra vires,* a party could be left without a remedy as the right to challenge a Notification issued under Section 6 stood extinguished by such declaration?

32. In addition to the above, the provisions of Section 16 of the 2006 Act may also be noticed. Section 16, which deals with occupancy and tenancy rights provides as follows :-

> "**16. Occupancy or tenancy right not to be extinguished** - Notwithstanding anything contained in any other law for the time being in force, the right of occupancy in any land of an evacuee which has vested in the Custodian shall not be extinguished, nor shall an evacuee or the Custodian, whether as an occupancy tenant, or a tenant for a fixed term of any land, be liable to be ejected or deemed to have become so liable on any ground whatsoever for any default of the Custodian."

It is clear from Section 16 that on account of the non-obstante clause, the provisions of Section 16 will prevail over any other law for the time being in force and the right of occupancy in any land of an evacuee shall not be extinguished. Accordingly, in the event the tenants were enjoying occupancy rights in respect of the lands in their possession, they could not be evicted therefrom by virtue of the Notification published under Section 6 of the 2006 Act.

However, the protection under Section 16 will be available only in respect of evacuee property after a determination to such effect is made. A unilateral declaration is clearly opposed to

the principles of natural justice and administrative fair play and cannot be supported.

33. As far as the second limb of Mr. Shah and Mr. Gupta's submissions is concerned, the same being the subject matter of the writ proceedings pending before the High Court, it would not be proper on our part to express any opinion in respect thereof.

34. Having considered the submissions made on behalf of the respective parties, we are inclined to accept the submission made on behalf of the Appellants that the Notification published on 21st November, 1980, under Section 6 of the 2006 Act, declaring the lands under the possession of the Appellants to be vested in the Custodian of Evacuee Property, stood vitiated, as the Appellants had been denied an opportunity of explaining that they were not mere occupants of the property in question, but tenants thereof, in which case, neither the provisions of Rule 9 nor Rule 13-C of the 2008 Rules would have any application to the facts of this case.

35. Apart from the above, the Settlement which was entered into between the writ petitioners and the State, was dependent on several factors, including the fact that the occupants of the lands in question had surrendered 22 kanals of prime land out of 37 kanals and 5 marlas in favour of the Custodian Department while remaining in possession of 15 kanals and 5 marlas, which were to be settled with them. While, on the one hand, the State authorities took advantage of the Settlement and constructions were raised on the surrendered lands, a stand was later taken on behalf of the State Government that the Settlement stood vitiated on account of non-compliance with the provisions of Rule 13-C of the 2008 Rules. The fact situation of this case is different from the circumstances contemplated under Rule 13-C of the 2008 Rules. In the present case, the lands covered by the Settlement were not vacant and were not, therefore, within the ambit of Rule 13-C when the Settlement was at the gestation stage. It is only under the

Settlement that the claims and rights, if any, of the writ petitioners were required to be surrendered and, therefore, the question of actual surrender of possession of 22 kanals of land out of 37 kanals and 5 marlas, was to follow, leaving a balance of 15 kanals and 5 marlas to be allotted to the occupancy rights and tenants-at-will in respect thereof.

36. The special facts of the case set the present Agreement/Settlement apart from the cases of grant of lease of vacant lands in terms of Rule 13-C and has, therefore, to be treated differently. Firstly, as the lands were not vacant, the very first criterion of Rule 13-C, was not satisfied and the lease of the lands were to be granted as part of the settlement packet, which included surrender of 22 kanals of prime land. We are inclined to agree with the views expressed by Mansoor Ahmad Mir, J. that in the special facts of this case, Rule 13-C of the 2008 Rules would have no application to the Settlement arrived at between the parties and the same were not, therefore, vitiated for not putting the lands to auction to determine the premium to be paid for the leases to be granted in respect thereof. As observed by His Lordship, it was nobody's case that the Settlement was the outcome of any fraud or was unlawful and the same, having been signed and acted upon, was binding on the parties and could not be withdrawn unilaterally.

37. In our view, the Settlement arrived at between the parties and filed before the High Court for acceptance by way of CMP No.128 of 2006 is lawful and within the scope of Sub-Rule (3) of Order 23 of the Code of Civil Procedure. The decision holding the Settlement to be contrary to the provisions of Rule 13-C of the 2008 Rules, as held by H. Imtiyaz Hussain, J. on 15th September, 2007, and affirmed by the third learned Judge, Y.P. Nargotra, J. by his judgment and order dated 25th March, 2008, cannot be sustained and is set aside. Consequently, the view expressed by Mansoor Ahmad Mir, J. is upheld. CMP No.525 of 2006 is, accordingly, dismissed and CMP No.128 of 2006 is allowed. The High Court shall proceed

to pass appropriate orders for acceptance of the out-of-Court settlement and for adjustment of the rights of the parties in terms thereof in the LPA as well as in OWP No.480 of 2003 and OWP No.454 of 2005.

38. Since, in these appeals we have only been called upon to consider as to whether the Settlement arrived at between the parties stood vitiated on account of non-compliance with the provisions of Rule 13-C of the 2008 Rules, we have not expressed any opinion with regard to the second limb of the submissions advanced regarding the constitutionality of Section 6 of the 2006 Act. The said issue is, accordingly, left to the High Court for decision. We make it clear that whatever has been expressed in this judgment, shall not in any way prejudice and/or affect the outcome of the decision of the High Court in the said matter.

39. The appeals are, accordingly, disposed of. There will, however, be no order as to costs.

B.B.B. Appeals disposed of.

HARDEVINDER SINGH
v.
PARAMJIT SINGH & OTHERS
(Civil Appeal No. 102 of 2013)

JANUARY 7, 2013

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

Code of Civil Procedure, 1908 – ss. 96 and 100 – Second appeal – Person aggrieved – Legal injury – Plaintiff claiming to be a co-sharer in respect of the property in question filed suit challenging a Will – Defendant no.5, brother of the plaintiff, supported his case — In appeal at the instance of defendant nos. 1 to 4, the plaintiff entered into a settlement with the contesting defendants who had preferred the appeal and the appellate court set aside the decree passed by the trial court – Second appeal filed by defendant no.5 held not maintainable by the High Court – Held: If a person is prejudicially or adversely affected by the decree, he can maintain an appeal – On facts, the decree prejudicially affects the defendant No.5 and, therefore, he could have preferred an appeal – The grievance pertained to the nature and character of the property and the trial court had decreed the suit – He stood benefited by such a decree – The same having been unsettled, the benefit accrued in his favour became extinct – He had suffered a legal injury by virtue of the overturning of the decree – His legal right was affected – Indubitably, appellant was a person aggrieved and was prejudicially affected by the decree and, hence, the appeal could not have been thrown overboard treating as not maintainable – Matter remitted to High Court.

The plaintiff claiming to be a co-sharer in respect of the property in question filed suit challenging a Will. The defendant no.5, the brother of the plaintiff, supported his

case. In an appeal at the instance of defendant nos. 1 to 4, the plaintiff entered into a settlement with the contesting defendants who had preferred the appeal and the appellate court set aside the judgment and decree passed by the trial court and dismissed the suit. The second appeal filed by defendant no.5 was held not maintainable by the High Court, and therefore the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Sections 96 and 100 of the Code of Civil Procedure, 1908 make provisions for preferring an appeal from any original appeal or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasize, he can prefer an appeal. [Para 13] [911-C-D]

1.2. If a person is prejudicially or adversely affected by the decree, he can maintain an appeal. In the present case, the plaintiff claiming to be a co-sharer filed the suit and challenged the will. The defendant No.5, the brother of the plaintiff, supported his case. In an appeal at the instance of the defendant Nos. 1 to 4, the judgment and decree was overturned. The plaintiff entered into a settlement with the contesting defendants who had preferred the appeal. Such a decree prejudicially affects the defendant No. 5 and, therefore, he could have preferred an appeal. The grievance pertained to the nature and character of the property and the trial court had decreed the suit. He stood benefited by such a decree. The same having been unsettled, the benefit accrued in his favour became extinct. He had suffered a legal injury by virtue of the over turning of the decree. His legal right has been affected. [Para 20] [914-E-H; 915-A]

1.3. Indubitably, the appellant was a person aggrieved and was prejudicially affected by the decree and, hence, the appeal could not have been thrown overboard treating as not maintainable. The judgment of the High Court is set aside, the second appeal preferred by the appellant is treated to be maintainable in law and the matter is remitted to the High Court. [Paras 21, 22] [915-E-F]

Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd. **AIR 1971 SC 374: 1971 (3) SCR 247;** *State of Punjab v. Amar Singh and Another* **AIR 1974 SC 994: 1974 (2) SCC 70;** *Baldev Singh v. Surinder Mohan Sharma and Others* **(2003) 1 SCC 34: 2002 (4) Suppl. SCR 43;** *Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Another* **(1970) 1 SCC 685: 1971 (1) SCR 146;** *Banarsi and Others v. Ram Phal* **AIR 2003 SC 1989: 2003 (2) SCR 22 and** *Phoolchand v. Gopal Lal* **AIR (1967) SC 1470: 1967 SCR 153 – relied on.**

Ayaaubkhan Noorkhan Pathan v. The State of Maharashtra & ors. **2012 (11) SCALE 39 – held applicable.**

Smt. Ganga Bai v. Vijay Kumar and Others **AIR 1974 SC 1126: 1974 (3) SCR 882 – referred to.**

Case Law Reference:

1974 (3) SCR 882	**referred to**	**Para 6, 9**
2003 (2) SCR 22	**relied on**	**Para 6, 18, 19**
1971 (3) SCR 247	**relied on**	**Para 13**
1974 (2) SCC 70	**relied on**	**Para 14**
(2003) 1 SCC 34	**relied on**	**Para 15**
2002 (4) Suppl. SCR 43	**relied on**	**Para 17**
1971 (1) SCR 146	**relied on**	**Para 20**
1967 SCR 153	**relied on**	**Para 19**
2012 (11) SCALE 39	**held applicable**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 102 of 2013.

From the Judgment & Order dated 28.7.2011 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 85 of 2007.

Vipin Gogia, Jaspreet Gogia, Brijendra Singh for the Appellant.

K.K. Mohan, Anand Mishra, Amrender K. Singh, Dr. Vipin Gupta, for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. One Sarabjit Singh filed Civil Suit No. 29 of 1995 for possession of the suit land to the extent of his share treating the will alleged to have been executed in favour of the defendant Nos. 1 to 4 as null and void with the consequential prayer for restraining them from alienating the suit property in any manner. It was set forth in the plaint that the suit land in the hands of his father, Shiv Singh, was ancestral coparcenary and Joint Hindu Family property and he, along with his brothers, the defendant Nos. 5 and 6, constituted a Joint Hindu Family with the father and mother. It was alleged that the defendant Nos. 1 to 4, on the basis of a forged will, forcibly took possession of the land. It was set forth that by virtue of the will, the plaintiff and the defendant Nos. 5 and 6, the co-owners, have been deprived of the legal rights in the suit land. It was the case of the plaintiff that the will was not executed voluntarily by his father, Shiv Singh, and it was a forged one and, therefore, no right could flow in favour of the said defendants.

3. The defendant Nos. 1 to 4 entered contest and supported the execution of the will on the basis that it was voluntary and without any pressure or coercion. That apart, it was contended that the rights of defendant No. 5 had not been affected as a registered gift was executed on 31.3.1980 by late Shiv Singh. The claim of the plaintiff was strongly disputed on the ground that the will had already been worked out since the revenue records had been corrected. The defendant No. 6 resisted the stand of the plaintiff contending, inter alia, that the property was self-acquired and the execution of the will was absolutely voluntary. The defendant No. 5 filed an independent written statement admitting the claim of the plaintiff. It was set forth by him that the suit land was ancestral, a Joint Hindu Coparcenary property and his father Shiv Singh, being the Karta, had no right to bequeath the same in favour of defendant Nos. 1 to 4 to the exclusion of the other rightful owners. That apart, it was contended that the will was vitiated by fraud. A prayer was made to put him in possession of the suit land after carving out his share.

4. The learned trial Judge framed as many as four issues. The plaintiff examined himself as PW-1 and tendered number of documents in evidence which were marked as Exts. P-1 to P-17. The defendant Nos. 1 to 4 examined number of witnesses and got seven documents exhibited. The defendant No.5 supported the evidence led by the plaintiff. In rebuttal, the plaintiff examined the Record Keeper of Medical College Rohtak as PW-2 and Dr. A.K. Verma as PW-3 and brought on record four forms, Exts. P-18 to P-19A. The learned trial Judge, on appreciation of the evidence brought on record, came to hold that the suit land was a Joint Hindu Family property; that defendant Nos. 1 to 4 had failed to dispel the suspicious circumstances in the execution of the will in favour of defendant Nos. 1 to 4 and, hence, the will was null and void; that the mutation did not create any impediment on the rights of the plaintiff and other natural heirs of the testator; and that they are entitled to get joint possession of the suit land as per their

shares in accordance with the law of natural succession.

5. On an appeal being preferred by the three beneficiaries of the will (as the original defendant No. 1 had died), the learned appellate Judge came to hold that the property held by Shiv Singh, the predecessor-in-interest of the parties to the suit, was not ancestral, but self-acquired and, hence, he was competent to alienate the same in any manner as he liked; that the will dated 6.7.1989, Exh. D-2, in favour of original defendant No. 1, his wife who had expired by the time the appeal was filed and the defendant Nos. 2 to 4, his grandsons, was validly executed and that the finding recorded by the learned trial Judge on that score was unsustainable. Be it noted, the learned appellate Judge took note of the fact that Sarabjit Singh had challenged the said will but, on account of settlement with the appellants before the appellate court, had practically withdrawn from the litigation. Being of this view, he set aside the judgment and decree passed by the learned trial Judge and dismissed the suit with costs.

6. The defendant No. 5 preferred R.S.A. No. 85 of 2007 before the High Court. The learned single Judge, upon hearing the learned counsel for the parties and placing reliance on *Smt. Ganga Bai v. Vijay Kumar and Others*[1] and *Banarsi and Others v. Ram Phal*[2], came to hold that the appeal was not maintainable at the instance of defendant No. 5 under Section 100 of the Code of Civil Procedure, 1908 (for short "the Code").

7. We have heard Mr. Vipin Gogia, learned counsel for the appellant, and Mr. K.K. Mohan, learned counsel appearing for the respondents.

8. At the very outset, we must state that the High Court has accepted the preliminary objections raised by the respondents as regards the maintainability of the appeal. While accepting

1. AIR 1974 SC 1126.
2. AIR 2003 SC 1989.

the preliminary objection, the High Court has opined that the plaintiff and the defendant Nos. 1 to 4 and 6 had accepted the judgment and decree; that the defendant No. 5 cannot be regarded as an aggrieved party to assail the impugned decree invoking the jurisdiction of the High Court under Section 100 of the Code; that appeal being a creature of the statute, the right to appeal inheres in one and it stands in a distinct position than that of a suit and, hence, no appeal could lie against a mere finding for the simple reason that the Code does not provide for such an appeal; and that the suit having been dismissed by virtue of the dislodging of the decree by the first appellate court, the regular second appeal could not be filed by the defendant No. 5. Hence, the present appeal by the said defendant-appellant.

9. As indicated earlier, to arrive at such a conclusion, reliance was placed on the decision in *Smt. Ganga Bai v. Vijay Kumar and Others* (supra) wherein a distinction was drawn between the inherent right to file a suit unless the suit is statutorily barred and the limitations in maintaining an appeal. In that case, the defendant Nos. 2 and 3 had preferred an appeal before the High Court challenging the finding recorded by the trial court. Thereafter, a challenge was made partly to the preliminary decree. This Court took note of the fact that the appeal preferred by the said defendants was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial court that the partition was not genuine. It was observed by this Court that to maintain an appeal, it requires authority of law. After referring to Sections 96(1), 100, 104(1) and 105 of the Code, the Bench observed as follows: -

> "17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow

> that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court."

10. Thereafter, the Court opined that the High Court mixed up two distinct issues, namely, (i) whether the defendants 2 and 3 were competent to file an appeal if they were aggrieved by the preliminary decree and (ii) whether the appeal as filed by them was maintainable. It was opined that if the defendants 2 and 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal, but as they had not filed an appeal against the preliminary decree, the question whether they were aggrieved by that decree and could file an appeal therefrom was irrelevant. The Bench held that the appeal was directed against the finding given by the trial court which was against them, hence, it was not maintainable. Be it noted, this Court also addressed with regard to the issue whether defendant Nos. 2 and 3 were aggrieved by the preliminary decree and opined that the appeal was against a mere finding and the preliminary decree, in fact, remained unchallenged for a long period.

11. Another aspect which was addressed by the Bench was whether the finding would operate as res judicata in the subsequent proceeding. This Court observed that the finding recorded by the trial court that the partition was a colourable transaction was unnecessary for the decision of the suit because even if the court were to find that the partition was genuine, the mortgage would only have bound the interest of the father as the debt was not of a character which, under the Hindu Law, would bind the interest of the sons. That apart, the matter relating to the partition being not directly and substantially in issue in the suit, the finding that the partition was sham could not operate as res judicata so as to preclude a party aggrieved by the finding from agitating the question covered by the finding in any other proceeding.

12. On a keen scrutiny of the facts of the aforesaid case and the dictum laid down therein, in our considered opinion, it does not really apply to the case at hand, regard being had to the obtaining factual matrix and further, the decision was rendered before the amendment was brought into the Code prior to 1976. Therefore, we have no hesitation in saying that the High Court has fallen into error in placing reliance on the said pronouncement.

13. Presently, it is apt to note that Sections 96 and 100 of the Code make provisions for preferring an appeal from any original appeal or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasize, he can prefer an appeal. In this context, a passage from *Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd.*[3] is worth noting: -

> "It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment."

14. In *State of Punjab v. Amar Singh and Another*[4], Sarkaria, J., while dealing with the maintainability of an appeal by a person who is not a party to a decree or order, has stated thus: -

> "84. Firstly there is a catena of authorities which, following the doctrine of Lindley, L.J., in re Securities Insurance Co., (1894) 2 Ch 410 have laid down the rule that a person who is not a party to a decree or order may with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it. As a rule, leave to appeal will not be refused to a person who might have been made ex nominee a party – see *Province of Bombay v. W.I. Automobile Association,* AIR 1949 Bom 141; *Heera Singh v. Veerka,* AIR 1958 Raj 181 and *Shivaraya v. Siddamma,* AIR 1963 Mys 127; *Executive Officer v. Raghavan Pillai,* AIR 1961 Ker 114. In re B, an Infant (1958) QB 12; *Govinda Menon v. Madhavan Nair,* AIR 1964 Ker 235."

3. AIR 1971 SC 374.

4. AIR 1974 SC 994.

15. In *Baldev Singh v. Surinder Mohan Sharma and Others*[5], a three Judge-Bench opined that an appeal under Section 96 of the Code would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. In the said case, while dealing with the concept of 'person aggrieved', the Bench observed thus:-

> "A person aggrieved to file an appeal must be one whose right is affected by reason or the judgment and decree sought to be impugned. It is not the contention of Respondent 1 that in the event the said judgment and decree is allowed to stand, the same will cause any personal injury to him or shall affect his interest otherwise."

16. Be it noted, in the said case, the challenge in appeal was to the dissolution of marriage of the appellant therein and his first wife which, this Court held, would have no repercussion on the property in the suit and, therefore, the High Court was not justified in disposing of the civil revision with the observation that the revisionist could prefer an appeal.

17. In *Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Another,*[6] it was observed that the right given to a respondent in an appeal is to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross appeal. In the said decision, emphasis was laid on the term 'decree'.

5. (2003) 1 SCC 34.

6. (1970) 1 SCC 685.

18. After the 1976 amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi and Others* v. *Ram Phal* (supra), it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.

19. At this juncture, we may usefully reproduce a passage from *Banarsi and Others* (supra) wherein it has been stated thus: -

> "Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the *person who can file an appeal*. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one *aggrieved* by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See *Phoolchand v. Gopal Lal*[7]*, Jatan Kumar Golcha v. Golcha Properties (P) Ltd.* (supra) and *Ganga Bai v. Vijay Kumar* (supra).) No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against *decree* and not against *judgment*."

20. Though the High Court has referred to the said pronouncement, yet it has not applied the ratio correctly to the facts. This Court has clearly stated that if a person is prejudicially or adversely affected by the decree, he can maintain an appeal. In the present case, as we find, the plaintiff claiming to be a co-sharer filed the suit and challenged the will. The defendant No. 5, the brother of the plaintiff, supported his case. In an appeal at the instance of the defendant Nos. 1 to 4, the judgment and decree was overturned. The plaintiff entered into a settlement with the contesting defendants who had preferred the appeal. Such a decree, we are disposed to think, prejudicially affects the defendant No. 5 and, therefore, he could have preferred an appeal. It is worthy to note that the grievance pertained to the nature and character of the property and the trial court had decreed the suit. He stood benefited by such a decree. The same having been unsettled, the benefit accrued in his favour became extinct. It needs no special

7. AIR 1967 SC 1470.

emphasis to state that he had suffered a legal injury by virtue of the over turning of the decree. His legal right has been affected. In this context, we may refer to a recent pronouncement in *Ayaaubkhan Noorkhan Pathan v. The State of Maharashtra & Ors.*[8] wherein this Court has held thus: -

> "A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardized. (Vide: *Shanti Kumar R. Chanji v. Home Insurance Co. of New York,* AIR 1974 SC 1719; and *State of Rajasthan & Ors. v. Union of India & Ors.,* AIR 1977 SC 1361)."

21. Though the said judgment was delivered in a different context, yet it is applicable to the obtaining factual matrix regard being had to the conception of legal injury. Thus, indubitably, the present appellant was a person aggrieved and was prejudicially affected by the decree and, hence, the appeal could not have been thrown overboard treating as not maintainable.

22. In view of the aforesaid premised reasons, we allow the appeal, set aside the judgment of the High Court, treat the second appeal preferred by the present appellant to be maintainable in law and remit the matter to the High Court with a request to decide the appeal within a period of six months. Needless to say, we have not expressed any opinion on any of the aspects which pertain to the merits of the case. In the facts and circumstances of the case, the parties shall bear their respective costs.

B.B.B. Appeal allowed.

8. 2012 (11) SCALE 39.

STATE OF BIHAR AND OTHERS
v.
NIRMAL KUMAR GUPTA
(Civil Appeal No. 128 of 2013)

JANUARY 08, 2013

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

Bihar Excise (Settlement of Licences for Retail Sale of Country/Spiced Country Liquor) Rules, 2004 – rr. 19, 20 and 24 – Settlement of excise shops in favour of auction-purchaser – Default in payment of advance security – Despite the default, licence issued – In view of the default, demand for licence fee raised from the date of settlement till the date of issuance of licence – High Court held that default would be deemed to be condoned as the licence was issued despite the default – Held: The purchaser failed to comply with r.19 – The default cannot be deemed to be condoned in view of the nature of trade in question – As per r. 24, the purchaser is required to pay licence fee from the date of settlement – Hence, the demand for licence fee is justified.

Pursuant to sale notification, excise shops were settled in favour of the respondent on 5th July, 2006. The respondent was required to pay 1/4th of the annual licence fee as advance security money. He failed to do so in time. He deposited the requisite amount in three instalments. Licence was issued on 5th July, 2006. Since the respondent failed to comply with the conditions of the licence ie. delay in payment of advance deposit, a demand for licence fee was raised for the period commencing 5th June, 2006 to 5th July, 2006. High Court allowed the writ petition of the respondent holding that the default in payment of advance security amount would be deemed to have been condoned in view of the fact that despsite the default, licence was issued; and that the

respondent was liable to pay from the date of issuance of licence and not from the date of settlement. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The respondent was required to pay 1/4th of the annual licence fee as advance security money but he failed to do so in time. He deposited the requisite amount in three instalments. Thus, the respondent failed to comply with r. 19 of Bihar Excise (Settlement of Licences for Retail Sale of Country/Spiced Country Liquor) Rules, 2004. [Para 19] [926-D-F]

2. Rule 20 of 2004 Rules clearly lays the postulate that if the advance security amount is not deposited in accordance with the time limit prescribed u/r. 19, the settlement and the licence, if issued, shall stand cancelled and the deposited sum, if any, shall be forfeited to the Government. Thus, there is a distinction between settlement and issue of licence. [Para 14] [924-G]

3. The principle of condonation of default by way of conduct cannot be attracted in the present case. On the touchstone of the nature of the trade, the role of the State, the economic concept of the policy, limited attractability of Article 14 of the Constitution as regards the legislation or policy, the restriction inherent in the policy and the duty of the court, there could not have been condonation of default. Such a concept is alien to the present nature of trade and a licencee cannot claim any benefit under the same, as the whole thing is governed by the command of the Rules. [Paras 21 and 31] [927-G; 931-A-B, D]

Har Shandar and Ors. etc. v. The Deputy Excise and Taxation Commissioner and Ors. etc. **AIR 1975 SC 1121: 1975 (3) SCR 254 ;** *M/s. Khoday Distilleries Ltd. v. State of*

Karnataka **(1995) 1 SCC 574: 1994 (4) Suppl. SCR 477 – followed.**

Amar Chandra Chakraborty v. The Collector of Excise, Govt. of Tripura, Agartala and Ors. **AIR 1972 SC 1863: 1973 (1) SCR 533 ;** *Nashirwar etc. v. State of Madhya Pradesh and Ors.* **AIR 1975 SC 360: 1975 (2) SCR 861 ;** *State of M.P. and Ors. etc. v. Nandlal Jaiswal and Ors. etc.* **AIR 1987 SC 251: 1987 (1) SCR 1;** *M/s. Ugar Sugar Works Ltd. v. Delhi Administration and Ors.* **AIR 2001 SC 1447: 2001 (2) SCR 630 ;** *State of M.P. and Ors. etc. etc. v. Nandlal Jaiswal and Ors. etc. etc.* **AIR 1987 SC 251: 1987 (1) SCR 1;** *P.N. Krishna Lal and Ors. v. Govt. of Kerala and Anr.* **1995 Supp (2) SCC 187: 1994 (5) Suppl. SCR 526;** *Secretary to Govt., Tamil Nadu and Anr. v. K. Vinayagamurthy* **AIR 2002 SC 2968: 2002 (1) Suppl. SCR 683 ;** *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.* **(2004) 11 SCC 26: 2003 (5) Suppl. SCR 930 – relied on.**

4. The interpretation placed by the High Court that the auction-purchaser is liable to pay from the date of issuance of licence but not from the date of the settlement cannot be accepted, as that runs counter to the plain language of Rule 24. The respondent had availed the benefit of the licence being fully aware of the Rules, Notification and the terms incorporated in the licence. The Rules provide that he has to pay from the date of the settlement and in the instant case, the settlement took place on 5th June, 2006. In view of what has been engrafted in the Rules, there cannot be any trace of doubt that the respondent has to be made liable to pay the licence fee from the date of the settlement. [Para 31] [931-B-E]

Case Law Reference:

1973 (1) SCR 533	**relied on**	**Para 21**
1975 (2) SCR 861	**relied on**	**Para 22**

1975 (3) SCR 254	**followed**	**Para 23**
1987 (1) SCR 1	**relied on**	**Para 24**
1994 (4) Suppl. SCR 477	**followed**	**Para 25**
2001 (2) SCR 630	**relied on**	**Para 26**
1987 (1) SCR 1	**relied on**	**Para 27**
1994 (5) Suppl. SCR 526	**relied on**	**Para 28**
2002 (1) Suppl. SCR 683	**relied on**	**Para 29**
2003 (5) Suppl. SCR 930	**relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 128 of 2013.

From the Judgment & Order dated 18.11.2008 of the High Court of Judicature at Patna in C.W.J.C., No. 16577 of 2008.

Gopal Singh for the Appellants.

Shantanu Sagar, Priti Rashmi, Smarhar Singh, T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The pivotal issue that emerges for consideration in this appeal is whether the Division Bench of the High Court of Judicature at Patna has correctly interpreted the effect and impact of the Bihar Excise (Settlement of Licences for retail sale of country/spiced country liquor) Rules, 2004 (for short "the Rules") and the sale notification published by the Collector of Kishanganj in Excise Form 127 for various excise shops in groups in the said district for the year 2006-07 and the terms of licence.

3. As the factual matrix would exposit, the Collector,

Kishanganj, got the sale notification in Excise Form 127 issued for settlement of various excise shops in various groups in the district of Kishanganj for the financial year 2006-07 which stipulated that the settlement shall be made on 23rd March, 2006 on auction-cum-tender basis and, accordingly, applications were invited from interested persons. As the settlement could not be effected in respect of group 'ka' shops in the said district, the Collector issued a second notification on 17th May, 2006 for the said group 'ka' which consisted of six country spirit shops and three spiced country spirit shops. On 5th June, 2006, the group 'ka' excise shops were settled in favour of the respondent at a monthly licence fee of Rs.8,29,600/-. The respondent deposited the advance security of Rs.8,29,594/- on 7th June, 2006 and further Rs.8,29,600/- on 22nd June, 2006. The Collector, Kishanganj moved the Commissioner for his approval and the same was granted on 1st July, 2006 in the office of the Collector on 5th July, 2006 and on that day itself, the licence was issued in favour of the respondent-licencee. It is the case of the appellant that as the respondent did not deposit the requisite 1/4th amount of the annual licence fee as advance security as prescribed under the Rules but did so in three instalments, there was delay in obtaining the approval from the Excise Commissioner in terms of Rule 17(kha) of the Rules. Despite the delay in the payment of the advance deposit, the Collector had recommended his case for approval and, eventually, the Commissioner approved the grant of licence in respect of group 'ka' shops and, ultimately, the licence was issued, as stated earlier, on 5th July, 2006.

4. As there was breach of the conditions of the licence, a demand was raised for the period commencing 5th June, 2006 to 5th July, 2006 by the Excise Superintendent, Araria-cum-Kishanganj on 27th March, 2007. On receipt of the demand notice, the respondent moved the Excise Superintendent on 29th April, 2007 asking him to withdraw the demand on the ground that he had not utilized the privilege during that period.

Thereafter, he challenged the demand notice before the Excise Commissioner, who rejected the application vide order dated 18th September, 2008. Being grieved by the said order he moved the High Court invoking the writ jurisdiction in CWJC No. 16577 of 2008.

5. The High Court referred to Rules 16, 17, 20, 22 and 24 and recorded its opinion in the following manner: -

> "That group of shops have been settled in favour of the petitioner in the midst of excise year, is not in dispute. It is also a fact that on 5th June, 2006, the bid made by the petitioner for group 'ka' excise shops of Kishanganj District was highest and accepted by the auctioning authority by such acceptance is subject to approval of the Excise Commissioner. There also does not seem to be any dispute that there was some default on the part of the petitioner in payment of the advance security amount. However, the default seems to have been condoned as despite the said default, his bid dated 5th June, 2006 was not cancelled and licence was issued in Form 26C of the Rules on 5th July, 2006. Rules 16 and 17 of the Rules, when read together, would show that the final acceptance of the bid by the auctioning authority, by itself, does not entitle the bidder to get the licence as the said bid has to be accepted by the Commissioner of Excise and only after it is accepted by the Commissioner, then the licence is issued. In the backdrop of the aforesaid legal position, when we turn to the facts of the present case, it would be seen that although highest bid of the petitioner was accepted on 5th June, 2006 but it was only on 30th June, 2006 that the Licensing Authority recommended to the Commissioner of Excise for approval of settlement and it was approved by the Excise Commissioner, Bihar on 1st July, 2006 and after receipt of the approval from the Excise Commissioner on 5th July, 2006, the licence was issued by the Licensing Authority on that date. Surely, in the backdrop of the facts that the licence was issued on 5th July, 2006 the petitioner could not have been fastened with the liability to pay licence fee from 5th June, 2006."

[Underlining is ours]

6. Questioning the correctness of the aforesaid conclusion, it is submitted by Mr. Gopal Singh, learned counsel for the State of Bihar, that the High Court has fallen into error by construing that the default has been condoned though there is no concept of condonation in such a trade. It is urged by him that as the requisite advance licence fee was not deposited as per the Rules, the approval could not be obtained earlier and hence, the Department, not being at fault, should not suffer the loss of revenue more so when the licencee had accepted the conditions enumerated in the licence. That apart, submits Mr. Singh, as per the Rules, in such a situation, the respondent was legally bound to pay the licence fee from the date of settlement.

7. Mr. Shantanu Sagar, learned counsel appearing for the respondent, per contra, has submitted that the High Court has correctly determined the controversy that the liability would be from the date of issue of the licence and not earlier than that, for unless the licence is issued, he cannot trade in liquor and further it cannot be said that the State has parted with the exclusive privilege.

8. To appreciate the controversy, it is necessary to refer to certain Rules. Rule 16 of the Rules deals with the acceptance of bid or tenders. It reads as follows: -

> "16. **Acceptance of bid or tenders.**– (1) The Auctioning Authority shall not be bound to accept the highest bid or tender or any bid. If the highest bid or tender is not accepted, the licensing officer shall instantaneously declare the date of fresh auction, mentioning the reasons. In such a circumstance, the entire deposited advance money will be refunded to those applicants who do not want to

participate in subsequent auction.

(2) If the bid amount in any auction is finally accepted, any subsequent offer with regard to that bid shall not be considered. No further negotiation shall be entertained by the Licensing Authority or the officer conducting the auction."

9. Rule 17 of the Rules which provides for final acceptance of the bid is as follows: -

"17. **Final acceptance of bid.** – (a) The recommendation to grant exclusive privilege of retail sale for the shop or group of shops to the person bidding highest, and acceptance under Rule 16, shall be sent to the Commissioner of Excise by the Licensing Officer, and after his acceptance a licence will be issued.

(b) The amount of highest bid, accepted will be the annual amount of licence fee."

10. On a perusal of the aforesaid two Rules, it is vivid that the Licensing Officer conducting auction accepts the bid and, thereafter, sends his recommendation for grant of exclusive privilege of retail sale for the shops or group of shops to the Commissioner and after his acceptance, the licence is issued. The pertinent part of this Rule is that the amount of highest bid accepted would be the annual amount of licence fee.

11. Rule 19 provides for payment of advance security in the manner prescribed therein. The said Rule is reproduced hereinbelow: -

"19. **Payment of Advance Security.** – After the declaration of acceptance of the highest bid the Licensing Authority, one fourth, portion of the annual licence fee shall be paid by the highest bidder as advance security in the following manner for due execution of a contract: -

(a) An amount equivalent to sixth portion of annual licence fee shall be immediately deposited in cash or in the form of Bank Draft. The amount of cash/ Bank Draft and that of advance money deposited previously under Rule 11(a) and Rule 11(c) respectively, shall be adjusted in part from security amount.

(b) The payable remaining amount on account of advance security shall have to be deposited within ten days of auction or before commencement of the licence whichever is earlier."

12. On a plain reading of the said Rule, it is manifest that the highest bidder has to immediately deposit one fourth of the annual licence fee as advance security money in the manner provided in sub-clauses (a) and (b) of the Rule.

13. Rule 20 deals with the consequences of default in advance security. It reads as under: -

"20. **Default in advance security.** – In case of failure to deposit the amount of advance security, as mentioned in Rule 19, within the prescribed time, the settlement and the licence, if issued, shall stand cancelled and the deposited amount, if any, shall be forfeited to the Government. In such a circumstance, a re-auction or alternative arrangement shall be made by the Licensing Authority."

14. The aforesaid Rule, when properly scrutinized, clearly lays the postulate that if the advance security amount is not deposited in accordance with the time limit prescribed under Rule 19, the settlement and the licence, if issued, shall stand cancelled and the deposited sum, if any, shall be forfeited to the Government. Thus, there is a distinction between settlement and issue of licence.

15. Rule 23 deals with adjustment/refund of advance

security amount. It stipulates that the security amount referred to in Rule 19 shall be refunded at the end of the settlement period if all the dues and claims of the State Government with regard to the auctioned shop or group of shops have already been paid by the licencee.

16. Rule 24 deals with the commencement of the period of licence. It is as follows: -

> "24. **Commencement of the period of licence.** – A licence issued in favour of any auction-purchaser shall be effective from 1st April of the excise year unless the Licensing Authority orders otherwise. The auction-purchaser shall be liable to pay the bid money from the first day of the licence period, even if the licence has been issued thereafter.
>
> Provided that if any shop or a group of shops is settled in the midst of the excise year, the licence shall commence from the date of settlement of the shop or the group of shops.
>
> The Licensing Authority shall mention details of the shops/ licences to be settled and annual minimum guaranteed quantity to be lifted under those licences and the reserved fee thereof, in the sale notification for every excise year."

17. The said Rule has to be carefully x-rayed and understood. It clearly lays down that the licence shall be effective from 1st April of the excise year and the auction-purchaser shall be liable to pay the bid money from the first day of the licence period, even if the licence has been issued thereafter. The proviso further stipulates that if any shop or a group of shops is settled in the midst of the excise year, the licence shall commence from the date of settlement of the shop or the group of shops.

18. The High Court, interpreting the Rule position, has opined that the shops were settled in favour of the respondent

in the midst of the year, i.e., on 5th June, 2006, and after obtaining the approval on 1st July, 2006 from the Excise Commissioner, the licence was issued by the Licensing Authority on 5th July, 2006, and, therefore, the demand of licence fee for the period from 5th June, 2006 to 5th July, 2006 is not sustainable.

19. As the factual matrix would reveal, the notification in Form No. 127 was issued on 23rd March, 2006. The terms and conditions of the settlement of excise shops were duly incorporated in the sale notification and as per Rule 8, the terms and conditions mentioned in the notification are deemed to be included in the conditions of the licence. As per the first notification, all the three country spirit shops could not be settled and further steps were taken for settlement and, eventually, the bid of the respondent was accepted on 5th June, 2006 with the annual licence fee of Rs.99,55,200/- or at a monthly fee of Rs.8,29,600/-. The respondent was required to pay 1/4th of the annual licence fee as advance security money but he failed to do so in time. He deposited the requisite amount in three instalments, i.e., first on 7th June, 2006, second on 22nd June, 2006 and third on 17th July, 2006. As per Rule 19(a), he was required to deposit 1/6th portion of the annual licence fee immediately in cash or in the form of bank draft. The remaining amount of advance security was to be deposited within ten days of the auction or before the commencement of the licence. Thus, the respondent failed to comply with the said Rule. However, the Collector recommended his case on 30th June, 2006 which was accepted on 1st July, 2006 and the licence was issued on 5th July, 2006. It is worthy to note that thereafter, demand notice of Rs.16,03,893/- was issued by the Excise Superintendent. The Commissioner took note of the fact that out of Rs.74,36,071/-, the licencee had paid Rs.66,36,794/- and, hence, a sum of Rs.7,99,277/- remained to be paid. Be it noted, on 3rd March, 2007, the licence was cancelled for breach of other conditions and in the present case, we are not concerned with those conditions, for the controversy in

praesenti only relates to the demand commencing 5th June, 2006 to 5th July, 2006.

20. The High Court has opined that the State had not parted with the exclusive privilege till the licence was issued. Under Rule 24, a licence issued in favour of the auction-purchaser is effective from 1st April of the excise year unless the Licensing Authority orders otherwise and the auction purchaser is liable to pay the bid money from the first day of the licence period even if the licence has been issued thereafter. That apart, he is supposed to pay the licence fee from the commencement of the settlement period and the licence commences from the date of the settlement. In the case at hand, it was settled on 5th June, 2006. The licence was issued on 5th July, 2006. The principle of condonation of default has been taken recourse to by the High Court on the foundation that despite default in making deposit of advance security, the licensing officer recommended his case for approval to the Commissioner of Excise. The default, as we perceive, comes into play if there is violation of Rule 19 which stipulates for advance security. There is no dispute over the fact that there was delay. The respondent was clearly responsible for the same. The licensing officer thought it appropriate to recommend his case and the Excise Commissioner did approve it and on receipt of the approval, the licence was issued on the same day. The respondent accepted the licence knowing fully well the terms and conditions of the licence and that he has to pay the licence fee from the date of the settlement.

21. At this juncture, we may usefully address to the issue whether in a case of this nature, the principle of condonation of default by way of conduct can be attracted. First of all, under the Rules, the authorities are entitled to forfeit the amount deposited when there is non-compliance of the Rules. It is to be borne in mind that the nature of the trade has also its own significance. In *Amar Chandra Chakraborty v. The Collector*

of Excise, Govt. of Tripura, Agartala and Others[1], this Court held thus: -

> "Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control which has been in force in the whole of India since several decades. In view of the injurious effect of excessive consumption of liquor on health this trade or business must be treated as a class by itself and it cannot be treated on the same basis as other trades while considering Article 14."

22. In the case of *Nashirwar etc. v. State of Madhya Pradesh and Others*[2], this Court opined that the State has the exclusive right or privilege in manufacturing and selling of liquor and a citizen has no fundamental right to do business in liquor. It has been further ruled that it is within the police power of the State to enforce public morality by prohibiting trade in noxious or dangerous goods.

23. In *Har Shandar and Others etc. v. The Deputy Excise and Taxation Commissioner and Others etc.*[3], the Constitution Bench reiterated the principles that there is no fundamental right to do trade or business in intoxicant and the State has the authority to prohibit every form of activity in relation to intoxicant including manufacture, storage, export, import, sale and possession. It has also been laid down that a wider right to prohibit absolutely would include the narrower right to permit dealings in intoxicants in such terms of general application as the State deems expedient.

24. In *State of M.P. and Others etc. v. Nandlal Jaiswal and Others etc.*[4], this Court held that trading in liquor is inherently punitive in nature.

