STATE OF U.P.

v.

HARI RAM

(Civil Appeal No. 2326 of 2013 etc.)

MARCH 11, 2013

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

Urban Land (Ceiling and Regulation) Repeal Act, 1999:

s. 3 – Saving clause – Held: No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and, therefore, the High Court is right in holding that the respondents are entitled to get benefit of s. 3 of the Repeal Act.

Urban Land (Ceiling and Regulation) Act, 1976:

s. 10(3) – Acquisition of vacant land in excess of ceiling limit – Expressions "deemed to have been acquired" and "deemed to have vested absolutely – Connotation of – Held: 'vesting' in sub-s. (3) of s.10 means vesting of title absolutely and not possession – Under s. 10(3), what is vested is de jure possession not de facto possession – Mere vesting of the land under sub-s. (3) of s.10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999 – State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-s. (5) of s. 10 or forceful dispossession under sub-s. (6) of s. 10 – On failure to establish any of these situations, the land owner or holder can claim the benefit of s.3 of the Repeal Act – Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983.

In the instant appeals filed by the State Government, the question for consideration before the Court was: whether the deemed vesting of surplus land u/s 10(3) of the Urban Land (Ceiling and Regulation) Act, 1976 would amount to taking de facto possession depriving the land holders of the benefit of the saving clause u/s 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999.

Dismissing the appeals, the Court

HELD: 1.1 Sub-s. (3) of s. 10 of the Urban Land (Ceiling and Regulation) Act, 1976 states that after the publication of the notification under sub-s. (1), the competent authority has to declare that the excess land referred to in the Notification published under sub-s. (1) of s.10 shall, with effect from such date, as might be prescribed in the declaration, be deemed to have been acquired by the State Government. On publication of a declaration to that effect such land shall be deemed to have been vested absolutely in the State Government, free from all encumbrances, with effect from the date so specified. [para 16] [317-G-H; 318-A-B]

1.2 Legislature is competent to create a legal fiction, for the purpose of assuming existence of a fact which does not really exist. Sub-s. (3) of s.10 contained two deeming provisions, such as, "deemed to have been acquired" and "deemed to have been vested absolutely". In interpreting the provision creating a legal fiction, the court is to ascertain for what purpose the fiction is created and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. [para 17] [318-C-E]

Delhi Cloth and General Mills Company Limited v. State of Rajasthan **(1996) 2 SCC 449;** *Organo Chemical Industries*

v. Union of India **1980 (1) SCR 61 = (1979) 4 SCC 573** *Directorate of Enforcement v. Deepak Mahajan* **1994 (1) SCR 445 = (1994) 3 SCC 440;** *S. Gopal Reddy v. State of U.P.* **1996 (3) Suppl. SCR 439 = (1996) 4 SCC 596;** *Jugal Kishore Saraf v. M/s Raw Cotton Co. Ltd.* **1955 SCR 1369 = AIR 1955 SC 376 - referred to.**

Ex-parte, Walton, In re, Levy **(1881) 17 Chance. D. 746;** *Szoma v. Secretary of State for the Department of Work and Pensions* **(2006) 1 All E.R. 1 (at 25);** *DEG Deutsche Institutions and another v. Kosby* **(2001) 3 All E.R. 878 – referred to.**

1.3 The expression "deemed to have been acquired" used as a deeming fiction under sub-s. (3) of s.10 can only mean acquisition of title or acquisition of interests because till that time the land may be either in the ownership of the person who held that vacant land or possessed such land as owner or as a tenant or as mortgagee and so on as defined u/s 2(1) of the Act. [para 23] [320-C-D]

Customs and Excise Commissioners v. Zielinski Baker and Partners **(2004) 2 All E.R. 141 (at 11) - referred to.**

Legal Glossary, published by Official Language (Legislative) Commission **1970 Edition Page 302;** *Black's Law Dictionary; Webster's Third New International Dictionary,* **of the English Language unabridged, Volume III S to Z at page 2547 - referred to.**

1.4 What is deemed "vesting absolutely" is that "what is deemed to have acquired". There must be express words of utmost clarity to persuade a court to hold that the legislature intended to divest possession also, since the owner or holder of the vacant land is pitted against a statutory hypothesis. [para 26] [321-H; 322-A]

Beedall v. Maitland **(1881) 17 Ch. D. p.183 - referred to.**

1.5 Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. Keeping in view the provisions of sub-ss. (5) and (6) of s. 10, the words 'acquired' and 'vested' have different meaning and content. [para 27] [322-D-G]

1.6 Under s. 10(3), what is vested is de jure possession not de facto. The 'vesting' in sub-s. (3) of s.10 means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. Surrendering or transfer of possession under sub-s. (3) of s.10 can be voluntary so that the person may get the compensation as provided u/s 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-s. (5) of s. 10 to surrender or deliver possession. Sub-s. (5) of s.10 visualizes a situation of surrendering and delivering possession, peacefully while sub-s. (6) of s.10 contemplates a situation of forceful dispossession. Requirement of giving notice under sub-ss. (5) and (6) of s. 10 is mandatory. Though the word 'may' has been used therein, the word 'may' in both the

sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-s. (5) or sub-s. (6) of s. 10 is that it might result the land holder being dispossessed without notice, therefore, the word 'may' has to be read as 'shall'. [para 27, 28, 32 and 34] [322-G; 323-A-B; 324-F-G; 325-E-F]

Maharaj Singh v. State of UP and Others **1977 (1) SCR 1072 = (1977) 1 SCC 155;** *Rajendra Kumar v. Kalyan (dead) by Lrs.* **2000 (2) Suppl. SCR 114 = (2000) 8 SCC 99 - referred to.**

1.7 Further, the Uttar Pradesh Urban Land Ceiling (Taking of Possession payment of amount and Allied Matters) Directions, 1983 make it clear that sub-s. (3) of s.10 takes in only de jure possession and not de facto possession. Therefore, if the land owner has not surrendered possession voluntarily under sub-s. (3) of s.10, or has not surrendered or delivered possession after notice u/s 10(5), or has not been dispossessed by use of force u/s 10(6), it cannot be said that the State Government has taken possession of the vacant land. [para 35, 36] [325-H; 326-A; 328-G-H; 329-A]

Pt. Madan Swaroop Shrotiya Public Charitable Trust v. State of U.P. and Others **(2000) 6 SCC 325,** *Ghasitey Lal Sahu and Another v. Competent Authority, Under the Urban (Ceiling and Regulation Act, 1976), U.P. and Another* **(2004) 13 SCC 452,** *Mukarram Ali Khan v. State of Uttar Pradesh and Others* **2007 (8) SCR 340 =(2007) 11 SCC 90 and** *Vinayak Kashinath Shilkar v. Deputy Collector and Competent Authority and Others* **2012 (2) SCR 219 = (2012) 4 SCC 718 – referred to.**

1.8 The mere vesting of the land under sub-s. (3) of

s.10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-s. (5) of s. 10 or forceful dispossession under sub-s. (6) of s. 10. On failure to establish any of these situations, the land owner or holder can claim the benefit of s.3 of the Repeal Act. The State Government could not establish any of these situations. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and, therefore, the High Court is right in holding that the respondents are entitled to get benefit of s. 3 of the Repeal Act. There is no infirmity in the judgment of the High Court. [para 39-40] [329-G-H; 330-A-C]

Case Law Reference:

1996 (1) SCR 518	**referred to**	**para 17**
(1881) 17 Chance. D. 746	**referred to**	**para 18**
(2006) 1 All E.R. 1 (at 25)	**referred to**	**para 19**
(2001) 3 All E.R. 878	**referred to**	**para 19**
1980 (1) SCR 61	**referred to**	**para 20**
1994 (1) SCR 445	**referred to**	**para 20**
1996 (3) Suppl. SCR 439	**referred to**	**para 21**
1955 SCR 1369	**referred to**	**para 22**
(2004) 2 All E.R. 141 (at 11)	**referred to**	**para 23**
(2001) 3 All E.R. 878	**referred to**	**para 23**
1977 (1) SCR 1072	**referred to**	**para 28**
2000 (2) Suppl. SCR 114	**referred to**	**para 37**

(2000) 6 SCC 325	**referred to**	**para 37**
(2004) 13 SCC 452	**referred to**	**para 37**
2012 (2) SCR 219	**referred to**	**para 37**
2007 (8) SCR 340	**referred to**	**para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2326 of 2013 etc.

From the Judgment & Order dated 27.04.2005 of the High Court of Judicature at Allahabad in Writ Petition No. 47369 of 2000.

C. A. Nos. 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387-2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510 of 2013.

M.R. Shamshad, Ahmad S. Azhar, Shashank, Kamlendra Mishra, Abhisth Kumar, Abhishek Chaudhary, Gunnam Venkateswara Rao, Niraj Gupta, Samir Ali Khan, Deepak Goel, Prabnab Kumar Mullick, Soma Mullick, Mohd. Parvez Dabas,

Shuaibudding, S.A. Syed, Pankaj Kumar Singh, Pawan Kumar Shukla, Dr. Kailash Chand, Abha Jain, Garima Prashad, Ashok Mathur, Laxmi Arvind, M.P. Shorawala, Praveen Jain, P.K. Jain, Prem Sunder Jha, Ramesh Chandra Mishra, R.D. Upadhyay, S.K. Sabharwal, Shrish Kumar Misra, Ugra Shankar Prasad, B. Sunita Rao, Abha R. Sharma, Yash Pal Dhingra, Chander Shekhar Ashri, K.L. Janjani, Asha Gopalan Nair, Himanshu Munshi, Gopal Prasad, Sujata Kurdukar, Rameshwar Prasad Goyal, Vishnu Sharma, Daya Krishan Sharma, Shekhar Kumar, Savita Singh, John Mathew, Gaurav Dhingra, Vishwa Pal Singh, Anuradha & Associates, Anoop Kr. Srivastav, Vidhi International, Ashok Kumar Gupta II, Santosh Kumar Tripathi, Pukhrambam Ramesh Kumar, Anupam Lal Das, Praveen Agrawal, Sudhir Kulshreshtha, Manoj K. Mishra, Susmita Lal, Sumit Kumar, Namita Choudhary, Garvesh Kabra for the appearing parties.

The Judgment of the Court was delivered by

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

2. We are, in these batch of cases, called upon to decide the question whether the deemed vesting of surplus land under Section 10(3) of the Urban Land (Ceiling and Regulation) Act, 1976 [for short 'the Act'] would amount to taking de facto possession depriving the land holders of the benefit of the saving Clause under Section 3 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 [for short 'the Repeal Act'].

FACTS:

3. Hari Ram, respondent herein, had filed a statement on 28.9.1976 giving details of the vacant land he was holding in excess of ceiling limit prescribed under the Act, as provided under Section 6 of the Act. The competent authority under the Act surveyed the land and the respondent was served with a draft statement under Section 8(3) of the Act on 13.5.1981, calling for objection to the draft statement within thirty days. No

objection was preferred by the respondent and it was found that he was holding excess land measuring 52,513.30 sq. meters and an order to that effect was passed by the competent authority under Section 8(4) of the Act, vide his proceeding dated 29.6.1981.

4. The competent authority later issued a notification dated 12.6.1982 under Section 10(1) of the Ceiling Act, which was published in the Government Gazette on 12.6.1982 giving the particulars of the vacant land held by the respondent. The competent authority then issued a notification dated 22.11.1997, which was published on the same date, stating the land shall be deemed to have been vested with the Government from 12.6.1982, free from all encumbrances. On 10.6.1999, the competent authority vide its letter dated 10.6.1999 informed the Bandobast Chakbandi Adhikar that the surplus land declared as per the Notification stood vested in the State Government. On 19.6.1999, the prescribed authority issued a notice under Section 10(5) of the Act directing the respondent to hand over possession of the land declared as surplus to a duly authorized person. Aggrieved by the same, the respondent preferred an appeal No.29 of 1999 before the District Judge, Varanasi under Section 33 of the Act, contending that before passing the order under Section 8(4) of the Act, no notice, as contemplated under Section 8(3) of the Act, was served on him. The appeal was allowed and the order dated 29.06.1981 was quashed, vide judgment dated 14.12.1999.

5. Aggrieved by the said order, State of U.P., through the competent authority, preferred Civil Misc. Petition No. 47369 of 2000 before the High Court of Allahabad under Article 226 of the Constitution of India, and the High Court, after elaborately considering the various contentions, took the view that sub-section (3) of Section 10 does not envisage, taking physical and de facto possession of the surplus land, for which proceedings under sub-section (5) of Section 10 have to be followed. On facts also, the Division Bench found no reason to

interfere with the order of the District Judge, and the appeal was dismissed, against which this appeal has been preferred. Following the judgment in Writ Petition No.47369 of 2000, several writ petitions were disposed of by the High Court against which appeals are pending before this Court.

6. We intend to take up the appeal filed against the judgment in Writ Petition No. 47369 of 2000 as the leading case, based on which other appeals can be disposed of.