1. AIR 1972 SC 1863.
2. AIR 1975 SC 360.
3. AIR 1975 SC 1121.
4. AIR 1987 SC 251.

25. In *M/s. Khoday Distilleries Ltd. v. State of Karnataka*[5], the Constitution Bench has ruled that the right to carry on occupation, trade or business does not extend to trade or business or any activities which are injurious and against the welfare of the general public. It is further held therein that a citizen has no fundamental right to do business in intoxicant as liquor.

26. In *M/s. Ugar Sugar Works Ltd. v. Delhi Administration and Others*[6], this Court reiterated the said principle and emphasized on the regulatory powers of the State.

27. In *State of M.P. and Ors. etc. etc. v. Nandlal Jaiswal and Ors. etc. etc.*[7], a two-Judge Bench, while expressing the view that Article 14 of the Constitution is attracted to grant of exclusive right or privilege for manufacture and sale of liquor as it involves the State largesse, has stated thus:-

> "33. But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or *mala fide*."
>
> [emphasis supplied]

5. (1995) 1 SCC 574.
6. AIR 2001 SC 1447.
7. AIR 1987 SC 251.

28. In *P.N. Krishna Lal and Ors. v. Govt. of Kerala and Anr.*[8], the Court expressed thus:-

> "28....dealing in liquor inherently pernicious or dangerous goods which endangers the community or subversive of morale, is within the legislative competence under the Act. The State has thereby the power to prohibit trade or business which is injurious to the health and welfare of the public and the elimination and exclusion from the business is inherent in the nature of liquor business. The power of the legislature to evolve the policy and its competence to raise presumptive evidence should be considered from this scenario."
>
> [emphasis supplied]

29. In *Secretary to Govt., Tamil Nadu and Anr. v. K. Vinayagamurthy*[9], it has been held as follows:

> "7....So far as the trade in noxious or dangerous goods are concerned, no citizen can claim to have trade in the same and the intoxicating liquor being a noxious material, no citizen can claim any inherent right to sell intoxicating liquor by retail. It cannot be claimed as a privilege of a citizen of a State. That being the position, any restriction which the State brings forth, must be a reasonable restriction within the meaning of Article 19(6) and reasonableness of the restriction would differ from trade to trade and no hard and fast rule concerning all trades can be laid down...."

30. In *State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr.*[10], it has been reiterated that trade in liquor is considered inherently noxious and pernicious.

31. We have referred to the aforesaid decisions to

8. 1995 Supp (2) SCC 187.
9. AIR 2002 SC 2968.
10. (2004) 11 SCC 26.

accentuate the nature of the trade, the role of the State, the economic concept of the policy, limited attractability of Article 14 of the Constitution as regards the legislation or policy, the restriction inherent in the policy and the duty of the court. On the aforesaid touchstone, we are required to see whether the doctrine of condonation by conduct, especially in the present case, could have been taken recourse to by the High Court. The respondent had availed the benefit of the licence being fully aware of the Rules, notification and the terms incorporated in the licence. The Rules provide that he has to pay from the date of the settlement and in this case, the settlement took place on 5th June, 2006. In view of what has been engrafted in the Rules, there cannot be any trace of doubt that the respondent has to be made liable to pay the licence fee from the date of the settlement. There could not have been condonation of default. Such a concept is alien to the present nature of trade and a licencee cannot claim any benefit under the same as the whole thing is governed by the command of the Rules. That apart, we are unable to subscribe to the interpretation placed by the High Court that the auction-purchaser is liable to pay from the date of issuance of licence but not from the date of the settlement as that runs counter to the plain language of Rule 24. Reading the Rules in a comprehensive manner in juxtaposition with the notification which forms the terms and conditions of the licence and the nature of the trade, the irresistible conclusion is that the liability accrued from the date of the settlement and, therefore, we find that the order passed by the Excise Commissioner was just and proper and there was no warrant on the part of the High Court to interfere with the same.

32. Consequently, the appeal is allowed, the order passed by the High Court is set aside and that of the Excise Commissioner is restored. The parties shall bear their respective costs.

K.K.T. Appeal allowed.

COMMISSIONER OF CENTRAL EXCISE, CHENNAI-II COMMISSIONERATE, CHENNAI

v.

M/S. AUSTRALIAN FOODS INDIA (P) LTD., CHENNAI

(Civil Appeal No. 2826 of 2006)

JANUARY 14, 2013

[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]

Excise – Cookies sold by assessee at its outlet – Use of brand name "cookie man" on sale of cookies in plastic pouches/containers – Entitlement of assessee-respondent to benefit of small scale exemption in respect of cookies sold loosely from the counter of the retail outlet – Held: Not entitled – It is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification – A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same – One fails to see how the same branded cookies, sold in containers, could transform to become unbranded ones, when sold from the same counter, or even from an adjoining counter, without packaging carrying the brand name – The cookies were sold from a dedicated outlet of "Cookie Man" where no other products but those of the assessee were sold – The invoices carried the name of the company and the cookies were sold from a counter of the store – The store's decision to sell some cookies without containers that were stamped with its brand or trade name did not change the brand of the cookies – The cookies sold even without inscription of the brand name, indicated a clear connection with the brand name, in the course of assessee's business of manufacture and sale of cookies under the brand name "Cookie Man" – They continued to be branded cookies of "Cookie Man" and hence could not claim exemption under

the SSI Notification – S.S.I. Notification No. 1/93-C.E., dated 28th February, 1993, as amended.

Respondent-assessee was engaged in the manufacture and sale of cookies from branded retail outlets of "Cookie Man". The brand name used the words "Cookie Man" accompanied with a logo. The assessee was selling some of these cookies in plastic pouches/ containers on which the brand name described above was printed. No brand name was affixed or inscribed on the cookies. Excise duty was duly paid, on the cookies sold in the said pouches/containers. However, on the cookies sold loosely from the counter of the same retail outlet, with plain plates and tissue paper, duty was not paid. The retail outlets did not receive any loose cookies nor did they manufacture them. They received all cookies in sealed pouches/containers. Those sold loosely were taken out of the containers and displayed for sale separately.

Notice was issued to the assessee by the Commissioner to show cause as to why (i) the cookies sold by the assessee at its outlets be not classified under Chapter sub-heading 1905.11 as biscuits and (ii) in view of their use of brand name "Cookie Man" on sale of cookies in plastic pouches/containers, S.S.I. exemption should not be disallowed. Upon consideration of the explanation furnished by the assessee, the Commissioner *inter-alia* came to the conclusion that unless the specified goods or the packaging in which these are sold, bear the brand name or the logo, prescribed S.S.I. exemption cannot be denied. Thus, the Commissioner held that since there was neither any material evidence nor averment to prove that the brand name was embossed on the cookies, the assessee was eligible to avail of the benefit of small scale exemption in respect of cookies sold loosely from the counter of the

retail outlet. Aggrieved, both the Department and the assessee filed cross appeals before the Customs, Excise and Service Tax Appellate Tribunal which affirmed the decision of the Commissioner, and therefore the present appeal by the revenue under Section 35L(b) of the Central Excise Act, 1944.

The question which arose for consideration was, whether the manufacture and sale of specified goods that did not physically bear a brand name, from branded sale outlets, disentitled the assessee from the benefit of S.S.I. Notification No. 1/93-C.E., dated 28th February, 1993, as amended from time to time.

Allowing the appeal, the Court

HELD: 1.1. If a final product is marked or stamped with a brand name, it is clearly a branded good; to stretch this principle to imply that one not marked by any brand is an unbranded good, is untenable. In case a scrutiny of the good itself fails to reveal a brand name then the search must not end there; one ought to look into the surrounding circumstances of the good to decipher, if it is in fact branded or not. Such an approach is necessary to maintain the essence of the concept of a brand name. A brand/ trade name must not be reduced to a label or sticker that is affixed on a good. The test of whether the good is branded or unbranded, must not be the physical presence of the brand name on the good, but whether it, as Explanation IX of the S.S.I. Notification No. 1/93-C.E., dated 28th February, 1993, reads, "is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of the person." Therefore, whether the brand name appears in entirety or in parts or does not appear

at all cannot be the chief criterion; primary focus has to be on whether an indication of a connection is conveyed in the course of trade between such specified goods and some person using the mark. [Paras 14, 15] [946-E-H; 947-A-B]

1.2. Once it is established that a specified good is a branded good, whether it is sold without any trade name on it, or by another manufacturer, it does not cease to be a branded good of the first manufacturer. Therefore, soft drinks of a certain company do not cease to be manufactured branded goods of that company simply because they are served in plain glasses, without any indication of the company, in a private restaurant. The good will continue to be a branded good of the company that manufactured it. The same principle would apply in the case of potato chips, chocolates, biscuits, wafers, powders and other such goods often sold from various locations. [Para 17] [948-F-H]

1.3. In case of goods sold from exclusive single brand retail outlets or restaurants or stores, the fact that a good is sold from such a store ought to be a relevant fact in construing if the good is its branded good or not. In the case of such goods, perhaps a rebuttable presumption arises in favour of such goods being branded goods of the specified store. Such a presumption can be rebutted if it is shown that the specified good being sold is in fact a branded good of another manufacturer. Thus, branded potato chips, soft drinks, chocolates etc. though sold from such outlets, will not be considered to be goods of such outlets. However, all other goods, sold without any appearance of a brand or trade name on them, would not be deemed unbranded goods; to the contrary, they may be deemed to be branded goods of that outlet unless a different brand or trade name appears. [Para 18] [949-A-C]

1.4 Hence, it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification, discussed above. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the good is sold. However, such factors would carry different hues in different scenarios. There can be no single formula to determine if a good is branded or not; such determination would vary from case to case. [Para 19] [949-D-F]

1.5 In the instant case, one fails to see how the same branded cookies, sold in containers, can transform to become unbranded ones, when sold from the same counter, or even from an adjoining counter, without packaging carrying the brand name. Admittedly, on the same cookies, physically bearing brand "Cookie Man" sold in containers carrying brand name duty is paid. It is interesting to note that counsel appearing on behalf of the assessee first argued that to determine if the cookies sold from the counter are branded or not, scrutiny must be limited to the case of the cookies themselves without looking at the surrounding circumstances; yet went on to argue that the tissues and plates they were served on did not bear the brand of the specified good. Either the environment of the goods can be looked into, or cannot be taken into consideration at all. Once it is established, as in the instant case, that the environment of the goods can be gone into to construe if it is branded or not, one fails to see why the environment of the goods should be limited to the plates and tissues, on which they are served. As aforesaid, in the instant case, the cookies were sold from a dedicated outlet of "Cookie Man" where no other products but those of the assessee were sold. The invoices carry the name of the company and the cookies were sold from a counter of the store. The

store's decision to sell some cookies without containers that are stamped with its brand or trade name does not change the brand of the cookies. The cookies sold even without inscription of the brand name, indicate a clear connection with the brand name, in the course of assessee's business of manufacture and sale of cookies under the brand name "Cookie Man". They continue to be branded cookies of "Cookie Man" and hence cannot claim exemption under the SSI Notification. [Para 20] [949-G-H; 950-A-E]

Commissioner of Central Excise, Trichy v. Rukmani Pakkwell Traders **(2004) 11 SCC 801 and** *Commissioner of Central Excise, Chandigarh-I, Vs. Mahaan Dairies* **(2004) 11 SCC 798 – relied on.**

Commissioner of Central Excise, Jamshedpur v. Superex Industries, Bihar **(2005) 4 SCC 207:** *Kohinoor Elastics (P) Ltd. v. Commissioner of Central Excise, Indore* **(2005) 7 SCC 528 –referred to.**

Case Law Reference:

(2005) 4 SCC 207	**referred to**	**Para 11, 12**
(2005) 7 SCC 528	**referred to**	**Para 13**
(2004) 11 SCC 801	**relied on**	**Para 15**
(2004) 11 SCC 798	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2826 of 2006.

From the Judgment & Order dated 27.09.2005 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, in Appeal Nos. E/916/2013 and E/1372/04.

R.P. Bhatt, Arijit Prasad, Shalini Kumar, Yatinder Chaudhary, A.K. Sharma for the Appellant.

N. Venkataraman, V. Lakshmi Kumaran, Alok Yadav, Rajesh Kumar, R. Satish Kumar, Parivesh Singh, Anjali Chauhan, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. The short question of law which arises for consideration in this appeal is, whether the manufacture and sale of specified goods that do not physically bear a brand name, from branded sale outlets, would disentitle an assessee from the benefit of S.S.I. Notification No. 1/93-C.E., dated 28th February, 1993, as amended from time to time.

2. Briefly stated, the material facts giving rise to the appeal, are as follows:

Pursuant to an inspection by the officials of the enforcement Commissionerate, Chennai-II at the sales outlet of the respondent (hereinafter referred as "the assessee"), revealed that the assessee was engaged in the manufacture and sale of cookies from branded retail outlets of "Cookie Man". The assessee had acquired this brand name from M/s Cookie Man Pvt. Ltd, Australia (which in turn acquired it from M/s Auto-bake Pvt. Ltd., Australia). The brand name used the words "Cookie Man" accompanied with a logo depicting the smiling face of a mustachioed chef. The assessee was selling some of these cookies in plastic pouches/containers on which the brand name described above was printed. No brand name was affixed or inscribed on the cookies. Excise duty was duly paid, on the cookies sold in the said pouches/containers. However, on the cookies sold loosely from the counter of the same retail outlet, with plain plates and tissue paper, duty was not paid.

3. The retail outlets did not receive any loose cookies nor did they manufacture them. They received all cookies in sealed pouches/containers. Those sold loosely were taken out of the containers and displayed for sale separately. Even though no separate register was maintained to account for the sale of the

cookies sold loosely, their numbers were calculated from the number of empty pouches/containers left behind at the end of day.

4. On scrutiny of the documents recovered from the said outlet and on the basis of the statement of the Executive Director, a notice dated 20th December, 2012 was issued to the assessee by the Commissioner to show cause as to why (i) the cookies sold by the assessee at its outlets be not classified under Chapter sub-heading 1905.11 as biscuits and (ii) in view of their use of brand name "Cookie Man" on sale of cookies in plastic pouches/containers, S.S.I. exemption should not be disallowed.

5. Upon consideration of the explanation furnished by the assessee, the Commissioner *inter-alia* came to the conclusion (relevant for the controversy at hand) that unless the specified goods or the packaging in which these are sold, bear the brand name or the logo, prescribed S.S.I. exemption cannot be denied. Thus, the Commissioner held that since there was neither any material evidence nor averment to prove that the brand name was embossed on the cookies, the assessee was eligible to avail of the benefit of small scale exemption in respect of cookies sold loosely from the counter of the retail outlet. Being aggrieved by the order, both the Department and the assessee filed cross appeals before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai (hereinafter referred to as "the Tribunal).

6. The decision of the Commissioner having been affirmed by the Tribunal, the revenue is before us in this appeal under Section 35L(b) of the Central Excise Act, 1944 (for short "the Act").

7. There is no dispute that the specified good is to be classified under sub-heading 1905.11 as Biscuits, manufactured with the aid of power. The controversy revolves around para 4 of S.S.I. notification No. 1/93-C.E. dated 28th

February, 1993, which, in its erstwhile form, read as follows: -

> "4. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification…"

8. The meaning of a "brand name" or "trade name" is enunciated in Explanation IX of the said notification which says:-

> "Explanation IX- 'Brand name' or 'trade name' shall mean a brand name or trade name, whether registered or not, that is to say a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person."

9. Para 4 of the said notification that deals with exemption for certain goods "affixed" with a brand name was amended vide notification No. 59/94-C.E. dated 1st March, 1994, to read:-

> "4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person…"

10. Part (iii) of para J of the Budget Changes-1994-95 dealt with "Changes in the SSI schemes" explains the purpose of the amendment in the following words:

> "(iii) Brand name provision has been amended so as to provide that SSI concession shall not apply to the goods bearing the brand name or trade name of another person. The effect of this amendment is that if an SSI unit

manufactures the branded goods for another person irrespective of whether the brand name owner himself is SSI unit or not, such goods shall not be eligible for the concession. Another implication of this amendment is that the requirement of affixation or brand name by the SSI unit has been changed and now the only condition is that the goods cleared by SSI unit bearing a brand name of another person shall not be eligible for the concession irrespective of the fact whether the brand name was affixed by the SSI unit or that, the input material used by the SSI unit was already affixed with brand name."

11. Mr. N.Venkataraman, learned senior counsel appearing on behalf of the assessee argued that a combined reading of Para 4 and Explanation IX of the notification, along with Para J of the Budget Changes, would lead to the conclusion that only specified goods bearing an affixed brand name, or in other words, those goods that physically display the brand name, are not covered by the exemption. Learned counsel relied on the decision of this Court in the case of *Commissioner of Central Excise, Jamshedpur Vs. Superex Industries, Bihar*[1] for the proposition that a physical manifestation of a brand name on a good is a necessary requirement for disqualification from the exemption granted by the concerned notification. Learned counsel also relied on the same decision to urge that this Court cannot look into the surrounding circumstances of a good, especially the specific outlet from which it is sold, to construe if it is branded or not; scrutiny, in his opinion, must be limited to the specified good itself. The relevant paragraph of the order on which emphasis was laid, reads as follows:

"**3.** CEGAT has held that the benefit of the notification would be lost only if the manufacturer affixes the specified goods with a brand name or trade name of the another who is not eligible to the exemption under the notification.

1. (2005) 4 SCC 207.

It could not be denied that the name Kirloskar is not affixed to the generating sets. CEGAT has held that merely because, in the invoices, the set is passed off as a Kirloskar generating set, the benefit of the notification would not be lost. We see no infirmity in this reasoning. We, therefore, see no reason to interfere."

12. We are unable to appreciate as to how a compulsory requirement of physical manifestation of a brand name on the specified good, for it to be construed as a branded good, can be derived from the above passage. The decision in the above case simply recognizes that the benefit would be lost only if a manufacturer affixes the specified goods with a brand or trade name of another who is not eligible for the exemption under the notification. It does not state that the specified good must itself bear or be physically affixed with the brand or trade name. Such an interpretation would lead to absurd results in case of goods, which are incapable of physically bearing brand names. For instance, the goods, which, due to their very nature and structure, are incapable of bearing brand names, would always be deemed unbranded. Liquids, soft drinks, milk, dairy products, powders, edible products, salt, pepper, sweets, gaseous products, perfumes, deodorants etc., to name a few, are either liquids, gases or amorphous/brittle solids, making it impossible for the good to be affixed with a brand name. In some situations, such an affixation may be impossible, in which case, it would be permissible for the specified good to continue being a branded good, as long as its environment conveys that it is branded. By environment we mean packaging and wrapping of the good, accessories it is served with, uniform of vendors, invoices, menu cards, hoardings and display boards of outlet, furniture and props used, the specific outlet itself in its entirety and other such factors, all of which together or individually or in parts, may convey that a good is a branded one, notwithstanding that there is no physical inscription of the brand or trade name on the good itself. Further, a specific, dedicated and exclusive outlet from which a good is sold is often

the most crucial and conclusive factor to hold a good as branded. The decision referred to above only made a limited point that invoices alone cannot be the sole basis of construing whether a good is a branded good or not; it does not hold that a specified good itself must be stamped with a brand name. It is therefore, permissible to look into the environment of the good. However, like in the case of Kirloskar generators [*Superex Industries* (supra)], invoices bearing brand name could not be the sole basis of construing whether goods are branded or not. That decision would depend on the facts and circumstances of the case. There can be no precise formula for such a determination; in some cases certain factors may carry more weight than in other situations. However, in most circumstances, an exclusive branded outlet from which the good is sold, would be a crucial factor in determining the question.

13. Learned counsel strongly relied on another decision of this Court in *Kohinoor Elastics (P) Ltd. Vs. Commissioner of Central Excise, Indore,*[2] for the proposition that only the "specified good" in question must be scrutinized and the expression cannot be expanded to mean "specified outlets" or other surrounding circumstances. To bring home his point, reliance was placed on the following paragraphs from the said decision:

> "**5.** Clause 4 of the notification is unambiguous and clear. It specifically states that the exemption contained in the notification shall not apply to specific goods which bear a brand name or trade name (registered or not) of another person. It is settled law that to claim exemption under a notification one must strictly comply with the terms of the notification. It is not permissible to imply words into the notification which the legislature has purposely not used. The framers were aware that use of a brand/trade name is generally to show to a consumer a connection between

2. (2005) 7 SCC 528.

> the goods and a person. The framers were aware that goods may be manufactured on order for captive consumption by that customer and bear the brand/trade name of that customer. The framers were aware that such goods may not reach the market in the form in which they were supplied to the customer. The framers were aware that the customer may merely use such goods as an input for the goods manufactured by him. Yet clause 4 provides in categoric terms that the exemption is lost if the goods bear the brand/trade name of another. Clause 4 does not state that the exemption is lost only in respect of such goods as reach the market. It does not carve out an exception for goods manufactured for captive consumption. The framers meant what they provided. The exemption was to be available only to goods which did not bear a brand/trade name of another. The reason for this is obvious. If use of brand/trade names were to be permitted on goods manufactured as per the orders of customers or which are to be captively consumed then manufacturers, who are otherwise not entitled to exemption, would get their goods or some inputs manufactured on job-work basis or through some small party, freely use their brand/trade name on the goods and avail of the exemption. It is to foreclose such a thing that clause 4 provides, in unambiguous terms, that the exemption is lost if the "goods" bear a brand/trade name of another."
>
> xxxxx xxxxx xxxxx
>
> **"7.** ….Now in this case there is no dispute on facts. The "course of trade" of the appellants is making elastics for specified customers. It is an admitted position that the appellants are affixing the brand/trade name of their customers on the elastics. They are being so affixed because the appellants and/or the customer wants to indicate that the "goods (elastic)" have a connection with

that customer. This is clear from the fact that the elastics on which brand/trade name of 'A' is affixed will not and cannot be used by any person other than the person using that brand/trade name. As set out hereinabove once a brand/trade name is used in the course of trade of the manufacturer, who is indicating a connection between the "goods" manufactured by him and the person using the brand/trade name, the exemption is lost. In any case it cannot be forgotten that the customer wants his brand/ trade name affixed on the product not for his own knowledge or interest. The elastic supplied by the appellants is becoming part and parcel of the undergarment. The customer is getting the brand/trade name affixed because he wants the ultimate customer to know that there is a connection between the product and him…"

14. We feel that to hold from the above passages that every good must be physically stamped with a brand or trade name to be considered a branded good in terms of the notification, and that, one is forbidden to look beyond the specified good into the surrounding environment of the good in construing if it is a branded good or not, would be a complete misunderstanding of the above judgment and a distortion of the concept of a brand or trade name. The above judgment makes no such observation and was delivered on a completely different set of facts and circumstances. It involved a case of undergarments manufactured by a producer P2, which used branded elastics produced by P1, and retained the brand name of P1 in the final product. P2 was denied exemption under the same notification involved in the present case because of the appearance of brand name of another i.e. P1, not covered by the same notice. P2 argued that the presence of P1's brand name should not be taken as a basis for disqualification from the benefits of the exemption since the customer buying the good would continue to associate the good with P2 and not P1, thus making it a branded good of only P2. This Court rejected

the contention and held that P1 is providing a stamped input for captive consumption to P2 "because he wants the ultimate customer to know that there is a connection between the product and him". The Court further observed that the term "specified goods" is used without any caveats and hence rejected the contention that some consideration should be given to the fact that P1 was used only as an input in the making of the final product of P2. It is in this background that this Court observed that the requirement of the notifications must be adhered to strictly and cannot be diluted by substituting the term "specified goods" with the nature of goods or the manner of disposal. In case the specified good clearly exhibits a brand name of another not covered by the notification, it would squarely fall within the confines of Para 4 of the notification; looking beyond the specified good to consider whether it is an input or not is not necessary in case of a conspicuous brand name. However, to apply this principle to the scenario of a specified good that does not contain a brand name at all would be equivalent to fitting a square peg in a round hole. If a final product is marked or stamped with a brand name, it is clearly a branded good; to stretch this principle to imply that one not marked by any brand is an unbranded good, is untenable. In case a scrutiny of the good itself fails to reveal a brand name then the search must not end there; one ought to look into the surrounding circumstances of the good to decipher, if it is in fact branded or not.

15. We are of the opinion that such an approach is necessary to maintain the essence of the concept of a brand name. A brand/ trade name must not be reduced to a label or sticker that is affixed on a good. The test of whether the good is branded or unbranded, must not be the physical presence of the brand name on the good, but whether it, as Explanation IX reads, "is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication

of the identity of the person." Therefore, whether the brand name appears in entirety or in parts or does not appear at all cannot be the chief criterion; primary focus has to be on whether an indication of a connection is conveyed in the course of trade between such specified goods and some person using the mark. Highlighting this principle, this Court in *Commissioner of Central Excise, Trichy Vs. Rukmani Pakkwell Traders*[3] observed thus: -

> "**6.** The Tribunal had also held that under the notification the use must be of "such brand name". The Tribunal has held that the words "such brand name" show that the very same brand name or trade name must be used. The Tribunal has held that if there are any differences then the exemption would not be lost. We are afraid that in coming to this conclusion the Tribunal has ignored Explanation IX. Explanation IX makes it clear that the brand name or trade name shall mean a brand name or trade name (whether registered or not), that is to say, a name or a mark, code number, design number, drawing number, symbol, monogram, label, signature or invented word or writing. This makes it very clear that even a use of part of a brand name or trade name, so long as it indicates a connection in the course of trade would be sufficient to disentitle the person from getting exemption under the notification. In this case, admittedly, the brand name or trade name is the word "ARR" with the photograph of the founder of the group. Merely because the registered trade mark is not entirely reproduced does not take the respondents out of clause 4 and make them eligible to the benefit of the notification."

16. Similarly, in *Commissioner of Central Excise, Chandigarh-I, Vs. Mahaan Dairies,*[4] it was noted as follows:

3. (2004) 11 SCC 801.

4. (2004) 11 SCC 798.

> "6**.** We have today delivered a judgment in *CCE v. Rukmani Pakkwell Traders,* (2004) 11 SCC 801 wherein we have held in respect of another notification containing identical words that it makes no difference whether the goods on which the trade name or mark is used are the same in respect of which the trade mark is registered. Even if the goods are different, so long as the trade name or brand name of some other company is used the benefit of the notification would not be available. Further, in our view, once a trade name or brand name is used then mere use of additional words would not enable the party to claim the benefit of the notification."
>
> "8. It is settled law that in order to claim benefit of a notification, a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the notification or by adding words to the notification benefit cannot be conferred. The Tribunal has based its decision on a decision delivered by it in *Rukmani Pakkwell Traders v. CCE* (1999) 109 ELT 204 (CEGAT). We have already overruled the decision in that case. In this case also we hold that the decision of the Tribunal is unsustainable. It is accordingly set aside."

17. As aforesaid, once it is established that a specified good is a branded good, whether it is sold without any trade name on it, or by another manufacturer, it does not cease to be a branded good of the first manufacturer. Therefore, soft drinks of a certain company do not cease to be manufactured branded goods of that company simply because they are served in plain glasses, without any indication of the company, in a private restaurant. The good will continue to be a branded good of the company that manufactured it. The same principle would apply in the case of potato chips, chocolates, biscuits, wafers, powders and other such goods often sold from various locations.

18. In case of goods sold from exclusive single brand retail outlets or restaurants or stores, the fact that a good is sold from such a store ought to be a relevant fact in construing if the good is its branded good or not. In the case of such goods, perhaps a rebuttable presumption arises in favour of such goods being branded goods of the specified store. Such a presumption can be rebutted if it is shown that the specified good being sold is in fact a branded good of another manufacturer. Thus, branded potato chips, soft drinks, chocolates etc. though sold from such outlets, will not be considered to be goods of such outlets. However, all other goods, sold without any appearance of a brand or trade name on them, would not be deemed unbranded goods; to the contrary, they may be deemed to be branded goods of that outlet unless a different brand or trade name appears.

19. Hence, we hold that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification, discussed above. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the good is sold. However, such factors would carry different hues in different scenarios. There can be no single formula to determine if a good is branded or not; such determination would vary from case to case. Also, our observations must be limited to this notification and not supplanted to other laws with similar subject matter pertaining to trade names and brand names.

20. Applying the said principles on the facts at hand, we fail to see how the same branded cookies, sold in containers, can transform to become unbranded ones, when sold from the same counter, or even from an adjoining counter, without packaging carrying the brand name. Admittedly, on the same cookies, physically bearing brand "Cookie Man" sold in containers carrying brand name duty is paid. It is interesting to note that learned counsel appearing on behalf of the assessee

first argued that to determine if the cookies sold from the counter are branded or not, scrutiny must be limited to the case of the cookies themselves without looking at the surrounding circumstances; yet went on to argue that the tissues and plates they were served on did not bear the brand of the specified good. Either the environment of the goods can be looked into, or cannot be taken into consideration at all. Once it is established, as in the instant case, that the environment of the goods can be gone into to construe if it is branded or not, we do not see why the environment of the goods should be limited to the plates and tissues, on which they are served. As aforesaid, in the instant case, the cookies were sold from a dedicated outlet of "Cookie Man" where no other products but those of the assessee were sold. The invoices carry the name of the company and the cookies were sold from a counter of the store. In our opinion, the store's decision to sell some cookies without containers that are stamped with its brand or trade name does not change the brand of the cookies. We are convinced that the cookies sold even without inscription of the brand name, indicate a clear connection with the brand name, in the course of assessee's business of manufacture and sale of cookies under the brand name "Cookie Man". They continue to be branded cookies of "Cookie Man" and hence cannot claim exemption under the SSI Notification.

21. In view of the aforegoing discussion, we are of the opinion that the impugned decision of the Tribunal is erroneous and unsustainable. Consequently, the appeal is allowed and the impugned order is set aside, leaving the parties to bear their own costs.

B.B.B. Appeal allowed.

STEPHANIE JOAN BECKER
v.
STATE AND ORS.
(Civil Appeal No. 1053 of 2013)

FEBRUARY 08, 2013

[P. SATHASIVAM, RANJAN GOGOI AND V. GOPALA GOWDA, JJ.]

GUARDIANS AND WARDS ACT, 1890:

ss.. 7 and 26 – Applications by appellant, a female American citizen, for an order appointing her as guardian of a minor female orphan and for permission to take the child out of country for purpose of adoption – Held: Claim of appellant will have to be necessarily considered on the basis of the law as in force on date, namely, the provisions of the JJ Act and the Rules framed thereunder and Guidelines of 2011 which have been conferred a statutory sanction – Having regard to totality of facts of the case, proposed adoption would be beneficial to child apart from being consistent with legal entitlement of appellant – Appellant is appointed as legal guardian of the child and is granted permission to take the child to USA – CARA will issue the necessary conformity certificate as contemplated under clause 34(4) of the Guidelines of 2011 – Juvenile Justice (Care and Protection of Children) Act, 2000 – s. 41 – Juvenile Justice (Care and Protection of Children) Rules, 2007, r. 33 – Guidelines for Adoption from India, 2006 – Guidelines Governing the Adoption of Children, 2011 – Adoption – Inter country adoption.

The appellant, an American citizen, by an application u/s 7 of the Guardians and Wards Act, 1890 (the Act), sought for an order appointing her as guardian of a 10 years old female orphan. By another application u/s 26

of the Act, she sought permission of the court to take the child out of the country for the purpose of adoption. Both the applications were rejected on the sole ground that the appellant being a single prospective adoptive parent was aged about 53 years whereas for such a person the maximum permissible age as prescribed by the Government of India Guidelines in force was 45. The High Court upheld the orders.

Allowing the appeal, the Court

HELD: 1.1. Under sub-s. (3) of s. 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) as amended by Act 33 of 2006 and made effective from 22.8.2006, power has been conferred in the court to give a child in adoption upon satisfaction that the various guidelines issued from time to time, either by the State Government or the Central Adoption Resource Agency (CARA) and notified by the Central Government have been followed in the given case. Further, r. 33(2) of the Juvenile Justice (Care and Protection of Children) Rules 2007 makes it clear that "for all matters relating to adoption, the guidelines issued by CARA and notified by the Central Government under sub-s. (3) of s.41 of the Act, shall apply." The Guidelines for Adoption from India, 2006 (Guidelines of 2006) stand repealed by the Guidelines Governing the Adoption of Children, 2011 (Guidelines of 2011). By virtue of the provisions of r. 33(2) it is the Guidelines of 2011 notified u/s 41(3) of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction. [para 8-9] [961-B-E; 962-A, D-E]

Lakshmi Kant Pandey v. Union of India **1984 (2) SCR 795 = (1984) 2 SCC 244 – referred to**

1.2. The claim of the appellant along with

consequential relief, if any, will have to be necessarily considered on the basis of the law as in force on date, namely, the provisions of the JJ Act and the Rules framed thereunder and the Guidelines of 2011. The appellant's case for adoption has been sponsored by an agency (Journeys of the Heart, USA) rendering service in USA which is recognized by CARA. The Home Study Report of the family of the appellant indicates that the appellant apart from being financially solvent is a person of amicable disposition who has developed affinity for Indian culture and Indian children. The appellant, though unmarried, has the support of her brother and other family members who have promised to look after the child in the event such a situation becomes necessary for any reason whatsoever. Each and every norm of the adoption process spelt out under the Guidelines of 2006, as well as the Guidelines of 2011, has been adhered to. If the foreign adoptive parent is otherwise suitable and willing, and consent of the child had also been taken (as in the instant case) and the expert bodies engaged in the field are of the view that the adoption process would end in a successful blending of the child in the family of the appellant in USA, the appellant cannot be said to be disqualified or disentitled to the relief(s) sought by her in the proceedings in question, and the Court must lean in favour of the proposed adoption. [para 9-11] [962-G; 963-C-D; 964-H; 965-A-D]

1.3. Therefore, the appellant is appointed as the legal guardian of the minor female child and is granted permission to take the child to USA. CARA will issue the necessary conformity certificate as contemplated under clause 34(4) of the Guidelines of 2011. [para 11] [965-E-G]

Case Law Reference:

1984 (2) SCR 795 referred to para 5

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1053 of 2013.

From the Judgment & Order dated 09.07.2012 of the High Court of Delhi at New Delhi in F.A.O. No. 425 of 2010.

Pinky Anand, Natasha Shehrawat, Prabal Bagchi, Amit Kumar, Vivek Narayan Sharma for the Appellant.

Ankur Goel, S. Ramamani, Binu Tamta, Priya Hingorani, Sushma Suri, Anant Asthna, Jyoti Mendiratta for the Respondents.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The rejection of the applications filed by the appellant under Sections 7 and 26 of the Guardians and Wards Act, 1890 (hereinafter for short the "Guardians Act") by the learned Trial Court vide its order dated 17.09.2010 in Guardianship Case No. 2 of 2010 and the affirmation of the said order made by the High Court of Delhi by its order dated 09.07.2012 in FAO No. 425 of 2010 has been put to challenge in the present appeal. By the application filed under Section 7 of the Guardians Act, the appellant had sought for an order of the Court appointing her as the guardian of one female orphan child Tina aged about 10 years whereas by the second application filed under Section 26 of the Guardians Act the appellant had sought permission of the Court to take the child Tina out of the country for the purpose of adoption.

3. The rejection of the aforesaid two applications by the learned Trial Court as well as by the High Court is on a sole and solitary ground, namely, that the appellant, being a single prospective adoptive parent, was aged about 53 years at the relevant point of time whereas for a single adoptive parent the maximum permissible age as prescribed by the Government of India Guidelines in force was 45. Though a no objection,

which contained an implicit relaxation of the rigour of the Guidelines with regard to age, has been granted by the Central Adoption Resource Authority (CARA), the High Court did not consider it appropriate to take the said no objection/relaxation into account inasmuch as the reasons for the relaxation granted were not evident on the face of the document i.e. no objection certificate in question.

4. To understand and appreciate the contentious issues that have arisen in the present appeal, particularly, the issues raised by a non-governmental organization that had sought impleadment in the present proceedings (subsequently impleaded as respondent No. 4) it will be necessary to take note of the principles of law governing inter-country adoption, a short resume of which is being made hereinbelow. But before doing that it would be worthwhile to put on record that the objections raised by the Respondent No.4, pertain to the legality of the practice of inter country adoption itself, besides the bonafides of the appellant in seeking to adopt the child involved in the present proceeding and the overzealous role of the different bodies involved in the process in question resulting in side stepping of the laid down norms.

5. The law with regard to inter-country adoption, indeed, was in a state of flux until the principles governing giving of Indian children in adoption to foreign parents and the procedure that should be followed in this regard to ensure absence of any abuse, maltreatment or trafficking of children came to be laid down by this Court in *Lakshmi Kant Pandey v. Union of India*[1]. The aforesaid proceedings were instituted by this Court on the basis of a letter addressed by one Lakshmi Kant Pandey, a practicing advocate of this Court with regard to alleged malpractices indulged in by social and voluntary organizations engaged in the work of offering Indian children in adoption to foreign parents. After an elaborate consideration of the various dimensions of the questions that arose/were raised before the

1. (1984) 2 SCC 244.

Court and the information laid before it by the Indian Council of Social Welfare, Indian Council of Child Welfare, SOS Children's Villages of India (respondent No. 2 herein) and also certain voluntary organizations working in the foreign jurisdictions, this Court, after holding in favour of inter country adoption, offered elaborate suggestions to ensure that the process of such adoption is governed by strict norms, and a well laid down procedure to eliminate the possibility of abuse or misuse in offering Indian children for adoption by foreign parents is in place. This Court in *Lakshmi Kant Pandey (supra)* also laid down the approach that is required to be adopted by the courts while dealing with applications under the Guardians and Wards Act seeking orders for appointment of foreign prospective parents as guardians of Indian children for the eventual purpose of adoption. Such directions, it may be noticed, was not only confined to hearing various organizations like the Indian Council for Child Welfare and Indian Council of Social Welfare by issuance of appropriate notices but also the time period within which the proceedings filed before the Court are to stand decided. Above all, it will be necessary for us to notice that in *Lakshmi Kant Pandey (supra)* this Court had observed that :

> "Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognized social or child welfare agencies in the country."

6. Pursuant to the decision of this Court in *Lakshmi Kant Pandey* (supra) surely, though very slowly, the principles

governing adoption including the establishment of a central body, i.e., Central Adoption Resource Authority (CARA) took shape and found eventual manifestation in a set of elaborate guidelines laid down by the Government of India commonly referred to as the Guidelines For Adoption from India 2006 (hereinafter referred to as "the Guidelines of 2006"). A reading of the aforesaid Guidelines indicates that elaborate provisions had been made to regulate the pre-adoption procedure which culminates in a declaration by the Child Welfare Committee that the child is free for adoption. Once the child (abandoned or surrendered) is so available for adoption the Guidelines of 2006 envisage distinct and separate steps in the process of adoption which may be usefully noticed below :

(1) Enlisted Foreign Adoption Agency (EFAA)

- The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/ Central Authority/Govt. Deptt. in their country, in which they are resident, which will prepare the a Home Study Report (HSR) etc. The validity of "Home Study Report" will be for a period of two years. HSR report prepared before two years will be updated at referral.

- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the applications may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India

- The adoption application dossier should contain all documents prescribed in **Annexure-2.** All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate

Govt. Department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations

- A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to RIPA by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

(2) Role of Recognized Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for inter-country adoption with the applicant.

- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

(3) Child being declared free for inter-country adoption - Clearance by ACA

- Before a RIPA proposes to place a child in the Inter country adoption, it must apply to the ACA for assistance for Indian placement.

- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue clearance certificate for inter-country adoption.

- ACA will issue clearance for inter-country adoption within 10 days in case of older children above 6 years, siblings or twins and Special Needs Children as per the additional guidelines issued in this regard.

- In case the ACA cannot find suitable Indian parent/ parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.
- If ACA Clearance is not given on 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) HOLDING Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

(4) Matching of the Child Study Report with Home Study Report of FPAP by RIPA

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of "No Objection Certificate".

(5) Issue of No Objection Certificate (NOC) by CARA

- RIPA shall make application for CARA NOC in case of foreign/PIO parents only after ACA Clearance Certificate is obtained.
- CARA will issue the 'NOC' within 15 days from the date of receipt of the adoption dossier if complete in all respect.
- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for inter-country adoption without a "No Objection Certificate" from CARA.

(6) Filing of Petition in the Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- As per the Hon'ble Supreme Court directions, the concerned Court may dispose the case within 2 months.

(7) Passport and Visa

- RIPA has to apply in the Regional Passport Office for obtaining an Indian Passport in favour of the child.
- The concerned Regional Passport Officer may issue the Passport within 10 days.
- Thereafter the VISA entry permit may be issued by the Consulate/Embassy/High Commission of the concerned country for the child.

(8) Child travels to adoptive country

- The adoptive parent/parents will have to come to India and accompany the child back to their country.

7. Even after the child leaves the country the Guidelines of 2006 contemplate a process of continuous monitoring of the welfare of the child through the foreign placement agency until the process of adoption in the country to which the child has been taken is completed, which process the Guidelines contemplate completion within two years. The monitoring of the welfare of the child after the process of adoption is complete and the steps that are to be taken in cases where the adoption does not materialize is also contemplated under the Guidelines of 2006. As the said aspects are not relevant for the purposes of the present adjudication the details in this regard are not being noticed. What, however, would require emphasis, at this

stage, is that by and large the Guidelines of 2006 framed by the Ministry of Women and Child Development are in implementation of the decision of this Court in the case of *Lakshmi Kant Pandey* (supra).