7. Shri Sunil Gupta, learned senior counsel appearing for the appellant - State of U.P. submitted that the High Court has committed an error in interpreting sub-section (3) to Section 10 of the Act and submitted that the expressions “deemed acquisition” and “deemed vesting” which find a place in Section 10(3) of the Act would take in not only de jure possession but also de facto possession. Learned senior counsel submitted that under Section 10(2) of the Act, the competent authority considers the claims of the persons interested in vacant land and then determines the nature and extent of such claims, followed by a declaration under Section 10(3) of the Act by publication in the Official Gazette which amounts to absolute vesting. Learned senior counsel submitted that Section 10(3) is a self contained provision and does not make vesting dependent on any other or further procedure to be complied with by the competent authority. Learned senior counsel also submitted that Section 10(5) and Section 10(6) speak of “hostile possession” and only in cases where hostile possession is set up by the owner in respect of the vacant land by growing crops, constructing buildings or other fixtures etc., the competent authority has to take recourse to the procedure laid down in those provisions. Referring to the provisions of the Repeal Act, learned senior counsel submitted that the wide language used therein envisages various possibilities such as taking over possession under Section 10(3), Section 10(5) or Section 10(6) of the Act. Learned senior counsel submitted that in cases where possession is seen having been taken over

legally, statutorily and by way of presumption in law, on account of the publication of the notification and the deeming clause and legal fiction provided under Section 10(3) of the Act, the requirement of Section 3(1)(a) of the Repeal Act shall stand satisfied and the land so vested and possessed by the State Government shall remain intact in the ownership and possession of the State Government. Learned senior counsel also submitted that the procedure laid down under U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (for short 'Directions 1983') would not apply in view of the plenary character of Section 10(3).

8. Learned counsels appearing for the respondents, on the other hand, fully supported the judgment of the High Court and submitted that on a conjoint reading of Sections 10(3), 10(5), 10(6) and Section 3 of the Repeal Act would show that the expressions "deemed to have been acquired" or "deemed to have vested" would not comprehend "physical possession" under Section 10(3) in view of Sections 10(5) and 10(6) of the Act. Learned counsels urged in such situations, the State has necessarily to follow the procedure laid down under the Directions 1983 issued in exercise of the powers conferred under Section 35 of the Act. Further, it was submitted that the Object and Reasons of the Repealing Act would be defeated, if the interpretation placed by Shri Gupta is accepted, since it being a beneficial enactment.

Judicial evaluation

9. The Parliament, after having felt the need for an orderly development of urban areas in view of the growth of population and increase in urbanization, enacted Act 33 of 1976. The Parliament also felt that it is necessary to take measures for exercising social control over the scarce resource of urban land with a view to ensuring its equitable distribution. To ensure uniformity in approach, the Government of India had also addressed various State Governments in this regard. Eleven

States had passed resolutions under Article 252(1) of the Constitution empowering the Parliament to undertake legislation in that behalf. Consequently, the Act of 1976 was enacted which came into force on 17.2.1976. The Object of the Act was to provide for imposition of ceiling on vacant land in urban agglomeration, for the acquisition of such land in excess of the ceiling limit, to regulate the construction of buildings on such lands and for matters connected therewith, with a view to preventing the concentration of urban land in the hands of few persons and speculation and profiteering therein and with a view to bringing about an equitable distribution of land in urban agglomerations to sub-serve the common good.

10. The legislature then put a ceiling on vacant land in Chapter III of the Act. Section 6 of the Act placed an obligation on persons holding vacant land in excess of ceiling limit to file statement before the competent authority. Section 8 of the Act referred to the preparation of draft statement as regards vacant land held in excess of ceiling limit. Draft statement prepared has to be served on the person concerned together with a notice under sub-section (3) of Section 8 calling for objections, if any, within 30 days to the service of notice. The competent authority, after considering the objections has to pass orders under sub-section (4) to Section 8, after considering the objections filed. The final statement has to be issued under Section 9 of the Act.

11. We are, in this case primarily concerned, with the scope of Section 10 of the Act, which reads as follow:

> **10. Acquisition of vacant land in excess of ceiling limit.-** (1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that-
>
> (i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all persons interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1), the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)--

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.

Explanation.-In this section, in sub-section (1) of section 11.and in sections 14 and 23, "State Government", in relation to-

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in a Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924, (2 of 1924.) means that State Government."

12. Before examining the scope of sub-section (3) to Section 10 as well as sub-sections (5) and (6) to Section 10, reference may be made to the Repeal Act 1999 and its Object and Reasons which are as follow:

Statement of Object and Reasons:

"1. The Urban Land (Ceiling and Regulation) Act, 1976 was

passed when Proclamation of emergency was in operation with a laudable objective in mind. The said Act was passed pursuant to resolution passed by the State Legislature under clause (1) of Article 252. Unfortunately public opinion is nearly unanimous that the Act has failed to achieve what was expected of it. It has on the contrary pushed up land prices to unconscionable levels, practically brought the housing industry to a stop and provided copious opportunities for corruption. There is wide spread clamour for removing this most potent clog on housing.

2. Parliament has no power to repeal or amend the Act unless resolutions are passed by two or more state legislatures as required under clause (2) of Article 252.

3. The Legislature of Haryana and Punjab have passed resolutions empowering Parliament to repel the act in those States. The Act, in the first instance will be repealed in those States and in the Union Territories and subsequently if any State Legislature adopts this Act by resolution, then from the date of its adoption the Act will stand repealed in that State.

4. The proposed repeal, along with some other incentives and simplification of administrative procedures is expected revive the stagnant housing industry and provide affordable living accommodation for those who are in a state of underserved want and are entitled to public assistance. The repeal will not however, affect land on which building activity has already commenced. For that limited purpose exemption granted under Section 20 of the Act will continue to be operative. Amounts paid out by the State Government will become refundable.

5. The bill seeks to achieve the above purpose."

13. The Act 36 of 1976 was repealed by Section 2 of the Repeal Act, 1999 and the Repeal Act was adopted in the State

of U.P. on March 18, 1999. The Repeal Act contains a saving clause vide Section 3 which reads as follow:

3. **Saving.-**

(I) The repeal of the principal Act shall not affect-

(a) The vesting of any vacant land under sub-section 10, possession of which has been taken over by the state government or any person duly authorized by the state government in this behalf or by the competent authority;

(b) The validity of any order granting exemption under sub-section (I) of section 20 or any action taken there under, notwithstanding any judgment of any court to the contrary;

(c) Any payment made to the state government as a condition for granting exemption under sub-section (I) of section 20.

(2) Where-

(a) any land is deemed to have vested in the state government under sub section (3) of section 10 of the principal Act but possession of which has not been taken over by the state government or any person duly authorized by the state government in this behalf or by the competent authority; and

(b) any amount has been paid by the state government with respect to such land,

then such land shall not be restored unless the amount paid, if any, has been refunded to the state government."

14. We notice even after the coming into force of the Repeal Act, the competent authority under the Act 33 of 1976 vide its letter dated 10th June, 1999 informed the Bandobast

Chakbandi Adhikar that the surplus land declared as per the notification issued under the Act had vested in the State Government free from all encumbrances and, therefore, in the revenue records the name of State Government be entered and name of the respondent be mutated. The competent authority vide its notice dated 19.6.1999 issued under Section 10(5) of the Act directed the respondent to handover possession of the land declared as surplus to duly authorized persons on behalf of the Collector.

15. Before examining the impact of the Repeal Act on Act 33 of 1976, particularly, Section 3 of the Repeal Act on sub-section (3) to Section 10 of the Act, let us examine whether possession could be taken following the procedure laid down in sub-section (3) to Section 10 of the Act. Section 6 casts an obligation on every person holding vacant land in excess of ceiling limit to file a statement before the competent authority and after following all the statutory procedures, the competent authority has to pass the order under Section 8(4) on the draft statement. Following that, a final statement has to be issued under Section 9 on the person concerned. Sub-section (1) to Section 10 states that after the service of statement, the competent authority has to issue a notification giving particulars of the land held by such person in excess of the ceiling limit. Notification has to be published for the information of the general public in the Official Gazette, stating that such vacant land is to be acquired and that the claims of all the persons interested in such vacant land be made by them giving particulars of the nature of their interests in such land.

16. Sub-section (2) of Section 10 states that after considering the claims of persons interested in the vacant land, the competent authority has to determine the nature and extent of such claims and pass such orders as it might deem fit. Sub-section (3) of Section 10 states that after the publication of the notification under sub-section (1), the competent authority has to declare that the excess land referred to in the Notification

published under sub-section (1) of Section 10 shall, with effect from such date, as might be prescribed in the declaration, be deemed to have been acquired by the State Government. On publication of a declaration to that effect such land shall be deemed to have been vested absolutely in the State Government, free from all encumbrances, with effect from the date so specified.

Legal Fiction

17. Legislature is competent to create a legal fiction, for the purpose of assuming existence of a fact which does not really exist. Sub-section (3) of Section 10 contained two deeming provisions such as "deemed to have been acquired" and "deemed to have been vested absolutely". Let us first examine the legal consequences of a 'deeming provision'. In interpreting the provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. This Court in Delhi Cloth and *General Mills Company Limited v. State of Rajasthan* (1996) 2 SCC 449 held that what can be deemed to exist under a legal fiction are facts and not legal consequences which do not flow from the law as it stands.

18. James Lords Justice in *Ex-parte, Walton, In re, Levy* (1881) 17 Chance. D. 746 speaks on deeming fiction as:

> "When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to".

19. In *Szoma v. Secretary of State for the Department of Work and Pensions* (2006) 1 All E.R. 1 (at 25), court held, it would be quite wrong to carry this fiction beyond its originally

intended purpose so as to deem a person in fact lawfully here not to be here at all. The intention of a deeming provision, in laying down a hypothesis is that the hypothesis shall be carried so far as necessary to achieve the legislative purpose but no further. (see also *DEG Deutsche Institutions and another v. Kosby* (2001) 3 All E.R. 878.

20. Let us test the meaning of the expression "deemed to have been acquired" and "deemed to have been vested absolutely" in the above legal settings. The expression "acquired" and "vested" are not defined under the Act. Each word, phrase or sentence that we get in a statutory provision, if not defined in the Act, then is to be construed in the light of the general purpose of the Act. As held by this Court in *Organo Chemical Industries v. Union of India* (1979) 4 SCC 573 that a bare mechanical interpretation of the words and application of a legislative intent devoid of concept of purpose will reduce most of the remedial and beneficial legislation to futility. Reference may also be made to the Judgment of this Court in *Directorate of Enforcement v. Deepak Mahajan* (1994) 3 SCC 440. Words and phrases, therefore, occurring in the statute are to be taken not in an isolated or detached manner, it is associated on the context but are read together and construed in the light of the purpose and object of the Act.

21. This Court in *S. Gopal Reddy v. State of U.P.* (1996) 4 SCC 596 held:

> "it is well known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The Courts must look to the object, which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary……."

22. In *Jugal Kishore Saraf v. M/s Raw Cotton Co. Ltd.* AIR 1955 SC 376, Justice S.R. Das stated:

> "The cardinal rule of construction of statutes is to read the statute literally that is, by giving to the words used by legislature their ordinary natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation."

23. The expression "deemed to have been acquired" used as a deeming fiction under sub-section (3) of Section 10 can only mean acquisition of title or acquisition of interests because till that time the land may be either in the ownership of the person who held that vacant land or to possess such land as owner or as a tenant or as mortgagee and so on as defined under Section 2(1) of the Act. The word "vested" has not been defined in the Act, so also the word "absolutely". What is vested absolutely is only the land which is deemed to have acquired and nothing more. The word "vest" has different meaning in different context; especially when we examine the meaning of vesting on the basis of a statutory hypothesis of a deeming provision which Lord Hoffmann in *Customs and Excise Commissioners v. Zielinski Baker and Partners* (2004) 2 All E.R. 141 (at 11) described as "heroic piece of deeming".

24. The word "vest" or "vesting" has different meaning. Legal Glossary, published by Official Language (Legislative) Commission 1970 Edition at Page 302:

> **"Vest:** 1. To give a person a legally fixed, immediate right or personal or future enjoyment of (an estate), to grant, endow, clothe with a particular authority, right of property, 2. To become legally vested; (T.P. Act.)
>
> **"Vesting order:** An order under statutory authority whereby property is transferred to and vested, without conveyance in some person or persons;

Black's Law Dictionary (Sixth Edition) 1990 at page 1563:

> **"Vested:** Fixed; accrued; settled; absolute; complete; Having the character or given the rights of absolute ownership; not contingent, not subject to be defeated by a condition precedent. Rights are "vested" when rights to enjoyment present or prospective has become property of some particular persons or persons as present interest; mere expectancy or future or contingent interest in property founded on anticipated continuance of existing laws does not continue "vested right" Vaughan v. Nadel; 228 Kan. 469, 618 p. 2d 778, 783. See also Accrue Vest and specific typed of vested interest infra."

Webster's Third New International Dictionary, of the English Language unabridged, Volume III S to Z at page 2547 defines the word "vest" as follow:

> **"vest"** vest …… To place or give into the possession or discretion of some person or authority (the regulation of the waterways …. to give to a person a legally fixed immediate right of present or future enjoyment of (as an estate) (a deed that vests a title estate in the grantee and a remainder in his children), b. to grant endow, or clothe with a particular authority right or property ….. to put (a person) in possession of land by the feudal ceremony of investiture ….. to become legally vested (normally) title to real property vests in the holder of a property executed deed.)"