8. Two significant developments in the law governing adoptions may now be taken note of. Section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter for short the "JJ Act") was amended by Act 33 of 2006 by substituting sub-Sections 2, 3 and 4 by the present provisions contained in the aforesaid sub-Sections of Section 41. The aforesaid amendment which was made effective from 22.8.2006 is significant inasmuch as under sub-Section 3 power has been conferred in the Court to give a child in adoption upon satisfaction that the various guidelines issued from time to time, either by the State Government or the CARA and notified by the Central Government have been followed in the given case. The second significant development in this regard is the enactment of the Juvenile Justice (Care and Protection of Children) Rules 2007 by repeal of the 2001 Rules in force. Rule 33 (2) makes it clear that "for all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section (3) of Section 41 of the Act, shall apply." Rule 33 (3) in the various sub-clauses (a) to (g) lays down an elaborate procedure for certifying an abandoned child to be free for adoption. Similarly, sub-rule (4) of Rule 33 deals with the procedure to be adopted for declaring a surrendered child to be legally free for adoption. Once such a declaration is made, the various steps in the process of adoption spelt out by the Guidelines of 2006, details of which have been extracted hereinabove, would apply finally leading to departure of the child from the country to his/her new home for completion of the process of adoption in accordance with the laws of the country to which the child had been taken. In this regard the order of the courts in the country under Section 41(3) of the JJ Act would be a step in facilitating the adoption of the child in the foreign

country.

9. It will also be necessary at this stage to take note of the fact that the Guidelines of 2006 stand repealed by a fresh set of Guidelines published by Notification dated 24.6.2011 of the Ministry of Women and Child Development, Government of India under Section 41(3) of the JJ Act. The time gap between the coming into effect of the provisions of Section 41(3) of the JJ Act i.e. 22.08.2006 and the publication of the 2011 Guidelines by the Notification dated 24.6.2011 is on account of what appears to be various procedural steps that were undertaken including consultation with various bodies and the different State Governments. A reading of the Guidelines of 2011 squarely indicate that the procedural norms spelt out by the 2006 Guidelines have been more elaborately reiterated and the requirements of the pre-adoption process under Rules 33(3) and (4) have been incorporated in the said Guidelines of 2011. As a matter of fact, by virtue of the provisions of Rule 33(2) it is the Guidelines of 2011 notified under Section 41(3) of the JJ Act which will now govern all matters pertaining to inter-country adoptions virtually conferring on the said Guidelines a statutory flavour and sanction. Though the above may not have been the position on the date of the order of the learned trial court i.e. 17.9.2010, the full vigour of Section 41(3) of the JJ Act read with Rule 33 (2) of the Rules and the Guidelines of 2011 were in operation on the date of the High Court order i.e. 9.7.2012. The Notification dated 24.06.2011 promulgating the Guidelines of 2011 would apply to all situations except such things done or actions completed before the date of the Notification in question, i.e., 24.06.2011. The said significant fact apparently escaped the notice of the High Court. Hence the claim of the appellant along with consequential relief, if any, will have to be necessarily considered on the basis of the law as in force today, namely, the provisions of the JJ Act and the Rules framed thereunder and the Guidelines of 2011 notified on 24.6.2011. In other words, if the appellant is found to be so entitled, apart from declaring her to be natural guardian and

grant of permission to take the child away from India a further order permitting the proposed adoption would also be called for. Whether the order relating to adoption of the child should be passed by this Court as the same was not dealt with in the erstwhile jurisdictions (trial court and the High Court) is an incidental aspect of the matter which would require consideration.

10. The facts of the present case, as evident from the pleadings of the parties and the documents brought on record, would go to show that the appellant's case for adoption has been sponsored by an agency (Journeys of the Heart, USA) rendering service in USA which is recognized by CARA. The Home Study Report of the family of the appellant indicates that the appellant apart from being gainfully employed and financially solvent is a person of amicable disposition who has developed affinity for Indian culture and Indian children. The appellant, though unmarried, has the support of her brother and other family members who have promised to look after the child in the event such a situation becomes necessary for any reason whatsoever. The Child Study Report alongwith medical examination Report prepared by the recognized agency in India has been read and considered by the appellant and it is only thereafter that she had indicated her willingness to adopt the child in question. Before permitting the present process of inter country adoption to commence, all possibilities of adoption of the child by an Indian parent were explored which however did not prove successful. The matter was considered by the No Objection Committee of the CARA and as stated in the affidavit of the said agency filed before this Court, the No Objection Certificate dated 03.02.2010 has been issued keeping in mind the various circumstances peculiar to the present case, details of which are as hereunder :

. "Child Tina was an older female child (aged 7 years when the NOC was issued) and thus relaxation was permissible as per the guidelines.

. The Prospective parent was 54 years of age, which is within the age up to which adoption by foreign prospective parent is permissible after relaxation i.e. 55 years.

. The Prospective Adoptive Parent is otherwise also suitable as she is financially stable and there are three reference letters supporting adoption of the child by her. The Home study report of the prospective parent (Ms. Stephanie Becker) shows the child as kind, welcoming, caring and responsible individual with physical, mental emotional and financial capability to parent a female child up to age of seven years from India.

. Procedures such as declaration of the child as legally free for adoption by CWC Child Welfare Committee (CWC); ensuring efforts for domestic adoption and clearance of Adoption Coordinating Agency; and taking consent of older child had been followed.

. Follow-up of the welfare of the child was to be properly done through Journeys of the Hearts, USA, the authorized agency which had also given an undertaking to ensure the adoption of child Tina according to the laws in USA within a period not exceeding two years from the date of arrival of the child in her new home. The agency has also committed to send follow-up reports as required.

. The Biological brother of the prospective parent, Mr. Philip Becker Jr. and his wife Ms. Linda Becker have given an undertaking on behalf of the single female applicant to act as legal guardian of the child in case of any unforeseen event to the adoptive parent. This is another important safeguard.

. Article 5 from the Office of Children's Issues, US Department of State allowing child Tina to enter and reside permanently in the United States and declaring suitability of the prospective adoptive parent, was available."

11. In view of the facts as stated above which would go to show that each and every norm of the adoption process spelt out under the Guidelines of 2006, as well as the Guidelines of 2011, has been adhered to, we find that the apprehension raised by the intervener, though may have been founded on good reasons, have proved themselves wholly unsubstantiated in the present case. If the foreign adoptive parent is otherwise suitable and willing, and consent of the child had also been taken (as in the present case) and the expert bodies engaged in the field are of the view that in the present case the adoption process would end in a successful blending of the child in the family of the appellant in USA, we do not see as to how the appellant could be understood to be disqualified or disentitled to the relief(s) sought by her in the proceedings in question. It is our considered view that having regard to the totality of the facts of the case the proposed adoption would be beneficial to the child apart from being consistent with the legal entitlement of the foreign adoptive parent. If the above is the net result of the discussions that have preceded, the Court must lean in favour of the proposed adoption. We, therefore, set aside the orders dated 17.09.2010 in Guardianship Case No. 2 of 2010 passed by the learned Trial Court and the order dated 09.07.2012 in FAO No. 425 of 2010 passed by the High Court of Delhi and appoint the appellant as the legal guardian of the minor female child Tina and grant permission to the appellant to take the child to USA. In view of the provisions of Section 41(3) of the JJ Act and to avoid any further delay in the matter which would be caused if we were to remand the aforesaid aspect of the case to the learned Trial Court, only on the ground that the same did not receive consideration of the learned Court, we deem it appropriate to pass necessary orders giving the child Tina in adoption to the appellant. The CARA will now issue the necessary conformity certificate as contemplated under clause 34(4) of the Guidelines of 2011. The appeal consequently shall stand allowed in the above terms.

R.P. Appeal allowed.

KUM. MICHAEL
v.
REGIONAL MANAGER ORIENTAL INSURANCE CO. LTD. & ANR.
(Civil Appeal No. 1100 of 2013)

FEBRUARY 11, 2013

[G.S. SINGHVI AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Motor Vehicles Act, 1988:

Motor accident – Compensation for permanent disability, loss of amenities etc. – Held: Appellant at the age of eight years suffered a dreadful accident resulting into a severe injury in his right leg which has virtually created a deformity in the said leg and he has to suffer with the disability for the rest of his life – Age of the appellant is, therefore, a very relevant factor while determining the compensation – Accordingly, compensation of Rs. 1 lakh as enhanced by High Court is further enhanced to Rs. 4 lakhs with 6% interest on the enhanced amount from date of petition till realization – Delay/laches.

The appellant, a male child of 8 years, was hit by a motor cycle, as a result of which his right leg got fractured and even after treatment, he suffered terminal restrictions of joint movements of right knee and total restriction of dorsiflexion of right ankle joint. Further the right lower limb got shortened by 1 cm as compared to opposite limb. The disability was assessed at 16% to the whole body. The Tribunal allowed a total compensation of Rs. 77,000/- (as against the claim of Rs. 4 lakhs), which was enhanced by the High Court to Rs. 1 lakh. The claimant filed the appeal for further enhancement of the compensation.

Allowing the appeal, the Court

HELD: 1.1. There was delay of 323 days in filing the appeal. The respondents have not contested the appeal. This Court is satisfied with the reasons adduced in support of the petition for condonation of delay. The delay stands condoned. [para 2] [969-C-D]

1.2. The appellant, at the age of 8 years, suffered a dreadful accident resulting into a severe injury in his right leg which has virtually created a deformity in the said leg and he has to suffer with the disability for the rest of his life. The age of the appellant was, therefore, a very relevant factor while determining the compensation payable. The sufferance of such physical disaster, cannot be measured in terms of money precisely, yet having regard to the present day living conditions and the extent to which the aspirations of the appellant came to be demolished by suffering a permanent disability for no fault of his, it becomes the responsibility of the respondent to adequately compensate whatever sufferings undergone by the appellant at that time and immediately after the accident as well as the mental agony that is being suffered by the appellant life long. [para 10] [972-G-H, 973-A-C]

R.D. Hattangadi v. M/s. Pest Control (India) Pvt. Ltd. and Others **– AIR 1955 SC 755;** *Ashwani Kumar Mishra v. P. Muniam Babu and Others* **1999 (2) SCR 518 = (1999) 4 SCC 22;** *The Divisional Controller, K.S.R.T.C. V. Mahadeva Shetty and Another* **2003 (2) Suppl. SCR 14 = AIR 2003 SC 4172;** *B.T. Krishnappa v. D.M. United Insurance Co. Ltd. & Anr.* **2010 (5) SCR 657 = AIR 2010 SC 2630 – relied on**

1.3. Keeping in view the various disadvantages suffered by the appellant as a result of the accident, he is entitled to still higher amount than what has been granted by the Tribunal as well as the High Court on account of pain and sufferings as well as loss of

amenities, and permanent disability. Though it will be impossible to make a precise assessment of the pain and suffering of the appellant considering the age at which the appellant met with the accident and the consequent disability and also taking note of the deprivement of better prospects in the life of the appellant due to the physical disability suffered, the compensation is determined in a sum of Rs.4 lacs as claimed by the appellant under the heads enumerated in the judgment. Interest shall be payable on enhanced compensation @ 6% per annum from the date of petition till the date of realization. Since the appellant is now 19 years old, this Court declares him as major. The Tribunal shall release the compensation amount to him as and when it is deposited by the first respondent. [para 15-16] [975-G-H; 976-A-B, E-F]

Case Law Reference:

AIR 1955 SC 755	**relied on**	**para 11**
1999 (2) SCR 518	**relied on**	**para 12**
2003 (2) Suppl. SCR 14	**relied on**	**para 13**
2010 (5) SCR 657	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : CIVIL APPEAL NO. 1100 OF 2013.

From the Judgment & Order dated 15.09.2010 of the High Court of Karnataka at Bangalore in M.F.A. No. 7863 of 2004 (M.V.)].

V.N. Raghupathy for the Appellant.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This petition is directed against the Division Bench judgment of the

High Court of Karnataka at Bangalore dated 15.09.2010 passed in M.F.A. No.7863 of 2004 (MV).

2. While hearing the S.L.P. on 06.01.2012 notice was ordered on the application for condonation of delay as well as on the main special leave petition and Dasti service was also permitted. After the service of notice, it was reported that the respondents did not enter appearance. As there was no representation on behalf of the respondents, the record of Courts below was called for. There was delay of 323 days in filing this petition. As the respondents have not bothered to contest this petition, we heard learned counsel for the appellant both on application for condonation of delay as well as on merits. As we are satisfied with the reasons adduced in the application filed in support of the condonation of delay petition, the delay stands condoned.

3. Leave granted.

4. We perused the judgment of the Motor Accident Claims Tribunal, Bangalore dated 02.07.2004 passed in M.V.C. No.248 of 2002, original record as well as the Division Bench Judgment impugned in this appeal. There was no dispute about the accident that occurred on 25.10.2001 at about 3:30 p.m. on the 1st Main Road, 2nd Cross, Valmikhinagar, Mysore Road, Bangalore. In the said accident the appellant who was then aged eight years was hit by Hero Puch Motor Cycle bearing Registration No.KA-09-J-4982 which belonged to the second respondent, by its rider. The manner in which the accident took place was vividly stated by P.W.1 who was none another than the father of the appellant himself and who was an eye witness to the accident. After the accident, the appellant was stated to have been admitted in Victoria Hospital and that he was treated as inpatient between 29.10.2001 to 10.11.2001 for a period of 12 days. The appellant suffered injuries in his right leg which was fractured coupled with lower third displacement, Plaster of Paris was applied to the right leg, which was removed after three months. The appellant was

doing his third standard at that time and due to the accident, as per the evidence of P.W.2 the doctor, who attended on him and who also subsequently examined him on 14.01.2004 noticed the following physical impairments:

> "1. Painful limp
>
> 2. Wasting & Weakness of muscles of right limb.
>
> 3. Tenderness right with joint line tenderness of right knee.
>
> 4. Terminal restrictions of joint movements of right knee by last, 20 degrees and total restriction of dorsiflexion of right ankle joint.
>
> 5. Shortening of 1 cm of right lower limb (compared to opposite limb)

He has assessed the disability to the extent of 16% to the whole body because of these accidental injuries."

5. It was also in medical evidence that the appellant continued to take follow-up treatment subsequently. In support of the medical evidence, apart from the version of P.W.2 Doctor, Exhibit P-4 the copy of accident register maintained at Victoria Hospital, Exhibit P-5 the discharge summary, Exhibit P-6 the inpatient record, Exhibit P-7 the outpatient record and Exhibit P-8 the X-ray were all produced. P.W.2 subsequently stated that there was a shortening of 1 cm of right lower limb as compared to the opposite limb.

6. Keeping the above factors in mind as there was no evidence placed on the side of respondents except the marking of the policy Exhibit R-1, the Tribunal held that the second respondent as the owner and the first respondent as the insurer were liable to pay compensation. The Tribunal computed the compensation payable under the following heads:

"For pain, agony, trauma, injury & suffering	Rs.35,000/-
Medical expenses as per bills and other Incidental charges like Conveyance, special	Rs.12,000/-
Diet, Attendant charges, nourishment etc	
Loss of amenities in life	Rs.30,000/-
Total	Rs.77,000-

Thus the petitioner is entitled for total compensation of Rs. 77,000/-."

7. Being aggrieved of the quantum of compensation determined by the Tribunal in a sum of Rs.77,000/- as against his claim of four lacs, the appellant approached the High Court by filing M.F.A. No.7863 of 2004 (MV). The Division Bench of the High Court while confirming the judgment of the Tribunal as regards the liability for payment of compensation by the respondents, however, enhanced the same to a sum of Rs.1 lac under the following heads:

Towards pain and sufferings	Rs.40,000/-
Towards medical expenses, conveyance, nourishing food and attendant charges	Rs.20,000/-
Towards loss of amenities	Rs.40,000/-
Total	**Rs.1,00,000/-**

8. Being aggrieved of the judgment of the Division Bench, the appellant is before us. Having heard learned counsel for the appellant and the respondents not being represented either in person or through counsel and having perused the orders impugned in this appeal, the original records and other material papers, we are of the considered opinion that for various

reasons stated herein the appellant was entitled for higher compensation than what has been ordered by the Tribunal as well as the Division Bench of the High Court. In this context when we refer to the evidence of P.W.2, as noted in the earlier part of this judgment, even after about three years of the accident the appellant continued to have a painful limp, weakness of muscle of right limb, tenderness in the joint line of right knee and terminal restrictions of joint movements of right knee and total restrictions of dorsiflexion of right ankle joint. That apart, there was shortening of 1 cm of right lower limb as compared to opposite limb. In the assessment of the doctor, the appellant suffered a permanent disability of 16% to the whole body because of the injuries sustained in the accident.

9. According to P.W.1 though he took the appellant to the hospital immediately after the accident, due to non-availability of bed facility he was advised to admit him after three days during which period the appellant suffered severe pain. The appellant was inpatient for 12 days as shown by Exhibit P-5 discharge summary. Appellant had suffered fracture of both bones of right leg with displacement. Plaster of Paris applied on the right leg of the appellant could be removed only after three months. Even after the discharge and removal of Plaster of Paris, as per the evidence, the appellant continued to visit the hospital for follow-up treatment. It has to be remembered that at the time the accident took place the appellant was an eight year old boy doing his third standard with all aspirations in life as spoken to by P.W.1 to involve himself in sports activities which could not be fulfilled by virtue of the accident.

10. *De hors* the evidence of P.W.1 considering the age at which the appellant suffered a dreadful accident in which the appellant suffered a severe injury in his right leg which has virtually created a deformity in the said leg, for the rest of his life the appellant has to suffer with the disability. The age of the appellant was, therefore, a very relevant factor while

determining the compensation payable as the sufferance of such physical disaster, that too on his right leg cannot be measured in terms of money precisely but yet having regard to the present day living conditions and the extent to which the aspirations of the appellant came to be demolished by suffering a permanent disability for no fault of his, it becomes the responsibility of the respondent to adequately compensate whatever sufferings undergone by the appellant at that time and immediately after the accident as well as the mental agony that is being suffered by the appellant life long.

11. In this context the reliance placed upon by the Tribunal in the decision reported in *R.D. Hattangadi V. M/s. Pest Control (India) Pvt. Ltd. and Others* – AIR 1955 SC 755 was apposite. That was a case where an Advocate of 52 years met with an accident who suffered serious injuries resulting in 100% disability and paraplegia below the waist. The said claimant apart from claiming compensation on other heads made a claim for pain and suffering and loss of amenities of life in a sum of Rs.3 lacs each. As against claim of Rs.6 lacs, the High Court granted a sum of Rs.1 lac. This Court considering the claim for non-pecuniary loss stated as under in paragraphs 9 and 17:

> "**9.** Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those is the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (*i*) medical attendance; (*ii*) loss of earning of profit up to the date of trial; (*iii*) other material loss. So far non-pecuniary damages are concerned, they may include (*i*) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (*ii*) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (*iii*) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (*iv*) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.
>
> **17.** The claim under Sl. No. 16 for pain and suffering and for loss of amenities of life under Sl. No. 17, are claims for non-pecuniary loss. The appellant has claimed lump sum amount of Rs.3,00,000 each under the two heads. The High Court has allowed Rs.1,00,000 against the claims of Rs.6,00,000. When compensation is to be awarded for pain and suffering and loss of amenity of life, the special circumstances of the claimant have to be taken into account including his age, the unusual deprivation he has suffered, the effect thereof on his future life. The amount of compensation for non-pecuniary loss is not easy to determine but the award must reflect that different circumstances have been taken into consideration. According to us, as the appellant was an advocate having good practice in different courts and as because of the accident he has been crippled and can move only on wheelchair, the High Court should have allowed an amount of Rs.1,50,000 in respect of claim for pain and suffering and Rs.1,50,000 in respect of loss of amenities of life. We direct payment of Rs.3,00,000 (Rupees three lakhs only) against the claim of Rs.6,00,000 under the heads 'Pain and Suffering' and 'Loss of amenities of life'."

12. The above-said ratio was subsequently followed in the decision reported in *Ashwani Kumar Mishra V. P. Muniam Babu and Others* – (1999) 4 SCC 22 for enhancing the compensation on account of loss of expectation to life besides

disappointment, frustration and mental stress suffered by the claimant therein.

13. The said decision was also followed in *The Divisional Controller, K.S.R.T.C. V. Mahadeva Shetty and Another* – AIR 2003 SC 4172.

14. In *B.T. Krishnappa V. D.M. United Insurance Co. Ltd. & Anr.* – AIR 2010 SC 2630, where one of us (Hon. Mr. Justice G.S. Singhvi) was a party, has held in paragraphs 17 and 18 as under:

"**17.** Long expectation of life is connected with earning capacity. If earning capacity is reduced, which is the case in the present situation, that impacts life expectancy as well.

18. Therefore, while fixing compensation in cases of injury affecting earning capacity the Court must remember:

"… No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury 'so far as money can compensate' because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame." [See *R.D. Hattangadi* v. *Pest Control (India) (P) Ltd & Others, (1995) 1 SCC 551: (AIR 1995) SC 755 : 1955 AIR SCW 243) at* page 556, para 10.]"

15. Having bestowed our serious consideration and having noted the various disadvantages suffered by the appellant by virtue of the accident, we are convinced that the appellant is entitled for still higher amount than what has been granted by the Tribunal as well as the High Court on account of pain and sufferings as well as loss of amenities. As held by us earlier, though it will be impossible to make a precise assessment of the pain and suffering of the appellant considering the age at

which the appellant met with the accident and the consequent disability and also taking note of the deprivement of better prospects in the life of the appellant due to the physical disability suffered, we determine the compensation in a sum of Rs.4 lacs as claimed by the appellant under the following heads:

Towards pain and sufferings and permanent disability	Rs.2,80,000/-
Towards medical expenses, conveyance, nourishing food and attendant charges	Rs.20,000/-
Towards loss of amenities	Rs.1,00,000/
Total	**Rs.4,00,000/-**

16. Consequently, the impugned judgment of the Division Bench in M.F.A. No.7863/2004 (MV) dated 15.09.2010 and the award of the Tribunal in M.V.C. No.248/2002 dated 02.07.2004 stand modified, granting a compensation of Rs.4 lacs. The enhanced compensation comes to Rs.3 lacs with interest at 6% per annum from the date of petition till the date of realization. The first respondent-Insurance Company is directed to deposit the enhanced compensation with interest within six weeks from today. Since the appellant was aged 8 years at the time of the accident, namely, 25.10.2001 and eleven years have gone by, he is now 19 years old. We, therefore, declare him as major and direct the Tribunal to release the compensation amount to him as and when it is deposited by the first respondent as directed in the judgment. Accordingly, the appeal stands allowed with the above directions.

R.P. Appeal allowed.

T.P. VISHNU KUMAR
v.
CANARA BANK P.N. ROAD, TIRUPPUR & ORS.
(SLP (C) Nos. 1258-1260 of 2013)

FEBRUARY 11, 2013

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

Constitution of India, 1950 – Article 226 – Writ jurisdiction under – In the matter of recovery of dues to the Bank under Recovery of Debts Act – Original application filed by Bank before Debt Recovery Tribunal – The defendants filing applications before Tribunal for direction to the Bank to produce certain documents – Application dismissed – Writ Petition – Single Judge of High Court holding that documents were necessary for filing Additional Written Statement – Division Bench of High Court allowed Writ Appeal holding that the defendant had alternative remedy available u/s. 20 of the Act – On appeal, held: When specific remedy is available u/s. 20, interference in exercise of jurisdiction under Article 226 is not justified – Powers under Article 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in prejudice to party or where such proceedings are arbitrary, unreasonable and unfair – Single Judge decided the matter on merit which is impermissible in exercise of jurisdiction under Article 226 – Intervention of the writ court has delayed the proceedings for four years defeating the very purpose and object of the Act – Recovery of Debts Due to Financial Institutions Act, 1993 – s. 20 – Administration of Justice.

The respondent-Bank filed Original Application against the petitioner and respondent Nos. 2 to 6 before Debts Recovery Tribunal for recovery of total amount of Rs. 1,59,51,477.93 with interest @ 17%. The appellant and

respondent Nos. 2 to 6 filed interim applications before the tribunal seeking a direction to produce the extract of accounts as well as documents relating to banking transactions. The applications were rejected on the ground that the intention of the petitioner was only to delay the proceedings. Petitioner challenged the order of the Tribunal in a Writ Petition. Single Judge of High Court allowed the petition holding that the documents were necessary for the purpose of filing additional written statement. Division Bench of High Court allowed the writ appeal, holding that alternative remedy was available u/s. 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Hence the present petition.

Dismissing the petition, the Court

HELD: 1. Debt Recovery Tribunals in the country are established for expeditious adjudication and recovery of debts due to banks and financial institutions. The Recovery of Debts due to Banks and Financial Institutions Act, 1993 provides the mechanism to an aggrieved party, if he is dissatisfied with an order passed by the tribunal. Section 20 of the Act says that *any person aggrieved by an order made, or deemed to have been made, by a Tribunal under the Act may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter*. **When a specific remedy is made available to the aggrieved party under Section 20 of the Act, the Single Judge of the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, was not justified in interfering with the orders passed by the Debt Recovery Tribunal. [Paras 6 and 8] [981-E-H; 982-A-B, E-F]**

2. Powers of the High Court under Article 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in

prejudice to the party or where such proceedings or action is wholly arbitrary, unreasonable and unfair. When the Act itself provides for a mechanism, by an appeal under Section 20 of the Act, the High Court is not justified in invoking jurisdiction under Article 226 to examine that the rejection of the applications by the tribunal was correct or not. The petitioner and the contesting respondents have no case that either the Bank or the Tribunal had violated any statutory provisions by rejecting their applications. Writ petition was preferred against the rejection of applications and the same were entertained by the Single Judge of High Court and decided on merits, which is impermissible while exercising its jurisdiction under Article 226 of the Constitution. If the correctness of otherwise of each and every interim order passed by the Tribunal, is going to be tested in a writ court, it will only defeat the object and purpose of establishing such tribunal. In the instant case, due to the intervention of the writ court, the matter got delayed for four years defeating the very purpose and object of the Act. [Paras 9 and 10] [982-G-H; 983-A-C]

CIVIL APPELLATE JURISDICTION : SLP (Civil) Nos. 1258-1260 of 2013.

From the Judgment & Order dated 04.09.2012 of the High Court of Judicature at Madras in W.A. Nos. 559 to 561 of 2009.

S. Thananjayan for the Petitioner.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Canara Bank, Tiruppur (first respondent herein) filed O.A. No. 152 of 2002 before Debt Recovery Tribunal, Coimbatore for a decree directing the defendants therein to pay a sum of Rs.29,68,161.93 with interest at 17% per annum, being the amount on account of Open Cash Credit facilities; a sum of Rs.30,82,758 being the

amount due on account of packing credit facilities and a sum of Rs.99,00,558 being the amount due for Foreign Bills of Exchange facilities and also for a further direction.

2. The petitioner and respondent nos. 2 to 6 herein preferred I.A. No. 873 to 875 of 2007 before the Tribunal seeking a direction to produce the extract of accounts as well as documents relating to banking transactions. Those applications were opposed by the bank contending that none of the documents sought for were germane to the issue to be decided in the applications but only to protract the proceedings. The applications were rejected by the tribunal on the ground that the intention of the petitioner was only to delay the proceedings, against which the petitioner herein filed writ petition nos. 14428-14430 of 2008 before the High Court of judicature at Madras. It was contended before the learned Single Judge of the High Court that the documents and accounts paid for are absolutely necessary for the purpose of filing additional written statement and that the bank cannot withhold those documents. The prayer was opposed by the bank stating that none of the documents sought for were germane to the issue to be decided and attempt was only to protract the proceedings. Further, it was also contended that in view of the matter, the petitioner had an alternative remedy available under the Act.

3. Learned Single Judge passed an elaborate order and allowed the writ petition and held that the petitioner therein had made out a case for production of documents sought for in I.A. Nos. 873 to 875 of 2007 except the promissory notes which were reported to be untraceable. Canara Bank took up the matter in appeal before the Division Bench by filing writ appeal Nos. 559 to 561 of 2009. Writ appeals were allowed holding that the petitioner had not availed of the alternative remedy available under Section 20 of the Recovery of Debs due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). Aggrieved by the same, this appeal has been preferred.

4. We have heard learned counsel for the petitioner. This is a classic case which shows how the parties can protract proceedings in fiscal matters. Parties as well as the system have contributed to the delay. At every stage of the proceedings there was delay. Facts disclosed that Canara Bank had filed the application in the year 2002 vide O.A. No. 152 of 2002 for total amount of Rs. 1,59,51,477.93 with interest and the OA stands at the stage at which it was filed, not-an inch forward.

5. I.A. Nos. 873 to 875 of 2007 were filed by the petitioner as well as respondent Nos. 2 to 6 before the Tribunal after a period of five years of filing the original applications. Applications were dismissed by the Tribunal on 18.02.2008. Writ petitions filed in the year 2008 were allowed by the learned Single Judge on 07.11.2008. Writ appeals were filed before the Division Bench by the Canara Bank in the year 2009, which could be disposed of only after a period of 3 years. Bank's appeals were allowed, since the contesting respondents did not avail of the alternative remedy available under the Act.

6. Debt Recovery Tribunals in the country are established for expeditious adjudication and recovery of debts due to banks and financial institutions. It was noticed that banks and financial institutions have been experiencing considerable difficulties in recovering loans and enforcement of securities charged with them and therefore the actual need was felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay. It was noticed that on 30.09.1990 more than fifteen lacs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs.5622 crores in dues of public sector banks and about 391 crores of dues of the financial institutions. The locking up of such huge amount of money in litigation, it was noticed, prevents proper utilization and recycling of the funds for the development of the country. It is in the above scenario, Parliament enacted The Recovery of Debts due to

Banks and Financial Institutions Act, 1993 (Act 51 of 1993). The Act itself provides the mechanism to an aggrieved party, if he is dissatisfied with an order passed by the tribunal. Section 20 of the Act says that *any person aggrieved by an order made, or deemed to have been made, by a Tribunal under the Act may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter*.

7. Section 18 of the Act deals with Bar of Jurisdiction which says:

> "On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17."

8. Powers, which were conferred on the civil court, now stands conferred on a Tribunal under Section 17 of the Act thereby it can deal with applications from banks and financial institutions for recovery of debts due to such banks and financial institutions. We are of the view when a specific remedy is made available to the aggrieved party under Section 20 of the Act, learned Single Judge of the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, was not justified in interfering with the orders passed by the Debt Recovery Tribunal.

9. Powers of the High Court under Article 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in prejudice to the party or where such proceedings or action is wholly arbitrary, unreasonable and unfair. When the Act itself provides for a mechanism, by an appeal under Section 20 of the Act, in our view, the High Court is not justified in invoking jurisdiction under Article 226 of the Constitution of India to examine that the rejection of the applications by the tribunal was correct or not.

The petitioner and the contesting respondents have no case that either the bank or the tribunal had violated any statutory provisions by rejecting their applications.

10. Writ petition was preferred against the rejection of applications and the same were entertained by the learned Single Judge and decided on merits and which in our view is impermissible while exercising its jurisdiction under Article 226 of the Constitution. If the correctness of otherwise of each and every interim order passed by the Tribunal, is going to be tested in a writ court, it will only defeat the object and purpose of establishing such tribunal. We already noticed that due to the intervention of the writ court, the matter got delayed for four years defeating the very purpose and object of the Act. We, therefore, find no merit in these petitions and the same are dismissed.

K.K.T. Petitions dismissed.

NASIB KAUR AND ORS.

v.

COL. SURAT SINGH (DECEASED) THROUGH L.RS & ORS.

(Civil Appeal No. 1276 of 2013 etc.)

FEBRUARY 12, 2013.

[A.K. PATNAIK AND H. L. GOKHALE, JJ.]

Code of Civil Procedure, 1908:

s.100 – Second appeal – Substantial question of law – Suits for declaration and permanent injunction – Decreed by High Court reversing the finding of first appellate court – Held: Evidence on record has established that defendants were in lawful possession of suit land by virtue of sale deeds and plaintiff had not been able to establish that he was owner thereof and, consequently, entitled to declaration of his title, recovery of possession and injunction – Therefore, the first appellate court had decided the core issue against the plaintiff and no substantial question of law arose for decision in case by High Court u/s 100 –Judgment and decree of High Court set aside.

The respondent in C.A No. 1276 sold some lands, which were further sold by the vendee to the contesting defendants/appellants. The respondent filed a suit against original vendee and his transferees, for declaration that he was the owner and in possession of the suit land. The trial court protected the possession of the contesting defendants till the partition was effected. The appeal of the respondent was dismissed. The respondent filed another suit for permanent injunction restraining the defendants from raising any construction on the suit land and alienating the same. The trial court dismissed the suit. The first appellate court dismissed the

appeal of the plaintiff. The second appeals filed by the wife of the plaintiff were allowed by High Court.

In the instant appeals filed by the contesting defendants, it was contended for the appellants that the first appellate court had concurred with the findings that the appellants had purchased the suit property and were in possession thereof and as there was no substantial question of law in the case, the High Court erred in reversing the concurrent findings of the courts below.

Allowing the appeals, the Court

HELD: In the instant case, the core issue was whether the plaintiff was the owner of the suit property. The findings of the first appellate court in the two cases show that in the suit for declaration of title, the plaintiff had not been able to produce any evidence to prove his ownership and possession over the suit land; and in the suit for injunction, the first appellate court had held that the plaintiff had admitted in plaint that the predecessor-in-interest of the defendants, had purchased the land from the plaintiff and the joint owner. Thus, the evidence on record has established that the appellants were in lawful possession of the suit land by virtue of the two sale deeds and the plaintiff had not been able to establish that he was the owner thereof and, consequently, entitled to declaration of his title, recovery of possession and injunction. Therefore, the first appellate court had decided the core issue against the plaintiff and no substantial question of law arose for decision in case by the High Court u/s 100, CPC. The impugned common judgment and decree of the High Court is set aside. [para 10, 12 and 13] [993-D-F; 994-A-B; 995-D, F-G]

Ishwar Dass Jain vs. Sohan Lal **1999 (5) Suppl. SCR 24 = (2000) 1 SCC 434;** *Achintya Kumar Saha vs.*

Nanee Printers and Others **2004 (2) SCR 28 = (2004) 12 SCC 368 – cited.**

Case Law Reference:

1999 (5) Suppl. SCR 24	**cited**	**para**
2004 (2) SCR 28	**cited**	**para**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1276 of 2013.

From the Judgment & Order dated 11.11.2009 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 2579 of 1997.

WITH

C.A. No. 1277 of 2013.

M.L. Saggar, Seeraj Baggar, Rajinder Mathur for the Appellants.

R.B.S. Chahal, Jyotika Kalra for the Respondents.

The Judgment of the Court was delivered by

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

2. These are the appeals against the common judgment dated 11.11.2009 of the High Court of Punjab and Haryana in R.S.A. Nos. 2579 of 1997 and 2482 of 2008 by way of special leave under Article 136 of the Constitution.

3. The facts very briefly are that Col. Surat Singh filed Civil Suit No. 735-T on 18.04.1987 for declaration that the plaintiff was the owner and was in possession of suit land. The plaintiff's case in the suit was that while he was in joint holding of some land, he sold 2 bighas and 16 biswas of land out of his share without specifying any khasra nos. to Col. Girdhar Singh and his family members (defendant nos. 1 to 4) and thereafter

defendant nos. 1 to 4 sold the land in pieces to defendant nos. 5 to 8 in the suit specifying the khasra nos. and mutation nos. 1120 and 1174. As the plaintiff did not sell the land specifying the khasra nos. to Col. Girdhar Singh and his son, they had no right to sell specific pieces of land with specific khasra nos. The plaintiff's further case in the plaint was that the specific khasra nos. which had been mutated in favour of defendant nos. 3, 4 and 5 were not in accordance with the registered sale deed in favour of Col. Girdhar Singh and his family members. Defendant Nos. 1 to 4 did not contest the suit, whereas defendant Nos. 5 to 8 appeared and filed their written statements. On the pleadings of the parties, the trial court framed issues and by its judgment and decree dated 20.02.2004 found that the areas of land sold under the sale deed dated 17.07.1978 by the plaintiff was less by 1 Biswas than the area in the mutation entries and similarly the area of land sold by the plaintiff as Attorney of Nanak Singh was less than the area shown in the mutation entries. The trial court, therefore, ordered for correction of the mutation entries, but directed that the corrections to be carried out would have no effect as regards the possession of the suit property, which has to continue as before and would be liable to be changed as and when any partition proceeding is effected between the co-sharers. Col. Surat Singh filed an appeal C.A. No. 1721 on 20.03.2004 before the Additional District Judge, Patiala, but by judgment and decree dated 18.03.2008 the Additional District Judge, Patiala, dismissed the appeal.

4. Col. Surat Singh also filed Civil Suit No. 148-T on 09.03.1987 for permanent injunction restraining the defendants from raising any construction on the suit property or alienating the same in any manner whatsoever. The plaintiff's case in the suit was that he sold 2 bighas and 16 biswas of land out of the joint holding of his own share without specifying any khasra nos. to one Col. Girdhar Singh and his son on 17.07.1978 and Col. Girdhar Singh has thus become a co-sharer to the extent of 2 bighas and 16 biswas in his joint holding of the property. Col.

Girdhar Singh, however, did not file any partition proceedings seeking partition of his share out of the joint holding. Thereafter, Col. Girdhar Singh sold the share to the extent of 2 bighas and 16 biswas of land to the defendants in February, 1987 and the defendants are now threatening to raise a new construction near the farm house of the plaintiff in a place of their choice on the plea that they had purchased the land without specific khasra nos. from Col. Girdhar Singh. The defendants contested the suit by filing a written statement and their plea in the written statement inter alia was that their predecessor-in-interest (Col. Girdhar Singh and his son) had purchased the suit property from the plaintiff and his uncle, Nanak Singh, vide sale deeds dated 17.07.1978 and 19.07.1979 and the plaintiff has himself delivered possession of the property purchased by their predecessor-in-interest without khasra nos. Their further plea in the written statement was that Col. Girdhar Singh had constructed his kothi and quarters and planted Eucalyptus trees on the suit property and the plaintiff has not raised any objection and the plaintiff was, therefore, estopped by his act and conduct from filing the suit. On the pleadings of the parties, the trial court framed issues and in its judgment and decree dated 18.08.1998 held that the plaintiff has sold 4 bighas and 16 biswas of land to Col. Girdhar Singh and others which is in possession of the defendants and hence the plaintiff was not entitled to injunction. Aggrieved, Col. Surat Singh filed an appeal C.A. No. 16-T/1989-90 before the learned District Judge, Patiala, but by judgment and decree dated 16.05.1997, the Additional District Judge, Patiala, dismissed the appeal.

5. Aggrieved by the judgments and decrees passed by the Additional District Judge, Patiala, dismissing the two civil appeals, the wife of the plaintiff, Smt. Dulari Singh, filed second appeals R.S.A. nos. 2579 of 1997 and 2482 of 2008 before the High Court and by the impugned common judgment, the High Court allowed the appeals and set aside the judgments and decrees of the trial court and the first appellate court in the two suits and decreed the suit of the plaintiff for possession qua

land measuring 17 karams X 45 karams after declaring the plaintiff to be the owner of the said property. The High Court has also held that the plaintiff was entitled for relief of permanent injunction restraining the defendants from raising any construction in the said property or alienating the said property. Aggrieved, the defendants nos. 5 to 8 in Civil Suit No.735-T/18.04.1987 and the legal heirs of defendants nos. 1 and 2 and the other defendants in Civil Suit No. 148-T/09.03.1987 have filed these appeals.

6. Learned counsel appearing for the appellants submitted that in both the suits, the trial court recorded findings that the appellants had purchased the suit property from Col. Girdhar Singh and his family members to whom the plaintiff had himself delivered possession of the suit property in the years 1978 and 1979 at the time of execution of the two sale deeds and hence the appellants were in possession of the suit properties and the first appellate court had also concurred with those findings and dismissed the First Appeals of the respondents but the High Court reversed the judgments of the trial court and the first appellate court. He submitted that the High Court's jurisdiction under Section 100 of the Code of Civil Procedure, 1908, (for short the 'the CPC') was limited to only deciding substantial questions of law which arise in a case and in this case there was no substantial question of law which arose for decision and, therefore, the findings of the first appellate court affirming the findings of the trial court could not have been disturbed by the High Court.

7. Learned counsel for the respondents, on the other hand, submitted that this Court has held in *Ishwar Dass Jain* vs *Sohan Lal* [(2000) 1 SCC 434] that when material evidence is not considered, which if considered, would have led to an opposite conclusion, a substantial question of law arises for decision which the High Court can decide in a Second Appeal under Section 100 C.P.C. He submitted that the High Court had, therefore, framed a substantial question of law in the impugned

judgment: whether the courts below have failed to consider the material evidence on record. He submitted that the core issue in this case is the very identity of the land sold by the plaintiff as Attorney of Nanak Singh and the trial court and the High Court had not addressed this core issue and hence a substantial question of law had arisen for decision by the High Court. He relied on *Achintya Kumar Saha vs. Nanee Printers and Others* [(2004) 12 SCC 368] in support of this submisson. He submitted that the High Court answered the aforesaid substantial question of law in favour of the respondents after considering the material evidence led in the suit. He submitted that the High Court found on the basis of the evidence that was adduced in the suit by the parties that Col. Surat Singh (plaintiff), as Attorney on behalf of Nanak Singh, had sold two bighas of land with regard to specific khasra nos. i.e. 167 min (1-10) and 166 min (0-10) by sale deed Ex.PW-7/2 and the appellants by virtue of the sale deed in their favour took possession of the portion marked EHGF in the site plan Ex.PW-9/A whereas the portion sold was in the western side of portion marked ABCD as the said portion was owned by Nanak Singh. He submitted that the High Court has held in the impugned judgment that the portion on the eastern side, i.e., marked with letters EHGF belongs to the plaintiff Col. Surat Singh and has accordingly declared that the land measuring 17 karams X 45 karams as depicted with letters EHGF in site plan Ex.PW-9/A was owned by plaintiff Col. Surat Singh and the plaintiff was entitled to the relief of permanent injunction restraining the defendant from raising any construction in the aforesaid suit property or alienating the aforesaid suit property.

8. We find that in Civil Suit No. 735-T/18.04.1987, plaintiff Col. Surat Singh had prayed for declaration, injunction and possession and the suit was partly decreed for correction of some mutation entries but the trial court clearly held that it would in no manner have any effect upon the possession of the parties to the suit which may be determined and finalized as and when partition proceedings are taken up and decided. Against the

decree of the trial court, the plaintiff filed first appeal C.A. No. 1721 on 20.03.2004 and the Additional District Judge held by its judgment and decree dated 18.03.2008 that the trial court is right in coming to the conclusion that plaintiff had not produced cogent evidence that he was the owner of the suit property. Relevant extract from para 29 of the judgment of the first appellate court which records the aforesaid findings and discusses the evidence in support of the finding is quoted hereinbelow:

> "It was incumbent upon the plaintiff to produce on record, the revenue record relating to the suit property, so as to ascertain the share of the plaintiff, as alleged by him. The perusal of jamabandi Ex.PW-4/1 for the year 1978-79; jamabandi Ex.PW-7/V for the year 1978-79; jamabandi Ex.PW-4/1 show that these pertain only to land measuring 29 bighas 5 biswas, which is recorded to be the ownernship of Col. Surat Singh and other co sharers and in possession of one Baghel Singh. Jamabandi Ex.DW7/V pertains to land measuring 29 bighas 5 biswas + 9 bighas 12 biswas + 0-4 biswas which is recorded to be the ownership of Col. Surat Singh and other co-sharers and only land measuring 9 bighas 12 biswas comprised in khasra No.165(3-1), 166(3-0), 167(1-16) and 168(1-15) is recorded in exclusive possession of Col. Surat Singh. The trial court has rightly held that other than the said revenue record no jamabandi of the suit land has been produced by the plaintiff. It has further rightly held that as per sanad takseem Ex.PW7/A the land has been partitioned between different co-sharers, which is mentioned as 72 bighas 8 biswas of which 15 bighas 12 biswas fell to the share of Col. Surat Singh. But even when the plaintiff has filed the present suit for declaring his to be owner in possession of the suit property, he did not bring forth on file any revenue record pertaining to the suit property except jamabandies Ex.PW4/1 and Ex.PW7/V pertaining to the year 1978-79 which are in complete and do not depict the

> entire property of Col. Surat Singh as a co-sharer along with other co-sharers. Trial court has rightly held that extent of ownership and possession of the plaintiff as alleged by him was to be proved by him, by brining on record documents from which he drew his title over the suit property. But no revenue record in the form of jamabandi has been produced on record, so as to prove the extent of ownership and possession of the plaintiff, so in the absence of any documentary proof regarding ownership of the suit property and the revenue record produced by the plaintiff being incomplete and relating to the year 1978-79, whereas the present suit was filed in 1987, copy of the sanad Takseem Ex.PW7/A depicting the share of Col. Surat Singh, are not sufficient to establish the extent of the property of which Col. Surat Sigh was the owner. Though, Sanad Takseem Ex.PW7/A was prepared on 30.8.92, but no revenue record after the preparation of the sanad takseem has been produced, so as to prove that the possession has been delivered and partition had been duly acted upon."

9. We find that in Civil Suit No. 148-T/9-3-1987, the plaintiff Col. Surat Singh had prayed for permanent injunction restraining the defendant from raising any construction or alienating in any manner whatsoever on the suit property and on the basis of the pleadings of the parties one of the issues framed was whether the defendants are owners and are in possession of the property purchased by them from Col. Girdhar Singh and others but by order dated 08.08.1990 the trial court deleted this issue and finally by judgment dated 08.08.1990 dismissed the suit. The plaintiff thereafter filed Civil Appeal No.16 on 19.09.1990 and contended before the Additional District Judge *inter alia* that the trial court was not right in deleting Issue No.2 by order dated 08.08.1990 at the stage when the parties had already led their evidence on that issue and the decision on this issue was necessary for deciding

the suit itself but the Additional District Judge rejected this contention of the plaintiff with the following reasons:

> "The simple prayer of the plaintiff made in the suit is that the defendants be restrained from raising construction over the suit land, or alienating the same. He has admitted in his plaint and replication that the predecessor-in-interest of the defendants; namely, Girdhar Singh, purchased the land from him and Nanak Singh, while the same was still joint. Naturally the defendants will become co-sharers in the land after purchasing the same from Girdhar Singh, as they would step into his shoes. In these circumstances, there was no necessity for framing an issue that the defendants are the owners of the suit land."

10. The aforesaid discussion of the findings of the first appellate court in the two cases shows that in the suit for declaration of title, the plaintiff had not been able to produce any evidence to prove his ownership over and possession over the suit land. Moreover, in the suit for injunction, the first appellate court had held that the plaintiff had admitted in plaint that Col. Girdhar Singh, the predecessor-in-interest of the defendants, had purchased the land from him and Nanak Singh while the same was joint and hence there was no necessity for framing the issue (issue No.2) that the defendants are owners and are in possession of the suit land. We find on a reading of the sale deed dated 17.07.1978 (Ex.PW7/1) executed by the plaintiff that possession of land measuring 2 bighas 16 biswas out of the share of the plaintiff was handed over to Col. Girdhar Singh and his family members and it is not in dispute that Col. Girdhar Singh and his family members thereafter sold this land to the appellants. We also find on a reading of the sale deed dated 19.07.1979 (Ex.PW7/2) executed by the plaintiff as Attorney of Nanak Singh that the possession of the land measuring 2 bighas out of the share of Nanak Singh was also given to Col. Girdhar Singh and his family members and it is not in dispute that Col. Girdhar Singh and his family members

thereafter sold this land to the appellants in 1987. Thus, the appellants were in lawful possession of the said areas of land by virtue of the two sale deeds and the plaintiff had not been able to establish that he was the owner of the suit land and consequently he is entitled to declaration of his title, recovery of possession and injunction.

11. The plaintiff, however, contended in the second appeal before the High Court that material evidence had not been taken into consideration by the first appellate court and the High Court has framed the following substantial question of law:

> "Whether the Courts below have failed to consider the material evidence on record?"

Having framed the substantial question of law, the High Court should have pointed out in the impugned judgment the material evidence which had not been considered by the first appellate court, which if considered, would have established ownership of the plaintiff to the suit property. Instead of pointing out the material evidence which has not been considered by the first appellate court, the High court has made its own assessment of the entire evidence as if it was the first appellate court and held that the plaintiff was the owner of the suit property and was entitled to possession of 17 karams X 45 karams of land depicted in letters EHGF in the site plan Ex.PW-9/A and that he was also entitled to the relief of permanent injunction restraining the plaintiff from raising any construction in the said property or alienating the said property. The High Court has itself noticed in the impugned judgment that the land depicted in the site plan Ex.PW-9/A as EHGF was delivered to Col. Girdhar Singh and his family members at the time of execution of the sale deed by the plaintiff as Attorney of Nanak Singh on 19.07.1979 and the appellants had taken possession of the aforesaid land from Col. Girdhar Singh and his family members in 1987. The appellants were, thus, in legal possession of the suit property and the High Court in exercise of its powers under

Section 100 CPC could not have reversed the findings of the trial court and the first appellate court and decreed the suits for declaration of title and for recovery of possession and injunction in favour of the respondents so as to adversely affect such legal possession of the appellants.

12. In *Achintya Kumar Saha vs. Nanee Printers and Others* (supra) cited by learned counsel for the respondents, this Court found that the main issue around which the entire case revolved was whether the agreement dated 05.07.1976 was a licence or a tenancy and though this issue was before the trial court and the agreement was held to be a licence, the lower appellate court had not adjudicated upon this issue and this Court held that when the core issue is not adjudicated upon, it raises a substantial question of law under section 100 CPC. In the present case, the core issue was whether the plaintiff was the owner of the suit property and the first appellate court has held in C.A. No. 1721 on 20.03.2004 that the plaintiff has not been able to prove his ownership over the suit property and has further held in C.A. No.16-T filed on 19.09.1990 that the plaintiff's own admitted case in the plaint is that the appellants had purchased the suit property from Col. Girdhar Singh and his family members and were in possession of the same and hence the plaintiff was not entitled to declaration of his title, recovery of possession and injunction. In this case, therefore, the first appellate court had decided the core issue against the plaintiff and no substantial question of law arose for decision in this case by the High Court under Section 100, CPC.

13. In the result, these appeals are allowed and the impugned common judgment and decree of the High Court is set aside. Considering, however, the peculiar facts and circumstances of the case, the parties shall bear their own costs.

R.P. Appeals allowed.

BHIMANDAS AMBWANI (D) THR. LRS.

v.

DELHI POWER COMPANY LIMITED & ORS.

(Civil Appeal Nos. 204-205 of 2004)

FEBRUARY 12, 2013

[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]

Land Acquistion Act,1894 – ss.4 and 6 – Successive Notifications under s.4/ Declarations under s.6 – Effect – Held: The effect would be that earlier notification/declaration stands obliterated/ superseded and in such a fact-situation, it would not be permissible for either of the parties to make any reference to the said notifications/ declarations which stood superseded – On facts, s.4 Notification dated 26.3.1983 and Declaration u/s.6 dated 13.5.1983 superseded all earlier notification/declaration – However, no proceedings were taken in pursuance of the said notification/declaration issued in the year 1983 and after commencement of the Amendment Act 1987, the said notification/declaration made in the year 1983 stood elapsed as no award had been made within the period stipulated under the Act –Thus, there can be no sanctity to any of the acquisition proceedings initiated by the respondents so far as the suit land is concerned, though the appellants stood dispossessed from his land in pursuance of the Notification u/s.4 dated 5.3.1963 –Appellants had been dispossessed without resorting to any valid law providing for acquisition of land, thus, entitled for restoration of possession of the land in dispute –However, considering the fact that possession of the land was taken over about half a century ago and a full-fledged residential colony of employees of DESU has been constructed on the said land, therefore, it would be difficult for respondent no.1 to restore the possession – In such a fact-situation, the only option left out to the respondents is to make the award treating s.4 notification as,

on this date, i.e. 12.2.2013 – Land Acquisition Collector directed to make award after hearing the parties within a period of four months – Appellants at liberty to file a reference u/s.18 of the Act and to pursue remedies available under the Act – Appellants shall be entitled to all statutory benefits.

Bhutnath Chatterjee v. State of West Bengal & Ors. **(1969) 3 SCC 675;** *Land Acquisition Officer-cum-RDO, Chevella Division, Ranga Reddy District v. A. Ramachandra Reddy & Ors.* **AIR 2011 SC 662: 2011 (1) SCR 324;** *Raghunath & Ors. v. State of Maharashtra & Ors.* **AIR 1988 SC 1615: 1988 (3) SCC 294;** *Hindustan Oil Mills Ltd. & Anr. v. Special Deputy Collector (Land Acquisition)* **AIR 1990 SC 731: 1990 (1) SCC 59;** *Raipur Development Authority v. Anupan Sahkari Griha Nirman Samiti & Ors.* **(2000) 4 SCC 357: 2000 (2) SCR 781** *and Tukaram Kana Joshi & Ors. thr. Power of Attorney Holder v. Maharashtra Industrial Development Corporation & Ors.* **(2013) 1 SCC 353 –** *relied on.*

Case Law Reference:

(1969)3 SCC675	**relied on**	**Para 7**
2011 (1) SCR 324	**relied on**	**Para 8**
1988 (3) SCC 294	**relied on**	**Para 8**
1990 (1) SCC 59	**relied on**	**Para 8**
2000 (2) SCR 781	**relied on**	**Para 8**
(2013) 1 SCC 353	**relied on**	**para 10,11**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 204-205 of 2004.

From the Judgment & Order dated 22.03.2002 of the High Court of Delhi at New Delhi in LPA No. 46 of 1983.

WITH

C.A. No. 203 of 2004.

Amit Sibal, Arvind Kumar, Purti Marwaha, Henna George, C.S. Chauhan, Anupam Lal Das, A. Ahlawat, Rani Chhabra, Vishnu B. Saharya (for Saharya & Co.) for the appearing parties.

The following Order of the Court was delivered

O R D E R

CIVIL APPEAL NOS. 204-205 OF 2004

1.These appeals have been preferred against the impugned judgment and order dated 22.3.2002, passed by Delhi High Court in LPA No. 46 of 1983 and judgment and order dated 21.5.2002 passed in Review Application C.M. No.893 of 2002 therein by way of which the appeal filed by the respondents against the judgment and order of the learned Single Judge dated 26.11.1982 had been allowed.

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

A. The appellants had been conferred title over the land in Khasra No.307 admeasuring 3 bighas and 3 biswas situate in the revenue estate of village Kilokri, Delhi and the Conveyance Deed for the same was registered on behalf of the President of India in favour of the appellant on 6.6.1962.

A Notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act') was issued on 5.3.1963 in respect of the land admeasuring 139 bighas and 2 biswas including the aforesaid land of the appellants. A declaration under Section 6 of the Act was made in respect of the said land on 22.8.1963. The Land Acquisition Collector made the award under the Act on 29.11.1963. However, no

award was made in respect of the land measuring 23 bighas and 7 biswas including the suit land as it had been shown to be the land of Central Government. However, the possession of the land in respect of which the award was made and the land transferred to the appellant was also taken and the Union of India handed it over to Delhi Electric Supply Units (for short 'DESU') for the construction of staff quarters on 5.7.1966. The appellants claimed to have been deprived of the land without paying any compensation whatsoever, thus, there was a regular correspondence by the appellants and in view thereof Section 4 Notification under the Act was issued on 7.10.1968 in respect of the land admeasuring 31 bighas and 15 biswas including the land in dispute. The said Notification under Section 4 was not acted upon, but a supplementary award No. 1651-A dated 16.2.1974, was made in respect of the land in dispute, making reference to Section 4 Notification dated 5.3.1963.

B. Aggrieved, Predecessor in interest of the appellants filed Writ Petition No.307 of 1972 before Delhi High Court and the said writ petition was disposed of vide judgment and order dated 26.11.1982 making it clear that acquisition proceedings emanating from Notification dated 5.3.1963 came to an end rather stood superseded by second Notification dated 7.10.1968 and therefore, supplementary award No.1651-A dated 16.2.1974 was illegal and without jurisdiction and thus, the award was quashed. The respondents were directed to handover the vacant possession of the suit property to the appellants by 31.12.1983. However, liberty was given to the State to issue a fresh Notification under Section 4 of the Act within a period of one year and till then the possession could be retained by the respondents.

C. It was in view thereof, a Notification dated 26.3.1983 was issued under Section 4 of the Act in respect of the suit land and in the meanwhile, the respondents preferred LPA No.46 of 1983 against the said judgment and order of the learned Single Judge dated 26.11.1982.

D. Declaration under Section 6 of the Act dated 30.5.1983 was issued in respect of the suit land and the respondents did not complete the acquisition proceedings rather abandoned the same.

E. The Division Bench allowed the said LPA vide judgment and order dated 22.3.2002. Review Petition against the said LPA filed by the appellant was dismissed on 21.5.2002.

Hence, these appeals.

3. Shri Arvind Kumar and Ms. Henna George, learned counsel appearing for the appellants have submitted that there had been 3 successive Notifications under Section 4 of the Act. Therefore, the second Notification superseded the first and the third Notification superseded the second notification. In response to the first Section 4 Notification there was no award as the Land Acquisition Collector considered that the suit land belonged to the Central Government. The supplementary award was made subsequent to the second Section 4 Notification making reference to the first Section 4 Notification dated 5.3.1963 which had already elapsed. The learned Single Judge has rightly decided the issue and in pursuance of the same once the third Section 4 Notification was issued on 26.3.1983 and no further proceedings were taken, it also stood elapsed. Therefore, in law, there had been no proceedings regarding acquisition of the land in dispute. The respondent-authorities cannot be permitted to encroach upon the land of the appellants without resorting to the procedure prescribed by law. The Division Bench erred in reversing the judgment of the learned Single Judge under the misconception that there was a valid award in respect of the land in dispute as it could be made referable to Notification under Section 4 dated 7.10.1968 and therefore, the appeals deserve to be allowed.

4. Per contra, Ms. Avnish Ahlawat, learned counsel appearing for the respondent no.1 and Shri Vishnu Saharya, learned counsel appearing for DDA have opposed the appeal

contending that their land had been acquired by the Union of India and handed over to the respondent no.1 after taking the amount of compensation from it. Therefore, the said respondent cannot be penalised at such a belated stage for the reason that DESU has deposited a sum of Rs.10,16,400/- towards the price of land on 24.5.1966. The judgment of the High Court does not require to be interfered with and thus, the appeals are liable to be dismissed.

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

6. There cannot be any dispute to the settled legal proposition that successive Notifications under Section 4 or successive Declarations under Section 6 of the Act can be made, however, the effect of the same would be that earlier notification/declaration stands obliterated/ superseded and in such a fact-situation, it would not be permissible for either of the parties to make any reference to the said notifications/ declarations which stood superseded.

7. In *Bhutnath Chatterjee v. State of West Bengal & Ors.,* (1969) 3 SCC 675, this Court held that where second Section 4 Notification has been issued, the market value is to be determined in terms of the later notification for the reason that there was an intention to supersede the previous notification and if the Government did not choose to explain the reasons which persuaded it to issue the second notification, the court is justified in inferring that it was intended to supersede the earlier notification by the later notification.

8. In *Land Acquisition Officer-cum-RDO, Chevella Division, Ranga Reddy District v. A. Ramachandra Reddy & Ors.,* AIR 2011 SC 662, while dealing with the same issue, this Court held:

> "".... the Government after considering the facts and circumstances, with a view to avoid further challenge, issued a fresh notification dated 9.9.1993 (gazetted on 19.11.1993) followed by final declaration dated, 16.2.1994. The State Government did not subsequently cancel/rescind/ withdraw the notifications dated 9.9.1993 and 16.2.1994. The State Government had clearly **abandoned the earlier notifications** dated 3.1.1990 and 10.l.1990 **by issuing the subsequent notifications** dated 9.91993 and 16.2.1994. The appellant cannot therefore contend that the second preliminary notification is redundant or that first preliminary notification continues to hold good....." (Emphasis added)

(See also : *Raghunath & Ors. v. State of Maharashtra & Ors.,* AIR 1988 SC 1615; *Hindustan Oil Mills Ltd. & Anr. vs. Special Deputy Collector (Land Acquisition),* AIR 1990 SC 731; and *Raipur Development Authority v. Anupan Sahkari Griha Nirman Samiti & Ors.,* (2000) 4 SCC 357).

9. In view of the above, Section 4 Notification dated 26.3.1983 and Declaration under Section 6 dated 13.5.1983 superseded all earlier notification/declaration. However, no proceedings were taken in pursuance of the said notification/ declaration issued in the year 1983 and after commencement of the Amendment Act 1987, the said notification/declaration made in the year 1983 stood elapsed as no award had been made within the period stipulated under the Act. Thus, there can be no sanctity to any of the acquisition proceedings initiated by the respondents so far as the suit land is concerned, though the appellants stood dispossessed from his land in pursuance of the Notification under Section 4 dated 5.3.1963. Thus, we have no hesitation in making a declaration that the appellants had been dispossessed without resorting to any valid law providing for acquisition of land. The Court is shocked as the appellants had been dispossessed from the land during the period when right to property was a fundamental right under Articles 31A and 19 of the Constitution of India and subsequently became a constitutional and human right under Article 300A.

10. This Court dealt with a similar case in *Tukaram Kana Joshi & Ors. thr. Power of Attorney Holder v. Maharashtra Industrial Development Corporation & Ors.,* (2013) 1 SCC 353, and held :

> "……There is a distinction, a ?true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under our constitution.
>
> xx xx xx
>
> Depriving the appellants of their immovable properties, was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfillment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.
>
> The appellants have been deprived of their legitimate dues for about half a century. In such a fact-situation, we

> fail to understand for which class of citizens, the Constitution provides guarantees and rights in this regard and what is the exact percentage of the citizens of this country, to whom Constitutional/statutory benefits are accorded, in accordance with the law".

11. The instant case is squarely covered by the aforesaid judgment in *Tukaram's* case (supra) and thus, entitled for restoration of possession of the land in dispute. However, considering the fact that the possession of the land was taken over about half a century ago and stood completely developed as Ms. Ahlawat, learned counsel has submitted that a full-fledged residential colony of employees of DESU has been constructed thereon, therefore, it would be difficult for respondent no.1 to restore the possession.

12. In such a fact-situation, the only option left out to the respondents is to make the award treating Section 4 notification as, on this date, i.e. 12.2.2013 and we direct the Land Acquisition Collector to make the award after hearing the parties within a period of four months from today. For that purpose, the parties are directed to appear before Land Acquisition Collector, C/o The Deputy Commissioner, South M.B. Road, Saket, New Delhi on 26.2.2013. The appellants are at liberty to file a reference under Section 18 of the Act and to pursue the remedies available to him under the Act. Needless to say that the appellants shall be entitled to all statutory benefits.

13. With these directions, the appeals are allowed. The judgments impugned herein are set aside.

C.A. No. 203/2004

14. In view of the order passed in C.A. Nos. 204-205/2004, the appeal is dismissed.

B.B.B. Appeals disposed of.

M/S TELESTAR TRAVELS PVT. LTD. & ORS.

v.

SPECIAL DIRECTOR OF ENFORCEMENT

(Civil Appeal Nos. 1306-1309 of 2013)

FEBRUARY 13, 2013

[T.S. THAKUR AND M.Y. EQBAL, JJ.]

Foreign Exchange Regulation Act, 1973:

ss. 8 and 14 – Dealing in foreign exchange without previous permission of Reserve Bank – An Indian company dealing with a foreign company based in U.K. and money transactions made through another company based outside India and alleged to be a paper company – Held: There is no reason to interfere with the concurrent findings of fact that the company concerned was a paper company controlled by appellants from India – There appears to be sufficient evidence on record for the Adjudicating Authority and the Appellate Tribunal to hold that the appellants were guilty of violating the provisions of FERA that called for imposition of suitable penalty against them – Appellate Tribunal has already given relief by reducing the penalty by 50% – Keeping in view the nature of violations and the means adopted by appellants to do so, there is no room for any further leniency.

Adjudication Rules under FERA:

r. 3 – Delay in pronouncement of order – Held: Delay by itself would not constitute a ground for setting aside an order that may otherwise be found legally valid and justified – A careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court indicates that no illegality or irregularity has been demonstrated – Foreign Exchange Regulation Act, 1973 – s.51 – Administrative law.

Evidence:

Retracted statements – Evidentiary value of – Held: Adjudicating Authority and Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand to hold that the statements were voluntary and, therefore, binding upon appellants.

Evidence Act, 1872:

s.139 – Cross-examination of person called to produce a document – Held: The documents relied upon by Adjudicating Authority produced by two officials of Indian High Commission in London, were permitted to be inspected – Therefore, refusal of Adjudicating Authority to permit cross examination of witnesses producing the documents cannot even on principles of Evidence Act be found fault with.

Appellant No. 1-travel agency was engaged in the business of booking of tickets for crew members working on ships. For the purpose, the appellants had arrangement with a company based in U.K. (CTL), which would send Pre-paid Ticket Advice (PTA) to appellants in India. The appellants would then secure ticket from the air line concerned. The money for the tickets would then be credited into the Swiss bank account of another company ('B' Ltd.) registered in British Virgin Islands. 'B' Ltd. would transfer the funds to CTL towards the price of tickets after realizing 3% of the ticket price towards commission payable to the appellant company. The Directorate of Enforcement issued a shows cause notice for adjudication proceedings as contemplated u/s 51 of the Foreign Exchange Regulation Act, 1973 stating that 'B' Ltd. was only a paper company and was entirely a holding of the appellant company and was being controlled by it. The Adjudicating Authority, by order dated 29.3.2001, held the appellant-company guilty of

violation of provisions of ss. 8 and 14 of FERA, and imposed upon it a penalty of Rs.90,000/- for contravening s.14 and Rs.85,00,000/- for contravention of s.8(1) of FERA. A consolidated penalty of Rs.20,00,000/- each was imposed on the remaining appellants. The Appellate Tribunal for Foreign Exchange, in appeal, reduced the penalty by 50%. The further appeals of the appellants were dismissed *in limine* by the High Court.

Dismissing the appeals, the Court

HELD: 1.1. Whether or not 'B' Ltd. is a paper Company and whether or not it was controlled and operated by the appellants is essentially a question of fact to be determined on the basis of the material collected in the course of the investigation. The Adjudicating Authority and Tribunal have answered that question in the affirmative taking into consideration the statements made by the appellants as also the documents that were recovered from their premises. There appears to be sufficient evidence on record for the Adjudicating Authority and the Tribunal to hold that the appellants were indeed guilty of violating the provisions of FERA that called for imposition of suitable penalty against them. Therefore, there is no reason to interfere with the concurrent findings of fact that 'B' Ltd. was a paper company controlled by the appellants from India. [para 12 and 15] [1021-C-D; 1023-G-H; 1024-A-B]

1.2. Delay in the pronouncement of the order by itself would not constitute a ground for setting aside the order that may otherwise be found legally valid and justified. A careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court indicates that no illegality or irregularity has been demonstrated. That apart delayed pronouncement of the order by the Adjudicating Authority was not urged as a ground of challenge before the Tribunal or the High

Court. The hearing had been concluded by the Adjudicating Authority in keeping with the requirement of s.51 of FERA and s.30 of Adjudication Rules under FERA. [para 6-7] [1015-B-C; 1016-B-D, F]

Ram Bali v. State of U.P. **2004 (1) Suppl. SCR 195 = (2004) 10 SCC 598 – relied on.**

Bhagwandas Fatechand Daswani and Ors. v. HPA International and Ors. **2000 (1) SCR 254 = 2000 (2) SCC 13,** *Kanhaiyalal and Ors. v. Anupkumar and Ors.* **2002 (4) Suppl. SCR 366 = (2003) 1 SCC 430 and** *Anil Rai v. State of Bihar* **2001 (1) Suppl. SCR 298 = (2001) 7 SCC 318 – cited.**

1.3. As regards the plea that retracted statements of the appellants were wrongly relied upon by the Adjudicating Authority, suffice it to say that the Adjudicating Authority has specifically held that the statements were voluntary in nature and that the subsequent retraction is a mere afterthought with a view to escaping the consequences of the violations committed by them. The Appellate Tribunal also held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. The Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. [para 9, 11] [1017-A-C; 1019-C-D]

K.T.M.S. Mohd. v. Union of India **1992 (2) SCR 879 = (1992) 3 SCC 178,** *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* **1997 (1) SCR 797 = (1997) 3 SCC 721 – referred to.**

Vinod Solanki v. Union of India & Anr. **2008 (17) SCR 1070 = (2008) 16 SCC 537 – held inapplicable**

1.4. In the case at hand, the Adjudicating Authority also placed reliance upon documents produced by two officials of Indian High Commission in London, and the appellants were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of s. 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross-examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants. [para 20] [1028-A-D]

Surjeet Singh Chhabra v. Union of India and Ors. **1996 (7) Suppl. SCR 818 = (1997) 1 SCC 508;** *M/s Kanungo & Company v. Collector of Customs and Ors.* **(1973) 2 SCC 438- referred to**

New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr. **2007 (13) SCR 598 = (2008) 3 SCC 279,** *S.C. Girotra v. United* **1995 Supp. (3) SCC 212,** *Lakshman Exports Ltd. v. Collector of Central Excise* **(2005) 10 SCC 634, and** *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.* **1972 (1) SCR 241 = (1971) 2 SCC 617 - cited**

1.5. There is no reason much less a compelling one to interfere with the quantum of penalty imposed upon the appellants by the Tribunal. The Adjudicating Authority had imposed a higher penalty. The Tribunal has already given relief by reducing the same by 50%. Keeping in view the nature of the violations and the means adopted by the appellants to do that, there is no room for any further leniency. [para 21] [1028-F]

Case Law Reference:

2000 (1) SCR 254	**cited**	**para 5**
2002 (4) Suppl. SCR 366	**cited**	**para 5**
2001 (1) Suppl. SCR 298	**cited**	**para 5**
2004 (1) Suppl. SCR 195	**relied on**	**para 6**
1992 (2) SCR 879	**referred to**	**para 11**
1997 (1) SCR 797	**referred to**	**para 11**
2008 (17) SCR 1070	**held inapplicable**	**para 11**
2007 (13) SCR 598	**cited**	**para 16**
1995 (3) Suppl. SCC 212	**cited**	**para 16**
2005 (10) SCC 634	**cited**	**para 16**
1972 (1) SCR 241	**cited**	**para 16**
1996 (7) Suppl. SCR 818	**referred to**	**para 18**
1973 (2) SCC 438	**referred to**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1306-1309 of 2013.

From the Judgment & Order dated 14.03.2008 of the High Court of Judicature of Bombay in FERA Appeal No. 8, 9, 10 & 11 of 2008.

Shyam Diwan, Tarun Gulati, Neil Hildreth, Shruti Sabharwal, Nirman Sharma, Praveen Kumar for the Appellants.

P.P. Malhotra, ASG, Chetan Chawla, Priyanka Mathur, Anil Katiyar, Shreekant N. Terdal for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. These appeals arise out of a common judgment and order dated 14th March, 2008 passed by a Division Bench of the High Court of Judicature at Bombay whereby the High Court has partly allowed FERA Appeal Nos.8 to 11 of 2008 that assailed the common order dated 28th November, 2007 passed by the Appellate Tribunal for Foreign Exchange, New Delhi and reduced the penalty imposed upon the appellants for contravention of Sections 14 and 8(1) of the Foreign Exchange Regulation Act, 1973 by 50%. The factual matrix in which the adjudication order came to be passed by the Deputy Director, Directorate of Enforcement, Mumbai and the appellate order passed by the Tribunal for Foreign Exchange, New Delhi has been set out in the order passed by the Tribunal and the order passed by the High Court of Bombay mentioned earlier. It is, therefore, unnecessary to recount the facts over again except to the extent it is absolutely necessary for disposal of these appeals.

3. Appellant-Telestar Travels Private Ltd. carries on a travel agency and specialises in booking of tickets for crew members working on ships. Most of the shipping companies are based abroad with their representatives located in Mumbai who would issue instructions to the appellant-company to arrange air passage for the crew from Bombay and other places in India to particular ports abroad. The company would then take steps to have tickets issued on the basis of such instructions for different destinations. The appellant's case is that the travel agents in U.K. had of late started offering cheap fares for seaman/crew travelling to join the ships. In order to benefit from such low fare tickets the shipping companies are said to have desired that the benefit of such low fare tickets be organized for them by the appellant. In order to make that possible the appellant-company claims to have approached M/s Clyde Travels Ltd. (CTL) in Glasgow (U.K.) for getting such cheap seaman tickets. According to this arrangement, the CTL would send a Pre-paid Ticket Advice (PTA) to the appellant in India based on which the appellant would secure a ticket from the

airline concerned. The money for the tickets would then be credited into the Swiss bank account of Bountiful Ltd., a company registered in British Virgin Islands. Bountiful Ltd. would out of money so received transfer funds to CTL towards the price of the tickets apart from realising 3% of the ticket price towards commission payable to the appellant-company. The appellant-company claims that the process of purchase of tickets as aforementioned was a commercial arrangement that was legally permissible and did not involve any violation of FERA. The Directorate of Enforcement, Mumbai, did not, however, think so. According to the Directorate, Bountiful Ltd. was a paper company that held Swiss bank account which was in turn operated by a person named Mr. Shirish Shah, a Chartered Accountant, operating from London on the instructions of Mr. Rajesh Desai, appellant in SLP (C) No.15549 of 2008 who was none other than the son of Mr. Arun Desai, Managing Director of Telestar Travels Pvt. Ltd. appellant in SLP (C) No.15547 of 2008. The further case of the Directorate was that documentary evidence seized from the office of M/s Telestar and the residence premises of the Managing Director in the course of investigation conducted under Section 37 of FERA unerringly revealed that Bountiful Ltd. was entirely a holding of the appellant-Telestar Pvt. Ltd. and entirely controlled in its operation and financial management by Mr. Arun N. Desai and his two sons Mr. Sujeet A. Desai and Mr. Rajesh A. Desai, appellants in these appeals. It was on the basis of the investigations conducted by the Directorate, the statements of the promoters of Telestar Pvt. Ltd. recorded during the course of such investigation and other material collected by the Directorate, a notice was issued by the Directorate calling upon them to show cause why the adjudication proceedings as contemplated under Section 51 of the FERA should not be filed against them for the contravention pointed out in the show cause notice. The show cause notice was followed by an addendum by which the Directorate sought to place reliance upon a report dated 15th January, 1997 received from the High Commission of India, at London and the revised list of

documents enclosed and communicated to the appellants. The appellants filed their replies in which they denied the allegations that Bountiful Ltd. was a paper company or that the same was being controlled from India by the appellants. By their letter dated 23rd September, 1997 the appellants sought to cross-examine Mr. Livingstone of CLD and the Indian High Commission officials in London who had met him. He also sought to cross-examine Miss Anita Chotrani and Mr. Deepak Raut upon whose depositions Directorate of Enforcement sought to place reliance in support of its case. The Adjudicating Authority eventually passed an order on 29th March, 2001 holding the appellants guilty of violation of provisions of Sections 8 and 14 of FERA inasmuch the appellants had received payments from various persons on account of tickets booked by them for US $ 846116.14 and GB Pounds 156943.16 which were credited to the account No.10975 at Geneva and which they failed to surrender to an authorised dealer in foreign exchange in India within three months of becoming the owner or holder thereof without the general permission of the RBI as required under Section 14 of FERA. The Adjudicating Authority has further held the appellants guilty of transferring foreign exchange of GB Pounds 138671.40 and US $ 672131.85 from the said Geneva Account No.10975 of M/s Bountiful Ltd. to various persons during the period of November, 1994 to July, 1995 without the previous general or special permission of the RBI, thereby contravening Section 8(1) of FERA, 1973. The Adjudicating Authority on that basis levied a penalty of Rs.90,00,000/- for contravening Section 14 and Rs.85,00,000/- for contravention of Section 8(1) upon M/s Telestar Pvt. Ltd., Mumbai. The Authority further levied a consolidated penalty of Rs.20,00,000/- each upon the remaining appellants Mr. Arun N. Desai, Managing Director, Mr. Rajesh Desai and Mr. Sujeet Desai, his sons.

4. Aggrieved by the order passed by the Adjudicating Authority, the appellants appealed to the Appellate Tribunal for

Foreign Exchange, New Delhi. The Tribunal, as already mentioned, allowed the said appeals but only in part and to the limited extent of reducing the penalty imposed by the Adjudicating Authority by 50%. The Tribunal, upon reappraisal of the entire material on record, affirmed the findings recorded by the Adjudicating Authority that the appellants had indeed committed violation of Sections 8 and 14 of the FERA 1973 as noticed earlier. The further appeals before the High Court of Judicature at Bombay by the appellants also failed and were dismissed *in limine* by the High Court by order dated 14th March, 2008. Hence the present appeal.

5. Appearing for the appellants, Mr. Shyam Diwan, learned senior counsel, made a three-fold submission in support of the appeals. Firstly, he contended that the judgment and order passed by the Adjudicating Authority was *ex parte* hence liable to be set aside. Elaborating that submission Mr. Diwan argued that since the adjudication order had been passed by the authority concerned nearly 3½ years after the matter was finally argued before it, the requirement of affording an opportunity of being heard to the appellants arising under Section 51 of FERA was not satisfied. It is submitted that the appellants had been prejudiced on account of delayed pronouncement of the adjudication order as the documents available with them could not be placed before the said authority after the hearing of the matter. He further contended that Rule 3 of the Adjudication Rules provided for a personal hearing which was no doubt provided on the date the matter was finally argued before the Adjudicating Authority but which hearing ought to have been repeated as the pronouncement of the order by the Authority had been delayed. Reliance in support of the submission was placed by Mr. Diwan upon the decisions of this Court in *Bhagwandas Fatechand Daswani and Ors. v. HPA International and Ors.* (2000) 2 SCC 13, *Kanhaiyalal and Ors. v. Anupkumar and Ors.* (2003) 1 SCC 430 and *Anil Rai v. State of Bihar* (2001) 7 SCC 318.

6. On behalf of respondent, it was per contra argued by Mr. P.P. Malhotra, learned Additional Solicitor General, that the order passed by the Adjudicating Authority was fully compliant with the provisions of Section 51 read with Section 30 of the Rules under FERA and could not be treated as an *ex parte* order by any stretch of reasoning. He also contended that mere delay in the pronouncement of adjudication order was not enough to justify setting aside of the order if the same was otherwise found to be legally valid and unacceptable. No prejudice was, at any rate, caused to the appellants by the delay, according to Mr. Malhotra, who placed reliance on the decision of this Court in *Ram Bali v. State of U.P.* (2004) 10 SCC 598 to argue that delay in the pronouncement was not itself sufficient to declare the order to be bad in law. This Court has, according to Mr. Diwan, deprecated the practice of Courts and Authorities delaying the pronouncement of orders and matters that have been heard and reserved for such pronouncements. There is no gainsaying that any Court or Authority hearing the matter must within a reasonable time frame pronounce the orders especially when any misgiving arising out of inordinate delay which gave rise to unnecessary apprehensions in the minds of litigants especially in the minds of a party that has lost the matter at the hand of such long delay. We can only express our respectful agreement with the observations made by this Court in the decisions relied upon by Mr. Diwan that have issued guidelines and set out time frame considered reasonable for pronouncement of order by Courts and Authorities. Even so, the question remains whether delay by itself should constitute a ground for setting aside the order that may otherwise be found legally valid and justified. Our answer to that question is in the negative. The decision of this Court in *Ram Bali v. State of U.P.* (2004) 10 SCC 598 is one such case where the Court repelled a similar argument and declared that delay was not a ground by itself that otherwise specifically dealt with the matter in issue. The Court at best put to caution requiring a careful and closer scrutiny of the order that was pronounced after undue delay but if upon such scrutiny also the order is not found to be wrong in any way it may decline to set aside the same.

7. We have in the instant case heard the matter at considerable length for a careful examination of the adjudication by the Authority and that of the Appellate Tribunal and the High Court to examine whether it suffers from any illegality or material irregularity causing prejudice to the appellants. We are of the view that no such illegality or irregularity has been demonstrated. That apart delayed pronouncement of the order by the Adjudicating Authority was not urged as a ground of challenge before the Tribunal or the High Court both of whom have remained silent on this aspect. Even on the question of prejudice we find the contention of Mr. Diwan to be more imaginary than real. The argument regarding prejudice is founded on the plea that the appellants could not place some of the documents which they have now placed before this Court for consideration. It is further admitted that no application for permission to produce these documents was filed by them before the Adjudicating Authority no matter they could have done so if they really indeed needed to place reliance on such documents. Mr. Malhotra was, in our view, justified in contending that the hearing had been concluded by the Adjudicating Authority in keeping with the requirement of Section 51 and Rule 3 of the Adjudication Rules under FERA. The first limb of the contention urged by Mr. Diwan, therefore, fails and is hereby rejected.

8. It was next argued by Mr. Diwan, that the Adjudicating Authority had placed reliance upon the retracted statements of the appellants while holding that Bountiful Ltd. was a paper company and that its financial control lay in their hands, so that receipt and appropriation of the foreign exchange by that device was a clear violation of the provisions of FERA.

9. A reading of the order passed by the Adjudicating Authority would show that the appellants had in their responses to the show cause notice and the addendum to the same

specifically raised a contention that the statements made by them were not voluntary and could not, therefore, be relied upon. That contention was not only noticed by the Adjudicating Authority but specifically dealt with and rejected holding that the statement was voluntary in nature and that the subsequent retraction is a mere after thought with a view to escaping the consequences of the violations committed by them. The Adjudicating Authority, we are more than satisfied, was aware of the requirement of examining the voluntary nature of the statements being relied upon by it. It has accordingly examined that aspect and given cogent reasons for holding that the statements were indeed voluntary and incriminating both. The Adjudicating Authority has observed:

> *"On going through the records of the case, I find that the statements dated 24.8.95, 25.8.95 and 6.2.96 of Shri Arun N. Desai, the Noticee No.1 and the statements dated 24/25.8.95 of Rajesh N. Desai and Sujeet Desai, the Noticee Nos. 2 & 3 were all given by the respective notices in their own handwriting and in the language known to them. Shri Arun Desai, in his statements, had explained in detail the functioning of M/s Telestar Travels, the Travel Agency, mainly engaged in booking of domestic and international air tickets for crew members joining foreign ships; the need for entering into an agreement with agents abroad; the mode of payments received ant eh commission/profit earned on the tickets booked by them through the overseas shipping companies and also how their commission was being remitted either by draft or telegraphic transfer into their account No.82886 in Bank of Baroda, Churchgate Branch etc. I thus find that the statemtns of the notice I contain such inner and minute details, which could have been given out of his personal knowledge and could not have been invented by the officers who recorded the said statements. Moreover, the statement of the notice No.1 have been confirmed by the statements of the other two notices S/Shri Rajesh and Sujeet Desai, in their respective statements given before the Enforcement Officers. Even otherwise there is nothing on record that might cast the slightest doubt on the voluntariness of the statements in question. I am, therefore, of the view that the statements in question were given by the respective three notices voluntarily in explanation of the plethora of documents seized from the business/residential premises of the notices and contain those details which they wished to state. The retraction subsequently filed by the notices S/Shri Rajesh Desai and Sujeet Desai are merely an afterthought to escape from the clutches of law and I reject them in toto."*

10. In the appeal filed by the appellants before the FERA Appellate Tribunal also a contention as to the voluntary nature of the statements made by the appellants was urged on their behalf but rejected by the Tribunal in the following words:

> *"It is argued that the statements given by Shri Arun Desai, Rajesh Desai and Sujeet Desai were not the voluntary ones which were dictated by the Enforcement Officers and were obtained under threats and coercion which were subsequently retracted and that there was no corroborative material to support them. But we find no force in these arguments because the appellants, in their statements, had explained in detail the functioning of M/s. Telstar Travels, which was engaged in booking of domestic and international air tickets for crew members joining foreign ships, the need for entering into an agreement with agents abroad, the mode of payments received and the commission earned on the tickets booked by them through the Over Shipping Companies and how their commission was remitted through Banking channel. Moreover, they were written in their own handwriting and in the language known to them. The statements contained such inner and minute details*

which could have been given out of their personal knowledge and could not have been invented by the officers of the Department."