25. Vest/vested, therefore, may or may not include "transfer of possession" the meaning of which depends on the context in which it has been placed and the interpretation of various other related provisions.

26. What is deemed "vesting absolutely" is that "what is deemed to have acquired". In our view, there must be express

words of utmost clarity to persuade a court to hold that the legislature intended to divest possession also, since the owners or holders of the vacant land is pitted against a statutory hypothesis. Possession, there is an adage "nine points of law" In *Beedall v. Maitland* (1881) 17 Ch. D. p.183 Sir Edward Fry, while speaking of a Statute which makes a forcible entry an indictable offence, stated as follows:

> "this statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession, he may use force to keep out a trespasser; but if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance."

27. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words 'acquired' and 'vested' have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary Surrender

28. The 'vesting' in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The court in *Maharaj Singh v. State of UP and Others* (1977) 1 SCC 155, while interpreting Section 117(1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that 'vesting' is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The court in *Rajendra Kumar v. Kalyan (dead) by Lrs.* (2000) 8 SCC 99 held as follows:

> "We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest, generally means to give a property in." (Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executor devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well."

29. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

30. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale,

mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

31. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.

32. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Subsection (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

33. The Act provides for forceful dispossession but only

when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10.

34. Requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word 'may' has been used therein, the word 'may' in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result the land holder being dispossessed without notice, therefore, the word 'may' has to be read as 'shall'.

35. Above reasoning is in consistence with the Directions 1983 which has been issued by the State Government in exercise of powers conferred under Section 35 of the Act. Directions clearly indicate that the procedure for taking possession of the vacant land in excess of the prescribed ceiling limit, which reads as under:

T**he Uttar Pradesh Urban Land Ceiling (Taking of**

Possession payment of amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976):

"In exercise of the powers under Section 35 of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), the governor is pleased to issue the following directions relating to the powers and duties of the Competent Authority in respect of amount referred to in Section 11 of the aforesaid Act to the person or persons entitled thereto:

1. Short title, application and Commencement –These directions may be called the Uttar Pradesh Urban Land Ceiling (Taking of Possession Payment of Amount and Allied Matters Directions, 1983)

2. The provisions contained in this direction shall be subjected to the provisions of any directions or rules or orders issued by the Central Government with such directions or rules or orders.

3. They shall come into force with effect from the date of publication in the Gazette.

2. Definitions:-

3. Procedure for taking possession of vacant Land in excess of Ceiling Limit-(1) The Competent Authority will maintain a register in From No.ULC - 1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the Gazette.

4. (2) an order in Form No.ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No.ULC-1.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No.ULC-1. The Competent Authority shall in token of verification of the entries, put his signatures in column 11 of Form No.ULC-1 and Column 10 of Form No.ULC-III.

Form No.ULC-1

Register of Notice u/s 10-(3) and 10(5)

1	2	3	4	5	6	7	8	9	10	11
S.No	Serial No. of Register of Receipt Sl. No. of Register of Taking Possession	Case Number	Date of Notification u/s 10(3)	Land to be acquireed village Mohali	Date of taking over possession	Remarks	Signature of Competent Authority			

Form NO. ULC-II

Notice order u/s 10(5)
(See clause (2) of Direction (3)
In the Court of Competent Authority

U.L.C. ……

No…… Date…….....

Sri/Smt……T/o ……

In exercise of the powers vested un/s 10(5) of the Urban Land Ceiling and Regulation Act, 1976 (Act No.33 of 1976, you are hereby informed that vide Notification No……. dated ….. under section 10(1) published in Uttar Pradesh Gazette dated …… following land has vested absolutely in the State free from all encumbrances as a

consequence Notification u/s 10(3) published in Uttar Pradesh Gazette dated ……. Notification No……. dated …. With effect from ……. you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27-U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of Vacant Land

Location	Khasra number identification	Area	Remarks
1	2	3	4

Competent Authority
……
……
Dated.……..

No.

Copy forwarded to the Collector ……. with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with copy of certificate to verify.

Competent Authority
……
……."

36. Above-mentioned directives make it clear that sub-section (3) takes in only de jure possession and not de facto possession, therefore, if the land owner is not surrendering possession voluntarily under sub-section (3) of Section 10, or surrendering or delivering possession after notice, under

Section 10(5) or dispossession by use of force, it cannot be said that the State Government has taken possession of the vacant land.

37. The scope of Act 33 of 1976 came up for consideration before this Court on few occasions, reference may be made to certain judgments, even though there has been no elaborate discussion of the provision of the Act and its impact on the Repeal Act. Reference may be made to *Pt. Madan Swaroop Shrotiya Public Charitable Trust v. State of U.P. and Others* (2000) 6 SCC 325, *Ghasitey Lal Sahu and Another v. Competent Authority, Under the Urban (Ceiling and Regulation Act, 1976), U.P. and Another* (2004) 13 SCC 452, *Mukarram Ali Khan v. State of Uttar Pradesh and Others* (2007) 11 SCC 90 and *Vinayak Kashinath Shilkar v. Deputy Collector and Competent Authority and Others* (2012) 4 SCC 718.

Effect of the Repeal Act

38. Let us now examine the effect of Section 3 of the Repeal Act 15 of 1999 on sub-section (3) to Section 10 of the Act. The Repeal Act 1999 has expressly repealed the Act 33 of 1976. The Object and Reasons of the Repeal Act has already been referred to in the earlier part of this Judgment. Repeal Act has, however, retained a saving clause. The question whether a right has been acquired or liability incurred under a statute before it is repealed will in each case depend on the construction of the statute and the facts of the particular case.

39. The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any

of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

40. We, therefore, find no infirmity in the judgment of the High Court and the appeal is, accordingly, dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no order as to costs.

R.P. Appeals dismissed.

DEBABRATA DASH AND ANR.
v.
JATINDRA PRASAD DAS & ORS.
(Civil Appeal No. 2316 of 2013)

MARCH 11, 2013

[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]

Orissa Judicial Service (Special Schemes) Rules 2001:

rr. 3, 4, 5 and 7 – Member of Orissa Superior Judicial Service (Junior Branch) – Ad hoc promotion as Additional District Judge in Fast Track Court created in terms of 11th Finance Commission recommendations – Claim that such ad hoc service be treated for the purpose of seniority in Orissa Superior Judicial Service (Sr. Branch) – Held: Not tenable – In the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made – On the date of appointment of the officer to ad hoc post of Addl. District Judge in Fast Track Court or on the date he joined the said post, there was no cadre post available – Promotion of the officer as an ad hoc Addl. District Judge pursuant to which he joined the post is traceable wholly and squarely to 2001 Rules and not to 1963 Rules – Officer has been rightly given benefit from the date the vacancy occurred in the Senior Branch cadre – Orissa Superior Judicial Service Rules 1963.

The instant appeal was filed by two officers of the Orissa Superior Judicial Service (Senior Branch) directly appointed from the bar, challenging the judgment of the High Court whereby it allowed the writ petition of respondent no. 1 (writ petitioner), and directed the High Court on administrative side to treat the period of service

rendered by the writ petitioner as ad hoc Additional District Judge (Fast Tack Court) for the purpose of seniority from the date of his joining the said post. The question for consideration before the Court was: "whether promotion of the writ petitioner as an ad hoc Additional District Judge vide Notification dated 5.1.2002 to the Senior Branch of the Superior Judicial Service for being posted in the Fast Track Court established out of 11th Finance Commission recommendations can be said to be an appointment in the Senior Branch cadre of Superior Judicial Service."

Allowing the appeal, the Court

HELD: 1.1. It is not in dispute that immediately before writ petitioner's ad hoc promotion to the Senior Branch of Superior Judicial Service for being posted in the Fast Track Court, he was a member of the Junior Branch of the Superior Judicial Service. There is also no dispute that there was no cadre post available on 05.01.2002 (on the date of ad hoc promotion for the writ petitioner) or 26.04.2002 (the date of joining the post) under the Orissa Superior Judicial Service Rules 1963. In the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made. [para 32-33] [346-G-H; 348-D]

1.2. It is to be noted that 72 posts of ad hoc Additional District Judges (Fast Track Court) were created out of 11th Finance Commission recommendations and these posts were to be filled up under the Orissa Judicial Service (Special Schemes) Rules 2001. These Rules were made to regulate the recruitment of Judicial Officers in the State of Orissa on ad hoc and purely temporary basis exclusively for implementation of the recommendations of 11th Finance Commission for upgradation of Judicial Administration

under upgradation for elimination of old pending cases. Rules 3 and 4 make it clear that the appointment made under 2001 Rules is purely on ad hoc and temporary basis for implementation of the Scheme. Rule 7 makes the provision that inservice Judicial Officer shall not claim regular promotion in the regular cadre on the basis of appointment made under this scheme. [para 32 and 35] [346-H; 347-A; 348-G-H; 349-A, B, E]

1.3. The writ petitioner's promotion as an ad hoc Additional District Judge by Notification dated 05.01.2002 pursuant to which he joined the post of ad hoc Additional District Judge on 26.04.2002 is traceable wholly and squarely to the 2001 Rules and not to be the 1963 Rules. The simple reason leading to this consequence is that there was no vacancy available which was to be filled up by promotion on that date in Superior Judicial Service (Senior Branch). Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, it cannot be said that he was given appointment to the post of ad hoc Additional District Judge under the 1963 Rules. [para 36 and 43] [349-F-H; 353-D-E]

Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others **1990 (2) SCR 900 = (1990) 2 SCC 715 – relied on.**

O.P Singla and Another v. Union of India and Others **1985 (1) SCR 351= (1984) 4 SCC 450,** *Rudra Kumar Sain and Others v. Union of India and Others* **2000 (2) Suppl. SCR 573 = (2000) 8 SC 25,** *Brij Mohan Lal v. Union of India and Others* **2002 (3) SCR 810 = (2002) 5 SCC 1** *[Brij Mohan Lal 1] and Brij Mohan Lal v. Union of India and Others* **2012 (5) SCR 305 = 2012 (6) SCC 502** *[Brij Mohan Lal 2]; S.B. Patwardhan v. State of Maharashtra* **1977 (3) SCR 775 = 1977 (3) SCC 399; and** *Baleshwar Dass v. State of U.P.* **1981 (1) SCR 449 = 1980 (4) SCC 226 – referred to.**

1.4. On 05.01.2002 or 26.04.2002, there was no vacancy in the cadre of Superior Judicial Service (Senior Branch) for being filled up by promotion. Such vacancy in the Senior Branch cadre of the service occurred on 15.12.2003 and from that date the writ petitioner has been given benefit of his service rendered in the Fast Track Court. [para 51] [356-F-G]

Case Law Reference:

1985 (1) SCR 351	**referred to**	**para 4**
1990 (2) SCR 900	**relied on**	**para 4**
2000 (2) Suppl. SCR 573	**referred to**	**para 4**
2002 (3) SCR 810	**referred to**	**para 4**
2012 (5) SCR 305	**referred to**	**para 4**
1977 (3) SCR 775	**referred to**	**para 4**
1981 (1) SCR 449	**referred to**	**para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2316 of 2013.

From the Judgment & Order dated 15.11.2011 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 21449 of 2011.

Gopal Subramaniam, Ashok Kr. Parija, R.M. Patnaik, Anand Verma, Dhananjay Mishra, Gaurav Kejriwal for the Appellants.

P.S. Patwalia, Ajay Singh, Ashok K. Mahanjan, Kirti Renu Mishra, Apurva Upmanyu, Sibo Sankar Mishra, Adbhut Pathak for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The inter se seniority between the appellants and respondent no. 1 in the Senior Branch cadre of Orissa Superior Judicial Service is the subject matter of this appeal.

3. In the writ petition filed by the respondent no.1 before the High Court, the principal question under consideration was whether the service rendered by him (writ petitioner) in the Fast Track Court as Additional District Judge is to be taken into account while fixing his seniority after regularization of his service in the Senior Branch cadre under the Orissa Superior Judicial Service Rules, 1963 (for short, "1963 Rules"). The High Court in the impugned judgment dated 15.11.2011 has answered the above question in favour of the writ petitioner, allowed the writ petition and directed the Orissa High Court on administrative side to treat the period of service rendered by the writ petitioner in the Fast Track Court for the purpose of seniority from the date of his joining the post i.e., 26.04.2002 and re-fix his seniority in light of the judgment.

4. The appellants, direct recruits, who were respondent nos. 3 and 4 in the writ petition, have challenged the above judgment principally on the ground that it is not consistent with the 1963 Rules, Orissa Judicial Service (Special Schemes) Rules, 2001 and Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007. The appellants contend that the High Court has not correctly applied the decisions of this Court in *O.P Singla and Another v. Union of India and Others*[1], *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others*[2], *Rudra Kumar Sain and Others v. Union of India and Others*[3], *Brij Mohan Lal v. Union of India and Others*[4] *[Brij Mohan Lal 1] and Brij Mohan Lal v. Union of India and Others*[5] *[Brij Mohan Lal 2].*

1. (1984) 4 SCC 450.
2. (1990) 2 SCC 715.
3. (2000) 8 SCC 25.
4. (2002) 5 SCC 1.
5. (2012) 6 SCC 502.

5. The brief facts leading to the controversy are these: The writ petitioner joined the judicial service in the State of Orissa as Munsiff on probation on 15.07.1981 under the Orissa Judicial Service Rules, 1964. He was promoted to the Junior Branch of the Superior Judicial Service on 19.07.1999. On 05.01.2002, the writ petitioner, who was continuing as a member of Superior Judicial Service (Junior Branch), was appointed, on ad hoc basis, as Additional District Judge in the Fast Track Court. Pursuant to the above order of appointment, on 11.04.2002 writ petitioner was posted as an ad hoc Additional District Judge in the Fast Track Court at Bargarh where he joined on 26.04.2002.

6. On 13.01.2003, the appellants were appointed in the Senior Branch cadre of Orissa Superior Judicial Service by way of direct recruitment under the 1963 Rules. Pursuant to the posting order dated 22.01.2003, they joined as Additional District and Sessions Judges at Cuttack and Behrampur on 03.02.2003 and 07.02.2003 respectively.

7. By an order dated 28.05.2003, the tenure of writ petitioner as ad hoc Additional District Judge (Fast Track Court), Bargarh was extended for a further period of one year or 31.03.2004 (whichever was earlier).

8. By a notification dated 15.12.2003, the writ petitioner was allowed to officiate in the Senior Branch of the Superior Judicial Service on regular basis on account of a vacancy that arose due to retirement of an officer of the Senior Branch on 31.07.2003. The writ petitioner was posted on 19.01.2004 as Additional District and Sessions Judge, Bargarh pursuant to the notification dated 15.12.2003 to which post the writ petitioner joined on 03.02.2004.

9. Appellant no. 1 was confirmed in the cadre of Senior Branch, Superior Judicial Service with effect from 03.02.2004 while appellant no. 2 was confirmed with effect from 07.02.2004. The appellants were conferred selection grade

with effect from 03.02.2008 and 07.02.2008 respectively.

10. The writ petitioner was substantively appointed in the cadre of District Judge with effect from 17.01.2007 and he was granted selection grade with effect from 22.10.2009.

11. On 13.11.2009, the writ petitioner submitted a representation to the High Court on administrative side seeking seniority in the cadre of District Judge with effect from 26.04.2002, i.e., the date of his joining as ad hoc Additional District Judge (Fast Track Court), Bargarh. The claim of seniority by the writ petitioner over and above the appellants was based on the ground that the period of his service as an ad hoc Additional District Judge (Fast Track Court) should be included for the purpose of computing his length of service in the cadre of Senior Branch, Superior Judicial Service under the 1963 Rules.

12. A committee to consider the representation of the writ petitioner was constituted. The committee by majority opined that the writ petitioner's representation was liable to be rejected. On 02.08.2011 the Full Court of the High Court considered the report of the committee. The representation of the writ petitioner was rejected on 08.08.2011. It was this administrative decision of the High Court that was challenged by the writ petitioner before the High Court on the judicial side.

13. The writ petition was contested by the appellants as well as the High Court on the administrative side and the State of Orissa.

14. Before we deal with the relevant rules, reference may be made to the various notifications concerning the appointments of the writ petitioner and the appellants. As noted above, by a notification dated 05.01.2002, the writ petitioner was allowed ad hoc promotion to the Senior Branch of the service. To the extent it is relevant, the said notification reads as under:

"GOVERNMENT OF ORISSA
HOME DEPARTMENT
NOTIFICATION
Bhubaneswar the 5th January 2002.

xxx xxx xxx

xxx xxx xxx

No. 993/Sri Jatindra Prasad Das, an officer of Orissa Superior Judicial Service (Junior Branch) at present Adviser, Orissa Electricity Regularity Commission Orissa, Bhubaneswar is allowed adhoc promotion to the Senior Branch of the said service in the scale of pay of Rs. 10,650-325-15,850/- with effect from the date he joins as such until further order in pursuance of Rule 3,4 & 5 of Orissa Judicial Service, (Special Scheme) Rules, 2001 for his appointment as adhoc Additional District Judge in the Fast & Track Court established out of 11th Finance Commission Award."

15. The notification dated 11.04.2002 whereby the writ petitioner was posted as an ad hoc Additional District Judge pursuant to the notification dated 05.01.2002 reads as under:

"ORISSA HIGH COURT : CUTTACK

NOTIFICATION

Dated, Cuttack the 11th April, 2002.

No. 150/A: On being reverted to the general line, Shri Jatindra Prasad Das, an officer of Orissa Superior Judicial Service (Junior Branch) at present Adviser, Orissa Electricity Regulatory Commission, Bhubaneswar, who has been allowed ad hoc promotion to the Senior Branch of the said service vide Home Department Notification No. 1933 dated 05.1.2002 is transferred and appointed to be the Ad hoc Additional District Judge in the Additional

District Judge Court established out of the 11th Finance Commission Award in the Judgeship and Sessions Division of Sambalpur Bargarh Deogarh Jharsuguda with headquarters at Bargarh Vice Shri Susanta Kumar Patnaik transferred on promotion."

16. The appellants were appointed as direct recruits in the cadre of Senior Branch, Superior Judicial Service by a notification dated 13.01.2003 which reads as follows:

"GOVERNMENT OF ORISSA
HOME DEPARTMENT
NOTIFICATION
Dated, Bhubaneswar, the 13.01.2003

No. 2495/SJS/1-13/2002/HS. In pursuance of Rule 8 of the Orissa Superior Judicial Service Rules, 1963 Sri Debabrata Dash, Advocate, Mayurbhanj, Baripada is hereby appointed on probation for a period of one year on the Orissa Superior Judicial Service (Senior Branch) in the scale of pay of Rs. 10,610-335-15,850/- by direct recruitment with effect from the date he joins the said service.

No.2496/HS. In pursuance of Rule 8 Orissa Superior Judicial Service Rules, 1963, Sri Satrughana Fujahari, Advocate, Sambalpur is hereby appointed in probation for a period one year in the Orissa Superior Judicial Service (Senior Branch) in the scale of pay of Rs. 10,650-325-15,850/- by direct recruitment with effect from the date he joins the said service."

17. We may now refer to the relevant rules. The 1963 Rules have been made by the Governor of Orissa under the proviso to Article 309 of the Constitution of India for the regulation of recruitment to posts in, and the conditions of service of persons appointed to the Orissa Superior Judicial Service.

18. Rule 3(d) provides that "Service" means the Orissa Superior Judicial Service. An officer appointed to the service in accordance with Rule 8 is called the "Direct Recruit" under rule 3(f), while an officer appointed to the service in accordance with Rule 9 is called the "Promoted Officer" under rule 3(g).

19. In Rule 4, it is provided that cadre of service shall consist of two branches, (i) Superior Judicial Service (Senior Branch) and (ii) Superior Judicial Service (Junior Branch). The cadre of Superior Judicial Service (Senior Branch) comprises of diverse posts, including District and Sessions Judges and Additional District and Sessions Judges. Rule 4(3) provides that the cadre of the Superior Judicial Service, Junior Branch, shall consist of 13 Chief Judicial Magistrates and 06 Additional Chief Judicial Magistrates.

20. Part III of the 1963 Rules which deals with recruitment, is crucial to the controversy. Rule 5 thereof provides as follows:

"5. Recruitment to the service shall be made by the following methods, namely :

(1) In respect of the Senior Branch—

(a) by direct recruitment in accordance with Rule 8, and

(b) by promotion of officers from the Junior Branch of the service.

(2) In respect of the Junior Branch by promotion of officers of the Orissa Judicial Service (Class-I) in accordance with the Rule 10."

21. Rule 7 enables the government to fill up the vacancy in Senior Branch of the service in consultation with the High Court by direct recruitment or promotion. It reads as under:

"7. When a vacancy occurs in the Senior Branch of the

service, Government shall decide in consultation with the High Court whether it may be filled up by direct recruitment or promotion:

Provided that the number of direct recruits in the Senior Branch of the service shall not exceed twenty-five per cent of the cadre posts mentioned in Sub-rule (2) of Rule 4."

22. Rule 9 lays down as follows:

"9. (1) Whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion the Government shall fill up the same after due consideration of the recommendation of the High Court in accordance with sub-rule (2).

(2) The High Court shall recommend for appointment to such vacancy, an officer of the Junior Branch of the service, who in the opinion of the High Court is the most suitable for the purpose:

Provided that if for any reason, Government are unable to accept the recommendation as aforesaid they may call for further recommendations from the High Court to fill up the vacancy."

23. Rule 17 makes provision for seniority of officers in the following manner.

"17. Seniority of officers in the service shall be determined in accordance with the dates of substantive appointment to the service.

Provided that a promoted officer, who may have been allowed to continuously officiate from a date prior to the date of appointment of a direct recruit, shall, if he is subsequently substantively appointed in the service without

reversion to his parent service, take his seniority in the cadre over such direct recruit."

24. In exercise of the powers conferred by the proviso to Article 309 read with Articles 233 and 234 of the Constitution of India, the Governor of Orissa, after consultation with the High Court of Orissa, framed the rules entitled, "Orissa Judicial Service (Special Scheme) Rules, 2001" which we shall refer to as "the 2001 Rules" hereinafter. 2001 Rules were made to regulate the recruitment of judicial officers in the State on ad hoc and purely on temporary basis exclusively for implementation of the recommendations of 11th Finance Commission for upgradation of judicial administration under upgradation grant for elimination of old pending cases. The 2001 Rules define "service" in Rule 2(f) which means the judicial service of the State of Orissa. Rules 3 and 4 of these rules make provision for appointment which read as under:

"3. Appointment – Notwithstanding anything contained in the Orissa Superior Judicial Service Rules, 1963 and Orissa Judicial Service Rules, 1994 the appointment of Additional District Judges on ad hoc and purely temporary basis for implementation of the Scheme will be made under these rules.

4. (1) The appointment made under these rules shall be purely on ad hoc and temporary basis.

(2) The appointment shall be made initially for a period of one year and shall be liable to be terminated at any time without any prior notice.

(3) During the term of such appointment the appointees will be under the administrative and disciplinary control of the High Court."

25. Rule 5 of the 2001 Rules prescribes eligibility. Clause (c) of sub-rule (1) of Rule 5 is relevant which reads as follows:

"5. Eligibility. – (1) The appointment of Additional District Judges on ad hoc and purely temporary basis shall be made by the Governor on recommendation of the High Court from amongst;

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) in-service Chief Judicial Magistrates/Additional Magistrates having three years of service as such."

26. Rule 6 of the 2001 Rules provides that the selection of in-service Judicial Officers for ad hoc appointment under the scheme shall be based on scrutiny of their judgments and their service record.

27. Rule 7 of 2001 Rules provides that inservice judicial officer shall not claim regular promotion in the regular cadre on the basis of his/her appointment made under this scheme.

28. The Division Bench in the impugned judgment has observed that though the promotion of the writ petitioner in Senior Branch cadre of Superior Judicial Service was initially ad hoc but that was given to him after the High Court adjudged his suitability for promotion by following the 1963 Rules. The Division Bench observed that such ad hoc promotion was regularized vide notification dated 15.12.2003 under the 1963 Rules as the writ petitioner had rendered uninterrupted service. The Division Bench has referred to and considered the minutes of the meeting of the Full Court held on 14.12.2001 against agenda no. 3 which concerned promotion of officers of Junior Branch to the cadre of Senior Branch for their posting as ad hoc Additional District Judges against Fast Track Courts. The relevant portion of the minutes of the meeting dated 14.12.2001 referred to and considered by the Division Bench, reads as follows:

"Considered the Judicial and administrative capabilities along with C.C.Rs. of the following officers in the cadre of Orissa Superior Judicial Service (Jr. Br.) for the purpose of their promotion to the cadre of Orissa Superior Judicial Service for their posting as ad hoc Additional District Judges against Fast Track Courts (Sr. Branch).

1. Shri G.R. Purohit, Secretary, Consumer Disputes Redressal Commission, Cuttack.

2. Shri M.K. Panda, Deputy Secretary, Orissa Legal Services Authority, Cuttack.

3. Shri J.P. Das, Adviser, O.E.R.C., Bhubaneswar.

Resolved that all the above named officers are found suitable for promotion to the cadre of O.S.J.S. (Sr. Branch) and accordingly their names be recommended to the State Government for promotion to the cadre of O.S.J.S. (Sr. Branch) for their appointment against the Fast Track Courts on ad-hoc basis."

29. The Division Bench, thus, found that promotion of the writ petitioner along with two others was considered by the Full Court taking into account their judicial and administrative capabilities and the confidential reports and thereafter the name of the writ petitioner was recommended to the state government for promotion to the Senior Branch of the service and such promotion could have been granted only under the 1963 Rules. In the opinion of the Division Bench the resolution of the Full Court dated 14.12.2001 has left no ambiguity that writ petitioner was promoted to the Senior Branch cadre in Superior Judicial Service under the 1963 Rules and his promotion as ad hoc Additional District Judge cannot be treated under the 2001 Rules. The Division Bench has held that the promotion of the writ petitioner to the Senior Branch has to be counted with effect from 26.04.2002 when he joined the post initially and his subsequent regularization deserves to be considered to be

effective from that date.