11. The Tribunal has relying upon the decision of this Court in *K.T.M.S. Mohd. v. Union of India* (1992) 3 SCC 178, *K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* (1997) 3 SCC 721 held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. There is, in that view, no gainsaying that the Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. Decision of this Court in *Vinod Solanki v. Union of India & Anr.* (2008) 16 SCC 537 relied upon by Mr. Diwan does not lend any help to the appellants. The decision is an authority for the proposition that a person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by an inducement, threat or promise by a person in authority. The burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts. The decision does not hold that even when a statement is founded upon consideration of the relevant facts and circumstances and also found to be voluntary, it cannot be relied upon because the same was retracted. We may usefully refer to the legal position stated in the following paragraph by this Court in *K.T.M.S. Mohd. & Anr.* (supra):

"34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of

Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated..."

(emphasis supplied)

12. That brings us to the submission of Mr. Diwan that the arrangement arrived at between the Appellant Company, on the one hand, and Clyde Travels Ltd. and Bountiful Ltd., on the other, was commercial in nature which the Adjudicating Authority and the Tribunal had failed to appreciate in its true and correct perspective. There was, according to Mr. Diwan,

no real basis for the Adjudicating Authority and the Tribunal to hold that Bountiful was a paper company and that it was being controlled by the Desais from India. Mr. Diwan made a strenuous attempt to persuade us to reverse the findings of fact recorded by the Adjudicating Authority and the Tribunal on this aspect. We regret our inability to do so. Whether or not Bountiful Ltd. is a paper Company and whether or not it was controlled and operated by the appellants is essentially a question of fact to be determined on the basis of the material collected in the course of the investigation. The Adjudicating Authority and Tribunal have answered that question in the affirmative taking into consideration the statements made by the appellants as also the documents that were recovered from their premises. All these documents and incriminatory circumstances have been discussed in the following passage by the Adjudicating Authority:

> *"...A perusal of the records indicate that various incriminating documents together with the Indian currencies were seized from the office premises of M/s Telstar Travels and also from the residence of Shri Arun Desai, the Managing Director of the said company. All the three noticees S/Shri Arun Desai and his two sons Rajesh and Sujeet Desai, have given their statements before the Enforcement Officer, in explanation of the said seized documents. It is also noticed that the seizure of documents and currencies had not been disputed by the notices at any point of time. Shri Rajesh Desai, son of the said Shri Arun N. Desai and one of the noticees in the impugned SCN, while explaining page No.18 of the bunch of documents marked 'G', had clearly admitted that it was the message from Shri Sirish Shah from London informing that US $ 33884 has been credited on 14.11.94 to the account of Bountiful. Similarly page Nos.30 & 34 of file marked 'I', contain instructions to transfer certain amounts to the account of Clyde Travels Ltd. Glasgow. When Shri Rajesh Desai was questioned as to how could issue such instructions in respect of the account of Bountiful Ltd., he clearly explained in his statement dated 24.8.95 that the account No.10975 of Bountiful at Geneva was an account of a paper company held by him for the sole purpose of receiving and making payments in respect of seamen airline tickets which were obtained at the very cheap rates from M/s Clyde Travels, Glasgow, with whom M/s Telstar had a tie up since August 1994; that Shri Sirish Shah was a Chartered Accountant in London, who was known to both M/s. Clyde Travels and Telstar; that the said Shri Sirish Shah was used by him for giving instructions to the bank for operating the account of Bountiful Ltd. At Switzerland that the last balance for the said account of Bountiful was US$ 98761.70. Shri Rajesh Desai further explained the page Nos. at 111 to 125 of file marked 'E' seized from the office of M/s. Telstar Travels. P. Ltd., in his statement dated 24.8.95, admitting the same to be the statement of account of Bountiful Ltd. with Banque De Financement, Geneva, which showed credits of amounts remitted by various overseas shipping companies against PTA tickets purchased for their crew; that the said credits represented amounts transferred from the bank accounts of their overseas shipping companies; that the debits represented the amounts transferred to the Bank of Scotland Glasgow which is the account of M/s. Clyde Travels Ltd. in Glasgow; that he was the person giving instructions to Shri Sirish Shah, Chartered Accountant of P.S.J. Alexandar & Co, London to transfer funds from the account in Geneva of M/s. Bountiful to various places which included transfer of funds to M/s Clyde Travels Ltd, Glasgow which forms a major portion of transfer for PTA tickets."*

13. Dealing with the invoices issued by Bountiful Ltd. to M/s. Ocean Air Ltd. and M/s Scot Travel Ltd., Hong Kong, the Adjudicating Authority held that appellant Telestar Pvt. Ltd. had

issued directions that the amount payable be deposited to the credit of M/s Bountiful Ltd. The Adjudicating Authority observed:

> *"... I also find from the records, certain invoices of Bountiful ltd. Drawn on M/s. Ocean Air Ltd. and on M/s. Scot Travel Ltd, Hong Kong, which were produced by Miss Anita Chotrani Travel Co-ordinator of M/s. Denklau Marine Services, Mumbai, which contain directions of M/s Telstar to credit the amount of the bill to the A/c No.10975 of M/s Bountiful Ltd, at Geneva. A scrutiny of the bills produced by the said Miss Anita Chotrani, given by Telstar, it was found that several air tickets of Air India booked by Telstar were also billed in these Bountiful invoices and payment of these Air India tickets have been directed to the Geneva Account. Moreover the bills do not bear any signatures nor the identity of the person allegedly managing the billing on behalf of Bountiful Ltd."*

14. The Adjudicating Authority has also noticed and relied upon incriminating circumstances like instructions issued by appellant Telestar to Bountiful to remit an amount of Rs.4,74,033/- to M/s Aarnav Shipping Company towards repairs of MV Rizcun Trader, a ship owned by one of their principals M/s United Ship Management, Hongkong. Similarly a payment of US$ 12500/- made from Bountiful Account to Mustaq Ali Najumden is also evidenced and was made on the instructions of appellant-Shri Rajesh Desai, which the latter explained to be kickbacks paid to overseas shipping company for giving ticketing business to Telestar.

15. Suffice it to say that there may be sufficient evidence on record for the Adjudicating Authority and the Tribunal to hold that the appellants were indeed guilty of violating the provisions of FERA that called for imposition of suitable penalty against them. It was not the case of the appellants that the findings were unsupported by any evidence nor was it their case that the statements made by the appellants were un-corroborated by any independent evidence documentary or otherwise. In the

circumstances, therefore, we see no reason to interfere with the concurrent findings of fact on the question whether Bountiful was or was not a paper company controlled by the appellants from India.

16. That brings us to the third limb of attack mounted by the appellants against the impugned orders. It was argued by Mr. Diwan that while holding that Bountiful Ltd. was a paper Company and was being controlled and operated from India by the appellants through Shri Sirish Shah, the Adjudicating Authority had relied upon the statements of Miss Anita Chotrani and Mr. Deepak Raut, and a communication received from the Indian High Commission in London. These statements and the report were, according to Mr. Diwan, inadmissible in evidence as the appellant's request for an opportunity to cross examine these witness had been unfairly declined, thereby violating the principles of natural justice that must be complied with no matter the strict rules of Evidence Act had been excluded from its application. Inasmuch as evidence that was inadmissible had been relied upon, the order passed by the Adjudicating Authority and the Tribunal were vitiated. Reliance in support was placed by Mr. Diwan upon the decisions of this Court in *New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr.* (2008) 3 SCC 279, *S.C. Girotra v. United* 1995 Supp. (3) SCC 212, *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, and *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.* (1971) 2 SCC 617.

17. Mr. Malhotra, on the other hand, argued that the right of cross-examination was available to a party under the Evidence Act which had no application to adjudication proceedings under FERA. He relied upon the provisions of Section 51 of the Act and Adjudication Rules framed thereunder in this regard. He also placed reliance upon a decision of this Court in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 to argue that cross-examination was unnecessary in certain circumstances such as the one at hand

where all material facts were admitted by appellants in their statements before the concerned authority.

18. There is, in our opinion, no merit even in that submission of the learned counsel. It is evident from Rule 3 of the Adjudication Rules framed under Section 79 of the FERA that the rules of procedure do not apply to adjudicating proceedings. That does not, however, mean that in a given situation, cross examination may not be permitted to test the veracity of a deposition sought to be issued against a party against whom action is proposed to be taken. It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a *de novo* enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in *Surjeet Singh Chhabra v. Union of India and Ors.* (1997) 1 SCC 508 before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed:

> **"3.** *It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner."*

19. We may also refer to the decision of this Court in *M/s Kanungo & Company v. Collector of Customs and Ors.* (1973) 2 SCC 438. The appellant in that case was carrying on business as a dealer, importer and repairer of watches in Calcutta. In the course of a search conducted by Customs Authorities on the appellant's premises, 280 wrist watches of foreign make were confiscated. When asked to show cause against the seizure of these wrist watches, the appellants produced vouchers to prove that the watches had been lawfully purchased by them between 1956 and 1957. However, upon certain enquiries, the Customs Authorities found the vouchers produced to be false and fictitious. The results of these enquiries were made known to the appellant, after which they were given a personal hearing before the adjudicating officer, the Additional Collector of Customs. Citing that the appellant made no attempt in the personal hearing to substantiate their claim of lawful importation, the Additional Collector passed an order confiscating the watches under Section 167(8), Sea Customs Act, read with Section 3(2) of the Imports and Exports

(Control) Act, 1947. The writ petition filed by the appellant to set aside the said order was allowed by a Single Judge of the High Court on the ground that the burden of proof on the Customs Authorities had not been discharged by them. The Division Bench of the High Court reversed this order on appeal stating that the burden of proving lawful importation had shifted upon the firm after the Customs Authorities had informed them of the results of their enquiries. In appeal before this Court, one of the four arguments advanced on behalf of the appellant was that the adjudicating officer had breached the principles of natural justice by denying them the opportunity to cross-examine the persons from whom enquiries were made by the Customs Authorities. The Supreme Court rejected this argument stating as follows:

> ***"12.*** *We may first deal with the question of breach of natural justice. On the material on record, in our opinion, there has been no such breach. In the show-cause notice issued on August 21, 1961, all the material on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation. The complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to enable it to cross-examine them. In our-opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."*

20. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by

Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected.

21. Mr. Diwan lastly argued that the penalty imposed was disproportionate to the nature of the violation and that this Court could at least, interfere to that extent. We do not see any reason much less a compelling one to interfere with the quantum of penalty imposed upon the appellants by the Tribunal. The Adjudicating Authority had, as noticed earlier, imposed a higher penalty. The Tribunal has already given relief by reducing the same by 50%. Keeping in view the nature of the violations and the means adopted by the respondent to do that, we see no room for any further leniency.

22. In the result, these appeals fail and are, hereby, dismissed with costs assessed at Rs.50,000/- in each appeal. Cost to be deposited within two months with the SCBA Lawyers' Welfare Fund.

R.P. Appeals dismissed.

RAJENDRA YADAV
v.
STATE OF M.P. & OTHERS
(Civil Appeal No. 1334 of 2013)

FEBRUARY 13, 2013

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

Service Law:

Disciplinary proceedings – Equality in punishment – Held: Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences – Therefore, punishment of dismissal from service imposed on appellant is set aside and it is ordered that he be reinstated in service forthwith from the date on which the co-delinquent was re-instated, and with the same consequent benefits – Doctrine of equality.

A departmental inquiry was conducted against the appellant, a Head Constable of Police, and two others namely, an ASI and another Head Constable, for demanding and accepting illegal gratification for registering a police complaint. The money was proved to have been paid to the co-delinquent (a Constable) and as far as the appellant was concerned, with regard to receiving money, his participation and tacit approval were proved. The ASI was demoted for three years. The appellant and the other Head Constable were dismissed from service and the co-delinquent (the Constable) was awarded the punishment of reduction of increment with cumulative effect for one year. The departmental appeal, the writ petition and the writ appeal filed by the appellant having been dismissed, he filed the appeal.

Allowing the appeal, the Court

HELD: 1. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. Parity among co-delinquents has also to be maintained when punishment is being imposed. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences. In the instant case, the charge levelled against the co-delinquent was more serious than the one against the appellant. It was the co-delinquent who had demanded and received the money; he was inflicted comparatively a lighter punishment. At the same time, the appellant, who had played a passive role, was inflicted with a more serious punishment of dismissal from service, which cannot be sustained. Therefore, the punishment of dismissal from service imposed on the appellant is set aside and it is ordered that he be reinstated in service forthwith from the date on which the co-delinquent was re-instated and be given all consequent benefits as was given to the said co-delinquent. [para 11-12 and 14] [1034-E-F, G-H; 1035-A-B; 1036-A-B]

Anand Regional Coop. Oil Seedsgrowers' Union Ltd. V. Shaileshkumr Harshadbhai Shah **2006 (4) Suppl. SCR 370 = (2006) 6 SCC 548;** *Director General of Police and Others v. G. Dasayan* **(1998) 2 SCC 407 – relied on.**

Case Law Reference:

2006 (4) Suppl. SCR 370	**relied on**	**para 9**
(1998) 2 SCC 407	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1334 of 2013.

From the Judgment & Order dated 06.09.2011 of the High

Court of Madhya Pradesh at Jabalpur in W.A. No. 1135 of 2007.

Rakesh Khanna, Udit Kumar, Bankey Bihari for the Appellant.

Arjun Garg, Mishra Saurabh, B.S. Banthia for the Respondents.

The Judgment of the Court was delivered by

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

2. Appellant, a Police Constable, while he was working in the police station Rahatgarh, District Sagar along with A.S.I. Lakhan Tiwari and Head Constable Jagdish Prasad Tiwari stated to have received an amount of Rs.3,000 for not implicating certain persons involved in Crime No. 4 of 2002 charged under Sections 341, 294, 323, 506(B), 34 IPC. A complaint to that effect was filed by one Kundan Rajak, a resident of Village Sothia, PS Rahatgarh. Acting on that complaint, the appellant was charge-sheeted, along with two others, vide proceedings dated 6.5.2002 by the Superintendant of Police, Sagar. The following are the charges levelled against the appellant:

(1) He demonstrated gross negligence and lack of interest in discharge of his duty by not implicating all the persons involved in the crime.

(2) He demonstrated misconduct by accepting Rs.3,000 from the complainant Kundan Rajak for lodging a report in the police station.

3. Appellant filed a detailed reply to the charge-sheet by his letter dated NIL and denied all the allegations.

4. A detailed inquiry was conducted through the Additional Superintendant of Police, Sagar against the appellant and other

two persons – A.S.I. Lakhan Tiwari and H.C. Jagdish Prasad Yadav. During the course of the inquiry, the charge against Lakhan Tiwari was found not proved, but his role was found to be doubtful. So far as appellant Rajendra Prasad Yadav is concerned, it was held that one of the charges could not be proved for want of evidence. The inquiry report dated 8.9.2004, so far as the appellant is concerned, states as follows:

> "Against the delinquent No. 2, H.C. 1104 Rajendra Prasad, one of the charges imputed could not be proved for want of evidence. During the course of departmental inquiry, the inquiry has noted that the charge No. 2 was also not proved from the statement of prosecution witness and documents of the prosecution but one cannot deny the participation of the delinquent and his tacit approval."

5. The Superintendant of Police, Sagar, however, vide his proceedings dated 26.3.2004, disagreed with the remarks of the Inquiry Officer and held that the charge No. 2 as against the appellant was found to be proved. Consequently, a supplementary charge-sheet was also given to the appellant. Later, a final order was passed by the Deputy Inspector General of Police, Sagar stating as follows:

> "With respect to the delinquent HC No. 1104 Rajendra Yadav, the Inquiry Officer has stated vide his said letter that the delinquent HC was present in the police station during the report of the Crime No. 4/02. As per the evidence, the money was demanded by Ct. Arjun Pathak. The report has been recorded by HC 1104 Rajendra Yadav whereas Rs.3,000/- was paid to Const. Arjun Pathak. Therefore, with regard to receiving money, the participation of HC Rajendra Yadav and his tacit approval are proved with respect to the charge No. 2. At the same time, he could not exercise his control over his subordinate. The money was demanded by Arjun Pathak and upon receipt of the money by Arjun Pathak, HC 1104 Rajendra Yadav lodged the report. Therefore, I am in disagreement with the view

of the Inquiry Officer given in the inquiry report of the department inquiry that the charge is not proved against the delinquent HC Rajendra Prasad Yadav. As per the remark of the Inquiry Officer, the above mentioned charge No. 2 imputed against HC No. 1104 Rajendra Prasad is found to be proved."

6. On the basis of the above finding, Lakhan Tiwari was demoted for three years from the post of A.S.I. to Head Constable. But the appellant and Jagdish Prasad Tiwari were dismissed from service.

7. Aggrieved by the same, appellant preferred an appeal before the Inspector General of Police (appellate authority), who dismissed the appeal vide his order dated 9.12.2004.

8. Appellant then filed a Writ Petition No. 10696 of 2007 before the High Court of Madhya Pradesh, Jabalpur Bench, which was dismissed by the learned single Judge by his order dated 3.5.2007, against which a Writ Appeal No. 11 of 2007 was also preferred, which was also dismissed by the Division Bench vide its impugned judgment dated 6.9.2011.

9. Mr. Rakesh Khanna, learned counsel appearing for the appellant, submitted that since both the charges levelled against the appellant were not proved fully, the respondent Department was not justified in dismissing him from the service, which is grossly disproportionate to the gravity of the offence. Further, it was pointed out that there is nothing on the record to show that the appellant had demanded or accepted the alleged sum of Rs.3,000 and it was proved in the inquiry that it was Constable Arjun Pathak who had demanded the above mentioned amount and he was, even though, inflicted with the punishment of compulsory retirement was, later, reinstated by imposing punishment of reduction of increment with cumulative effect for one year. The inquiry has clearly established that it was Arjun Pathak who had demanded and accepted the illegal gratification from the complainant, but he has been given a

lighter punishment while the appellant was imposed a harsher punishment, which is clearly arbitrary and discriminatory. Learned counsel placed considerable reliance on the judgment of this Court in *Anand Regional Coop. Oil Seedsgrowers' Union Ltd. V. Shaileshkumr Harshadbhai Shah* (2006) 6 SCC 548 and claimed parity, if not fully exonerated.

10. Shri Arjun Garg, learned counsel appearing for the respondent State, submitted that there is no illegality in the views expressed by the learned single Judge and the Division Bench calling for any interference. Further, it was pointed out that since the appellant, being a member of a disciplined force, should not have involved in such an incident and his tacit approval could not be brushed aside because it had taken place in his presence.

11. We have gone through the inquiry report placed before us in respect of the appellant as well as Constable Arjun Pathak. The inquiry clearly reveals the role of Arjun Pathak. It was Arjun Pathak who had demanded and received the money, though the tacit approval of the appellant was proved in the inquiry. The charge levelled against Arjun Pathak was more serious than the one charged against the appellant. Both appellants and other two persons as well as Arjun Pathak were involved in the same incident. After having found that Arjun Pathak had a more serious role and, in fact, it was he who had demanded and received the money, he was inflicted comparatively a lighter punishment. At the same time, appellant who had played a passive role was inflicted with a more serious punishment of dismissal from service which, in our view, cannot be sustained.

12. The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate

while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.

13. The principle stated above is seen applied in few judgments of this Court. The earliest one is *Director General of Police and Others v. G. Dasayan* (1998) 2 SCC 407, wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India. In *Shaileshkumar Harshadbhai Shah* case (supra), the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit.

14. We are of the view the principle laid down in the above mentioned judgments also would apply to the facts of the present case. We have already indicated that the action of the Disciplinary Authority imposing a comparatively lighter punishment to the co-delinquent Arjun Pathak and at the same time, harsher punishment to the appellant cannot be permitted in law, since they were all involved in the same incident. Consequently, we are inclined to allow the appeal by setting

aside the punishment of dismissal from service imposed on the appellant and order that he be reinstated in service forthwith. Appellant is, therefore, to be re-instated from the date on which Arjun Pathak was re-instated and be given all consequent benefits as was given to Arjun Pathak. Ordered accordingly. However, there will be no order as to costs.

R.P. Appeal allowed.

SURESH KUMAR BHIKAMCHAND JAIN
v.
STATE OF MAHARASHTRA & ANR.
(Special Leave Petition (Crl.) No.147 of 2013)

FEBRUARY 13, 2013

[ALTAMAS KABIR, CJI, J. CHELAMESWAR AND VIKRAMAJIT SEN, JJ.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 167 (2) – Statutory bail – Charge-sheet filed within the stipulated period, but cognizance not taken as sanction for prosecution had not been obtained – Held: Grant of sanction is nowhere contemplated u/s 167 – Once a charge-sheet is filed within the stipulated time, question of grant of default bail or statutory bail does not arise – Filing of charge-sheet is sufficient compliance with provisions of s.167(2)(a)(ii) in the instant case – Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of s.309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in s.167.

During investigation of a case of misappropriation of amount meant for development of slums, the petitioner, who was an MLA and was functioning as the Minster of Housing and Slum Area Development, at the relevant time, was arrested on 11.3.2012. The case against him pertained to offences punishable u/ss 120-B, 409, 411, 406, 408, 465, 466, 468, 471, 177, 109 read with s.34 IPC and also u/ss 13(1)(c), 13(1) (d) and 13(2) of the Prevention of Corruption Act, 1988. The first charge-sheet against four other accused was filed on 25.4.2012 and the supplementary charge-sheet in which the petitioner was named was filed on 1.6.2012.

In the instant petition for special leave to appeal, the issue for consideration before the Court was regarding the right of the petitioner to be released on bail u/s 167(2) CrPC, as though the charge-sheet in the case had been filed within the stipulated period, the sanction for his prosecution was not obtained as a result of which no cognizance was taken of the offence and remand orders continued to be made and the petitioner remained in magisterial custody.

Dismissing the petition, the Court

HELD: 1.1. The power of remand is vested in the court at the very initial stage before taking of cognizance u/s 167(2) Cr.P.C. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, u/s 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. [para 15 and 18] [1047-G; 1052-B-C]

1.2. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. Once cognizance is taken, the power to remand shifts to the provisions of s.309 Cr.P.C., under which the trial court is empowered to postpone or adjourn proceedings and, for the said purpose, to extend the period of detention from time to time. However, the provisions of s. 309 Cr.P.C. have no application to the facts of the instant case. [para 15 and 18] [1047-G-H; 1048-B; 1052-A]

1.3. In the event, an investigating authority fails to file

the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of s.309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court. [para 18] [1052-C-E]

1.4. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings. Merely because sanction has not been obtained to prosecute the accused and to proceed to the stage of s.309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in s.167 Cr.P.C. Grant of sanction is nowhere contemplated u/s 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. Once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. Whether cognizance is taken or not is not material as far as s.167 Cr.P.C. is concerned. [para 17-19] [1050-G-H; 1051-F-G; 1052-F-G]

1.5. In the instant case, both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but such failure does not amount to non-compliance of the provisions of

s.167(2) CrPC. The filing of charge-sheet is sufficient compliance with the provisions of s.167(2)(a)(ii). The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of the instant case. [para 17 & 18] [1050-F-G; 1051-F-G]

Sanjay Dutt v. State **1994 (3) Suppl. SCR 263 = (1994) 5 SCC 410;** *Natabar Parida v. the State of Orissa* **1975 Suppl. SCR 137 = (1975) 2 SCC 220 – referred to.**

1.6 . This Court, therefore, holds that though the prosecution had not been able to obtain sanction to prosecute the accused, he was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated u/s 167(2)(a)(ii) Cr.P.C. [para 19] [1052-F]

Case Law Reference:

1994 (3) Suppl. SCR 263	**referred to**	**para 10**
1975 Suppl. SCR 137	**referred to**	**para 10**

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 147 of 2013.

From the Judgment & Order dated 17.12.2012 of the High Court of Judicature at Bombay Bench at Aurangabad in Criminal Application No. 4601 of 2012.

U.U. Lalit, Nagendra Rai, Harish Salve, Siddharth Aggarwal, Shyel Trehan, Subhash Jadhav, Adit S. Pujari, Arjun S. Suri, Nikhil Pillai, Sudesh Kotwal, Kumar Rachit, Liz Mathew for the Petitiioner.

B.H. Marlapalle, Amol B. Karande, Kunal Cheema, Naresh Kumar, Sanjay V. Kharde, Sachin J. Patil, Preshit V. Surshe, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. This Special Leave Petition arises out of the judgment and order dated 17th December, 2012, passed by the Aurangabad Bench of the Bombay High Court in CRLA No. 4601 of 2012, dismissing the same and directing the Special Judge, in seisin of the matter, to expedite the hearing on framing of charge, as had been directed by this Court on 12th October, 2012, while disposing of Special Leave to Appeal (Crl.) No. 6463 of 2012, filed by the co-accused Pradeep Raisoni.

2. This case has thrown into focus certain important issues regarding the right of an accused to be released on bail under Section 167(2) of the Code of Criminal Procedure, 1973, hereinafter referred to as "Cr.P.C.". One of such issues concerns the power of the Magistrate to pass orders of remand even beyond the period envisaged under Section 167(2) Cr.P.C. In the instant case, despite charge-sheet having been filed, no cognizance has been taken on the basis thereof. The learned Magistrate has, however, continued to pass remand orders, without apparently having proceeded to the stage contemplated under Section 309 Cr.P.C. In order to appreciate the issues which have cropped up during the hearing of the instant case, it is necessary to briefly set out the facts giving rise to the said questions, which have fallen for determination.

3. As per the prosecution case, the Petitioner, Suresh Kumar Bhikamchand Jain, is alleged to have misappropriated amounts meant for development of slums in Jalgaon city, when he was functioning as the Minister of Housing and Slum Area Development, as a Member of the Legislative Assembly. Initially, charge-sheet was filed against certain persons claiming to be the contractors and the Vice-President of the Municipal Corporation, Jalgaon. Thereafter, during investigation the Petitioner was arrested on 11th March, 2012, and while charge-sheet was filed against the four other accused persons on 25th April, 2012, a supplementary charge-sheet came to be filed against the Petitioner herein on 1st June, 2012. For a while,

the Petitioner was released on interim bail, but upon rejection of his application for bail on merit, he was again taken into custody on 5th July, 2012.

4. What has been stressed upon on behalf of the Petitioner is that, although, charge-sheet had been filed within the time stipulated under Section 167(2) Cr.P.C., sanction to prosecute the Petitioner had not been obtained, as a result whereof, no cognizance was taken of the offence. Notwithstanding the above, remand orders continued to be made and the Petitioner remained in magisterial custody.

5. At this stage, it may be pertinent to point out that the Petitioner is an accused in respect of offences punishable under Sections 120B, 409, 411, 406, 408, 465, 466, 468, 471, 177, 109 read with Section 34 of the Indian Penal Code, hereinafter referred to as "IPC" and also under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, hereinafter referred to as "the PC Act", in Crime No. 13 of 2006, registered with the City Police Station Jalgaon.

6. Appearing in support of the Special Leave Petition, Mr. U.U. Lalit, learned senior Advocate, submitted that since the statutory period of 90 days, envisaged under Section 167(2) Cr.P.C., had lapsed, the Petitioner could not have been remanded to custody, as had been done by the learned Special Judge, who is yet to take cognizance for want of sanction. Mr. Lalit submitted that the Petitioner was, therefore, entitled to be released on bail forthwith, since the orders of remand passed by the learned Magistrate after a period of 90 days were without jurisdiction and, therefore, invalid in the facts and circumstances of the case.

7. Mr. Lalit also submitted that Section 309 Cr.P.C., which also deals with remand of the accused under certain circumstances, does not apply to the allegations relating to the provisions of the PC Act, inasmuch as, there is no committal proceeding contemplated in the proceeding before the learned

Special Judge. However, as far as Section 309 Cr.P.C. is concerned, Mr. Lalit submitted that the same would be applicable only after cognizance of the offence had been taken or upon the commencement of the trial before the Special Court. In the absence of cognizance being taken by the Special Court, it could not be said that the trial had commenced and, therefore, further detention of the Petitioner was wholly illegal and not authorised in law and he was, therefore, entitled to be released on bail forthwith on the basis of the "indefeasible right" acquired by him on the failure of the Investigating Authorities to obtain sanction for prosecuting the Petitioner.

8. Mr. Lalit submitted that the High Court also went wrong in holding that in the absence of sanction, the actual trial could not be stayed and could be proceeded with and that the question of grant of sanction could be considered at the stage of framing of charge, as to whether such sanction was actually required to prosecute the accused.

9. In support of his submission, Mr. Lalit referred to and relied upon the Constitution Bench decision of this Court in *Sanjay Dutt v. State* [(1994) 5 SCC 410], wherein the said Bench had occasion to consider the effect of non-completion of investigation within the time stipulated under Section 167(2) Cr.P.C. Learned counsel pointed out that in the said decision, it has, *inter alia*, been held that default in completion of investigation within 180 days did not give a fully indefeasible right to the accused to be released on bail. Such a right arises from the time of default in filing of the charge-sheet and continues till the filing thereof, but does not survive once the charge-sheet is filed. Thereafter, grant of bail would be decided on merits. Mr. Lalit submitted that the indefeasible right referred to in the said decision would become absolute in the event an application for bail was filed after the expiry of the statutory period stipulated by the statute, but before filing of the charge-sheet. In such a case, Mr. Lalit submitted that the concerned accused was entitled as a matter of right to be released on bail.

10. Mr. Lalit also referred to the decision of this Court in *Natabar Parida v. the State of Orissa* [(1975) 2 SCC 220], which was decided by a Bench of 2-Judges, who also had occasion to consider the impact of Section 167(2) Cr.P.C. and the proviso (a) thereto. In the said case, the powers of the High Court to pass an order of remand of an accused on the basis of inherent powers, was sought to be negated. It was ultimately held that the Court will have no inherent power of remand of an accused to any custody, unless the power is conferred by law. Mr. Lalit urged that since remand orders passed against the Petitioner in the present case did not have the sanction either of Section 167(2) Cr.P.C. or Section 309 Cr.P.C., the Petitioner was entitled to be released on statutory bail forthwith.

11. Appearing for the State of Maharashtra, Mr. Sanjay V. Kharde, learned Advocate, supported the decision of the High Court and urged that with the filing of the charge-sheet under Section 167(2) Cr.P.C., the conditions of the said Section stood satisfied and even if sanction had not been obtained for prosecuting the Accused, the Trial Court was entitled to proceed further in the matter. Mr. Kharde submitted that the orders of remand passed by the Trial Court were not vitiated since charge-sheet had already been filed within 90 days of the arrest of the Petitioner.

12. Also referring to the decision in *Sanjay Dutt's* case (supra), Mr. Kharde submitted that the "indefeasible right" of the accused to be released on bail under Section 167(2) Cr.P.C., in default of completion of the investigation and filing of charge-sheet within the time allowed, is a right which accrued to and is enforceable by the accused only from the time of default till the filing of the charge-sheet and it does not survive or remain enforceable on the charge-sheet being filed. Accordingly, if in a given case, the accused applies for bail, under the aforesaid provision, on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. However, once the charge-sheet is filed, the question

of bail has to be decided only with reference to the merits of the case under the principles relating to grant of bail to an accused after filing of the charge-sheet. Mr. Kharde reiterated that in the instant case since the charge-sheet had already been filed, notwithstanding the fact that sanction had not been obtained, it could not be said that the powers of the learned Magistrate or the Trial Court to pass orders of remand came to an end, even if sanction had not been obtained for prosecuting the accused under the provisions of the PC Act.

13. The question posed in this Special Leave Petition concerns the right of a Magistrate or the Trial Court to pass orders of remand in terms of Section 167(2) Cr.P.C. beyond the period prescribed therein. Section 167(2) Cr.P.C., which is relevant for an understanding of the issues involved in this case, is extracted hereinbelow:

"**167. Procedure when investigation cannot be completed in twenty-four hours.**

(1) *** *** ***

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) The Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in

custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) Sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I. - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II. - If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to

production of the accused person through the medium of electronic video linkage, as the case may be.

Provided further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution."

14. From the above provision, it would be amply clear that the Magistrate may authorise the detention of an accused person, otherwise than in the custody of the police, beyond a period of 15 days, if he is satisfied that there are adequate grounds for doing so, but no Magistrate is authorised to detain the accused person in custody for a total period exceeding 90 days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and 60 days where the investigation relates to any other offence. In other words, if an accused was ready to offer bail, once the stipulated period for the investigation had been completed, then the Magistrate no longer had the authority to extend the period of detention beyond the said period of 90 days and, consequently, he had no option but to release the accused on bail. The language used in Sections 167(2)(a)(i) and (ii) is that on the expiry of the period of 90 days or 60 days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail. The direction upon the learned Magistrate or the Trial Court is mandatory in nature and any detention beyond the said period would be illegal.

15. The power of remand is vested in the Court at the very initial stage before taking of cognizance under Section 167(2) Cr.P.C. Once cognizance is taken, the power to remand shifts to the provisions of Section 309 Cr.P.C., under which the Trial Court is empowered to postpone or adjourn proceedings and, for the said purpose, to extend the period of detention from time to time. Section 309(2) Cr.P.C. contemplates a situation where if the Court **after taking cognizance** of an offence or

commencement of trial finds it necessary to postpone the commencement of, or adjourn, any inquiry or trial, it may, for reasons to be recorded, postpone or adjourn the inquiry or trial on such terms as it thinks fit, for such time as it considers reasonable, and **may by a warrant remand the accused if in custody**, for a period of fifteen days at a time. Although, the provisions of Section 309 Cr.P.C. may not have any application to the facts of this case, in order to appreciate the view that we have taken, the same are reproduced hereinbelow:

"**309. Power to postpone or adjourn proceedings.**— (1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under Sections 376 to Section 376 D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1 – If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand.

Explanation 2 – The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

16. At this juncture, we may refer to certain dates which are relevant to the facts of this case, namely:

(a) 11.03.2012 - Petitioner arrested and remanded to police custody;

(b) 25.04.2012 - First charge-sheet filed against the four accused;

(c) 1.06.2012 - Supplementary charge-sheet filed in which the Petitioner is named;

(d) 30.07.2012 - The Trial Court rejected the Petitioner's prayer for grant of bail;

(e) 13.09.2012 - The High Court confirmed the order of the Trial Court;

(f) 2.10.2012 - Application filed under Section 167(2) Cr.P.C. before the Trial Court;

(g) 5.10.2012 - Trial Court rejected the application under Section 167(2) Cr.P.C.

17. From the above dates, it would be evident that both the charge-sheet as also the supplementary charge-sheet were filed within 90 days from the date of the Petitioner's arrest and remand to police custody. It is true that cognizance was not taken by the Special Court on account of failure of the prosecution to obtain sanction to prosecute the accused under the provisions of the PC Act, but does such failure amount to non-compliance of the provisions of Section 167(2) Cr.P.C. is the question with which we are confronted. In our view, grant of sanction is nowhere contemplated under Section 167 Cr.P.C. What the said Section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused,

first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the Legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the Court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in *Natabar Parida's* case(supra) and in *Sanjay Dutt's* case (supra) were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) Cr.P.C. and an application having been made for grant of bail prior to the filing of charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) in this case. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. is concerned. The right which may have accrued to the Petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C. The

scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) Cr.P.C., the Magistrate is vested with authority to remand the accused to custody, both police custody and/ or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the Court trying the offence, when the said Court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 Cr.P.C. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court.

19. Having regard to the above, we have no hesitation in holding that notwithstanding the fact that the prosecution had not been able to obtain sanction to prosecute the accused, the accused was not entitled to grant of statutory bail since the charge-sheet had been filed well within the period contemplated under Section 167(2)(a)(ii) Cr.P.C. Sanction is an enabling provision to prosecute, which is totally separate from the concept of investigation which is concluded by the filing of the charge-sheet. The two are on separate footings.

20. In that view of the matter, the Special Leave Petition deserves to be and is hereby dismissed.

R.P. SLP dismissed.

SURENDER KAUSHIK AND OTHERS
v.
STATE OF UTTAR PRADESH AND OTHERS
(Criminal Appeal No. 305 of 2013)

FEBRUARY 14, 2013

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

FIR – Lodgment of two FIRs – In respect of same incident – Permissibility – Held – Lodgment of two FIRs is not permissible in respect of one and the same incident – However, the concept of sameness does not encompass filing of counter FIR – Prohibition is for further complaint by same complainant and others against the same accused – In the present case, the allegations in the FIRs are distinct and separate and the same may be regarded as counter complaint – Principle of sameness does not get attracted – Hence, second FIR not liable to be quashed on account of existence of first FIR – Constitution of India, 1950 – Articles 226 and 227.

The question for consideration in the present appeal was whether after registration of FIR and commencement of investigation, a second FIR relating to the same incident on the basis of a direction issued by the Magistrate u/s. 156 (3) Cr.P.C. can be registered.

Dismissing the appeal, the Court

HELD: 1. Lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the

registration of the case under Cr.P.C, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. The prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible. [Para 24] [1067-G-H; 1068-A-C]

2. In the present case, if the involvement of the number of accused persons and the nature of the allegations are scrutinized, it becomes crystal clear that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is impossible to say that the principle of sameness gets attracted. If the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. To say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, the plea that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance. [Para 25] [1068-G-H; 1069-A-E]

Upkar Singh v. Ved Prakash and Ors. **(2004) 13 SCC 292 – relied on.**

Amrawati and Anr. v. State of UP **2005 Crl. L.J. 755;** *Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Ors.* **(2009) 4 SCC 437: 2009 (4) SCR 1027;** *State of Haryana and Ors. v. Bhajan Lal and Ors.* **1992 Supp (1) SCC 335: 1990 (3) Suppl. SCR 259;** *T.T. Antony v. State of Kerala and Ors.* **(2001) 6 SCC 181: 2001 (3) SCR 942;** *Pandurang Chandrakant Mhatre and Ors. v. State of Maharashtra* **(2009) 10 SCC 773: 2009 (15) SCR 58;** *Babubhai v. State of Gujarat and Ors.* **(2010) 12 SCC 254: 2010 (10) SCR 651;** *Ram Lal Narang v. State (Delhi Administration)* **(1979) 2 SCC 322;** *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru* **(2005) 11 SCC 600: 2005 (2) Suppl. SCR 79;** *Ram Mohan Garg v. State of U.P.* **(1990) 27 ACC 438;** *Kari Choudhary v. Sita Devi* **(2002) 1 SCC 714: 2001 (5) Suppl. SCR 588;** *State of Bihar v. J.A.C. Saldanha* **(1980) 1 SCC 554: 1980 (2) SCR 16;** *Ramesh Baburao Devaskar v. State of Maharashtra* **(2007) 13 SCC 501;** *Vikram v. State of Maharashtra* **(2007) 12 SCC 332 – referred to.**

Case Law Reference:

2005 Crl. L.J. 755	**Referred to**	**Para 3**
2009 (4) SCR 1027	**Referred to**	**Para 3**
1990 (3) Suppl. SCR 259	**Referred to**	**Para 8**
2010 (10) SCR 651	**Referred to**	**Para 8**
2005 (2) Suppl. SCR 79	**Referred to**	**Para 10**
(1979) 2 SCC 322	**Referred to**	**Para 13**
2001 (3) SCR 942	**Referred to**	**Para 14**
(2004) 13 SCC 292	**Relied on**	**Para 16**
(1990) 27 ACC 438	**Referred to**	**Para 16**
2001 (5) Suppl. SCR 588	**Referred to**	**Para 18**
1980 (2) SCR 16	**Referred to**	**Para 18**
2009 (15) SCR 58	**Referred to**	**Para 21**
2001 (3) SCR 942	**Referred to**	**Para 21**
(2007) 13 SCC 501	**Referred to**	**Para 21**
2007 (6) SCR 185	**Referred to**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 305 of 2013.

From the Judgment & Order dated 12.10.2012 of the High Court of Judicature at Allahabad, Uttar Pradesh in Criminal Misc. Writ Petition No. 15077 of 2012.