30. In the impugned judgment, the Division Bench has held that the view taken by the High Court on administrative side was in ignorance of the law laid down by this Court in *Brij Mohan Lal 1*[4]. In paragraph 17 of the impugned judgment, the consideration of the matter by the High Court with reference to the Brij Mohan Lal 14 is as follows :

> "17. The aforesaid direction of the apex Court clearly lays down the mandate that the promotees' service in such Fast Track Courts shall be counted towards regular service. Moreover, the appointment of the petitioner was never on officiating basis for any particular period, but was a final selection in accordance with the Rules, 1963 and Scheme Rules 2001 and that is why the apex Court directed for filling up all the consequential vacancies in the lower cadre from which the promotions are given in Fast Track Courts simultaneously. Moreover, it was also made clear that the persons appointed under the Scheme shall get all service benefits which are applicable to the members of Judicial Service of the State on equivalent status. The State Government took cognizance and promoted the incumbents like the petitioner from the cadre of Orissa Superior Judicial Service (Junior Branch) to Orissa Superior Judicial Service (Senior Branch) by following the prescribed procedure. The opposite parties 3 and 4 joined in Orissa Superior Judicial Service (Senior Branch) as direct recruits as contemplated under Rules 5 and 8 of the Rules, 1963. They were appointed as Addl. District Judges vide Home Department Notification Nos. 2495 and 2496 dated 13.01.2003, copy of which is filed as Annexure-8 to the writ petition and the High Court notifications dated 22.1.2003, filed as Annexure-9 and 9-A respectively. The opposite parties 3 and 4 joined in their respective posts on 3.2.2003 and 7.2.2003 respectively, meaning thereby they were born in the cadre of Orissa

> Superior Judicial Service (Senior Branch) after about 10 months of the petitioner entering into such cadre on promotion to the post. But even then the opposite parties 3 and 4 were given selection grade with effect from 3.2.2008 and 7.2.2008 respectively vide Court's notification no. 79 and 80 dated 22.2.2008, copy of which is annexed as Annexure-10, thereby ignoring the claim of the petitioner with regard to his seniority. All this clearly spells out that the petitioner and other officers were superseded by the opposite parties 3 and 4 and on the other hand the petitioner was promoted to the cadre of Selection grade with effect from 22nd October, 2009 vide notification no. 899 dated 29.10.2009 of the High Court (Annexure-11) and in this manner the period of service as Addl. District Judge (Fast Track) was not taken into consideration ignoring the settled law of the apex Court."

31. The crucial question that arises for consideration in this appeal is, whether promotion of the writ petitioner as an ad hoc Additional District Judge vide Notification dated 5.1.2002 to the Senior Branch of the Superior Judicial Service for being posted in the Fast Track Court established out of 11th Finance Commission recommendations can be said to be an appointment in the Senior Branch cadre of Superior Judicial Service. The fate of the appeal depends upon answer to this question. If the answer to this question is found in the affirmative, the appeal must fail. On the other hand, appeal must succeed if the answer is in the negative.

32. It is not in dispute that immediately before writ petitioner's ad hoc promotion to the Senior Branch of Superior Judicial Service for being posted in the Fast Track Court, he was a member of the Junior Branch of the Superior Judicial Service. There is also no dispute before us that there was no cadre post available on 05.01.2002 or 26.04.2002 under the 1963 Rules. The fact of the matter is that 72 posts of ad hoc Additional District Judges (Fast Track Court) were created out

of 11th Finance Commission recommendations and these posts were to be filled up under the 2001 Rules.

33. In the backdrop of the above factual position, we shall now consider the scheme of the 1963 Rules. Rule 4 of the 1963 Rules provides that cadre of Superior Judicial Service shall consist of two branches; (i) Superior Judicial Service, Senior Branch and (ii) Superior Judicial Service, Junior Branch. There are two modes of recruitment to the Superior Judicial Service in respect of Senior Branch. These two modes prescribed in Rule 5, are, (a) by direct recruitment in accordance with Rule 8 and (b) by promotion of officers from the Junior Branch of the service. Rule 9(1) lays down that whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion, the government shall fill up the same after due consideration of the recommendation of the High Court in accordance with sub-rule (2). As per sub-rule (2) of Rule 9, the High Court shall recommend for appointment to such vacancy an officer of the Junior Branch of the service, who, in the opinion of the High Court, is the most suitable for the purpose. If the government is unable to accept the recommendation of the High Court, it may call for further recommendations from the High Court to fill up the vacancy. Rule 7 of the 1963 Rules, enables the government to fill up the vacancy in the Senior Branch of the service in consultation with the High Court either by direct recruitment or promotion. As regards the strength of direct recruits in the Senior Branch of the service, a cap is put that their number shall not exceed 25 per cent of the cadre posts mentioned in Rule 4 (2). The direct recruitment to the Senior Branch of the service is required to be made from the Bar. Rule 8 makes the complete provision about the eligibility of the candidates, reservation and the procedure for filling up the vacancies available to direct recruits to the Senior Branch of the service. Rules 7,8 and 9 of the 1963 Rules are quite significant. The position that emerges from these provisions is this : When a vacancy occurs in the Senior Branch of the service, first a decision is taken whether such vacancy is to be

filled up by promotion or direct recruitment. Obviously, while taking such decision, the cap on the number of the direct recruits has to be kept in view. If the vacancy is to be filled up by direct recruitment, Rule 8 comes into play. In case, such vacancy is decided to be filled by promotion, the procedure in Rule 9 has to be followed. In other words, for a vacancy in the Senior Branch of service to be filled by promotion, the High Court makes recommendation for appointment to such vacancy an officer of the Junior Branch of the service, who in the opinion of High Court is the most suitable for the purpose. When such recommendation is made by the High Court for filling the vacancy, either the government accepts the recommendation or if, for any reason the government is unable to accept the recommendation, it may call for further recommendations from the High Court. Thus, in the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made. It is as fundamental as this.

34. The cadre strength in Orissa Superior Judicial Service, Senior Branch has been fixed in the 1963 Rules. No ad hoc or temporary posts of Additional District Judges have been created under these Rules before 05.01.2002 or 26.04.2002. The cadre strength of Senior Branch of service has not been increased. In this view of the matter, the question of giving any promotion to the Senior Branch of service in the absence of a vacancy in the cadre does not arise.

35. It is appropriate at this stage to consider the 2001 Rules and its scheme. 2001 Rules were made to regulate the recruitment of Judicial Officers in the State of Orissa on ad hoc and purely temporary basis exclusively for implementation of the recommendations of 11th Finance Commission for upgradation of Judicial Administration under upgradation grant for elimination of old pending cases. Rule 2 of the 2001 Rules defines “service” to mean the Judicial Service of State of

Orissa. Rule 3 thereof provides that notwithstanding anything contained in the 1963 Rules and Orissa Judicial Service Rules, 1994 the appointment of Additional District Judges on ad hoc and purely temporary basis shall be made for implementation of the scheme. Rule 4 again clarifies that the appointment made under 2001 Rules is purely on ad hoc and temporary basis. It also provides that appointment under these Rules shall be made initially for a period of one year and shall be liable to be terminated at any time without any prior notice. Rule 5 of the 2001 Rules lays down the eligibility for the appointment of Additional District Judges. The appointment of the Additional District Judges under this scheme can be made from 4 sources, one of such sources is in-service Chief Judicial Magistrates/Additional Magistrates having three years of service as such. Rule 6 of these Rules provides that the selection of in-service Judicial Officers for ad hoc appointment shall be based on scrutiny of their judgments and service record. The selection shall be made on the basis of seniority-cum-merit. Rule 7 makes the provision that inservice Judicial Officer shall not claim regular promotion in the regular cadre on the basis of appointment made under this scheme.

36. As noted earlier, 72 posts of ad hoc Additional District Judges were created under the 2001 Rules to meet its objectives. These posts were not part of cadre strength of Senior Branch Service in the 1963 Rules nor by creation of these posts under the 2001 Rules, the cadre strength of the Senior Branch of service got increased. The writ petitioner's promotion as an ad hoc Additional District Judge vide Notification dated 05.01.2002 pursuant to which he joined the post of ad hoc Additional District Judge, Bargarh on 26.04.2002 is traceable wholly and squarely to the 2001 Rules. Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, we are afraid, it cannot be said that he was given appointment to the post of ad hoc Additional District Judge under the 1963 Rules. As noted above, there was no vacancy to be filled by promotion in cadre

strength of Senior Branch of the service under the 1963 Rules on that date.

37. As a matter of fact, on the representation made by the writ petitioner, the Committee advised to the Full Court of the Orissa High Court to reject the representation, inter alia, for the following reason:

> "Shri Das claims seniority over and above Shri D. Dash and Shri S. Pujhari as he was appointed as Ad hoc Addl. Sessions Judge prior to them. Shri Dash and Shri Pujhari were appointed in regular cadre vacancy of 44 against the available direct recruit quota of 2(11 being the total quota). When Shri Dash and Shri Pujhari were appointed, no quota to the promotees was available either in the cadre or in the ex-cadre (44+36). So no substantive vacancy was available for being filled up from the promotion quota. When Shri Das was not born in the cadre of substantive vacancy of District Judge (which includes cadre + ex-cadre) and also even no vacancy was available to absorb him in the cadre then, his claim for seniority in the cadre by no stretch of imagination be allowed".

38. The essence of the reason given by the Committee is that when appellants were appointed as Additional District Judges, no vacancy to be filled by way of promotion to the Senior Branch of the service was available either in the cadre or in the ex-cadre. When no vacancy was available against which the writ petitioner could have been brought into the cadre then his claim for seniority in the cadre over the appellants did not arise. The above Report of the Committee was accepted by the Full Court and the writ petitioner's representation claiming seniority over the appellants was rejected. There is no legal flaw at all in the decision of the Full Court which is founded on the above view of the Committee. In view of the admitted factual position, the proviso following the main provision in Rule 17 of the 1963 Rules does not help the writ petitioner at all.

39. The Division Bench committed two fundamental errors, one, in holding that the promotion of the writ petitioner on 05.01.2002 as Additional District Judge is under the 1963 Rules and two, that the existence of substantive vacancy in the Senior Branch cadre of Superior Judicial Service on 05.01.2002 or for that matter 26.04.2002 is wholly academic. The Division Bench overlooked the true scope of Rules 7, 8 and 9 of the 1963 Rules. In the absence of vacancy in the Senior Branch cadre of service to be filled up by promotion on the relevant date, no promotion could have been accorded on ad hoc basis or otherwise under the 1963 Rules.

40. The question of inter se seniority between promotees and direct recruits has engaged the attention of this Court on more than one occasion. In the words of Y.V. Chandrachud, C.J. in *O.P. Singla*[1], "there are many decisions bearing upon the familiar controversy between promotees and direct recruits and this will be one more. Perhaps, just another." We do not think that anybody will dispute this apt description in respect of litigations between promotees and direct recruits. In O.P. Singla1, this Court was concerned with the question of inter se seniority between promotees and direct recruits in the Judicial Service of Delhi. This Court considered the above question in light of the provisions in Delhi Higher Judicial Service Rules, 1970. Having regard to the provisions contained in Rule 2(d), the majority decision in para 21 of the Report held as under:

> 21. …….. This Rule shows that two conditions must co-exist in order that a person can become a 'Member of the Service'. Firstly, his appointment has to be in a substantive capacity and secondly, the appointment has to be to the Service, that is, to a post in the Service. Persons who hold posts bearing designations similar to the designations of posts comprised in the Service cannot, for that reason alone, become members of the Service. It is only when they are appointed in a substantive capacity to a post in the Service, that they become members of the Service."
>
> *(emphasis supplied by us)*

41. Rules 3(d), 4, 5, 7, 8 and 9 of the 1963 Rules leave no manner of doubt that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior Branch service, there is no question of any appointment being made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion.

42. A five-Judge Bench of this Court in Direct Recruit Class II Engineering Officers' Association2 was concerned with a question of seniority in service between the direct recruits and promotees amongst Deputy Engineers in the State of Maharashtra. This Court considered previous decisions of this Court, including *S.B. Patwardhan v. State of Maharashtra*[6] and *Baleshwar Dass v. State of U.P.*[7] and in paragraph 47 of the Report summed up the legal position. Clauses (A), (B) and (C) of paragraph 47 are relevant for the present purpose which read as follows:

> (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.
>
> The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
>
> (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee

6. 1977 (3) SCC 399.
7. 1980 (4) SCC 226.

continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

43. The essence of direction in clause (A) is that the seniority of an appointee has to be counted from the date of his appointment and not according to the date of his confirmation once a recruitee is appointed to a post according to rules. In other words, where initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. The writ petitioner's appointment as an ad hoc Additional District Judge is not traceable to the 1963 Rules. The simple reason leading to this consequence is that there was no vacancy available which was to be filled up by promotion on that date in Superior Judicial Service (Senior Branch).

44. In *Rudra Kumar Sain*[3], a Five-Judge Bench of this Court was again concerned with the inter se seniority between the promotees and direct recruits in the Delhi Higher Judicial Service. The contention was whether the guidelines and directions given by this Court in *O.P. Singla*[1] have been followed or not. The Court considered the 3 terms "ad hoc", "stop-gap" and "fortuitous" in the context of the service jurisprudence and in para 20 of the Report held as under:

> "20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on

> which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

45. The Division Bench in the impugned order has quoted the above paragraph from *Rudra Kumar Sain*[3] but applied it wrongly.

46. In *Brij Mohan Lal* 1[4], a three-Judge Bench of this Court, inter alia, considered the Fast Track Courts scheme. In paragraph 10 of the judgment, this Court gave various directions. Direction no. 14 in that para is relevant which can be paraphrased as follows:

(i) No right will be conferred on judicial officers in service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme.

(ii) The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre.

(iii) In case any judicial officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

47. Learned senior counsel for the writ petitioner heavily relied upon the third part of direction no. 14. As a matter of fact, this part has been relied upon in the impugned judgment as well. It is submitted on behalf of the writ petitioner that on promotion to the Senior Branch cadre of Superior Judicial Service during his tenure in the Fast Track Courts, the writ petitioner is entitled to the counting of the service rendered by him in the Fast Track Court as a service in Superior Judicial Service (Senior Branch). The submission overlooks the first two parts of direction no. 14, one, no right will be conferred in judicial service for claiming

any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme; and two, the service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In our opinion, until the vacancy occurred in the cadre of Superior Judicial Service (Senior Branch) which was to be filled up by promotion, the service rendered by the writ petitioner in the Fast Track Court cannot be deemed to be service rendered in the Superior Judicial Service, Senior Branch. Rather until then, he continued to be a member of the parent cadre, i.e., Superior Judicial Service (Junior Branch). The third part of direction no. 14, in our view, does not deserve to be read in a manner that overrides the 1963 Rules.

48. In *Brij Mohan Lal 2*[5], inter alia, the controversy centered around the closure of Fast Track Courts Scheme and the appointment of retired district and sessions judges as ad hoc judges of the Fast Track Courts. In one of the writ petitions filed before this Court, the relief was intended to ensure that only the members of the Bar were appointed by direct recruitment to the post of ad hoc district and sessions judges under the Fast Track Courts Scheme. The Court considered the directions given by this Court in Brij Mohan Lal 14. The Court observed in Brij Mohan Lal 25, that this Court had foreseen the possibility of the closure of the Fast Track Courts Scheme. The Court noted the directions given in Brij Mohan Lal 14 , inter alia, in the following manner: "…. that the service in FTCs will be deemed as service of the promoted judicial officers rendered in the parent cadre. However, no right would accrue to such recruits promoted/ posted on ad hoc basis from the lower judiciary for regular promotion on the basis of such appointment. For direct recruits, continuation in service will be dependent on review by the High Court and there could be possibility of absorption in the regular vacancy if their performance was found to be satisfactory……".

49. In *Brij Mohan Lal* 2[5], this Court with reference to the Superior Judicial Service in the State of Orissa, noted in paragraph 171 of the Report thus:

"171. Similarly, we also find no merit in the contention that this Court should quash the advertisement issued by the State of Orissa for making selections to the Orissa Higher Judicial Services on the basis of the claims for regularisation of the petitioners against such posts. There are two different sets of Rules, applicable in different situations, to these two different classes of officers and further they are governed by different conditions of service. They cannot be placed on a par. The process of their appointments is distinct and different. These petitioners have no right to the post. Thus, it would neither be permissible nor proper for the Court to halt the regular process of selection on the plea that these petitioners have a right to be absorbed against the posts in the regular cadre."

50. Then, in paragraph 176 of the Report, the Court observed that the Fast Track Court Judges were appointed under a separate set of rules than the rules governing the regular appointment to the State Higher Judicial Service. The Court noted that while appointing Fast Track Court Judges, it was clearly stipulated that such appointments would be ad hoc and temporary and that the appointees shall not derive any benefit from such appointments.

51. We have already indicated above that on 05.01.2002 or 26.04.2002, there was no vacancy in the cadre of Superior Judicial Service (Senior Branch) for being filled up by promotion. Such vacancy in the Senior Branch cadre of the service occurred on 15.12.2003 and from that date the writ petitioner has been given benefit of his service rendered in the Fast Track Court. The administrative decision by the Full Court is in accord with the 1963 Rules, the 2001 Rules and the legal position already indicated above. The view of the Division Bench in the impugned judgment is legally unsustainable. The impugned judgment is liable to be set aside and is set aside.

52. Appeal is allowed, as above, with no order as to costs.

R.P. Appeal allowed.

MODINSAB KASIMSAB KANCHAGAR
v.
STATE OF KARNATAKA & ANR.
(Criminal Appeal No. 512 of 2007)

MARCH 11, 2013.

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

Penal Code, 1860:

ss. 304-B and 498-A – Demand from husband through wife (deceased) for repayment of society loan – Held: The demand was not in connection with dowry, therefore, provisions of s.304-B were not attracted and appellant-husband acquitted of the charge – But, there is clear evidence establishing that deceased was subjected to harassment by her husband on account of her failure to meet the said unlawful demand – Therefore, conviction u/s 498-A is maintained – Appellant sentenced for the period already undergone, which is approximately 2 years.

Dowry Prohibition Act, 1961:

ss. 3, 4 and 6 read with s.5 (1), proviso – Accused-husband found guilty of demanding and receiving cash and gold – Conviction and six month sentence under each of the three counts awarded by High Court, not interfered with.

The appellant and his mother were prosecuted for committing offences punishable u/ss 498-A and 304-B read with s.34 IPC as well as u/ss 3, 4 and 6 of Dowry Prohibition Act, 1961. The prosecution case was that at the time of marriage of the appellant with the deceased, the accused demanded and were given Rs.1000/- cash and one tola of gold. Subsequently, the appellant harassed the deceased for more dowry of Rs.10,000/-. Rs.2000/- were paid and the family showed its inability to

meet the balance demand of Rs.8000/-. When the deceased came to her mother, she once again asked for the balance amount of Rs.8000/- and within 15 days thereafter she committed suicide. The trial court acquitted both the accused, but the High Court convicted the appellant of the offences charged.

Allowing the appeal in part, the Court

HELD: 1.1. The High Court has recorded its findings to hold the appellant guilty of the charges on the basis of evidence of PWs. 2,3,4,5,7 and 12. What appears to have been lost sight of by the High Court is that the demand of Rs.10,000/- was not towards dowry but for payment of a society loan. From the evidence of PW-3, the uncle of the deceased, it is clear that at the time of marriage, there was no such demand and the amount of Rs.10,000/- demanded by the appellant through the deceased was for repayment of a society loan of the appellant and it had no connection with the marriage of the appellant and the deceased. Therefore, even if, there was demand of Rs.10,000/- by the appellant, it was not a demand in connection with the dowry and the offence u/s 304B was not attracted. [para 5, 6 and 7] [362-F-G; 363-F; 364-H; 365-F]

Appasaheb and Another v. State of Maharashtra **2007 (1) SCR 164 = (2007) 9 SCC 721 – relied on.**

1.2. However, the appellant was liable for the offence u/s 498A IPC. The demand of Rs. 10,000/- towards the society loan made by the appellant may not be a demand in connection with dowry but is certainly an unlawful demand for a property or valuable security and there is clear evidence of the prosecution to show that the deceased was subjected to harassment by the appellant on account of her failure to meet the aforesaid demand of Rs. 10,000/-. [para 8] [365-G; 366-A-B]

1.3. On a reading of the evidence of the prosecution witnesses and in particular, P.Ws. 2, 3, 4, 5, 7, 10 and 12, it is evident that a sum of Rs. 1000/- in cash and one tola of gold in addition to other articles were given to the appellant at the time of marriage. Therefore, the said cash and articles have been given towards dowry. The High Court has found that the appellant was guilty of the offences u/ss 3, 4 and 6 of the Dowry Prohibition Act, 1961, but has not considered the offences to be grave and has imposed punishments for only six months for each of the offences in accordance with the proviso to sub-s. (1) of s.5 of the Dowry Prohibition Act. [para 10] [366-E-F; 367-B-C]

1.4. In the result, the conviction and sentence of the appellant u/s 304B IPC are set aside, but the conviction u/s 498A IPC and under the Dowry Prohibition Act, 1961 is maintained. The appellant is sentenced for the offence punishable u/s 498A IPC to the period already undergone, which is approximately two years. The sentence of six months' imprisonment awarded to the appellant under the Dowry Prohibition Act for each of the offences under the said Act is also maintained. [para 11] [367-D-F]

Case Law Reference:

2007 (1) SCR 164 relied on para 3

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 512 of 2007.

From the Judgment & Order dated 11.09.2006 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 805 of 2000.

Anirudh Sanganeria, B. Subrahmanya Prasad, Raghuvendra Kumar, V.K. Kunduru for the Appellant.

Vishruti Vijay, Neha Singh, Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK J. 1. This is an appeal against the judgment dated 11th September, 2006 of the Karnataka High Court in Criminal Appeal No. 805 of 2006.

2. The facts very briefly are:

2.1. The appellant was married to Rajbee on 21st April, 1997. She committed suicide on 29th March, 1998. A case was registered and investigated by the Police Inspector [Anti-Dowry Cell] and charge sheet was filed against the appellant and the mother of the appellant for offences under Sections 498A and 304B read with Section 34 IPC as well as Sections 3, 4 and 6 of the Dowry Prohibition Act read with Section 34 of IPC.

2.2. The prosecution case was that at the time of marriage of the appellant with Rajbee(the deceased), Rs. 1,000/- cash and one tola of gold was given to the appellant and thereafter the appellant harassed the deceased further for more dowry of Rs. 10,000/- and the deceased informed about this harassment to her mother. Thereafter, the mother of the deceased was able to give Rs. 2000/- towards the demand but was unable to pay the balance amount of Rs. 8000/-. The deceased came along with the appellant to her mother's place and when the appellant was told that her family does not have any capacity to meet the balance demand of Rs. 8000/-, the deceased went back to her matrimonial house weeping and saying that her life would not be safe. She came back again to her mother's place during the Holi festival and complained of harassment and once again asked for the balance amount of Rs.8000/-, but the same was not paid to her by her mother and within fifteen days of this incident, the deceased committed suicide.

2.3. At the trial, mother of the deceased was examined as P.W. 2 and two of her uncles were examined as P.W. 3 and P.W. 4 and besides them four other witnesses were examined

as P.Ws. 5, 7, 10 and 12, who all deposed about the demand of Rs. 1,000/- cash and one tola of gold as well as demand of Rs. 10,000/- and about the fact that Rs. 1,000/- cash and one tola of gold were actually given to the appellant at the time of marriage and also about the fact that out of the demand of Rs. 10,000/- made after the marriage, Rs. 2,000/- was paid but the balance of Rs. 8,000/- could not be paid because of which the deceased was harassed and she committed suicide. Nonetheless, the trial court acquitted the appellant of the charges by its judgment dated 2nd December, 1999.

2.4. Aggrieved, the State of Karnataka filed Criminal Appeal No. 805 of 2000 before the High Court and by the impugned judgment, the High Court reversed the order of the trial court only qua the appellant-husband and convicted the appellant for the offences punishable under Section 498A, 304B and Sections 3, 4 and 6 of the Dowry Prohibition Act and sentenced the appellant to undergo simple imprisonment for a period of seven years for the offence under Section 304B and in view of the sentence awarded under Section 304B, the High Court did not award any separate sentence for the offence under Section 498A. In respect of the offences under Sections 3, 4 and 6 of the Dowry Prohibition Act, the High Court sentenced the appellant to undergo simple imprisonment for a period of six months for each of the three offences.

3. Learned counsel for the appellant submitted that there was no demand for dowry by the appellant. He submitted that '1000/- and one tola of gold was given by P.W.2, the mother of the deceased to the appellant as *"Varopachara"* as has been found by the trial court on the basis of the evidence of P.W. 3, the uncle of the deceased. Regarding the demand of Rs. 10,000/-, he submitted that the evidence of P.W.3, the uncle of the deceased, is clear that after six months of marriage, the deceased demanded Rs. 10,000/- from P.W. 2, her mother, stating that there was a society loan of the appellant. He submitted that the demand of Rs. 10,000/- was, therefore, not

towards dowry but was for repayment of a society loan. He cited a decision of this Court in *Appasaheb and Another v. State of Maharashtra* (2007) 9 SCC 721 in which it has been held that some money for meeting domestic expenses and for purchasing manures cannot be treated as dowry and, therefore, the provisions of Section 304B IPC which applies to only the demand made in connection with dowry could not be attracted. He finally submitted that although all the prosecution witnesses have stated that there was harassment to the deceased in connection with the demand of '10,000/-, no specific acts of harassment or cruelty have been proved against the appellant by the prosecution.