Nagendra Rai, R.K. Dash, Altaf Ahmed, Smarhar Singh, Shantanu Sagar, Abhishek Kr. singh, Gopi Raman, Chandra Prakash, Abhisth Kumar, Archana Singh, Ashok K. Srivasta for the appearing parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal, by special leave, is directed against the order dated 12.10.2012 passed by the Division Bench of the High Court of Judicature at Allahabad in Criminal Miscellaneous Writ Petition No. 15077 of 2012 wherein the High Court has declined to quash the FIR No. 442 of 2012 registered at P.S. Civil Lines, Meerut, that has given rise to Crime No. 491 of 2012 for offences punishable under Sections 406, 420, 467, 468, 471, 504 and 506 of the Indian Penal Code (for short "the IPC").

3. At the very outset, it is requisite to be stated that the appellants had invoked the jurisdiction under Article 226 of the Constitution for quashment of the FIR on two counts, namely,

first, that no prima facie case existed for putting the criminal law into motion and, second, when on the similar and identical cause of action and allegations, FIR No. 425 of 2012 corresponding to Crime No. 475 of 2012 had already been registered, a second FIR could not have been lodged and entertained. The High Court, by the impugned order, has opined that it cannot be held that no prima facie case is disclosed and, thereafter, proceeded to issue certain directions in relation to surrender before the concerned court and grant of interim bail in view of the decision rendered by the Full Bench of the Allahabad High Court in *Amrawati and Another v. State of UP*[1] and *Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Others*[2].

4. We are not adverting to the second part of the order as the controversy in this regard has not emerged before this Court in the present case. The assail to the validity of registration of second FIR has not been dealt with by the High Court. Mr. Nagendra Rai, learned senior counsel appearing for the appellants, did not advance any contention and, rightly so, with regard to the existence of a prima facie case for registration of the FIR, but emphatically put forth the proponements pertaining to the validity of entertaining the second FIR despite the lodgment of an earlier FIR in respect of the same cause of action and the same incident. Therefore, we shall restrict our delineation to the said sentinel issue exclusively.

5. From the factual background which has been exposited in this appeal and the documents annexed thereto, it is limpid that FIR No. 274 of 2012 was lodged by the appellant No. 1, Surender Kaushik, as the Secretary of Sanjeev Memorial Education Society on 29.5.2012 against Dr. Subhash Gupta, Dr. Harshu Gupta and Yunus Pahalwan, members of the society, alleging that in collusion with one Surya Prakash Jalan, they had prepared fake and fraudulent documents. It was further

1. 2005 Cri. L.J. 755.
2. (2009) 4 SCC 437.

alleged that their signatures had been forged indicating their participation in various general/executive meetings of the society, though they had not attended the said meetings. On the basis of the said FIR, a crime under Sections 420, 467, 468 and 471 of the IPC was registered.

6. One Dr. Subhash Gupta filed an application before the Additional Chief Judicial Magistrate, Meerut, under Section 156(3) of the Code of Criminal Procedure (for brevity "the Code") alleging, inter alia, that he was never a member of the Sanjeev Memorial Education Society, Ghaziabad and further he was neither present in the meetings of the society which were held on 1.10.2008 and 16.4.2009 nor was he a signatory to the resolutions passed in the said meetings. It was further asseverated in the application that the accused persons, namely, P.C. Gupta, Seema Gupta, Surender Kaushik, Kamlesh Sharma and Vimal Singh, had fabricated an affidavit on 15.12.2008 with forged signatures and filed before the Deputy Registrar, Society Chit and Fund, Mohanpuri, Meerut. The said petition was entertained and on the basis of the direction of the learned Magistrate, FIR No. 425 of 2012 was lodged on 21.8.2012 for the offences punishable under Sections 406, 420, 467, 468, 471, 504 and 506 of the IPC.

7. As the facts would further unfurl, FIR No. 442 of 2012 which gave rise to Crime No. 491 of 2012 was registered on 4.9.2012 and it is apt to note that the said FIR came to be registered on the basis of an order passed by the learned Magistrate under Section 156(3) of the Code. In the said case, the complainant was Smt. Nidhi Jalan, one of the members of the Governing Body of the society, and it was alleged that she is a member of the society which runs an educational institution, namely, Mayo International School, and the accused persons, namely, P.C. Gupta, Seema Gupta, Vikash Jain, Bhawna Jain, Sushil Jain, Shubhi Jain, Surender Kaushik, Kamlesh Sharma, Rajender Sharma, Virender Bhardwaj, Vimal Singh and Renu Sharma, having entered into a conspiracy had prepared forged

documents regarding meetings held on different dates, fabricated signatures of the members and filed before the competent authority with the common intention to grab the property/funds of the society. Be it noted, the members had filed affidavits before the competent authority that they had never taken part in the meetings of the school management and had not signed any papers. As already stated, the said FIR pertained to offences punishable under Sections 406, 420, 467, 468, 471, 504 and 506 of the IPC.

8.It is submitted by Mr. Nagendra Rai, learned senior counsel, that the FIR No. 442 of 2012 could not have been lodged and entertained as law prohibits lodgment of the second FIR in respect of the same cognizable offence and it is propounded by him that when there is a legal impediment for setting the criminal law in motion, the decision in *State of Haryana and Others v. Bhajan Lal and Others*[3] gets attracted. To bolster the contention that the second FIR could not have been entertained, the learned senior counsel has commended us to the decisions in *T.T. Antony v. State of Kerala and Others*[4], *Pandurang Chandrakant Mhatre and Others v. State of Maharashtra*[5] and *Babubhai v. State of Gujarat and Others*[6].

9. Mr. R.K. Dash, learned senior counsel for the State, per contra, submitted that there is no absolute prohibition in law for lodgment of a second FIR and, more so, when allegations are made from different spectrum or, for that matter, when different versions are put forth by different persons and there are different accused persons. It is urged by him that the decisions relied upon by the appellants are distinguishable on facts and the proposition of law laid down therein is not applicable to the case at hand. The learned senior counsel would further contend that the principles stated in *Ram Lal Narang v. State (Delhi Administration)*[7] and *Upkar Singh v. Ved Prakash and Others*[8] are attracted to the case at hand.

3. 1992 Supp (1) SCC 335.

4. (2001) 6 SCC 181.

5. (2009) 10 SCC 773.

6. (2010) 12 SCC 254.

10. Mr. Altaf Ahmed, learned senior counsel appearing for the complainant, the fourth respondent herein, has submitted that on certain occasions, same set of facts may constitute different offences and when there are two distinct offences having different ingredients, there would be no embargo for registration of two FIRs. It is further canvassed by him that on certain occasions, two FIRs may have some overlapping features but it is the substance of the allegations which has to be looked into, and if a restricted view is taken, then no counter FIR can ever be lodged. The learned senior counsel would further submit that the investigation by the police cannot be scuttled and the accused persons cannot be allowed to pave the escape route in this manner. It has been highlighted by him that lodging of second FIR for the same cause of action or offence is based on the principle that a person should not be vexed twice, but if there are offences having distinctive ingredients and overlapping features, it would not invite the frown of Article 20 of the Constitution of India. The pronouncement in *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*[9] has been commended to us.

11. Chapter XII of the Code deals with information to the police and their powers to investigate. As provided under Section 154 of the Code, every information relating to commission of a cognizable offence either given orally or in writing is required to be entered in a book to be kept by the officer-in-charge of the concerned police station. The said FIR, as mandated by law, has to pertain to a cognizable case. Section 2(c) of the Code defines “cognizable offence” which also deals with cognizable cases. It reads as follows:-

7. (1979) 2 SCC 322.

8. (2004) 13 SCC 292.

9. (2005) 11 SCC 600.

"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;"

12. If the primary requirement is satisfied, an FIR is registered and the criminal law is set in motion and the officer-in-charge of the police station takes up the investigation. The question that has emerged for consideration in this case is whether after registration of the FIR and commencement of the investigation, a second FIR relating to the same incident on the basis of a direction issued by the learned Magistrate under Section 156(3) of the Code can be registered.

13. For apposite appreciation of the issue raised, it is necessitous to refer to certain authorities which would throw significant light under what circumstances entertainment of second FIR is prohibited. In *Ram Lal Narang* (supra), this Court was dealing with the facts and circumstances of a case where two FIRs were lodged and two charge-sheets were filed. The Bench took note of the fact that the conspiracy which was the subject-matter of the second case could not be said to be identical with the conspiracy which was the subject-matter of the first one and further the conspirators were different, although the conspiracy which was the subject-matter of the first case may, perhaps, be said to have turned out to be a part of the conspiracy which was the subject-matter of the second case. After adverting to the various facets, it has been opined that occasions may arise when a second investigation started independently of the first may disclose wide range of offences including those covered by the first investigation. Being of this view, the Court did not find any flaw in the investigation on the basis of the subsequent FIR.

14. In *T.T. Antony* (supra), it was canvassed on behalf of the accused that the registration of fresh information in respect of the very same incident as an FIR under Section 154 of the Code was not valid and, therefore, all steps taken pursuant

thereto including investigation were illegal and liable to be quashed. The Bench, analyzing the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, came to hold that only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code and, therefore, there can be no second FIR and consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. It was further observed that on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code.

15. It is worth noting that in the said case, the two-Judge Bench explained and distinguished the dictum in *Ram Lal Narang* (supra) by opining that the Court had indicated that the real question was whether the two conspiracies were in truth and substance the same and held that the conspiracies in the two cases were not identical. It further proceeded to state that the Court did not repel the contention of the appellant regarding the illegality of the second FIR and the investigation based thereon being vitiated, but on facts found that the two FIRs in truth and substance were different since the first was a smaller conspiracy and the second was a larger conspiracy as it turned out eventually. Thereafter, the Bench explained thus: -

"The 1973 CrPC specifically provides for further investigation after forwarding of report under sub-section (2) of Section 173 CrPC and forwarding of further report or reports to the Magistrate concerned under Section 173(8) CrPC. It follows that if the gravamen of the charges

in the two FIRs — the first and the second — is in truth and substance the same, registering the second FIR and making fresh investigation and forwarding report under Section 173 CrPC will be irregular and the court cannot take cognizance of the same."

16. In *Upkar Singh* (supra), a three-Judge Bench was addressing the issue pertaining to the correctness of law laid down in the case of *T.T. Antony* (supra). The larger Bench took note of the fact that a complaint was lodged by the first respondent therein with Sikhera Police Station in Village Fahimpur Kalan at 10.00 a.m. on 20th May, 1995 making certain allegations against the appellant therein and some other persons. On the basis of the said complaint, the police had registered a crime under Sections 452 and 307 of the IPC. The appellant had lodged a complaint in regard to the very same incident against the respondents therein for having committed offences punishable under Sections 506 and 307 of the IPC as against him and his family members. As the said complaint was not entertained by the concerned police, he, under compelling circumstances, filed a petition under Section 156(3) of the Code before the Judicial Magistrate, who having found a prima facie case, directed the concerned police station to register a crime against the accused persons in the said complaint and to investigate the same and submit a report. On the basis of the said direction, Crime No. 48-A of 1995 was registered for offences punishable under Sections 147, 148, 149 and 307 of the IPC. Challenging the direction of the Magistrate, a revision was preferred before the learned Sessions Judge who set aside the said direction. Being aggrieved by the order passed by the learned Sessions Judge, a Criminal Miscellaneous petition was filed before the High Court of Judicature at Allahabad and the High Court, following its earlier decision in *Ram Mohan Garg v. State of U.P.*[10], dismissed the revision. While dealing with the issue, this Court

10. (1990) 27 SCC 438.

referred to paragraph 18 of *T.T. Antony* (supra) and noted how the same had been understood: -

> **"11.** This observation of the Supreme Court in the said case of *T.T. Antony* is understood by the learned counsel for the respondents as the Code prohibiting the filing of a second complaint arising from the same incident. It is on that basis and relying on the said judgment in *T.T. Antony case* an argument is addressed before us that once an FIR is registered on the complaint of one party a second FIR in the nature of a counter-case is not registrable and no investigation based on the said second complaint could be carried out."

17. After so observing, the Court held that the judgment in *T.T. Antony* (supra) really does not lay down such a proposition of law as has been understood by the learned counsel for the respondent therein. The Bench referred to the factual score of *T.T. Antony* (supra) and explained thus:-

> "Having carefully gone through the above judgment, we do not think that this Court in the said cases of *T.T. Antony v. State of Kerala* has precluded an aggrieved person from filing a counter-case as in the present case."

To arrive at such a conclusion, the Bench referred to paragraph 27 of the decision in *T.T. Antony* (supra) wherein it has been stated that a case of fresh investigation based on the second or successive FIRs, *not being a counter-case*, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution. Thereafter, the three-Judge Bench ruled thus:

"In our opinion, this Court in that case only held that any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter-complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident."

18. Be it noted, in the said verdict, reference was made to *Kari Choudhary v. Sita Devi*[11], wherein it has been opined that there cannot be two FIRs against the same accused in respect of the same case, but when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried out under both of them by the same investigating agency. Reference was made to the pronouncement in *State of Bihar v. J.A.C. Saldanha*[12] wherein it has been highlighted that the power of the Magistrate under Section 156(3) of the Code to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out under Section 3 of the Police Act.

19. It is worth noting that the Court also dealt with the view expressed in *Ram Lal Narang* (supra) and stated thus: -

"22. A perusal of the judgment of this Court in *Ram Lal Narang v. State (Delhi Admn.)* also shows that even in cases where a prior complaint is already registered, a counter-complaint is permissible but it goes further and holds that even in cases where a first complaint is

11. (2002) 1 SCC 714.

12. (1980) 1 SCC 554.

registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. Of course, this larger proposition of law laid down in *Ram Lal Narang case* is not necessary to be relied on by us in the present case. Suffice it to say that the discussion in *Ram Lal Narang case* is in the same line as found in the judgments in *Kari Choudhary* and *State of Bihar v. J.A.C. Saldanha*. However, it must be noticed that in *T.T. Antony case*, *Ram Lal Narang case* was noticed but the Court did not express any opinion either way."

20. Explaining further, the Court observed that if the law laid down by this Court in *T.T. Antony* (supra) is to be accepted to have held that a second complaint in regard to the same incident filed as a counter complaint is prohibited under the Code, such conclusion would lead to serious consequences inasmuch as the real accused can take the first opportunity to lodge a false complaint and get it registered by the jurisdictional police and then that would preclude the victim to lodge a complaint.

21. In *Pandurang Chandrakant Mhatre* (supra), the Court referred to *T.T. Antony* (supra), *Ramesh Baburao Devaskar v. State of Maharashtra*[13] and *Vikram v. State of Maharashtra*[14] and opined that the earliest information in regard to the commission of a cognizable offence is to be treated as the first information report and it sets the criminal law in motion and the investigation commences on that basis. Although the first information report is not expected to be an encyclopaedia of events, yet an information to the police in order to be first information report under Section 154(1) of the Code, must contain some essential and relevant details of the incident. A cryptic information about the commission of a cognizable offence irrespective of the nature and details of such information

13. (2007) 13 SCC 501.

14. (2007) 12 SCC 332.

may not be treated as first information report. After so stating, the Bench posed the question whether the information regarding the incident therein entered into general diary given by PW-5 is the first information report within the meaning of Section 154 of the Code and, if so, it would be hit by Section 162 of the Code. It is worth noting that analyzing the facts, the Court opined that information given to the police to rush to the place of the incident to control the situation need not necessarily amount to an FIR.

22. In *Babubhai* (supra), this Court, after surveying the earlier decisions, expressed the view that the court has to examine the facts and circumstances giving rise to both the FIRs and the test of sameness is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, the second FIR is liable to be quashed. However, in case the contrary is proved, where the version in the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible. In case the accused in the first FIR comes forward with a different version or counterclaim in respect of the same incident, investigation on both the FIRs has to be conducted.

23. It is worth noting that in the said case, the Court expressed the view that the High Court had correctly reached the conclusion that the second FIR was liable to be quashed as in both the FIRs, the allegations related to the same incident that had occurred at the same place in close proximity of time and, therefore, they were two parts of the same transaction.

24. From the aforesaid decisions, it is quite luminous that the lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same

complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-Judge Bench in *Upkar Singh* (supra), the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible.

25. In the case at hand, the appellants lodged the FIR No. 274 of 2012 against four accused persons alleging that they had prepared fake and fraudulent documents. The second FIR came to be registered on the basis of the direction issued by the learned Additional Chief Judicial Magistrate in exercise of power under Section 156(3) of the Code at the instance of another person alleging, inter alia, that he was neither present in the meetings nor had he signed any of the resolutions of the meetings and the accused persons, five in number, including the appellant No. 1 herein, had fabricated documents and filed the same before the competent authority. FIR No. 442 of 2012 (which gave rise to Crime No. 491 of 2012) was registered because of an order passed by the learned Magistrate. Be it noted, the complaint was filed by another member of the Governing Body of the Society and the allegation was that the accused persons, twelve in number, had entered into a conspiracy and prepared forged documents relating to the meetings held on different dates. There was allegation of fabrication of the signatures of the members and filing of forged documents before the Registrar of Societies with the common intention to grab the property/funds of the Society. If the involvement of the number of accused persons and the nature of the allegations are scrutinized, it becomes crystal clear that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter

complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is well-nigh impossible to say that the principle of sameness gets attracted. We are inclined to think so, for if the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. In the ultimate eventuate, how the trial would commence and be concluded is up to the concerned court. The appellants or any of the other complainants or the accused persons may move the appropriate court for a trial in one court. That is another aspect altogether. But to say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, we conclude and hold that the submission that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance.

26. In view of the aforesaid premised reasons, the appeal, being sans substance, stands dismissed.

K.K.T. Appeal dismissed.

VIVEK KALRA
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 221 of 2007)

FEBRUARY 15, 2013.

[A.K. PATNAIK AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 – s. 302 – Murder – Circumstantial evidence – Medical evidence that 2 of the 9 injuries on the deceased could not have been caused by the alleged weapon of offence – Courts below on the basis of the motive and circumstances of the case convicted the accused – On appeal, held: Motive not proved – But absence of motive would not affect the prosecution case where the chain of other circumstances establish beyond reasonable doubt that the accused and accused alone committed the offence – Circumstances of the present case prove the prosecution case beyond reasonable doubt – As per the medical evidence, majority of the injuries were stated to have been caused by the weapon of crime and were sufficient in the ordinary course to cause death – The general good behaviour of the accused has no nexus with the offence alleged – Conviction upheld.

The appellant-accused was prosecuted for killing 13-14 years old boy. The prosecution case is based on circumstantial evidence. The motive for murder was that the accused took revenge from his uncle by killing the deceased (deceased being son of the uncle) because the uncle as a guardian to him was not giving him an amount of Rs. 80,000/ which was in a fixed deposit in his name. Trial court convicted him u/s. 302 IPC. High Court affirmed the conviction.

In appeal to this Court, appellant-accused contended that motive could not be said to have been proved; that

PW5 deposed that the accused had a good behaviour and had no bad habit; and that as per the medical evidence, injury Nos. 8 and 9 on the person of the deceased could not have been caused by the weapon of offence i.e. *'dantli',* and therefore prosecution failed to establish its case beyond reasonable doubt.

Dismissing the appeal, the Court

HELD: 1. Where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Evidence Act, 1872 but where the chain of other circumstances establish beyond reasonable doubt that it is the accused and accused alone who has committed the offence and this is one such case, the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence. [Para 6] [1076-D-E]

Ujjagar Singh v. State of Punjab **(2007) 13 SCC 90: 2007 (13) SCR 653 – relied on.**

2. In the instant case, the dead body of the deceased was found on the morning of 08.06.1997 at around 8.00 a.m. and it is clear from the evidence of PW-5 and PW-6 that the appellant had taken the deceased in a scooter between 7.00 p.m. and 9.00 p.m. on 07.06.1997 on the pretext of getting a cassette. PW-28 has confirmed that between 8.00 p.m. and 8.30 p.m. the appellant had come to his cassette shop and taken the cassette. It is also clear from the evidence of PW-5 and PW-6 that neither the appellant nor the deceased returned on the evening of 07.06.1997. From the evidence of PW-26 and PW-7, it is clear that the blood-stained *dantli* has been recovered from the place of occurrence and the blacksmith, PW-13, has confirmed that he had sold that particular *dantli* to the appellant. [Para 7] [1076-G-H; 1077-A-B]

3. PW-22, the doctor has said in his evidence that injury nos. 1 to 7 could have been caused by the *dantli* and that the death of the deceased has been caused from shock and haemorrhage with blood oozing from all the injuries. The number and nature of the injuries together are enough in the ordinary course to cause death and have been caused by *dantli* purchased by the appellant. Hence, merely because the prosecution has not been able to prove that injury Nos. 8 and 9 have been caused by *dantli*, it cannot be held that it is not the appellant who has caused the death of the deceased. [Para 8] [1077-C-E]

4. The general good behaviour of the appellant and the fact that he had no bad habit as stated by PW-5 have no nexus with the offence alleged against the appellant and are not relevant when other circumstances have established beyond reasonable doubt that it is the appellant and the appellant alone who has committed the murder of the deceased. [Para 9] [1078-B]

Vikramjit Singh alias Vicky v. State of Punjab **2006 (12) SCC 306: 2006 (9) Suppl. SCR 375 – relied on.**

Case Law Reference:

2007 (13) SCR 653	**Relied on**	**Para 6**
2006 (9) Suppl. SCR 375	**Relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 221 of 2007.

From the Judgment & Order dated 25.10.2004 of the High Court Judicature for Rajasthan at Jaipur Bench, Jaipur in DBCRL No. 602 of 2002.

Vidya Dhar Gaur for the Appellant.

Sonia Mathur, Sushil Kumar Dubey, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 25.10.2004 of the Rajasthan High Court, Jaipur Bench, in D.B. Criminal Appeal No. 602 of 2002, maintaining the conviction of the appellant under Section 302 of the Indian Penal Code, 1860, (for short 'the IPC') and the sentence of life imprisonment and fine of Rs.1,000/- for the offence.

2. The facts very briefly are that on 08.06.1997 at about 8.30 a.m., one Lal Singh, who was running a tea shop at By-pass Road, Sedariya Tiraha, lodged an FIR with Police Station Adarsh Nagar, Ajmer. In the FIR, he stated that at about 8.00 a.m. on 08.06.1997 one truck driver told him that ahead of Shantinath Dharm Kanta, on the wall of *pulia* (small bridge) one boy has been murdered and laid down and he went there to see and found that one boy, aged about 13-14 years, was lying dead in a pool of blood and several persons have gathered there. The police registered a case under Section 302, IPC, and after investigation, the police filed a charge-sheet against the appellant under Section 302, IPC.

3. At the trial, the prosecution did not examine any eye-witness to the murder of the deceased, but produced circumstantial evidence to establish that the appellant had committed the murder of the deceased and the trial court convicted the appellant. On appeal, the High Court held in the impugned judgment that after the death of his father the appellant was living with his uncle, Gurcharan Kalra, and there was a fixed deposit in his name of Rs.80,000/-, but as Gurcharan Kalra decided to utilize the fixed deposit only at the time of marriage of the appellant, in order to take revenge, the appellant purchased a *dantli,* took Ankit Kalra, the son of Gurcharan Kalra, in a Scooter on the evening of 07.06.1997 to get a cassette, and committed the murder of Ankit Kalra, left the scene of incident, reached Jaipur and got himself admitted to a hospital there on 08.06.1997 for treatment saying that he has met with an accident.

4. Learned counsel for the appellant submitted that the finding of the High Court in the impugned judgment on the motive of the appellant to commit the offence is based on the evidence of Gurcharan Kalra, PW-11, about the fixed deposit of Rs.80,000/- of the appellant, which the appellant used to demand, but from this evidence the High Court could not have come to the conclusion that the motive of the appellant was to take revenge by killing the deceased. He next submitted that PW-5 has admitted in his evidence that the appellant had a good behaviour and had no bad habit and, therefore, it is quite probable that the appellant has not committed the offence. He further submitted that PW-5 has clearly said that when he made the enquiry from the appellant about the deceased Ankit, he had told him that he had been assaulted by Munna and his 2 to 4 associates and caused injuries. He submitted that it is quite possible that Munna may have killed the deceased and that the appellant had not committed the murder. He further submitted that the medical evidence of PW-22, Dr. B.K. Mathur, is clear that the injury nos. 8 and 9 could not have been caused by *dantli*. He submitted that since the prosecution case is that the appellant used a *dantli* to cause the death of the deceased, this medical evidence creates sufficient doubt on the prosecution case.

5. Learned counsel appearing for the State, on the other hand, supported the impugned judgment of the High Court by relying on the following circumstances:

(i) PW-6 has stated that in the evening of 07.06.1997 when his parents had gone to the market and he was playing with the deceased, the appellant came to their house and took the deceased with him saying that they will come back after getting a cassette, but thereafter the deceased did not come back home.

(ii) PW-5, the father of PW-6, has corroborated the evidence of PW-6 that at about 7.00 p.m. in the

evening of 07.06.1997, he and his wife had gone to the market for shopping and when they came back home at about 9.00 p.m., PW-6 told them that the appellant took the deceased on a scooter on the pretext of taking a cassette.

(iii) PW-28 has deposed that he used to work at V.K. Video Movies, Plaza Road, and on 07.06.1997 between 8.00 p.m. and 8.30 p.m. a person by the name of Vivek Kalra (the appellant) came to their shop and took one cassette of picture Judwaa and deposited Rs.100/- in advance and his name has been entered in the register of the shop, but the cassette was never received back.

(iv) PW-7 is a witness to the *panchnama* of the dead body of the deceased (Ext. P-6) which bears his signatures at points A to B and he has said that one *dantli* was lying on the ground near the *pulia* which had a wooden handle and was taken possession of by the police vide memo Ext. P7, which bears his signatures at points A to B and he has also stated that the *dantli* was blood- stained.

(v) PW-13 is a blacksmith and he has said before the Court that the appellant had come to purchase a *dantli* from his shop and he agreed to pay a price of Rs.110/- out of which he paid advance of Rs.10/- to him and on the next day he came to the shop and took the sharp edged *dantli* and he had paid the balance of Rs. 100/- to him and the seized *Dantli* was produced before PW-13 as Article-1 and PW-13 identified Article-1 as the one that was purchased by the appellant from him.

(vi) PW-22, Dr. B.K. Mathur, has given his opinion that he conducted the postmortem on the deceased on

09.06.1997 at 9.30 a.m. and that the injuries no. 1 to 7 could be caused by the *dantli*.

Learned counsel for the State submitted that considering all these circumstances established by the prosecution, there can be no doubt that it is the appellant and the appellant only who has committed the murder of the deceased.

6. We have considered the submissions of the learned counsel for the parties and we agree with the learned counsel for the appellant that from the evidence of PW-11 one could not hold that the appellant had committed the murder of the deceased to take revenge on his uncle (PW-11), who had not given him Rs.80,000/- kept in fixed deposit. We are, however, of the opinion that where prosecution relies on circumstantial evidence only, motive is a relevant fact and can be taken into consideration under Section 8 of the Indian Evidence Act, 1872 but where the chain of other circumstances establish beyond reasonable doubt that it is the accused and accused alone who has committed the offence and this is one such case the Court cannot hold that in the absence of motive of the accused being established by the prosecution, the accused cannot be held guilty of the offence. In *Ujjagar Singh v. State of Punjab* [(2007) 13 SCC 90], this Court observed:

> "It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy."

7. In this case, the dead body of Ankit was found on the morning of 08.06.1997 at around 8.00 a.m. and it is clear from the evidence of PW-5 and PW-6 that the appellant had taken Ankit in a scooter between 7.00 p.m. and 9.00 p.m. on 07.06.1997 on the pretext of getting a cassette. PW-28 has

confirmed that between 8.00 p.m. and 8.30 p.m. the appellant had come to his cassette shop and taken the cassette of the film *Judwaa*. It is also clear from the evidence of PW-5 and PW-6 that neither the appellant nor the deceased returned on the evening of 07.06.1997. From the evidence of PW-26 and PW-7, we also find that the blood-stained *dantli* has been recovered from the place of occurrence and the blacksmith, PW-13, has confirmed that he had sold that particular *dantli* to the appellant at a price of Rs.110/-.

8. Dr. B.K. Mathur, PW-22, has said in his evidence that injury nos. 1 to 7 could have been caused by the *dantli* and that the death of the deceased has been caused from shock and haemorrhage with blood oozing from all the injuries. We find that injury nos. 1, 2, 3, 4, 5, 6 and 7 are cut wounds on the left of the face, left of the neck, back of the neck, on the left muscles and specula bone intestine and on the left of the waist. The number and nature of these injuries together are enough in the ordinary course to cause death and have been caused by *dantli* purchased by the appellant. Hence, merely because the prosecution has not been able to prove that injury nos. 8 and 9 have been caused by *dantli*, we cannot hold that it is not the appellant who has caused the death of the deceased.

9. It is true that PW-5 has stated that the appellant had a good behaviour and had no bad habit. Section 8 of the Indian Evidence Act, 1872, however, provides that the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent to it. Hence, any behaviour or conduct of the appellant would be relevant if it had nexus with the offence under Section 302 alleged to have been committed by him. This Court has held in *Vikramjit Singh alias Vicky v. State of Punjab* [2006 (12) SCC 306] at page 314:

> "…..Conduct of an accused must have nexus with the crime committed. It must form part of the evidence as regards his conduct either preceding, during or after the commission of the offence as envisaged under Section 8 of the Evidence Act…."

The general good behaviour of the appellant and the fact that he had no bad habit have no nexus with the offence alleged against the appellant and are not relevant when other circumstances have established beyond reasonable doubt that it is the appellant and the appellant alone who has committed the murder of the deceased.

10. In the result, we find no merit in the appeal and we dismiss the same.

K.K.T. Appeal dismissed.

SANAULLAH KHAN
v.
STATE OF BIHAR
(Criminal Appeal Nos. 94 - 95 of 2011)

FEBRUARY 15, 2013

[A.K. PATNAIK AND MADAN B. LOKUR, JJ.]

Penal Code, 1860:

ss. 302 and 201 – Triple murder – Circumstantial evidence – Conviction and sentence of death awarded by trial court confirmed by High Court – Held: Chain of circumstances proved by prosecution establishes beyond reasonable doubt that it was the appellant who had eliminated three persons – Therefore, conviction of appellant u/s 302 for each of the three offences of murder is upheld – However, as regards the sentence, motive for crime was not established – Further, though deceased persons appear to have been brutally killed, what exactly happened leading to their murder by appellant is not known – There is no evidence to establish the gravest case of extreme culpability of appellant and there is also no evidence to establish his circumstances – Therefore, imprisonment for life for each of the three offences of murder and the sentences to run consecutively would meet the ends of justice – Ordered accordingly – Code of Criminal Procedure, 1973 – s.31 – Sentence/Sentencing – Criminal law – Motive.

The appellant and another were prosecuted for committing offences punishable u/ss. 364/34, 302, 120-B and 201 IPC. The prosecution case was that regarding the quality of milk supplied by the appellant at the tea stall of 'R' the father of the informant, there arose a dispute between the two. On 16.12.2002 at about 8 p.m. 'A', the worker of the appellant came at the tea stall and told 'R'

that the appellant was calling him. 'R' went along with 'A'. After some time 'A' again came to the tea stall and said that the appellant was calling 'S', the other son of 'R'. 'S' also accompanied 'A'. However, both 'R' and 'S' did not return till the following morning. On the basis of the 'fardbeyan' given by the informant, an FIR was registered for the offence of kidnapping. During the investigation three dead bodies, of 'R', 'S' and 'A', were recovered from the 'Khatal (a cattle shed)' of the appellant. The trial court convicted the appellant and sentenced him to death. The other person was acquitted. The High Court confirmed the conviction as also the death sentence.

Partly allowing the appeals, the Court

HELD: 1.1. In the instant case, three circumstances have been established by the prosecution. Firstly, 'A' came to the tea stall on 16.12.2002 at about 8.00 p.m. and told 'R' that he was being called by the appellant and 'R' went with 'A' and within an hour thereafter 'A' again came to the tea stall and told 'S' that he was being called by the appellant and 'S' also went along with 'A'; secondly, on 17.12.2002 the dead bodies of the three deceased were recovered from a room in occupation of the appellant; and thirdly, pursuant to the information divulged by the appellant, the incriminating materials were recovered by the I.O. Thus, the chain of these three circumstances establishes beyond reasonable doubt that it was the appellant who had eliminated the three deceased persons. Therefore, the 5 golden principles laid down in S*harad Birdhichand Sarda apply in the instant case and the only hypothesis that the Court can conclude from the chain of three circumstances is that it is the appellant who has committed the murder of the three deceased persons. [Para 17-18] [1091-E-H; 1092-D-E]**

**Sharad Birdhichand Sarda vs. State of Maharashtra*

1985 (1) SCR 88 = (1984) 4 SCC 116 – relied on

1.2. The evidence of PW4 may create some doubt with regard to the motive of the appellant to kill 'R' and ?S?. Where other circumstances lead to the only hypothesis that the accused has committed the offence, the court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case. [Para 19] [1093-B-C]

Ujjagar Singh v. State of Punjab **2007 (13) SCR 653 = (2007) 13 SCC 90 – relied on.**

Javed Masood and Another vs. State of Rajasthan **2010 (3) SCR 236 = (2010) 3 SCC 538; and** *Mukhtiar Ahmed Ansari vs. State* **2005 (3) SCR 797 = (2005) 5 SCC 258 – cited.**

2.1. As regards the sentence, motive for the appellant to commit the murder of three persons has not been established. There is also no eyewitness to the manner in which the appellant committed the murder of three persons and the culpability of the appellant has been established only by a chain of three circumstances established by the prosecution. The finding of the High Court, therefore, that either 'R' or 'S' had to undergo the trauma of watching the father or the son being killed first in front of the other is a pure surmise. What exactly happened leading to the murder of three persons by the appellant is not known, but what appears from the *post mortem* reports is that the three deceased persons were brutally killed by the appellant. Brutality would be a relevant factor, but how the same did take place is also a relevant and necessary material to be considered while deciding whether to award life imprisonment or death for the offence of murder. As has been held in *Bachan Singh's* case, the extreme penalty of death can be inflicted only in gravest cases of extreme culpability and in making

choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. In the instant case, there is no evidence to establish the gravest case of extreme culpability of the appellant and there is also no evidence to establish the circumstances of the appellant. [Para 22-23] [1094-D-H; 1095-A-D-F]

Panchhi & Ors. v. State of U.P. **1998 (1) Suppl. SCR 40 = AIR 1998 SC 2726; and** *Bachan Singh vs. State of Punjab* **1983 (1) SCR 145 = 1980 AIR 898 – referred to**

2.2. However, there is sufficient evidence to establish the culpability of the appellant for three offences of murder as defined in s. 300, IPC, and for each of the three offences of murder, he is liable u/s. 302, IPC for imprisonment for life if not the extreme penalty of death. Section 31(1), Cr. P.C. empowers the court to inflict sentences of imprisonment for more than one offence to run either consecutively or concurrently. The term "imprisonment" in s. 31 Cr.P.C. includes the sentence for imprisonment for life. Considering the facts of the case, this Court is of the opinion that the sentences of imprisonment for life should not run concurrently but consecutively and such punishment of consecutive sentence of imprisonment for the triple murder committed by the appellant will serve the interest of justice. Ordered accordingly. [Paras 24 and 25] [1095-F-G; 1096-B-D]

Kamalanantha & Ors. vs. State of T. N. **2005 (3) SCR 182** *= (2005) 5 SCC 194 –* **relied on**

Macchhi Singh vs. State of Punjab **1983 (3) SCR 413 = (1983) 3 SCC 470 – cited.**

Case Law Reference:

1983 (3) SCR 413	**cited**	**para 5**

2010 (3) SCR 236	**cited**	**para 10**
1985 (1) SCR 88	**relied on**	**`Para 18**
2005 (3) SCR 797	**cited**	**para 19**
2007 (13) SCR 653	**relied on**	**para 19**
1983 (1) SCR 145	**relied on**	**para 22**
1998 (1) Suppl. SCR 40	**referred to**	**para 22**
2005 (3) SCR 182	**relied on**	**para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 94-95 of 2011.

From the Judgment & Order dated 16.12.2009 of the High Court of Judicature at Patna in Death Reference Case No. 1 of 2007 with Criminal Appeal (DB) No. 379 of 2007.

Amarendra Sharan, Irshad Ahmad, Sanchit G., Somesh Chandra Jha, Dhruv Pal for the Appellant.

Samir Ali Khan, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 16.12.2009 of the Patna High Court in Death Reference Case No. 1 of 2007 and Criminal Appeal (DB) No. 379 of 2007.

FACTS:

2. The facts very briefly are that a *fardbeyan* was lodged on 17.12.2002 by one Sanju Kumar (hereinafter referred to as Informant), resident of Village Mathura, P.S. Bidupur, District Vaishali. In the *fardbeyan*, it was stated: Father of the informant, namely Ravindra Prasad, was running a tea stall near the Eastern gate of the GPO. For the tea stall he required about 25 Litres of milk everyday and this milk was being supplied by

Sanaullah Khan, the appellant herein, for about a month. Sanaullah Khan started mixing water with the milk and the customers of the tea stall started making complaints about the quality of tea. On 02.12.2002 at about 2.00 p.m. Sanaullah Khan along with Md. Hamid and Arvind came to the tea stall and demanded the dues for the supply of milk. After calculation it was found that the dues amounted to Rs. 1,000/- and Ravindra Prasad gave Sanauallah Khan Rs. 500/- and told him that the rest of the amount will be paid later. Ravindra Prasad, however, informed Sanaullah Khan that the milk supplied by him was not up to the mark and therefore he will no longer purchase milk from his Khatal. Sanaullah Khan got annoyed and told him that he will not allow him to run the tea stall. Ravindra Prasad retorted that he had seen many persons like him at his tea stall. Sanaullah Khan said that he will have to face serious consequences and that he will teach him a lesson within two to four days. Thereafter, Sanaullah Khan, Hamid and Arvind went away. On 16.12.2002 at about 8.00 p.m. Arvind, who was working with Sanaullah Khan came and told Ravindra Prasad that his master was calling him for some urgent work and Ravindra Prasad went along with Arvind and did not return for an hour. Arvind again came and told his brother Sunny Kumar, who was in the tea stall, that his master was calling him and that Ravindra Prasad was in the Khatal. Sunny Kumar also accompanied Arvind. Ravindra Prasad and Sunny Kumar, however, did not return till the next morning. The Informant became suspicious and started searching for his father and his brother. He went to the Khatal of the appellant, but found it to be closed. He suspected that the appellant, Hamid and Arvind had kidnapped his father and younger brother.

3. The *fardbeyan* given by the Informant was registered as FIR No.451 of 2002 at Kotwali, P.S. for the offence of kidnapping under Section 364 read with Section 34 of the Indian Penal Code, 1860, (for short 'the IPC'). When investigation was done by the police, three dead bodies were found concealed in husk in a room on the eastern verandah of

Pearl Cinema and the dead bodies were seized and a seizure list was prepared in which Parimal Kumar and Baleshwar Ram signed as witnesses. Two of the dead bodies were identified by the informant as those of Ravindra Prasad and Sunny Kumar. Inquest reports and postmortem reports of the dead bodies were prepared. Later the third body was identified to be that of Arvind by Ramanand Ram, father of Arvind. The appellant was arrested and pursuant to the confession of the appellant, the shoes, sandal and gamchha of the three deceased persons, a rope, a small plastic bag and a knife were recovered from the garbage situated in north-east of Khatal and were seized and Parimal Kumar and Baleshwar Ram signed the seizure list. Offences under Sections 302, 120B and 201 IPC were added and a charge-sheet was filed against the appellant and Hamid and the case was committed to the Court of Sessions.

4. At the trial, altogether eight witnesses were examined. The Trial Court held that the chain of circumstances is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant and it goes to show that in all human probabilities, the offences must have been committed by the appellant. The trial court, however, acquitted Hamid of the charges. After hearing on the question of sentence, the trial court took the view that the appellant should be hanged by the neck till death as he had killed three helpless persons brutally after premeditation and if he is allowed to continue to live in the present society, he will be a threat to his co-human beings and this was one of those rarest of rare cases in which the appellant deserves the capital punishment of death. The trial court accordingly referred the sentence of death to the High Court.

5. The appellant also filed a criminal appeal against the judgment of the trial court. On 03.07.2006, the High Court directed recording of additional evidence on two points in exercise of its powers under Section 391 of the Criminal

Procedure Code, 1973 (for short 'the Cr.P.C.'). Pursuant to the direction of the High Court the confessional statement of the appellant was marked as an exhibit through the investigating officer (PW-8) after his recall by the trial court and the knife which was seized and listed as item 10 in the seizure list was also marked as an exhibit. Thereafter, the High Court heard the appeal and held that the prosecution has been able to bring home the guilt of the appellant with regard to the murder of the 3 deceased persons by exhibiting four circumstances and these are (i) that the appellant was selling milk to the deceased Ravindra Prasad and Ravindra Prasad stopped buying the milk (ii) the appellant summoned the deceased Ravindra Prasad and deceased Sunny Kumar through the deceased Arvind who was working with the appellant (iii) the dead bodies of the three deceased persons were recovered from the room belonging to the appellant and (iv) the weapons used in the murder of three deceased persons were recovered pursuant to the confession of the appellant. The High Court also confirmed the death sentence of the appellant saying that the tests laid down by this Court in *Macchhi Singh vs. State of Punjab* [(1983) 3 SCC 470] regarding the cases in which death penalty should be imposed were present in the facts and circumstances of the present case. Aggrieved by the judgment of the High Court, the appellant has filed this appeal.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PARTIES:

6. Mr. Amarendra Sharan, learned senior counsel appearing for the appellant, submitted that there is no eye witness to the murder of the three deceased persons and the finding of the High Court that the prosecution has been able to establish the guilt of the appellant beyond reasonable doubt are based on 4 circumstances is not correct.