4. Learned counsel for the State, on the other hand, supported the impugned judgment of the High Court and submitted that there was clear evidence led by the prosecution through P.Ws. 2, 3,4, 5, 7, 10 and 12 that there was demand of dowry of Rs. 1,000/- and one tola of gold at the time of marriage and further there was a demand of dowry of Rs. 10,000/- after the marriage by the appellant and that the appellant harassed the deceased on account of which the deceased had no option but to commit suicide. Learned counsel for the State vehemently submitted that this is definitely not a case in which this Court should interfere with the impugned judgment of the High Court.

5. We have examined the impugned judgment of the High Court and we find that the High Court has in para 10 of its judgment impugned herein recorded its findings to hold the appellant guilty of the charges on the basis of evidence of P.W.s. 2,3,4,5,7 and 12. Para 10 of the judgment is extracted hereunder:-

> *"It is the specific case of the prosecution that at the time of marriage of the deceased with A1 Rs. 1,000/- cash was paid along with 1 tola of gold, watch, etc. and the accused continued to demand further dowry of Rs. 10,000/- from the deceased. The evidence in this regard is spoken to*

by Pws. 2, 3,4,5,7 and 12. PW Hussainbi is the mother of the deceased and she has stated in her evidence that at the time of marriage, 1 tola of gold and Rs. 1,000/- cash was paid to the accused. She also stated that for six months following the marriage, her daughter and A1 – husband got on well, but later on, her daughter was forced to bring Rs. 10,000/- cash and in that connection, Rs. 2,000/- was paid by one Abdul Sab the younger brother of PW 2's husband and she further states that her daughter came for Ramzan festival and told about the harassment given to her and she was sent back by stating that there was no money to be paid and again her duaghter came along with A-1 after some days and at that time A-1 demanded a sum of Rs. 8,000/- and when PW2 expressed her inability to pay the said, the deceased went back weeping and saying her life may not be safe and once again came for holi festival and asked for money and was again sent back without money and after 15 days Rajbi committeed suicide in the house of her husband. PW2 has clearly stated in her evidence that her daughter committed suicide because of the harassment given by the accused."

6. What appears to have been lost sight of by the High Court is that the demand of Rs. 10,000/- was not towards dowry but for payment of a society loan. The evidence of P.W. 2 on which the High Court has heavily relied upon in the impugned judgment for convicting the appellant is clear that when the deceased came to her house on the occasion of Holi festival and she demanded money, she told her to ask from her uncle. Thus, the uncle of the deceased was the person who knew exactly what were the demands upon the deceased in connection with her marriage. The uncle of the deceased Ismailsab has been examined as P.W. 3 and his evidence is to the following effect.:-

"I know accused, Daughter of my elder brother has given in marriage to A-1. P.W. 2 is the wife of my elder brother.

I was present along with my brothers & parents at Banaginhal where marriage talks of Rajbee were held. One Ameerbee was the mediator. One tola gold Rs. 1,000/- were demanded for A-1 apart from some ornaments to Rajbee. Half tola boramala sara, 3 anas ear rings, 3 anas bugudi were put to Rajbee at the time of her marriage. 2½ or 3 months after marriage talks marriage was held between Rajbee & A-1 & as agreed valuable ornaments, cash, utensils, bed etc. were given. Dresses & watch were also given. After marriage Rajbee went to live with A-1. They were happy six months after thereafterwards Rajbee demanded Rs. 10,000/- stating there was society loan of A-1. We expressed our inability. However we consoled Rajbee that availability of amount will be seen. Again Rajbee had coem to our house on some occasion. At that time my brother had given Rs. 2,000/'- to Rajbee, stating not to disclose it to A-1 otherwise he would demand more. Again he came to our village at Holi festival and demanded remaining amount and stated she was harassed by the accused. Inability was expressed about fulfilling that demand. Rajbee went back to her husband's house weeping. On 29.3.1998 at about 5.30 p.m., received some message that there was heart to Rajbee. I alone went to their house. When all other came to Kanaginhal it was 10:00 p.m. Many persons had gathered there. That body was about to be removed to hospital. There was some mark on the neck of Rajbee. It was told Rajbee died due to stomach pain. But she had no such pain, at any time. Rajbee committed suicide due to the harassment by the accused. I have given statement before the COI & Gadag Police & also Tahsildar Marriage card & photo are marked at Ex. P.5 &6."

From the aforesaid evidence, it is clear that at the time of marriage there was no demand of Rs. 10,000/- towards society loan, and only Rs. 1,000/- in cash, one tola of gold and other

articles were demanded and were agreed and given to the appellant. It further appears from the evidence of PW 3 that after the marriage, the appellant and the deceased were happy for six months and thereafter the deceased demanded Rs. 10,000/- stating that there was a society loan of A1 (appellant) and the family expressed their inability and consoled the deceased that the availability of the amount will be seen later and again when the deceased came to her house, Rs. 2000/- was paid to her but the balance was not paid and she committed suicide due to harassment by the appellant.

7. Thus the demand of Rs. 10,000/- was not a dowry demand but was in connection with a society loan of Rs. 10,000/- of the appellant. This Court in *Appasaheb's case* (supra) has referred to the provisions of Section 304B IPC and in particular explanation appended to sub-Section (1) thereof which says that the word "dowry" under Section 304B will have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 and has held that the word "dowry" in Section 304B of the IPC would, therefore, mean 'any property or valuable security given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the parties'. In this case, the amount of Rs. 10,000/- was demanded by the appellant through the deceased was for repayment of a society loan of the appellant and it had no connection with the marriage of the appellant and the deceased. Hence, even if, there was demand of Rs. 10,000/- by the appellant, it was not a demand in connection with the dowry and the offence under section 304B was not attracted.

8. We are, however, of the view that the appellant was liable for the offence under Section 498A IPC. Section 498A read with Explanation (b) thereto provides that if a husband of a woman subjects the woman to harassment with a view to coerce her or any person related to her to meet any unlawful demand for property or valuable security he shall be liable with punishment for a term which may extend to three years and shall

also be liable to fine. The demand of Rs. 10,000/- towards the society loan made by the appellant, thus, may not be a demand in connection with dowry but is certainly an unlawful demand for a property or valuable security and there is clear evidence of the prosecution to show that the deceased was subjected to harassment by the appellant on account of her failure to meet the aforesaid demand of Rs. 10,000/-.

9. Regarding the offences under the Dowry prohibition Act, 1961, Section 2 of the Act defines 'dowry' to mean -

> "any property or valuable security given and agreed to be given either directly or indirectly -
>
> (a) by one party to the marriage to the other party to the marriage; or
>
> (b) by the parents of either party to a marriage or by another person, to either party to a marriage or by another person to either party to the marriage or to any other person on or before any time of the marriage.

10. On a reading of the evidence of the prosecution witnesses and in particular, P.Ws. 2, 3, 4, 5, 7, 10 and 12, we find that a sum of Rs. 1000/- in cash and one tola of gold in addition to other articles were given to the appellant at the time of marriage. Hence, the aforesaid cash and articles have been given towards dowry. Sub-section (1) of Section 3 of the Dowry Prohibition Act provides that if any person, after the commencement of the Act, gives or takes or a bets the giving or taking of dowry, he shall be punishable for the term mentioned therein. Sub-section (2) of Section 3, however, states that nothing in Sub-section (1) of Section 3 - (a) in relation to presents which are given at the time of marriage to the bride; and (b) presents which are given at the time of marriage to the bride groom. The proviso under Clauses (a) and (b) of Sub-section (2), however, states that such presents must be entered in a list maintained in accordance with the

rules made under this Act. Hence the Section clearly intends to exempt presents which are given at the time of marriage to the bride or the bride groom from the prohibition against dowry under the Act. Perhaps for this reason, the trial Court has taken a view that if anything was given to the appellant in the form of *"Varopachara"* such payment may not attract the provisions of the Dowry Prohibition Act. The High Court, however, has found that the appellant was guilty of the offences under Sections 3, 4 and 6 of the Dowry Prohibition Act, 1961, but has not considered the offences to be grave and has imposed punishments for only six months for each of the offences in accordance with the proviso to Section 5(1) of the Dowry Prohibition Act. Considering the lenient view taken by the High Court of the offences under the Dowry Prohibition Act, 1961, we are not inclined to interfere with the findings of the High Court in respect of the offences under the said Act.

11. In the result, we set aside the conviction of the appellant under Section 304B IPC and the sentence thereunder but maintain the conviction of the appellant under Section 498A IPC and under the Dowry Prohibition Act, 1961. We maintain the sentence of six months' imprisonment awarded to the appellant under the Dowry Prohibition Act for each of the offences under the said Act and award sentence of approximately two years which the appellant is stated to have already undergone for the offence under Sections 498A IPC and further direct that the sentences under Section 498A IPC as well as the offences under the Dowry Prohibition Act, 1961 will run concurrently.

12. The appeal is allowed to the aforesaid extent. The bail bonds stand discharged.

R.P. Appeal allowed.

JOSEPH JOHN PETER SANDY

v.

VERONICA THOMAS RAJKUMAR & ANR.

(Civil Appeal Nos. 2178-2179 of 2004 etc.)

MARCH 12, 2013

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

SPECIFIC RELIEF ACT, 1963:

s.26 – Suit for rectification of settlement deeds – Held: Appellant could not have filed the suit for rectification of settlement deed, as there was no mistake in its understanding or execution by the parties – It was only the father of the parties who could have sought rectification of the deed, but he was neither impleaded, nor examined before the trial court, though he was still alive at the time of institution of the suit – As respondent no. 1 was not a party to the alleged rectification deed, she was not bound by it – Besides, the memorandum of agreement relied upon by the plaintiff has not been proved – Evidence – Onus of proof.

CONTRACT ACT, 1872:

s.16 – Contract induced by undue influence – Held: High Court has come to the conclusion that it was a case of undue influence, as on the date of executing the alleged document, i.e. Memorandum of agreement, respondent no.1 was unmarried and was dependent on her father and brother for settling her marriage and for sustenance – She having contended that plaintiff was in a position to dominate her will, the alleged document was termed as an unconscionable – The said document was clouded with suspicious and unexplained circumstances.

The father of the appellant and respondent no. 1 executed two registered settlement deeds on 27.8.1981 transferring House No. 23 in the name of his daughter (respondent No. 1) and House No. 22 in the name of his son (the appellant). The appellant filed O.S.No. 6331 of 1983 on 12.9.1983 for issuance of direction to defendant/ respondent no.1, to execute a Deed of Rectification and further to restrain her from interference with the appellant's possession of the suit property. It was the case of the plaintiff-appellant that after the settlement deed dated 27.8.1981, the father of the parties realised that House No. 23 which was given to the daughter, ought to have been given to him and House No. 22 to the daughter. Thus, the parties to give effect to the real intention of their father decided to exchange the properties given to them, and in furtherance thereof, executed an Agreement Deed to exchange the same on 1.6.1982 (Ext. A-3), but respondent no. 1 failed to give effect to the same. During the pendency of the suit, the settler and the appellant were stated to have executed a Rectification Deed (Ext.A-6) on 8.10.1983 by which the property in Door No.23 was given to the appellant. The said deed was signed by two witnesses. Respondent no.1/defendant filed suit O.S. No. 415 of 1984 for declaration that the agreement dated 1.6.1982 (Ext.A-3), an unregistered document, was null and void, being a forged document, and that she, under undue influence, put her signature on the blank non-judicial stamp papers. The trial court decreed the appellant's suit and dismissed that of respondent no.1. However, the High Court allowed both the appeals filed by respondent no.1.