7. Mr. Sharan relied on the evidence of PW-3 to the effect that Arvind had a dairy (khatal) at Old Bakri Bazar and also on the evidence of PW-4 that the appellant never had any business

of milk but had a business of bakri (goat). He submitted that the first circumstance which was the motive for the appellant to kill the deceased Ravindra Prasad and Sunny Kumar is itself not established in this case.

8. Mr. Sharan submitted that there is absolutely no evidence to establish the second circumstance that the appellant summoned the deceased persons Ravindra Prasad and Sunny Kumar. He submitted that the trial court and the High Court has relied on the evidence of PW-6 to hold that the appellant summoned the deceased persons Ravindra Prasad and Sunny Kumar through his servant Arvind but PW-6 was not present at the tea stall. He submitted that the evidence of PW-7 would show that PW-6 was in the house of PW-7 on 16.12.2002 and remained there till the morning of 17.12.2002 and thus PW-6 was not present at the tea stall on 16.12.2002 when Arvind is alleged to have told Ravindra Prasad and Sunny Kumar that they have been summoned by the appellant.

9. Mr. Sharan next submitted that the third circumstance that dead bodies were recovered from the room belonging to the appellant is also not proved in as much as PW-7 has said in his evidence that the dead bodies were in fact recovered in front of the Pearl Cinema. He submitted that the two seizure witnesses PW-1 and PW-2 have clearly said that recovery of the dead bodies and the weapon with which the offence was committed and other incriminating materials were not made in their presence. He argued that Rajender Tiwari, the officer who made the recoveries has also not been examined. He submitted that the recoveries were made from the pile of the garbage and not from the drain by the side of Sona Medical Hall as is alleged to have been stated by the appellant in his confession. He submitted that, therefore, the fourth circumstance that the incriminating materials were recovered pursuant to the confession of the appellant is also not established.

10. *Mr. Sharan relied on Sharad Birdhichand Sarda vs. State of Maharashtra* [(1984) 4 SCC 116] in which this Court has laid down the tests to be satisfied before the court convicts an accused on the basis of only circumstantial evidence. He argued that in this case these tests are not satisfied and therefore the conviction of the appellant by the trial court as maintained by the High Court should be set aside. He also cited the decision of this Court in *Javed Masood and Another vs. State of Rajasthan* [(2010) 3 SCC 538] to argue that the evidence of prosecution witnesses was binding on the prosecution. He submitted that the evidence of PW3, PW4 and PW7 relied upon by the appellant to establish his innocence, therefore, is binding on the prosecution.

11. Mr. Samir Ali Khan, learned counsel appearing for the State, on the other hand, submitted that the evidence of PW-6 is consistent and if the evidence of PW-6 is considered along with the recovery of the dead bodies from the room belonging to the appellant as well as the recovery of the weapons and other incriminating materials pursuant to the confessional statement of the appellant marked Ex.1, the Court will arrive at the only conclusion that it is the appellant who has committed the murder of three deceased persons. He submitted that though the appellant retracted his confession before the trial court when his statement under Section 313 of the Cr.P.C. was recorded, the appellant has not led any evidence to establish his innocence. He submitted that the trial court and the High Court, therefore, have rightly held that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt.

FINDINGS OF THE COURT:

12. The evidence of PW-6 on which both the trial court and the High Court have relied on is clear that on 16.12.2002 at about 8.00 p.m. when he was present at the tea stall, Arvind, servant of the appellant came and called Ravindra Prasad saying that the appellant wanted to talk to him on certain issues

and that Ravindra Prasad left with Arvind. PW-6 has also stated in his evidence that after about an hour Arvind came again and told that the appellant was calling Sunny also and Sunny went along with Arvind and thereafter PW-6 closed the shop and went to his house. No suggestion has also been made to PW-6 in his cross-examination by the defence that PW-6 was not present at the tea stall on 16.12.2002. Mr. Sharan, however, referred to the evidence of PW-7 that PW-6 has come to his house on 16.12.2002 and stayed at his house at Patna itself in the night and left in the morning but PW-7 has not stated the time when PW-6 had come to his house on 16.12.2002. Hence, the evidence of PW-7 does not contradict the evidence of PW-6 that he was at the tea stall at 8.00 p.m. on 16.12.2002 when Arvind told Ravindra Prasad and Sunny Kumar that they were being called by the appellant.

13. There is also evidence to show that the dead bodies of Ravindra Prasad, Sunny Kumar and Arvind were recovered from the Khatal of the appellant. Though, the seizure witnesses PW-1 and PW-2 stated that nothing was seized in their presence, PW-6 has stated that when the Khatal (cattle shed) of the appellant was opened, he saw some splashes of blood and the dead bodies were found in another room and these dead bodies were of Ravindra Prasad, Sunny Kumar and Arvind. He has also stated that the inquest reports of all the three dead bodies were prepared at the place of occurrence itself and he put his signature on it and all the three signatures are his and these have been marked as Ex.1/5, 1/6 and 1/7. In cross examination by the defence, PW-6 has denied the suggestion that the dead bodies had not been recovered in his presence and that the inquest reports were not prepared in his presence and that he had not put his signatures on the inquest reports.

14. Mr. Sharan relied on the evidence of PW-7 to submit that the three dead bodies were not recovered from the Khatal but we find that PW-7 has also stated that the three dead

bodies were recovered from the room of Pearl Cinema where the Khatals of the appellant were situated. PW-7 has, however, admitted in cross-examination on behalf of the defence that he had not seen with his own eyes as to from which place the dead bodies were recovered. Thus the evidence of PW-7 may not establish the place from which the dead bodies were recovered but the evidence of PW-6 clearly proves that the bodies were recovered from a room in the verandah of Pearl Cinema, which was in occupation of the appellant and this evidence of PW-6 has not been contradicted by the evidence of PW-7.

15. PW-8, the I.O. who inspected the place of occurrence has stated in his deposition that Pearl Cinema is situated to the east of the tea stall in Budh Marg and was closed for a long period and there is a verandah to the east of the cinema hall which is divided into many rooms and the rooms situated to the north is in possession of the appellant. He has further stated in his evidence that in the western portion of the floor of this room, blood was found in huge quantity which had already clotted and the stains of blood were found on the western wall also. PW-8 has further stated that to the north of this room and near the door there is a vacant place which is fitted with the grill gate and to the north of this place there is another room in which there is heap of straw and the three dead bodies were found concealed in this very heap of husk which were recovered and the husk was found sticking to the injuries on the dead bodies of the deceased persons. PW-8 has further stated that the three dead bodies were recovered from the place of occurrence itself. He has also stated that Rajender Tiwari, the SI of Police prepared the inquest reports of all the three dead bodies and he put his signatures on all the three inquest reports which have been marked as Ex.5, 5/1 and 5/2 respectively.

16. PW-8 has also stated in his evidence that in course of investigation, after the appellant had surrendered in court, he took him on police remand and in course of investigation he gave his confessional statement, and pursuant to information

the appellant divulged, he seized two pair of blood stained plastic shoes, a blood stained white gamcha (towel of Indian type), a blood stained chequerred gamcha, a plastic rope of green colour, a blood stained piece of plastic, a blood stained old sack, a small sack of blood, a blood stained green small plastic sack, a blood stained small container made of plastic, a knife of 16 inches used for slaughtering goat. PW-8 has also stated that a seizure list of all these articles which were recovered were prepared by Rajender Tiwari and he had identified the writing and signature of Rajender Tiwari and the seizure list is marked as Ex.6/1. Section 27 of the Indian Evidence Act, 1872, states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Hence, the information received from the appellant pursuant to which the aforesaid incriminating materials were recovered is not only admissible but also has been proved.

17. Thus, three circumstances have been established by the prosecution. The first circumstance established by the prosecution is that Arvind came to the tea stall on 16.12.2002 at about 8.00 p.m. and told Ravindra Prasad that he was being called by the appellant and Ravindra Prasad went with Arvind and within an hour thereafter Arvind again came to the tea stall and told Sunny Kumar that he was being called by the appellant and Sunny Kumar went along with Arvind. The second circumstance that has been established by the prosecution is that on 17.12.2002 the dead bodies of Ravindra Prasad, Sunny Kumar and Arvind were recovered from a room in occupation of the appellant in the verandah of Pearl Cinema. The third circumstance which has been established by the prosecution is that pursuant to the information divulged by the appellant the incriminating materials were recovered by the I.O. These three chain of circumstances establish beyond reasonable doubt that

it was the appellant who had eliminated the three deceased persons.

18. In *Sharad Birdhichand Sarda vs. State of Maharashtra* (supra), cited by Mr. Sharan, the following 5 golden principles were laid down for a proof of guilt on the basis of circumstantial evidence (i) the circumstance from which the conclusion of the guilt is to be drawn should be fully established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused; (iii) the circumstances should be of a conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved, and (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Considering the chain of three circumstances which have been fully established by the prosecution, the 5 golden principles laid down in *Sharad Birdhichand Sarda vs. State of Maharashtra* (supra) apply in this case and the only hypothesis that we can conclude from the chain of three circumstances is that it is the appellant who has committed the murder of the three deceased persons.

19. In *Javed Masood and Another vs. State of Rajasthan* (supra) cited by Mr. Sharan, this Court relying on its earlier decision in *Mukhtiar Ahmed Ansari vs. State* [(2005) 5 SCC 258] has held that it was open to the defence to rely on the evidence led by the prosecution. In this case, we have found that the evidence of PW-7 does not contradict the evidence of PW-6 and does not support the defence. It, however, appears from the evidence of PW-3 that it was Arvind who had a Khatal at Old Bakri Bazar. We have perused the evidence of PW-3 and we do not find that PW-3 has stated that the appellant did not have a Khatal on the verandah of the Pearl Cinema. Of course, PW4 has stated that the appellant runs business of bakri (sheep goat) and never ran milk business but in the

evidence of PW-4 there is nothing to show that the room on the verandah of Pearl Cinema was not in the occupation of the appellant. At best the defence can rely on PW-4 to argue that the appellant did not carry on milk business and therefore the motive for committing the offence did not exist. The evidence of PW4 may thus create some doubt with regard to the motive of the appellant to kill Ravindra Prasad and Sunny Kumar. Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case. In *Ujjagar Singh v. State of Punjab* [(2007) 13 SCC 90, this Court has held:

> "It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliche) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy".

SENTENCE:

20. On the question of sentence, the trial court has recorded special reasons under Section 354(3) Cr.P.C. for awarding death sentence to the appellant. The trial court has held that the appellant has killed Ravindra Prasad and Sunny Kumar on an issue of petty amount and the appellant has also not spared his servant, Arvind. The trial court has also found from the *post mortem* reports of the three deceased persons that they have been brutally murdered after premeditation. The trial court has further held that if the appellant is allowed to continue to live in society, he will be a great threat to his co-human beings. For the aforesaid reasons, the trial court took the view that the appellant should be awarded the death sentence.

21. While confirming the death sentence, the High Court has held in the impugned judgment that the present case clearly falls under the yardstick laid down in *Machhi Singh & Ors. v. State of Punjab* [AIR 1983 SC 957]. The reasons, which weighed with the High Court in confirming the death sentence, are that the appellant did not hesitate to take away three lives for petty monetary gain; the tender age of Sunny was of no concern to him; either Ravindra or Sunny had to undergo the trauma of watching the father or the son being killed first in front of the other and their hands and feet were tied and a butchering knife was used to cause multiple murders and the nature of the assault upon the deceased Arvind to do away with all evidence whatsoever was dastardly.

22. We have, however, noticed that the motive for the appellant to commit the murder of three persons has not been established in this case. Hence, one of the reasons given by the trial court and the High Court that the murders were committed for petty monetary gain is not substantiated by evidence. We have also found that there is no eyewitness to the manner in which the appellant committed the murder of three persons and the culpability of the appellant has been established only by a chain of three circumstances established by the prosecution. The finding of the High Court, therefore, that either Ravindra or Sunny had to undergo the trauma of watching the father or the son being killed first in front of the other is a pure surmise. Similarly, the finding of the High Court that the hands and feet were tied and a butchering knife was used to cause multiple murders is an inference drawn by the High Court from the *post mortem* report. What exactly happened leading to the murder of three persons by the appellant is not known, but what appears from the *post mortem* reports is that the three deceased persons were brutally killed by the appellant. It has, however, been held by this Court in *Subhash Ramkumar Bind @ Vakil & Anr. v. State of Maharashtra* [AIR 2003 SC 269] that brutality would be a relevant factor but how the same did take place is also a relevant and necessary material to be

considered while deciding whether to award life imprisonment or death for the offence of murder. Moreover, in *Panchhi & Ors. v. State of U.P*. [AIR 1998 SC 2726] a three-Judge Bench of this Court has held:

> "Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in, *Bachan Singh's* case, (AIR 1980 SC 898), in a way every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

23. The trial court, however, has held that as the appellant has eliminated the three deceased, if the appellant is allowed to continue to live in society, he will be a great threat to his co-human beings. This reason for awarding the extreme penalty of death is based on an apprehension and may not be enough to impose the extreme penalty of death. As has been held by the majority of four Judges in *Bachan Singh's* case (supra), the extreme penalty of death can be inflicted only in gravest cases of extreme culpability and in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. In the present case, we do not find evidence to establish the gravest case of extreme culpability of the appellant and we do not also have evidence to establish the circumstances of the appellant.

24. We have, however, sufficient evidence to establish the culpability of the appellant for three offences of murder as defined in Section 300, IPC, and for each of the three offences of murder, the appellant is liable under Section 302, IPC for imprisonment for life if not the extreme penalty of death. Section 31(1) of the Cr.P.C. provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code, sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such

punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. Thus, Section 31(1) of the Cr. P.C. empowers the Court to inflict sentences of imprisonment for more than one offence to run either consecutively or concurrently. In *Kamalanantha & Ors. vs. State of T.N.* [(2005) 5 SCC 194], this Court has held that the term "imprisonment" in Section 31 of the Cr. P.C. includes the sentence for imprisonment for life. Considering the facts of this case, we are of the opinion that the appellant is liable under Section 302, IPC for imprisonment for life for each of three offences of murder under Section 300, IPC and the imprisonments for life should not run concurrently but consecutively and such punishment of consecutive sentence of imprisonment for the triple murder committed by the appellant will serve the interest of justice.

25. In the result, we maintain the conviction of the appellant for three offences of murder under section 302, IPC, but convert the sentence from death to sentence for rigorous imprisonment for life for each of the three offences of murder and direct that the sentences of imprisonment for life for the three offences will run consecutively and not concurrently. Thus, the appeals are allowed only on the question of sentence, and dismissed as regards conviction.

R.P. Appeals allowed

STATE OF MADHYA PRADESH
v.
GIRIRAJ DUBEY
(Criminal Appeal No. 319 of 2013)

FEBRUARY 19, 2013

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

Code of Criminal Procedure, 1973:

s.378(3) – Appeal against acquittal – High Court declining to grant leave – Held: Order of High Court is irrefragably cryptic and clearly shows non-application of mind – Despite the clear law laid down by Supreme Court, High Courts, while declining to grant leave against judgments of acquittal, do not indicate reasons for formation of such an opinion – Judgments of Supreme Court, being binding on all courts, are required to be followed in letter and spirit – That is the constitutional mandate and that is the judicial discipline – Order passed by High Court set aside and matter remitted to it to pass a cogent and reasoned order relating to grant or refusal of leave – Constitution of India, 1950 – Art. 141 – Judicial discipline.

ADMINISTRATION OF JUSTICE:

Criminal justice – Appeal against acquittal – Held: Every crime is an offence against the collective as a whole – It is the duty of courts to see that justice is done to the sufferer of the crime which, eventually, mitigates the cause of the collective and satisfies the cry of society against crime.

The instant appeal was filed by the State against the order of the High Court declining to grant leave to the State to file appeal against the judgment of acquittal passed by the trial court.

Allowing the appeal, the Court

HELD: 1.1. The High Court has only stated that the trial court, after appreciation of the evidence, had found that the prosecution had failed to establish the offence against the respondent and, therefore, the judgment of acquittal did not suffer from infirmity. Such an order cannot be said to be a reasoned order. On the contrary, it is irrefragably cryptic and clearly shows non-application of mind. [para 5] [1100-H; 1101-A-B]

1.2. Despite the clear law laid down by this Court, High Courts, while declining to grant leave against the judgments of acquittal, do not indicate reasons for formation of such an opinion. The order has to reflect proper application of mind and such reflection of application of mind has to be manifest from the order itself. It should be kept in mind that the judgments of this Court, being binding on all courts, are required to be followed in letter and spirit. That is the constitutional mandate and that is the judicial discipline. Consequently, the order passed by the High Court is set aside and the matter is remitted to it to pass a cogent and reasoned order relating to grant or refusal of leave. [para 12-13] [1104-C-D, G; 1105-A-C]

State of Maharashtra v. Vithal Rao Pritirao Chawan **(1981) 4 SCC 129;** *State of Orissa v. Dhaniram Luhar* **2004 (2) SCR 68 = (2004) 5 SCC 568;** *State of Rajasthan v. Sohan Lal and Others* **2004 (1) Suppl. SCR 480 = 2004 (5) SCC 573;** *State of Uttar Pradesh v. Ajai Kumar* **2008 (2) SCR 552 = 2008 (3) SCC 351;** *State of Maharashtra v. Sujay Mangesh Poyarekar* **2008 (13) SCR 750 = 2008 (9) SCC 475 – relied on**

2. It is the duty of every court to bear in mind that when a crime is committed, though an individual is affected or, on some occasions, a group of individuals

become victims of the crime, yet in essentiality, every crime is an offence against the collective as a whole. It creates a stir in the society. The degree may be different depending on the nature of the offence. That makes the duty of the High Courts to see that justice is done to the sufferer of the crime which, eventually, mitigates the cause of the collective and satisfies the cry of the society against the crime. [para 12] [1104-D-F]

Case Law Reference:

(1981) 4 SCC 129	**relied on**	**para 6**
2004 (2) SCR 68	**relied on**	**para 7**
2004 (1) Suppl. SCR 480	**relied on**	**para 8**
2008 (2) SCR 552	**relied on**	**para 9**
2008 (13) SCR 750	**relied on**	**para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 319 of 2013.

From the Judgment & Order dated 04.07.2012 of the High Court of Madhya Pradesh, bench at Gwalior in Criminal Appeal No. 1835 of 2012.

Samir Ali Khan, C.D. Singh for the Appellant.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Questioning the assailability and substantiality of the order dated 4.7.2012 passed by the Division Bench of the High Court of Judicature of Madhya Pradesh at Gwalior in M.Cr.C. No. 1835 of 2012 whereby the High Court has declined to grant leave to the State to prefer an appeal against the judgment of acquittal dated 2.12.2011 passed by the learned Sessions Judge, Bhind in Sessions Trial No. 193 of 2010, the present

appeal by special leave has been preferred.

3. Shorn of unnecessary details, the facts which are requisite to be stated are that on the basis of an FIR lodged by the complainant, the investigating agency laid a charge-sheet before the competent court against the accused-respondent for the offences punishable under Sections 294 and 436 of the Indian Penal Code (for short "the IPC"). The learned Magistrate, on receipt of the charge-sheet, committed the matter to the Court of Session. The learned Sessions Judge, by his judgment dated 2.12.2011, acquitted the respondent herein of the charge on the foundation that there was no witness to the occurrence of the crime and further PW-2, the wife of the complainant, could not tell the exact abuses hurled at her by the accused respondent. In the application seeking leave to appeal, many a ground was urged challenging the judgment of acquittal. The Division Bench of the High Court, by the impugned order, referred to the trial court judgment and opined that the trial court, after appreciation of the evidence on record, has opined that the prosecution has failed to prove the offence against the respondent beyond reasonable doubt inasmuch as there was not adequate evidence to substantiate the charges against the respondent and, hence, there was no legality in the judgment of acquittal.

4. Mr. Samir Ali Khan, learned counsel for the State, has raised a singular contention that the High Court, while declining to grant leave to appeal, has really not ascribed any reason whatsoever and what has been stated in the impugned order does not remotely reflect any reason, for the High Court has only stated that the prosecution has failed to establish the offence against the respondent by adducing adequate evidence. It is urged by him that it is obligatory on the part of the High Court to give reasons while dismissing the application for leave.

5. To appreciate the aforesaid submission, we have

bestowed our anxious consideration and carefully perused the order passed by the High Court. The High Court has only stated that the trial court, after appreciation of the evidence, had found that the prosecution had failed to establish the offence against the respondent and, hence, the judgment of acquittal did not suffer from infirmity. We are afraid that such an order cannot be said to be a reasoned order. On the contrary, such an order is, irrefragably, cryptic and clearly shows non-application of mind.

6. It needs no special emphasis to say that while dealing with an application for leave to appeal, it is obligatory on the part of the High Court to assign reasons. In *State of Maharashtra v. Vithal Rao Pritirao Chawan*[1], this Court has observed as follows: -

> "If we would have had the benefit of the view of the learned Judge of the High Court who refused to grant leave on the question as to how he came to the conclusion that the transfer of the charge by making necessary entry in the cash book of cash handed over to the accused does not constitute entrustment, we would certainly have been able to examine the correctness of the view."

After so stating, the two-Judge Bench opined that it would be for the benefit of this Court that a speaking order is passed.

7. In *State of Orissa v. Dhaniram Luhar*[2], this Court, while dealing with an order of refusal to grant leave by the High Court without ascribing any reason, expressed that when the High Court refuses to grant leave without giving any reasons, a close scrutiny of the order of acquittal, by the appellate forum, has been lost once and for all. The two-Judge Bench proceeded to express thus: -

"The manner in which appeal against acquittal has been

1. (1981) 4 SCC 129.
2. (2004) 5 SCC 568.

> dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief in its order, indicative of an application of its mind; all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable."

It is worth noting that in the said case, this Court has observed that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

8. In *State of Rajasthan v. Sohan Lal and Others*[3], after referring to the case of *Dhani Ram Luhar* (supra), it has been ruled that the provision for seeking leave to appeal is to ensure that no frivolous appeals are filed against judgments of acquittal, as a matter of course, but that does not enable the High Court to mechanically refuse to grant leave by mere cryptic or readymade observations, pointing out that the court does not notice any infirmity in the order. Emphasis was laid on the factum that the orders of the High Court are amenable to further challenge before this Court and, therefore, such ritualistic observations and summary disposal which has the effect of, at times, as in certain cases, foreclosing statutory right of appeal cannot be said to be proper. The Court further opined that giving of reasons for a decision is an essential attribute of judicial and judicious disposal of the matter before courts, and also the only indication to know about the manner and quality of the exercise undertaken, as also the fact that the court concerned had really applied its mind.

9. In *State of Uttar Pradesh v. Ajai Kumar*[4], after referring to the decisions in *Sohan Lal* (supra) and *Dhani Ram Luhar* (supra), the principle for the need to give reasons was reiterated.

3. (2004) 5 SCC 573.
4. (2008) 3 SCC 351.

10. Yet in another pronouncement in *State of Maharashtra v. Sujay Mangesh Poyarekar*[5], a two-Judge Bench reproduced the order where the High Court had opined that the trial court had appreciated the evidence properly and its judgment could not be said to be perverse and, on that score, declined to interfere. In that context, this Court referred to the language employed under Section 378(3) of the Code of Criminal Procedure and stated that if the State is aggrieved by an order of acquittal recorded by a Court of Session, it can file an application for leave to appeal, as required by sub-section (3) of Section 378 of the Code, and the appeal can only be registered after grant of leave and heard on merits. After so stating, the two-Judge Bench proceeded to lay down as follows: -

> "**20**. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a *prima facie* case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.
>
> **21.** It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted."

11. Elaborating further, the Court observed that where there is application of mind by the appellate court and reasons (may

5. (2008) 9 SCC 475.

be in brief) in support of such view are recorded, the order of the court may not be said to be illegal or objectionable. A clarification was given that, however, if arguable points have been raised and if the material on record discloses necessity of deeper scrutiny and reappreciation, review or reconsideration of evidence, the appellate court must grant leave as sought and decide the appeal on its merits. In the said case, as the Bench noted, the High Court did neither. Emphasis was laid on the failure on the part of the High Court to record reasons for refusal of such leave.

12. At this juncture, we are obliged to state that despite the clear law laid down by this Court, it has come to our notice that the High Courts, while declining to grant leave against the judgments of acquittal, do not indicate reasons for formation of such an opinion. In number of cases, anguish has been expressed. It is the duty of every court to bear in mind that when a crime is committed, though an individual is affected or, on some occasions, a group of individuals become victims of the crime, yet in essentiality, every crime is an offence against the collective as a whole. It creates a stir in the society. The degree may be different depending on the nature of the offence. That makes the duty of the High Courts to see that justice is done to the sufferer of the crime which, eventually, mitigates the cause of the collective and satisfies the cry of the society against the crime. It does not necessarily mean that all windows remain constantly open for all kinds of cases to be entertained in appeal, but, while closing the windows, there has to be proper delineation and application of mind so that none would be in a position to say that the order epitomizes "the inscrutable face of the sphinx". The order has to reflect proper application of mind and such reflection of application of mind has to be manifest from the order itself. Expression of an opinion founded on sound reasoning is like the light of the Sun. Absence of reasons is comparable to use a candle when the sunlight is required. We may repeat at the cost of repetition that we have

said so with immense pain and enormous hope that occasions should not arise in future for passing of such cryptic and unreasoned orders. It should be kept in mind that the judgments of this Court, being binding on all courts, are required to be followed in letter and spirit. That is the constitutional mandate and that is the judicial discipline.

13. Consequently, the appeal is allowed, the order passed by the High Court is set aside and the matter is remitted to the High Court to pass a cogent and reasoned order relating to grant or refusal of leave. We may hasten to clarify that we have not expressed any opinion on the merits of the case.

R.P. Appeal allowed.

MATA PRASAD MATHUR (DEAD) BY LRS.
v.
JWALA PRASAD MATHUR & ORS.
(Civil Appeal No. 1457 of 2013)

FEBRUARY 20, 2013

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Code of Civil Procedure, 1908 – Or.22, r.4(4) – Suit for declaration, partition and injunction – Death of a non-contesting defendant – Failure of the plaintiffs-respondents to bring on record the LRs of such defendant – Held: Did not result in abatement of the suit – Requirement of substitution of the LRs of such non-contesting defendant could be legitimately dispensed with by the Court by virtue of the power of exemption abundantly available to it under Or.22, r.4(4).

The question that arose for determination in the present appeal was whether the suit filed by the plaintiffs-respondents seeking a decree for declaration, partition and injunction against the appellants abated on the failure of the plaintiffs to file an application for substitution of the Legal Representatives of a deceased defendant 'V'. The trial Court, when approached by the plaintiff for deletion of the name of the deceased defendant 'V' and setting aside of the abatement, held that the suit had abated *in toto* and accordingly dismissed the same. In an appeal filed by the plaintiffs against that order, the First Appellate Court held that the trial Court had not properly considered the issue in the light of the nature of the averments made in the plaint and the relief sought by the plaintiff. The Court accordingly set aside the judgment and order passed by the trial Court with the observation that the demise of 'V' and failure of the plaintiff to bring his legal representatives on record did not affect the

maintainability of the suit. The High Court affirmed that order, and hence the instant appeal.

Dismissing the appeal, the Court

HELD: 1. This Court is inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that 'V'-defendant was proceeded ex parte as he had not appeared to contest the suit or file a written statement. Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4. The High Court rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated. [Paras 3, 4] [1109-E-F; 1110-C-D]

2. The history of the amendment of Order XXII, Rule 4 may be traced to highlight the purpose underlying the same. The Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary, the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-'V'. The view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly

available to the Courts below under Order XXII Rule 4 (4) of the CPC. [Paras 5, 9] [1110-E; 1113-E-G]

3. In the case at hand, the legal representatives of the deceased defendant 'V' have already been brought on record in place of their uncle (V's brother) who died issueless. They can, therefore, represent the estates left behind by both the brothers. Grant of exemption in that view is only a matter of maintaining procedural rectitude more than any substantial adjudication of the matter in controversy. This Court has at any rate adopted a liberal approach in setting aside abatement of suits. The trial court shall now proceed to dispose of the suit on merits expeditiously. [Para 10 & 11] [1113-H; 1114-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1457 of 2013.

From the Judgment & Order dated 21.04.2006 of the High Court of Madhya Praesh, Judicature Jabalpur, bench at Gwalior in Second Appeal No. 1454 of 2005.

WITH

Contempt Petition (C) No. 11 & 435 of 2011 in SLP (C) No. 21276 of 2006.

Shiv Sagar Tiwari, Sangeeta Gaur, Mahabir Singh Magla, Vikas Mehta for the Appellants.

Indu Malhotra, Vivek Jain, Chinmayee Chantra, Kush Chaturvedi, Vikas Mehta, Puneet Jain, Christi Jain, Pratibha Jain for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. The short question that arises for determination in this

appeal is whether the suit filed by the plaintiffs-respondents seeking a decree for declaration, partition and injunction against the appellants abated on the failure of the plaintiffs to file an application for substitution of the Legal Representatives of Virendra Kumar one of the defendants. The trial Court, when approached by the plaintiff for deletion of the name of the deceased and setting aside of the abatement, held that the suit had abated *in toto* and accordingly dismissed the same. In an appeal filed by the plaintiffs against that order, the First Appellate Court held that the trial Court had not properly considered the issue in the light of the nature of the averments made in the plaint and the relief sought by the plaintiff. The Court accordingly set aside the judgment and order passed by the trial Court with the observation that the demise of Virendra Kumar and failure of the plaintiff to bring his legal representatives on record did not affect the maintainability of the suit. The High Court of Madhya Pradesh has affirmed that order, hence the present appeal.

3. Having heard learned counsel for the parties, we are inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that Virendra Kumar-defendant was proceeded ex parte as he had not appeared to contest the suit or file a written statement. Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4, which is as under:

> ***"4. Procedure in case of death of one of several defendants or of sole defendant.-***
>
> *(1) xxxxx*
>
> *(2) xxxxx*
>
> *(3) xxxxx*

> *(4)The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."*

4. The High Court has, in our view, rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated.

5. We may at this stage briefly trace the history of the amendment of Order XXII, Rule 4 only to highlight the purpose underlying the same. The Law Commission had, despite noticing that many of the High Courts had made local amendments to incorporate Sub-Rule (4) to Rule 4 to Order XXII, made its recommendations against a similar incorporation. In the *27th Report of the Law Commission of India,* on the amendment to the Code of Civil Procedure, 1908, the Commission noted at p.210,

> *"Order XXII, rule 4 – relaxation of*
>
> *The question whether the court should have power to grant exemption in respect of the requirement of substitution in a proper case has been considered. Local amendments giving such power have been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a defendant who has failed to appear and contest the suit. It is, however, felt that such a change should not be made, as it would impinge upon the rule that litigation*

should not proceed in the absence of the heirs of a person who is dead. These local Amendments have not, therefore, been adopted".

6. In the *54th Report of the Law Commission,* the matter was once more taken up for consideration by the Commission. The Report notes in Chapter 22 at p.193,

"Order 22, rule 4 – power to relax – whether should be given

22.2. The first point concerns Order 22, rule 4, under which non-substitution of a legal representative leads to abatement of the suit. The question whether the Court should, in a proper case, have power to grant exemption in respect of the requirement of substitution of the legal representative was considered in the earlier Report. The Commission noted that local amendments giving such power had been made by the High Courts of Calcutta, Madras, Orissa, etc., in respect of a defendant who has failed to appear and contest the suit. It however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments were not therefore, adopted.

22.3. We considered the matter further. At one stage we were inclined to add sub-rule (4) in Order 22, rule 4 as follows:-

"(4) The Court, whenever it seems fit, may exempt the plaintiff from the necessity to substitute the legal representative of any defendant against whom the case has been allowed to proceed ex parte or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing, and the judgment in such a case may be pronounced against such defendant

notwithstanding the death of such defendant, and shall have the same force and effect as if it had been pronounced before the death took place."

22.4. We have however, come to the conclusion that any such amendment would amount to passing a decree against a dead man and would be wrong in principle. Hence no change is recommended".

7. Interestingly, the Amendment that followed the 54th Law Commission Report of 1973, substantially introduced Order XXII Rule 4(4) to the Code of Civil Procedure, vide s.73(i) of Act 104 of 1976. It is noteworthy that in the original Bill, the provision of Order XXII Rule 4(4) was not included. The Bill was then referred to the Joint Committee and a recommendation made for the inclusion of a provision akin to Rule 4(4). The Joint Committee noted:

"55. Clause 73 (Original clause 76) – (i) The Committee were informed during the course of evidence by various witnesses that delay in the substitution of the legal representatives of the deceased defendant was one of the causes of delay in the disposal of suits. The Committee were also informed that, as a remedial measure, the Calcutta, Madras, Karnataka and Orissa High Courts had inserted a new sub-rule in Rule 4 of Order XXII to the effect that substitution of the legal representatives of a non-contesting defendant would not be necessary and the judgment delivered in the case would be as effective as it would have been if it had been passed when the defendant was alive.

The Committee are, therefore, of the view that in order to avoid delay in the substitution of the legal representatives of the deceased defendant and consequent delay in the disposal of suits, similar provision may be made in the Code itself. New sub-rule

3A in rule 4 of Order XXII has been inserted accordingly".

8. The Joint Committee, accordingly, inserted the following provision in the Amendment Bill, which was later incorporated through the Amendment.

***"73.** In the First Schedule, in Order XXII,–*

(i) in Rule 4, after sub-rule (3), the following sub-rules shall be inserted, namely:-

"(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant and shall have the same force and effect as if it has been pronounced before death took place."

9. It would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-Virendra Kumar. We have no manner of doubt that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4 (4) of the CPC.

10. It is important to note that the legal representatives of

Virendra Kumar, deceased, have already been brought on record in place of Devendra Kumar, their uncle (Virendra Kumar's brother) who died issueless. They can, therefore, represent the estates left behind by both Virendra Kumar and Devendra Kumar. Grant of exemption in that view is only a matter of maintaining procedural rectitude more than any substantial adjudication of the matter in controversy. This Court has at any rate adopted a liberal approach in setting aside abatement of suits.

11. In the result this appeal fails and is, hereby, dismissed. The trial Court shall now proceed to dispose of the suit on merits as early as possible. No costs.

Contempt Petition (C) Nos.11 of 2011 and No.435 of 2011

12. We have heard learned counsel for the parties and examined the averments made in the contempt petitions. We do not consider it necessary to take any further action in these petitions in which the parties appear to be accusing each other of committing contempt of this Court. The contempt petitions are, therefore, dismissed.

B.B.B. Appeal & Contempt Petitions dismissed.

RAVINDERSINGH @ RAVI PAVAR
v.
STATE OF GUJARAT
(Criminal Appeal No. 334 of 2013 etc.)

FEBRUARY 22, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Code of Criminal Procedure, 1973:

s.439(1) read with Art.136 of the Constitution – Bail – Hooch tragedy – A large number of persons died and other suffered serious physical injuries by consuming country made liquor containing ethyl and methyl alcohol – Held: The materials placed on record prima facie establish that the appellant was not a mere supplier of spurious alcohol but he was involved in the criminal conspiracy of manufacturing spurious liquor along with the main accused and selling the same at various places through his men – Besides, the appellant is a habitual offender and is facing several similar cases – There is every likelihood that if the accused/appellant is released on bail, he would threaten the witnesses and again indulge in sale of spurious liquor – Therefore, the appellant is not at all entitled to bail at this stage – The record reveals that respondent in the other appeal is a prime conspirator and had indulged in illegally supplying ethyl and methyl alcohol to main accused for manufacturing country made liquor – Further, the respondent is a habitual offender – There are several cases pending against him – He has also abused the bail granted to him in a different case – Taking note of all the aspects, the antecedents of the respondent, the gravity and nature of offence, loss of human lives, the impact on the social fabric of the society, his continuous involvement in criminal activities while on bail, the Court is satisfied that the respondent does not deserve to continue to remain on bail –

Accordingly, the judgment and order passed by High Court granting him bail is set aside – Constitution of India, 1950 – Art. 136.

The appellant in Crl. A. No. 334 of 2013 and the respondent in Crl. A. No. 335 and 336 of 2013 were charged with various offences punishable under the Penal Code, 1860 and Bombay Prohibition Act, 1949, in the case relating to the hooch tragedy which resulted in death of 147 persons and serious physical injuries to 205 others after consuming spurious country made liquor containing poisonous chemical methyl alcohol which was manufactured and supplied by accused persons. The application for bail filed by the appellant in Crl. A. No. 334 of 2013 was rejected whereas the bail applications of the respondent in Crl. A. 335 and 336 of 2013 were allowed by the High Court.

Disposing of the appeals, the Court

HELD: 1.1 Normally, while considering the application for bail, it is not necessary for the court to assess the materials placed by either side, discuss and arrive at a definite conclusion. However, taking note of the gravity of the offence, this Court has to deal with those aspects confining to the disposal of the bail application. [para 11] [1121-D-E]

1.2 In a State having prohibition policy, supply of raw material for liquor, its production and distribution are illegal. It is a matter of common knowledge that if any one consumes liquor manufactured out of ethyl/methyl alcohol, it would have very adverse effect on the body which can cause death or bodily injury as is likely to cause death. [para 26] [1127-G-H; 1128-A]

Crl. Appeal No. 334 of 2013

2.1 A perusal of the reasoning of the High Court as well as the materials placed by the prosecution *prima face* establish that the appellant was not a mere supplier of spurious alcohol but he was involved in the criminal conspiracy of manufacturing spurious liquor along with the main co-accused (A-1) and selling the same at various places through his men. The statements of various persons support the greater role played by the accused/ appellant. [para 14] [1123-A-B]

2.2 It has also been brought to the notice of the Court that the appellant is a "habitual offender" and is facing more than 20 cases including similar cases under the various provisions of IPC and the Bombay Prohibition Act, 1949. It is further pointed out that there is every likelihood that if the accused/appellant is released on bail, he would threaten the witnesses and again indulge in sale of spurious liquor. The appellant cannot claim parity with other accused in claiming bail. Therefore, the appellant is not at all entitled to bail at this stage and the High Court has rightly denied him bail. [para 15, 16-17] [1123-E-G; 1124-C]

Crl. Appeal Nos. 335 and 336 of 2013

3.1 It is highlighted by the prosecution that during the course of investigation, it has been revealed that the respondent (A-2) is a prime conspirator and had indulged in illegally supplying ethyl and methyl alcohol to A-1for manufacturing country made liquor. Because of the conduct of A-2 in supplying ethanol and methanol to A-1 for preparation of spurious liquor, several casualties and injuries were resulted. The High Court, in a casual way, has concluded that since the business of A-2 was looked after by his nephew and he also disposed of his petrol pump, A-2 cannot be blamed. It is not a valid ground for

enlarging the accused on bail. [para 19 and 23] [1124-H; 1125-A; 1127-A-B]

3.2 The State has highlighted that A-2 is a "habitual offender" and there are 22 cases pending against him in various police stations. It is also mentioned that during the period while he was granted temporary bail by the High Court, he indulged in an offence of theft and a case was registered against him u/s 379 of IPC for which he was arrested and later enlarged on bail. Taking note of all the aspects, the antecedents of the respondent, the gravity and nature of offence, loss of human lives, the impact on the social fabric of the society, his continuous involvement in criminal activities while on bail, the Court is satisfied that the respondent (A-2) does not deserve to continue to remain on bail. Accordingly, the judgment and order passed by the High Court is set aside. [para 24, 25 and 27] [1127-C-D, F; 1128-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 334 of 2013.

From the Judgment & Order dated 10.02.2012 of the High Court of Judicature for Gujarat at Ahmedabad in Criminal Misc. Application No. 1281 of 2012.

WITH

Crl. A. Nos. 335 & 336 of 2013.

K.T.S. Tulsi, Uday U. Lalit, Amit Sharma, Hemantika Wahi, Pinky Behra, Nandini Gupta, Yogesh Ravani, Shiv Mangal Singh, Abhinandini Sharma, T. Mahipal for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted in all the special leave petitions.

2. Ravindersingh @ Ravi Pavar has preferred appeal

arising out of SLP (Crl.) No. 3334 of 2012 before this Court against the final judgment and order dated 10.02.2012 passed by the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 1281 of 2012 whereby the High Court dismissed his application filed under Section 439 of the Code of Criminal Procedure, 1973 (in short 'the Code') seeking regular bail in C.R. No. 252 of 2009 registered with Odhav Police Station, Ahmedabad for the offences punishable under Sections 302, 307, 328, 272, 273, 201, 109, 114, 120B of the Indian Penal Code, 1860 ('IPC' for short) and Sections 65(a)(b)(c)(d)(e), 66(1)(b), 67-1A, 72, 75, 81 and 83 of the Bombay Prohibition Act, 1949.

3. The State of Gujarat, aggrieved by the judgment and order dated 29.09.2011, passed by the High Court in Criminal Misc. Application Nos. 12384 and 12385 of 2011 whereby the High Court enlarged one Jayesh Hiralal Thakkar (A-2) on bail in connection with C.R. No. 161 of 2009 registered with Kagdapith Police Station, Ahmedabad for the offences punishable under Sections 120B, 302, 307, 328, 272, 273, 201, 217, 221, 109 and 114 of IPC and Sections 65(a)(b)(c)(d)(e), 66(1)(b), 68, 72, 75, 81 and 83 of the Bombay Prohibition Act, 1949 and C.R. No. 252 of 2009 registered with Odhav Police Station, Ahmedabad for the very same offences, has filed the other two appeals arising out of special leave petition Nos. 4026 and 4027 of 2012.

4. Since the subject-matter of all the three appeals is one and the same, they are being disposed of by this common judgment.

S.L.P. (Criminal) No. 3334 of 2012:

5. The case relates to the hooch tragedy which resulted into the death of 147 persons and serious physical injuries to 205 others after consuming spurious country-made liquor consisting poisonous chemical Methyl Alcohol in different parts of the Ahmedabad city, Gujarat, in July, 2009 for which case

has been registered against several accused persons under various Sections of IPC and the Bombay Prevention Act, 1949 with Odhav and Kagdapith Police Stations vide C.R. Nos. 252 and 161 of 2009 respectively.

6. The charge framed against Ravindersingh @ Ravi Pavar (accused No.11) is that he was a party to a meeting held with other accused persons prior to the date of the incident wherein they conspired to manufacture and distribute country-made liquor consisting poisonous chemical Methyl Alcohol, in order to gain financial benefit, by selling the same due to its low cost. The charge sheet further proceeds that as a part of criminal conspiracy, he along with other accused, agreed to manufacture and distribute/sell such liquor to suppliers in spite of the knowledge that on consumption of the same, it can cause death or severe physical damage/injury to the consumer.

7. When the accused/appellant moved an application under Section 439 of the Code in connection with C.R. No. 252 of 2009, before the High Court, on going into the specific allegations against him, his role and involvement in the hooch tragedy which resulted into more than 147 deaths in the city of Ahmedabad and after satisfying prima facie case as well as considering the gravity of the crime punishable under Section 302 etc. the High Court rejected his third successive bail application.

8. Mr. K.T.S. Tulsi, learned senior counsel for the appellant, after taking us through the allegations in the charge sheet and connected materials submitted that in the absence of any material that the appellant had any knowledge that illicit liquor was poisonous or that he had any intention to cause the death of the deceased persons at the most it is the case under Section 304 of IPC and not under Section 302 of IPC. He further submitted that the High Court failed to consider that the co-accused, alleged to be having similar role as that of the appellant as well as those accused allegedly having graver role, have already been granted bail and, therefore, on the ground

of parity also, the accused/appellant deserves to be enlarged on bail on the same terms and conditions.

9. Ms. Hemantika Wahi, learned counsel appearing for the State, by taking us through the allegations mentioned in the charge sheet, statement of witnesses and the gravity of the offence submitted that in view of the appellant's association with the main accused, namely, Vinod @ Dagri (A-1) and also taking note of the fact that he is a "habitual offender" involved in many similar offences, it is not desirable to enlarge him on bail and according to her, the High Court was fully justified in dismissing his bail application.

10. We have carefully considered the allegations, materials placed, gravity of the offence etc. in detail.

11. Normally, while considering the application for bail, it is not necessary for the court to assess the materials placed by either side discuss and arrive at a definite conclusion. However, taking note of the gravity of the offence, we have no other option except to deal with those aspects confining to the disposal of the bail application. The charge sheet (Annexure-P3) filed along with the special leave petition gives the details of involvement/role played by the accused persons. The role of the present appellant (A-11) reads as under:

> "The accused No.11 Ravindersingh @ Ravi s/o Jayramsingh Pavar mentioned in column No.1 who was doing the business of country and foreign liquor with his partners column No.1 accused Nos. 29 and 30 and having the criminal history and remaining in contact with the accused No.1 for obtaining cheap country liquor having Methyl Alcohol made the partnership with the accused No.1 and obtained county liquor having Methyl Alcohol from accused No.1 and in spite of aware of the fact that it caused physical harm which cause death of the persons brought it from Vanthvadi village on 06.07.2009 through his persons accused No. 32 and 33 and sold it on cheap rates to the column No.1 accused Nos. 27, 28 and 31 and column No. 2 accused Nos. 1 and 2 and also selling it to his own liquor stand place situated in Bapunagar area behind General Hospital through his persons and on drinking caused the death of the persons and also causing the serious injuries to the peoples fulfilled the criminal conspiracy and on 06.07.2009 lots of people died in the Ahmedabad city drinking the poisonous liquor and admitted into the Hospitals and in spite of knowing the said facts continue to sell the poisonous country liquor committed the serious nature offence and thereafter disposed off the evidence had disposed the chemicalized poisonous liquor which is in his possession."

12. Mr. Tulsi, learned senior counsel for the accused/appellant has contended that the only allegation against him is that he has simply sold the country-made liquor and prima facie no case is being made out against him for manufacturing spurious liquor and, therefore, he cannot be charged under Sections 302, 307 and 328 of IPC. On going through the entire materials, we are unable to accept the same.

13. The materials placed by the prosecution show that the appellant was not just a supplier of alcohol but was one of the main conspirators along with Vinod @ Dagri (A-1) in the manufacture of spurious alcohol along with other co-accused. It is the case of the prosecution as established by the statement of witnesses that the appellant, along with main accused, with a view to earn easy money, hatched a conspiracy for manufacturing spurious alcohol from Methyl Alcohol, very well knowing that it is poisonous and can cause death or severe physical damage/injury on consumption. The statements of various persons relied on by the prosecution supports the above stand. The investigation further revealed that on the next day of the hooch tragedy in July, 2009, the appellant and his two associates had gone to one-Farzana Banu to sell the huge stock of spurious liquor, since the premises of the appellant was raided by the Police.

14. A perusal of the reasoning of the High Court as well as the materials placed by the prosecution prima face establish that the appellant was not a mere supplier of spurious alcohol but he was involved in the criminal conspiracy of manufacturing spurious liquor along with the main co-accused Vinod @ Dagri (A-1) and selling the same at various places through his men. The statements of various persons including one Dahiben support the greater role played by the accused/appellant.

15. Mr. Tulsi, learned senior counsel has also claimed parity with the co-accused Jayesh Hiralal Thakker (A-2), who has been granted bail by the High Court, vide order dated 29.09.2011, in the similar offence and claimed similar order in respect of the present appellant - Ravindersingh @ Ravi Pavar. He also brought to our notice that bail has been granted to one Minaben (A-27) on 20.07.2011 and the State has not filed any special leave petition before this Court. As far as grant of bail to Jayesh Hiralal Thakker is concerned, the State has filed Special Leave Petition (Criminal) Nos. 4026 and 4027 of 2012, which we are going to consider after the conclusion of the present appeal. Hence, the appellant cannot claim parity with the co-accused Jayesh Hiralal Thakker. Insofar as the order granting bail to A-27 is concerned, we were taken through the reasons appended to in her bail application and also of the fact that she being a lady, we are of the view that the appellant cannot claim parity with the said accused in claiming bail.

16. Apart from the above materials, learned counsel for the State has also brought to our notice that the appellant is a "habitual offender" and is facing more than 20 cases including similar cases under the various provisions of IPC and the Bombay Prohibition Act, 1949. It is further pointed out that there is every likelihood that if the accused/appellant is released on bail, he would threaten the witnesses and again indulge in sale of spurious liquor.

17. It is a well known fact that Methanol is a poisonous substance and by adding the same while manufacturing

spurious alcohol, it can have devastating results and can cause death or severe damage to health or injuries to anyone who consumes it. Further, such type of offences, as in the case on hand, are against the society at large and who commit the same do not deserve any leniency, particularly, in the State of Gujarat where complete prohibition is being followed. Merely because the accused/appellant had spent three years as an undertrial prisoner, taking note of the gravity of the offence, he is not entitled for bail. As observed earlier, in view of the gravity of the offence, death of a number of persons, injury to several others and the impact on the society as a whole, we hold that the appellant is not at all entitled to bail at this stage and the High Court has rightly denied his application for bail, consequently, the appeal of the accused fails and the same is dismissed.

Appeals filed by the State:

S.L.P. (Criminal) Nos. 4026 and 4027 of 2012

18. The above mentioned appeals have been preferred by the State wherein the respondent–Jayesh Hiralal Thakker (A-2) is an accused in C.R. No.161 of 2009 registered with Kagdapith Police Station, Ahmedabad and C.R. No. 252 of 2009 registered with Odhav Police Station, Ahmedabad and in both the cases, he has been charged under various sections of IPC and the Bombay Prohibition Act, 1949, as mentioned earlier and was granted bail by the High Court.

19. The respondent is Accused No. 2 in C.R. No. 252 of 2009 and C.R. No. 161 of 2009 registered at Odhav and Kagdapith Police Stations respectively wherein total of 147 persons died and 205 persons were seriously injured after consuming spurious liquor prepared from chemicals like ethanol and methanol, which were supplied by the respondent-accused, who was trading in those hazardous chemicals, to Vinod @ Dagri (A-1) for the preparation of country-made liquor. It is highlighted by the prosecution that during the course of

investigation, it was revealed that respondent (A-2) is a prime conspirator and had indulged in supplying methyl alcohol for manufacturing country made liquor. According to the prosecution, the statements recorded from seven witnesses reveal about the involvement of the respondent. It is also projected by the prosecution that one of the witnesses stated that near the petrol pump at Mogar, there is a godown and two barrels were put in his vehicle to be delivered to A-1, who was the mastermind in preparation of country made liquor out of methyl alcohol, supplied by A-2 at village Vanthwadi. It is also their case that respondent (A-2) had purchased about 500-600 plastic and iron barrels as per his requirement and again in the month of July, he purchased 70 more barrels. The prosecution has also projected that A-2 had sufficient knowledge about the properties of methyl alcohol and that it is poisonous to use in the preparation of country liquor. Despite this, the respondent used to obtain the same illegally from the tankers coming from Kutch and Mumbai through absconding co-accused and kept the same in his custody without permit and supplied it to Vinod @ Dagri (A-1) for the preparation of liquor. All these particulars form part of charge sheet filed on 05.09.2009.

20. The specific allegations in the charge sheet about the respondent (A-2) are as under:

> "Accused No.2 Jayesh Hiralal Thakkar stated in the Column No.(1) having the criminal antecedents who is running illegal business of chemical at the Godown situated at the petrol Pump located at Village – Mogar, in company of the Accused No.3 named in the Column No.(1) and through the accused Nos. 3, 4 and 5 mentioned in the Column No.(2) had illegally obtained the poisonous Methyl Alcohol from the Tankers coming from Bomby and Kutch possessed the same without any Pass or permit, and inspite of having knowledge regarding poisonousness of Methyl Alcohol and that it is to be used in preparing liquor the Accused Nos. 4, 5, 6, 7 and 8 had sold the poisonous Methyl Alcohol to Accused No.1 for manufacturing Degenerated poisonous country liquor and thereby have played active role in the conspiracy with the view to earn monetary profit and after the declaration of Hooch Tragedy disposed of the Methyl Alcohol within their possession and had gone on run and thereby have committed serious offence."

21. The information furnished by the prosecution clearly shows that in a State having complete prohibition policy, the supply of raw material for liquor, its production and distribution are illegal. It is also demonstrated that respondent (A-2) has illegally supplied poisonous chemicals like ethyl and methyl alcohol to A-1 for the manufacture of country made liquor. It is not in dispute that if anyone consumes liquor manufactured out of ethyl/methyl alcohol, it would have a very adverse effect on the body and can cause death or bodily injury as is likely to cause death. In spite of the abundant materials placed by the prosecution and even after taking note of the fact that the samples sent to Forensic Science Laboratory (FSL) for analysis confirmed the presence of methanol and ethanol and also of the fact that A-2 has supplied those materials to A-1, the claim that he had no knowledge about all these aspects is unacceptable. Though the learned Single Judge of the High court perused and verified the expert opinion of the Medical Officer, the FSL report and noted that poisonous chemical is found, after casually finding that there is no "meeting of mind" and "agreement for criminal conspiracy" accepted the case of A-2 and enlarged him on bail.

22. The other reason given by the High Court is that the whole transaction in the said business of A-2 was looked after by his nephew and in view of the fact that he has already disposed of the petrol pump, concluded that prima facie ingredients of Sections 299 and 300(4) of IPC would not attract and enlarged him on bail after imposing certain conditions.

23. We have already noted that because of the conduct of A-2 in supplying ethanol and methanol to A-1 for preparation of spurious liquor, several casualties and injuries were resulted and in view of the acceptable materials, we are unable to accept the reasoning of the High Court. We are constrained to observe that the High Court, in a casual way, has concluded that since his business was looked after by his nephew and he also disposed of his petrol pump, A-2 cannot be blamed, which according to us, is not a valid ground for enlarging him on bail.

24. In para 5 of the rejoinder affidavit, the State has highlighted that A-2 is a "habitual offender" and there are 22 cases pending against him in various police stations. It is also mentioned in the counter affidavit that during the period while he was granted temporary bail by the High Court, he indulged in an offence of theft and a case was registered against him vide I-C.R. No. 92 of 2011 under Section 379 of IPC by the Vasad Police Station for which he was arrested on 10.08.2011 and later enlarged on bail. It is also brought to our notice that the respondent A-2, while on regular bail, was arrested on 13.09.2012 in Vadodara city in connection with Javaharnagar Police Station crime registered vide I-C.R. No. 94 of 2012 under Sections 407, 408 and 120B and later on he was released on bail.

25. Taking note of all these aspects, his antecedents, the gravity and nature of offence, loss of human lives, the impact on the social fabric of the society, his continuous involvement in criminal activities while on bail, we are satisfied that respondent (A-2) does not deserve to continue to remain on bail.

26. In a State having prohibition policy, supply of raw material for liquor, its production and distribution are illegal and A-2 has supplied those poisonous chemicals such as ethyl and methyl alcohol to A-1 for the manufacture of spurious country made liquor. It is a matter of common knowledge that if any one consumes liquor manufactured out of ethyl/methyl alcohol, it

would have very adverse effect on the body which can cause death or bodily injury as is likely to cause death.

27. Under these circumstances, considering the nature of the offence and the manner in which A-2 supplied those poisonous chemicals despite having full knowledge about its consequences, we are satisfied that the respondent (A-2) does not deserve liberty of remaining on bail. Accordingly, the judgment and order dated 29.09.2011 passed by the High Court in Criminal Misc. Application Nos. 12384 and 12385 of 2011 is set aside. The respondent (A-2) is directed to surrender before the court concerned within a period of two weeks from today, failing which, necessary steps be taken for his arrest in order to put him in jail.

28. It is unfortunate to note that in a State like Gujarat, which strictly prohibits the use of alcohol in any form whatsoever, the accused caused death and injuries to several persons by supplying spurious country-made liquor. Taking a serious view of the matter, the complexity of the crime, the role played by accused persons as well as the number of casualties, we are of the view that it is not a fit case for grant of bail.

29. In the light of the above discussion, the appeal of the accused-Ravinder Singh @ Ravi Pavar is dismissed. We direct the trial Judge to proceed with the trial on day to day basis avoiding unnecessary adjournments. It is made clear that if the trial continues beyond one year from today, they are free to file fresh application before the trial Court. In that event, it is for the concerned court to dispose of the bail application on merits. It is made clear that whatever observations made above are only for the purpose of disposal of the bail application. It is for the trial Court to decide on the basis of the materials placed before it in accordance with law.

30. The appeal of Ravindersingh @ Ravi Pavar (A-11) is dismissed and the appeals filed by the State are allowed.

R.P. Appeals disposed by.

RAMESH KUMAR SONI
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 353 of 2013)

FEBRUARY 26, 2013

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Code of Criminal Procedure (Madhya Pradesh Amendment) Act 2007:

First Schedule to Code of Criminal Procedure, 1973 – Amendment – Offences punishable u/ss 467, 468 and 471 made triable by Court of Session in State of Madhya Pradesh – Offence committed prior to amendment but charge-sheet filed after the amendment came into force – Held: Magistrate on receipt of a charge-sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Court of Session as three of the offences with which he was charged were triable only by Court of Session – Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor the Magistrate had taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary – Appellant could not claim a vested right of forum for his trial for, no such right is recognised – Judgment of Full Bench of Madhya Pradesh High Court overruled – Prospective overruling of judgment – Retrospective operation of amendment shifting the forum – Code of Criminal Procedure, 1973 – First Schedule as amended in State of Madhya Pradesh.

By the Code of Criminal Procedure (Madhya Pradesh

Amendment) Act of 2007, the first Schedule to the Code of Criminal Procedure, 1973 was amended w.e.f. 22.2.2008 and, among others, offences punishable u/ss 467, 468 and 471 IPC were made triable by the Court of Session in State of Madhya Pradesh instead of a Court of Magistrate of First Class. Consequently, the Judicial Magistrates, First Class committed to the Court of Session all cases involving the relevant offences. On reference made by a Sessions Judge, a full Bench of the High Court[1] held that all cases pending before the Court of Judicial Magistrate First Class as on 22.2.2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class. The Court further held that all such cases as were pending before the Judicial Magistrate First Class and had been committed to the Court of Session would be sent back to the Judicial Magistrate First Class in accordance with law. Relying upon the said decision the appellant, against whom a case for offences punishable u/ss 408, 420, 467, 468 and 471 IPC was registered, filed an application before the trial court seeking a similar direction for remission of the case for trial by a Judicial Magistrate. The case of the appellant was that though the police had not filed a charge-sheet against the appellant and the investigation in the case was pending as on the date the amendment came into force, the appellant had acquired the right of trial by a forum specified in Schedule I of the 1973 Code and any amendment shifting the forum of trial to the Court of Session was not attracted. The trial court held that since no charge-sheet had been filed before the Magistrate as on the date the amendment came into force, the case was exclusively triable by the Court of Session. The High Court dismissed the revision petition filed by the appellant.

1. *Re. Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act,* 2007 : 2008 (3) MPLJ 311.

In the instant appeal filed by the accused the question for consideration before the Court was: "whether the amendment is prospective and will be applicable only to offences committed after the date the amendment was notified or would govern cases that were pending on the date of the amendment or may have been filed after the same had become operative".

Dismissing the appeal, the Court

HELD: 1.1 The Code of Criminal Procedure does not provide any definition of institution of a case. It is, however, trite that a case must be deemed to be instituted only when the court competent to take cognizance of the offence alleged therein does so. The cognizance can, in turn, be taken by a Magistrate on a complaint of facts filed before him which constitutes such an offence. It may also be taken if a police report is filed before the Magistrate in writing of such facts as would constitute an offence. The Magistrate may also take cognizance of an offence on the basis of his knowledge or suspicion upon receipt of the information from any person other than a police officer. In the case of the Court of Session, such cognizance is taken on commitment to it by a Magistrate duly empowered in that behalf. All this implies that the case is instituted in the Magistrate's Court when the Magistrate takes cognizance of an offence, in which event the case is one instituted on a complaint or a police report. [para 7] [1139-A-D]

Jamuna Singh and Ors. v. Bahdai Shah **1964 SCR 37 = AIR 1964 SC 1541;** *Devrapally Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors.* **1976 Suppl. SCR 524 = (1976) 3 SCC 252;** *Kamlapati Trivedi v. State of West Bengal* **1979 (2) SCR 717 = (1980) 2 SCC 91 – referred to**

1.2 No case was pending before the Magistrate against the appellant as on the date the Amendment Act

came into force. That being so, the Magistrate on receipt of a charge-sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Court of Session as three of the offences with which he was charged were triable only by the Court of Session. The Sessions Judge as also the High Court were, in that view, perfectly justified in holding that the order of committal passed by the Magistrate was a legally valid order and the appellant could be tried only by the Court of Session to which the case stood committed. [para 8] [1139-G-H; 1140-A-C]

1.3 The amendment to the Criminal Procedure Code in the instant case has the effect of shifting the forum of trial of the accused from the Court of Magistrate First Class to the Court of Session. Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor the Magistrate had taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary. The appellant could not claim a vested right of forum for his trial, for no such right is recognised. [para 13] [1144-E-G]

New India Insurance Company Ltd. v. Smt. Shanti Misra, Adult **1976 (2) SCR 266 = (1975) 2 SCC 840;** *Hitendra Vishnu Thakur and Ors. etc. etc. v. State of Maharashtra and Ors.* **1994 (1) Suppl. SCR 360 = (1994) 4 SCC 602;** *Sudhir G. Angur and Ors. v. M. Sanjeev and Ors.* **2005 (4) Suppl. SCR 851 = (2006) 1 SCC 141;** *Nani Gopal Mitra v. State of Bihar* **1969 SCR 411 = AIR 1970 SC 1636;** *Anant Gopal Sheorey v. State of Bombay* **1959 SCR 919 = AIR 1958 SC 915 – relied on.**

Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass and Ors. **(1952) 54 Bom LR 330 – stood approved**

Manujendra Dutt. v. Purnedu Prosad Roy Chowdhury & Ors. **1967 SCR 475 = AIR 1967 SC 1419,** *Commissioner of Income-tax, Bangalore v. Smt. R. Sharadamma* **1996 (3) SCR 1200 = (1996) 8 SCC 388 and** *R. Kapilanath(Dead) through L.R. v. Krishna* **2002 (5) Suppl. SCR 66 = (2003) 1 SCC 444 - referred to.**

V. Dhanapal Chettiar v. Yesodai Ammal **1980 (1) SCR 334 = (1979) 4 SCC 214 - distinguished.**

1.4 The view taken by the Full Bench holding the amended provision not to be applicable to pending cases is not correct on principle. The decision rendered by the Full Bench would, therefore, stand overruled but only prospectively. It would be so because the trial of the cases that were sent back from the Court of Session to the Court of Magistrate First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to Court of Session for trial in the light of the amendment and the view expressed by this Court. [para 19] [1148-C-E]

Re: *Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act,* **2007 : 2008 (3) MPLJ 311- overruled.**

1.5 The principle of prospective overruling has been invoked by this Court, no matter sparingly, to avoid unnecessary hardship and anomalies. The instant case is one in which this Court need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision. [para 20 and 25] [1148-F; 1150-G]

I.C. Golak Nath and Ors. v. State of Punjab and Ors. **1967 SCR 762 = AIR 1967 SC 1643;** *Ashok Kumar Gupta and Anr. v. State of U.P. and Ors.* **1997 (3) SCR 269 = (1997) 5 SCC 201;** *Baburam v. C.C. Jacob and Ors.* **(1999) 3 SCC 362;** *Harish Dhingra v. State of Haryana & Ors*. **2001 (3) Suppl. SCR 446 = (2001) 9 SCC 550;** *Sarwan Kumar and Anr. v. Madan Lal Aggarwal* **2003 (1) SCR 918 = (2003) 4 SCC 147– relied on.**

Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa **2009 (2) SCR 161 = (2009) 4 SCC 299 – referred to.**

Case Law Reference:

1964 SCR 37	**referred to**	**para 7**
1976 (0) Suppl. SCR 524	**referred to**	**para 7**
1979 (2) SCR 717	**referred to**	**para 7**
1976 (2) SCR 266	**relied on**	**para 9**
1994 (1) Suppl. SCR 360	**relied on**	**para 10**
2005 (4) Suppl. SCR 851	**relied on**	**para 11**
(1952) 54 Bom LR 330	**stood overruled**	**para 11**
1967 SCR 475	**distinguished**	**para 14**
1996 (3) SCR 1200	**distinguished**	**para 14**
2002 (5) Suppl. SCR 66	**distinguished**	**para 14**
1980 (1) SCR 334	**distinguished**	**para 14**
1969 SCR 411	**relied on**	**para 17**
1959 SCR 919	**relied on**	**para 18**
1967 SCR 762	**relied on**	**para 20**
1997 (3) SCR 269	**relied on**	**para 20**

(1999) 3 SCC 362	**relied on**	**para 21**
2001 (3) Suppl. SCR 446	**relied on**	**para 22**
2003 (1) SCR 918	**relied on**	**para 23**
2009 (2) SCR 161	**referred to**	**para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 353 of 2013.

From the Judgment & Order dated 02.05.20111 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Criminal Revision No. 713 of 2011.

June Chaudhary, Sumeeta Chaudhari, Prabhat Kumar, Anshuman Ashok, Dr. Kailash Chand for the Appellant.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. The short question that falls for determination in this appeal is whether the appellant could be tried by the Judicial Magistrate, First Class, for the offences punishable under Sections 408, 420, 467, 468 and 471 of the IPC notwithstanding the fact that the First Schedule of the Code of Criminal Procedure, 1973 as amended by Code of Criminal Procedure (Madhya Pradesh Amendment) Act of 2007, made offences punishable under Sections 467, 468 and 471 of the Penal Code triable only by the Court of Sessions. The Trial Court of 9th Additional Sessions Judge, Jabalpur has answered that question in the negative and held that after the amendment the appellant could be tried only by the Court of Sessions. That view has been affirmed by the High Court of Madhya Pradesh at Jabalpur in a criminal revision petition filed by the appellant against the order passed by the Trial Court. The factual matrix in which the controversy arises may be summarised as under:

3. Crime No.129 of 2007 for commission of offences punishable under Sections 408, 420, 467, 468 and 471 of the IPC was registered against the appellant on 18th May, 2007,

at Bheraghat Police Station. On the date of the registration of the case the offences in question were triable by a Magistrate of First Class in terms of the First Schedule of Code of Criminal Procedure, 1973. That position underwent a change on account of the Code of Criminal Procedure (Madhya Pradesh Amendment) Act of 2007 introduced by Madhya Pradesh Act 2 of 2008 which amended the First Schedule of the 1973 Code and among others made offences under Sections 467, 468 and 471 of the IPC triable by the Court of Sessions instead of a Magistrate of First Class. The amendment received the assent of the President on 14th February, 2008 and was published in Madhya Pradesh Gazette (Extraordinary) on 22nd February, 2008. Consequent upon the amendment aforementioned, the Judicial Magistrate, First Class appears to have committed to the Sessions Court all cases involving commission of offences under the above provisions. In one such case the Sessions Judge, Jabalpur, made a reference to the High Court on the following two distinct questions of law:

> 1. Whether the recent amendment dated 22nd February, 2008 in the Schedule-I of the Cr.P.C. is to be applied retrospectively?
>
> 2. Consequently, whether the cases pending before the Magistrate First Class, in which evidence partly or wholly has been recorded, and now have been committed to this Court are to be tried de novo by the Court of Sessions or should be remanded back to the Magistrate First Class for further trial?

4. A Full Bench of the High Court of Madhya Pradesh in Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M. P. Amendment) Act, 2007 2008 (3) MPLJ 311, answered the reference and held that all cases pending before the Court of Judicial Magistrate First Class as on 22nd February, 2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class as the Amendment Act did not contain a clear indication that such cases also have to be made over to the Court of

Sessions. The Court further held that all such cases as were pending before the Judicial Magistrate First Class and had been committed to the Sessions Court shall be sent back to the Judicial Magistrate First Class in accordance with law. The reference was answered accordingly.

5. Relying upon the decision of the Full Bench the appellant filed an application before the trial Court seeking a similar direction for remission of the case for trial by a Judicial Magistrate. The appellant argued on the authority of the above decision that although the police had not filed a charge-sheet against the appellant and the investigation in the case was pending as on the date the amendment came into force, the appellant had acquired the right of trial by a forum specified in Schedule I of the 1973 Code. Any amendment to the said provision shifting the forum of trial to the Court of Sessions was not attracted to the appellant's case thereby rendering the committal of the case to the Sessions Court and the proposed trial of the appellant before the Sessions Court illegal. The trial Court, as mentioned earlier, repelled that contention and held that since no charge-sheet had been filed before the Magistrate as on the date the amendment came into force, the case was exclusively triable by the Sessions Court. The High Court has affirmed that view and dismissed the revision petition filed by the appellant, hence the present appeal.

6. The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 is in the following words:

> "An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.
>
> Be it enacted by the Madhya Pradesh Legislature in the Fifty-eighth Year of the Republic of India as follows:
>
> 1. Short title. – (1) This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.
>
> 2. Amendment of Central Act No.2 of 1974 in its application to the State of Madhya Pradesh – The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.
>
> 3. Amendment of Section 167 - .....
>
> xxxx xxx xxx
>
> 4. Amendment of the First Schedule – In the First Schedule to the Principal Act, under the heading "I-Offences under the Indian Penal Code" in column 6 against section 317, 318, 326, 363, 363A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477A, for the words "Magistrate of First Class" wherever they occur, the words "Court of Sessions" shall be substituted."

7. The First Schedule to the Criminal Procedure Code 1973 classifies offences under the IPC for purposes of determining whether or not a particular offence is cognizable or non-cognizable and bailable or non-bailable. Column 6 of the First Schedule indicates the Court by which the offence in question is triable. The Madhya Pradesh Amendment extracted above has shifted the forum of trial from the Court of a Magistrate of First Class to the Court of Sessions. The question is whether the said amendment is prospective and will be applicable only to offences committed after the date the amendment was notified or would govern cases that were pending on the date of the amendment or may have been filed after the same had become operative. The Full Bench has taken the view that since there is no specific provision contained in the Amendment Act making the amendment applicable to pending cases, the same would not apply to cases that were already filed before the Magistrate. This implies that if a case had not been filed upto the date the Amendment Act came into force, it would be governed by the Amended Code and hence be triable only by the Sessions

Court. The Code of Criminal Procedure does not, however, provide any definition of institution of a case. It is, however, trite that a case must be deemed to be instituted only when the Court competent to take cognizance of the offence alleged therein does so. The cognizance can, in turn, be taken by a Magistrate on a complaint of facts filed before him which constitutes such an offence. It may also be taken if a police report is filed before the Magistrate in writing of such facts as would constitute an offence. The Magistrate may also take cognizance of an offence on the basis of his knowledge or suspicion upon receipt of the information from any person other than a police officer. In the case of the Sessions Court, such cognizance is taken on commitment to it by a Magistrate duly empowered in that behalf. All this implies that the case is instituted in the Magistrate's Court when the Magistrate takes cognizance of an offence, in which event the case is one instituted on a complaint or a police report. The decision of this Court in *Jamuna Singh and Ors. v. Bahdai Shah* AIR 1964 SC 1541, clearly explains the legal position in this regard. To the same effect is the decision of this Court in *Devrapally Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors.* (1976) 3 SCC 252 where this Court held that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein and that cognizance can be taken in the manner set out in clauses (a) to (c) of Section 190(1) of the Cr.P.C. We may also refer to the decision of this Court in *Kamlapati Trivedi v. State of West Bengal* (1980) 2 SCC 91 where this Court interpreted the provisions of Section 190 Cr.P.C. and reiterated the legal position set out in the earlier decisions.

8. Applying the test judicially recognized in the above pronouncements to the case at hand, we have no hesitation in holding that no case was pending before the Magistrate against the appellant as on the date the Amendment Act came into force. That being so, the Magistrate on receipt of a charge-sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Sessions

as three of the offences with which he was charged were triable only by the Court of Sessions. The case having been instituted after the Amendment Act had taken effect, there was no need to look for any provision in the Amendment Act for determining whether the amendment was applicable even to pending matters as on the date of the amendment no case had been instituted against the appellant nor was it pending before any Court to necessitate a search for any such provision in the Amendment Act. The Sessions Judge as also the High Court were, in that view, perfectly justified in holding that the order of committal passed by the Magistrate was a legally valid order and the appellant could be tried only by the Court of Sessions to which the case stood committed.

9. Having said so, we may now examine the issue from a slightly different angle. The question whether any law relating to forum of trial is procedural or substantive in nature has been the subject matter of several pronouncements of this Court in the past. We may refer to some of these decisions, no matter briefly. In *New India Insurance Company Ltd. v. Smt. Shanti Misra, Adult* (1975) 2 SCC 840, this Court was dealing with the claim of payment of compensation under the Motor Vehicles Act. The victim of the accident had passed away because of the vehicular accident before the constitution of the Claims Tribunal under the Motor Vehicles Act, 1939, as amended. The legal heirs of the deceased filed a claim petition for payment of compensation before the Tribunal after the Tribunal was established. The question that arose was whether the claim petition was maintainable having regard to the fact that the cause of action had arisen prior to the change of the forum for trial of a claim for payment of compensation. This Court held that the change of law operates retrospectively even if the cause of action or right of action had accrued prior to the change of forum. The claimant shall, therefore, have to approach the forum as per the amended law. The claimant, observed this Court, had a "vested right of action" but not a "vested right of forum". It also held that unless by express words the new forum is available only to causes of action arising after

the creation of the forum, the general rule is to make it retrospective. The following passages are in this regard apposite:

> "5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way. But the provision of limitation of 60 days contained in sub-section (3) created an obstacle in the straight application of the well-established principle of law. If the accident had occurred within 60 days prior to the constitution of the tribunal then the bar of limitation provided in sub-section (3) was not an impediment. An application to the tribunal could be said to be the only remedy. If such an application, due to one reason or the other, could not be made within 60 days then the tribunal had the power to condone the delay under the proviso. But if the accident occurred more than 60 days before the constitution of the tribunal then the bar of limitation provided in sub-section (3) of Section 110-A on its face was attracted. This difficulty of limitation led most of the High Courts to fall back upon the proviso and say

> that such a case will be a fit one where the tribunal would be able to condone the delay under the proviso to sub-section (3), and led others to say that the tribunal will have no jurisdiction to entertain such an application and the remedy of going to the civil court in such a situation was not barred under Section 110-F of the Act. While taking the latter view the High Court failed to notice that primarily the law engrafted in Sections 110-A and 110-F was a law relating to the change of forum.
>
> 6. In our opinion in view of the clear and unambiguous language of Sections 110-A and 110-F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of Section 110-A. It must be vice versa. The change of the procedural law of forum must be given effect to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the claims tribunal on payment of a nominal court fee whereas a large amount of ad valorem court fee was required to be paid in civil court."

10. In *Hitendra Vishnu Thakur and Ors. etc. etc. v. State of Maharashtra and Ors.* (1994) 4 SCC 602, one of the questions which this Court was examining was whether clause (bb) of Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) of the Cr.P.C. in relation to TADA matters was in the realm of procedural law and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (b) and (bb) of sub-section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force. The Court summed up the legal position with regard to the procedural law being retrospective

in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words:

"26. xxx xxx

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

11. We may also refer to the decision of this Court in *Sudhir G. Angur and Ors. v. M. Sanjeev and Ors.* (2006) 1 SCC 141 where a three-Judge Bench of this Court approved the decision of the Bombay High Court in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass and Ors.* (1952) 54 Bom LR 330 and observed:

"12....It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations..."

(emphasis supplied)

12. In *Shiv Bhagwan Moti Ram Saraoji's* case (supra) the Bombay High Court has held procedural laws to be in force unless the legislatures expressly provide to the contrary. The Court observed:

"...Now, I think it may be stated as a general principle that no party has a vested right to a particular proceeding or to a particular forum, and it is also well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal..."

(emphasis supplied)

13. The amendment to the Criminal Procedure Code in the instant case has the effect of shifting the forum of trial of the accused from the Court of Magistrate First Class to the Court of Sessions. Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor the Magistrate had taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary. The appellant could not claim a vested right of forum for his trial for no such right is recognised. The High Court was, in that view of the matter, justified in interfering with the order passed by the Trial Court.

14. The questions formulated by the Full Bench of the High Court were answered in the negative holding that all cases pending in the Court of Judicial Magistrate First Class as on 22nd February, 2008 when the amendment to the First

Schedule to the Cr.P.C. became operative, will remain unaffected by the said amendment and such matters as were, in the meanwhile committed to the Court of Sessions, will be sent back to the Judicial Magistrate First Class for trial in accordance with law. In coming to that conclusion the Full Bench placed reliance upon three decisions of this Court in *Manujendra Dutt. v. Purnedu Prosad Roy Chowdhury & Ors.* AIR 1967 SC 1419, *Commissioner of Income-tax, Bangalore v. Smt. R. Sharadamma* (1996) 8 SCC 388 and *R. Kapilanath(Dead) through L.R. v. Krishna* (2003) 1 SCC 444. The ratio of the above decisions, in our opinion, was not directly applicable to the fact situation before the Full Bench. The Full Bench of the High Court was concerned with cases where evidence had been wholly or partly recorded before the Judicial Magistrate First Class when the same were committed to the Court of Sessions pursuant to the amendment to the Code of Criminal Procedure. The decisions upon which the High Court placed reliance did not, however, deal with those kind of fact situations. In *Manujendra Dutt's* case (supra) the proceedings in the Court in which the suit was instituted had concluded. At any rate, no vested right could be claimed for a particular forum for litigation. The decisions of this Court referred to by us earlier settle the legal position which bears no repetition. It is also noteworthy that the decision in *Manujendra Dutt's* case (supra) was subsequently overruled by a seven-Judge Bench of this Court in *V. Dhanapal Chettiar v. Yesodai Ammal* (1979) 4 SCC 214 though on a different legal point.

15. So also the decision of this Court in *Smt. R. Sharadamma's* case (supra) relied upon by the Full Bench was distinguishable on facts. The question there related to a liability incurred under a repealed enactment. Proceedings in the forum in which the case was instituted had concluded and the matter had been referred to Inspecting Assistant Commissioner before the dispute regarding jurisdiction arose.

16. The decision of this Court in R. Kapilanath's case (supra), relied upon by the Full Bench was also distinguishable

since that was a case where the eviction proceedings before the Court of Munsif under the Karnataka Rent Control Act, 1961 had concluded when the Karnataka Rent Control (Amendment) Act, 1994 came into force. By that amendment, the Court of Munsif was deprived of jurisdiction in such cases. This Court held that the change of forum did not affect pending proceedings. This Court further held that the challenge to the competence of the forum was raised for the first time, that too as an additional ground before this Court and that, for other factors, the Court was inclined to uphold the jurisdiction of the Court of Munsif to entertain and adjudicate upon the eviction matter. The fact situation was thus different in this case.

17. Even otherwise the Full Bench failed to notice the law declared by this Court in a series of pronouncements on the subject to which we may briefly refer at this stage. In Nani Gopal Mitra v. State of Bihar AIR 1970 SC 1636, this Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure. In that case the trial of the appellant had been taken up by Special Judge, Santhal Paraganas when Section 5(3) of the Prevention of Corruption Act, 1947 was still operative. The appellant was convicted by the Special Judge before the Amendment Act repealing Section 5(3) was promulgated. This Court held that the conviction pronounced by the Special Judge could not be termed illegal just because there was an amendment to the procedural law on 18th December 1964. The following passage is, in this regard, apposite:

> "…. It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz. that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the

amending Act came into force--(See In re a Debtor, and In re Vernazza. The same principle is embodied in Section 6 of the General Clauses Act which is to the following effect:

xx xx xx (Section 6 is quoted) xx xx xx

…. The effect of the application of this principle is that pending cases although instituted under the old Act but still pending are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying the new procedure. In the present case, the trial of the appellant was taken up by the Special Judge, Santhal Parganas when Section 5(3) of the Act was still operative. The conviction of the appellant was pronounced on March 31, 1962 by the Special Judge, Santhal Parganus long before the amending Act was promulgated. It is not hence possible to accept the argument of the appellant that the conviction pronounced by the Special Judge, Santhal Parganas has become illegal or in any way defective in law because of the amendment to procedural law made on December 18, 1964. In our opinion, the High Court was right in invoking the presumption under Section 5(3) of the Act even though it was repealed on December 18, 1964 by the amending Act. We accordingly reject the argument of the appellant on this aspect of the case."

(emphasis supplied)

18. Reference may also be made upon the decision of this Court in *Anant Gopal Sheorey v. State of Bombay* AIR 1958 SC 915 where the legal position was stated in the following words:

"4. The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has

a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See Maxwell on Interpretation of Statutes on p. 225; *The Colonial Sugar Refining Co. Ltd. v. Irving* (1905) A.C. 369, 372). In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective."

19. The upshot of the above discussion is that the view taken by the Full Bench holding the amended provision to be applicable to pending cases is not correct on principle. The decision rendered by the Full Bench would, therefore, stand overruled but only prospectively. We say so because the trial of the cases that were sent back from Sessions Court to the Court of Magistrate First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us.

20. The principle of prospective overruling has been invoked by this Court, no matter sparingly, to avoid unnecessary hardship and anomalies. That doctrine was first invoked by this Court in *I.C. Golak Nath and Ors. v. State of Punjab and Ors.* AIR 1967 SC 1643 followed by the decision of this Court in *Ashok Kumar Gupta and Anr. v. State of U.P. and Ors.* (1997) 5 SCC 201.

21. In *Baburam v. C.C. Jacob and Ors.* (1999) 3 SCC 362, this Court invoked and adopted a device for avoiding reopening of settled issues, multiplicity of proceedings and avoidable litigation. The Court said:

"5. The prospective declaration of law is a devise innovated by the apex court to avoid reopening of settled issues and to **prevent multiplicity of proceedings**. It is also a devise adopted to **avoid uncertainty and avoidable litigation**. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty-bound to apply such dictum to cases which would arise in future only. In matters where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law…"

(emphasis supplied)

22. To the same effect is the decision of this Court in *Harish Dhingra v. State of Haryana & Ors.* (2001) 9 SCC 550 where this Court observed:

"7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to **prevent multiplicity of proceedings**. It is also a device adopted to **avoid uncertainty and avoidable litigation.** By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation."

(emphasis supplied)

23. In *Sarwan Kumar and Anr. v. Madan Lal Aggarwal* (2003) 4 SCC 147, this Court held that though the doctrine of prospective overruling was initially made applicable to the matters arising under the Constitution but subsequent decisions have made the same applicable even to cases under different statutes. The Court observed:

"15. The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal **would otherwise work hardship to those who had trusted to its existence.** Invocation of doctrine of "prospective overruling" is left to the discretion of the court to mould with the justice of the cause or the matter before the court."

(emphasis supplied)

24. In *Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa* (2009) 4 SCC 299, this Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures The Nature of Judicial Process – that " in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld."

25. The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision.

26. With the above observations, this appeal fails and is hereby dismissed.

R.P. Appeal dismissed.