Dismissing the appeals, the Court,

HELD: 1.1. Section 26 of the Specific Relief Act, 1963 has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual

mistake of the parties, the real intention of the parties is not expressed in relation to an instrument. Such rectification is permissible only by the parties to the instrument and by none else. [para 7] [378-D-E]

Subhadra & Ors. v. Thankam, **2010 (8) SCR 299 = AIR 2010 SC 3031;** *State of Karnataka & Anr. v. K. K. Mohandas & etc,* **2007 (8) SCR 697 = AIR 2007 SC 2917 – relied on.**

1.2. In the instant case, as respondent no. 1 was not a party to the document Ext A-6, she was not bound by it. Also, the appellant could not have filed the suit for rectification of settlement deed, as there was no mistake in the understanding or execution by the parties. It was only the father of the parties who could have sought rectification of the deed, but he was neither impleaded, nor examined before the trial court, though he was still alive at the time of institution of the suit. Even the appellant failed to examine the witnesses to the document Ext.A-3. [para 4] [377-C-D]

1.3. There is no dispute that by the settlement deed dated 27.8.1981, the father of the parties had given House No. 23 admeasuring 2413 Sq. Ft. to the daughter – respondent no.1 and House No. 22 admeasuring 730 Sq. Ft. to the son – appellant. None of the attesting witnesses to these documents had been examined by either of the parties, to ascertain whether father of the parties, had expressed any intention in respect of the properties before them. Ext.A-6 dated 28.10.1983 an unregistered document by which the father had expressed his will that House No. 23 should be given to the son – appellant, is subsequent to Exts.A1 and A2. The appellant has examined one of the attesting witnesses but the High Court came to the right conclusion that as respondent no.1 was not a party to the document, it has no effect, whatsoever in law, on the case. [para 20] [384-D-F]

1.4. In the Memorandum of Agreement dated 1.6.1982, it is stated that mistakes, in the settlement deed made by the father, of the parties having been discovered only in the last week of May 1982, the parties, have decided to rectify the error and for that purpose, they would execute and register necessary documents to rectify the mistake. Thus, the document Ex.A-3 cannot be read as an "agreement to exchange." It can be read only as a rectification deed, which could have been done only by the settlor and not by the contesting parties. Considering the respective area of the properties bearing nos.22 and 23, the contract can definitely be held "unconscionable". [para 20 and 27(viii)] [384-G-H; 385-A; 388-F]

2.1. Section 16 of the Contract Act, 1872 provides that a contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other. [para 7] [378-F-G]

Bishundeo Narain & Anr. v. Seogeni Rai & Jagernath **1951 SCR 548 = AIR 1951 SC 280;** *Ladli Prashad Jaiswal v. The Karnal Distillery Co. Ltd., Karnal & Ors,* **1964 SCR 270 = AIR 1963 SC 1279;** *Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors.,* **1967 SCR 331 =AIR 1967 SC 878;** *Afsar Shaikh & Anr v. Soleman Bibi & Ors.* **1976 (2) SCR 327 = AIR 1976 SC 163 – relied on.**

Poosathurai v. Kannappa Chettiar, **AIR 1920 PC 65 – referred to.**

2.2. In the instant case, High Court came to the conclusion that it was a case of undue influence as on the date of executing the alleged document Ext.A-3,

respondent no.1 was unmarried and was dependent on her father and brother for settling her marriage and for sustenance, and, as such, the plaintiff was in a position to dominate her will. It was a case, wherein, after obtaining the signatures of respondent no.1 on some papers, the document had been scribed. With respect to the document, the High Court held that the said document Ext.A-3 being a typed document, ought to have contained the name of the person who had scribed it. It further reasoned that the language used therein suggests that it was drafted by an expert in the field and thus, the whole document is clouded with suspicion and unexplained circumstances. [para 24] [386-B-E]

Madan Mohan Singh & Ors v. Rajni Kant & Anr, **2010 (10) SCR 30 =AIR 2010 SC 2933;** *State of Bihar & Ors. v. Radha Krishna Singh & Ors.,* **AIR 1983 SC 684;** *H.Siddiqui (dead) by Lrs. v. A. Ramalingam* **2011 (5) SCR 587 = AIR 2011 SC 1492;** *Laxmibai (dead) thr. Lrs. & Anr v. Bhagwantbuva (dead) thr Lrs. & Ors.,* **JT 2013(2) SC 362 – relied on.**

Hari Singh v. Kanhaiya Lal **1999 Suppl. (2) SCR 216 = AIR 1999 SC 3325 – referred to.**

2.3. It is crystal clear that even though the document may be admissible, still its contents have to be proved. In the instant case, as the appellant did not examine either the attesting witnesses of the document, nor proved its contents no fault can be found with the judgment of the High Court. Neither of the party has examined the attesting witness to document Ext.A-3. Such a witness could have explained the conduct of the parties and deposed as to who had prepared Ext. A-3. The trial court had reasoned that, even though the appellant did not examine the attesting witness of Ex.A-3, the defendant could have done it and prove the

allegations she had made against her brother – appellant, and thus in the process had wrongly shifted the burden of proof. [para 22, 26 and 27(1)] [385-D; 386-G-H; 387-C]

Thiruvengada Pillai v. Navaneethammal & Anr, **2008 (3) SCR 23 = AIR 2008 SC 1541;** *K. Laxmanan v. Thekkayil Padmini & Ors.,* **2008 (16) SCR 1117 = AIR 2009 SC 951; and** *Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors.* **2003 Suppl. (3) SCR 496 = AIR 2003 SC 4351 – referred to.**

2.4. Document Ex. B3 dated 29th July 1983 is subsequent to document Ex.A-6, wherein settlor wrote to respondent No.1 that he had given Door No.23 to her. Thus, the settlor never intended otherwise. [para 27(vi)] [388-C]

Case Law Reference:

2010 (8) SCR 299	**relied on**	**para 6**
2007 (8) SCR 697	**relied on**	**para 6**
1951 SCR 548	**relied on**	**para 8**
AIR 1920 PC 65	**referred to**	**para 9**
1964 SCR 270	**relied on**	**para 10**
1967 SCR 331	**relied on**	**para 11**
1976 (2) SCR 327	**relied on**	**para 12**
1999 (2) Suppl. SCR 216	**referred to**	**para 13**
AIR 1983 SC 684	**relied on**	**para 14**
2010 (10) SCR 30	**relied on**	**para 15**
2011 (5) SCR 587	**relied on**	**para 15**
JT 2013(2) SC 362	**relied on**	**para 15**

2008 (3) SCR 23	**referred to**	**para 16**
2008 (16) SCR 1117	**referred to**	**para 17**
2003 (3) Suppl. SCR 496	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2178-2179 of 2004.

From the Judgments & Orders dated 16.07.2003 of the High Court of Judicature at Madras in A.S. No. 1104 of 1987 and Transferred A.S. No. 1120 of 2001.

WITH

C.A. Nos. 2184-2185 of 2004.

R. Balasubramanian, S. Nanda Kumar, R. Satish Kumar, Parivesh Singh Anjali Chauhan, Karunakaran, S.K. Bandhyopadhya, Rakesh K. Sharma, V.N. Raghupathy for the Appellant.

Shyam Nandan, Neha Aggarwal, Karun Mehta, W. Aman, Varun Tandon, Subramonium Prasad for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and decree dated 16.7.2003 passed by the High Court of Madras in A.S. No. 1104 of 1987 and Transferred A.S. No. 1120 of 2001, wherein it has set aside the judgment and decree of the trial court which had decreed the suit of the appellant and dismissed the suit of the respondent No.1.

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

A. The contesting parties are the son and the daughter of late B.P. Sandy. Though late B.P. Sandy had several children, considering his old age, he decided to transfer/settle his two

houses bearing nos.22 and 23, Peria Palli Street, Raja Annamalai Puram, Chennai-28 in favour of his youngest son and daughter (the contesting parties herein) respectively. Therefore, the father of the parties executed two registered settlement deeds on 27.8.1981 bearing nos. 1690/81 and 1691/81 at the office of Sub-Registrar, Mylapore, Chennai, transferring House No. 23 in the name of his daughter (Respondent No. 1) and House No. 22 in the name of his son (Appellant).

B. It is alleged by the appellant that the father of the parties had only at a later point of time realised that the House No. 23 which was given to the daughter, ought to have been given to him and House No. 22 to the daughter. Thus, the parties to give effect to the real intention of their father decided to exchange the properties given to them, and in furtherance thereof, executed a Agreement Deed to exchange the same on 1.6.1982. The said document was witnessed by Sheila Doss and Mrs. Mary Doss, who were neighbours and teachers and colleagues of the daughter – respondent no.1. Since, the said agreement dated 1.6.1982 (Ex.A-3) had not been given effect to by the respondent no.1, the appellant filed O.S.No. 6331 of 1983 on 12.9.1983 in the court of City Civil Judge, Chennai, for issuance of direction to the defendant/respondent no.1, to execute a Deed of Rectification and further to restrain her from interference with the appellant's possession of the suit property. During the pendency of this suit, Shri B.P. Sandy and the appellant executed a Rectification Deed (Ex.A-6) on 8.10.1983 by which property in Door No.23 was given to the appellant. The said deed was signed by two witnesses Susan Muthu and A. Bernard. The respondent no.1/defendant filed suit O.S. No. 415 of 1984 before the same court for declaration that the agreement dated 1.6.1982 (Ex.A-3), an unregistered document, was null and void, being a forged document, and that she has under undue influence put her signature on the blank non-judicial stamp papers.

C. The trial court decided both the suits together vide judgment and decree dated 21.8.1986 by way of which the appellant's suit was decreed and that of respondent no.1 was dismissed.

D. Aggrieved, the respondent no.1 filed an appeal before the learned District Judge, however, it was subsequently transferred to the High Court and the High Court has allowed both the appeals filed by respondent no.1.

It may also be pertinent to mention here that during the pendency of the appeals, the appellant got the Trial Court decree executed through the court and subsequently sold the property no.23 to the respondent no.2.

Hence, these appeals.

3. Shri R. Balasubramanian, learned senior counsel appearing for the appellant, has submitted that the High Court has committed an error in interpreting the statutory provisions of law and it was not necessary, that the agreement between the parties, tantamount to an agreement to sell, may be a registered document as required under Section 17 of the Registration Act or by any provision of the Transfer of Property Act and, therefore, the High Court erred in holding the Ex.A-3 was inadmissible and inoperative in law. Once the document (Ex.A-3) had been admitted in the evidence without any objection being raised, its contents were bound to be admitted and relied upon. In fact, the said document had been executed by the parties in order to give effect to the real intention of their father. Therefore, the question of undue influence could not have been inferred. The judgment of the trial court ought not to have been reversed by the appellate court. The parties having jointly taken a loan, an agreement was reached between the parties that in consideration for the appellant paying the entire loan taken for the marriage and maintenance of the respondent no.1, she would transfer the property stood in her name. Thus, the appeals deserve to be allowed.

4. Shri Shyam D. Nandan, learned counsel appearing on behalf of the respondent No.1, has submitted that the High Court has rightly reversed the judgments and decree of the trial court interpreting and applying the statutory provisions in correct perspective. It was a clear cut case of undue influence. The Rectification Deed (Ex.A-6) executed by the father and appellant ought not to have been given effect to.

In the instant case, as the respondent no. 1 was not a party to the document Ex.A-6, she was not bound by it. Also, the appellant could not have file the suit for rectification of settlement deed– Ex.A-1, as there was no mistake in the understanding or execution by the parties. The father of the parties was neither impleaded, nor examined before the trial court, though he was still alive at the time of institution of the suit. Even the appellant failed to examine the witnesses to the document Ex.A-3. He examined only Shri A. Bernard, the witness of document (Ex.A-6), who had no bearing to the instant case. Thus, the appeals lack merit and are liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the records. Before entering into merits of the case, it is desirable to examine the legal issues.

LEGAL ISSUES :

I. Section 26 of Specific Relief Act, 1963:

Section 26 of the Special Relief Act 1963 (hereinafter referred to as 'Act') provides for rectification of instruments, where through fraud or a mutual mistake of the parties, an instrument in writing does not express the real intention, then the parties may apply for rectification. However, clause 4 thereof, provides that such a relief cannot be granted by the court, unless it is specifically claimed.

6. In *Subhadra & Ors. v. Thankam,* AIR 2010 SC 3031, this Court while deciding upon whether the agreement suffers

from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases. The provisions of this Section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed **where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument.**

A similar view has been reiterated by this Court in *State of Karnataka & Anr. v. K. K. Mohandas & etc,* AIR 2007 SC 2917.

7. Thus, in view of the above, it can be held that Section 26 of the Act has a limited application, and is applicable only where it is pleaded and proved that through fraud or mutual mistake of the parties, the real intention of the parties is not expressed in relation to an instrument. Such rectification is permissible only by the parties to the instrument and by none else.

II. Undue influence - Section 16 of Contract Act, 1872:

Section 16 of the Contract Act provides that a contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.

8. In *Bishundeo Narain & Anr. v. Seogeni Rai & Jagernath,* AIR 1951 SC 280, while dealing with the issue, this Court held:

"….in cases of fraud, 'undue influence' and coercion, the parties pleading it must set forth full particulars and the

case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

9. The Privy Council in *Poosathurai v. Kannappa Chettiar,* AIR 1920 PC 65, reasoned that it is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue'.

10. In *Ladli Prashad Jaiswal v. The Karnal Distillery Co. Ltd., Karnal & Ors,* AIR 1963 SC 1279, this Court held:

"The doctrine of 'undue influence' under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English common law. The first sub-section of S.16 lays down the principle in general terms. By sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a

person who has obtained an advantage over another by dominating his will may also remain in a position to suppress the requisite evidence in support of the plea of undue influence."

11. In *Subhash Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors.,* AIR 1967 SC 878, this Court held that the Court trying the case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee, such that the donee is in a position to dominate the Will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these two issues a third point emerges, which is that of the onus probandi. If the transaction appears to be **unconscionable,** then the burden of proving that the contract was not induced by undue influence lies upon the person who is in a position to dominate the Will of the other. It was further said that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises.

12. In *Afsar Shaikh & Anr v. Soleman Bibi & Ors.,* AIR 1976 SC 163, this Court held:

"The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. Sub-section (3) of Section 16 contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on the ground of undue influence proves-

(a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and

(b) that the transaction is unconscionable,

the burden shifts on the party benefiting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be discussed presently, in the instant case the first condition had not been established; and consequently, the burden never shifted on the defendant. The Privy Council in *Raghunath Prasad v. Sarju Prasad,* (AIR 1924 PC 60) expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point, 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached - namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi. *If the transaction appears to be unconscionable,* then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties. Were they such as to put one in a position to dominate the will of the other"

(Emphasis added)

13. If there are facts on the record to justify the inference

of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the Court has to see is that there is no surprise to the defendant. In Hari Singh v. Kanhaiya Lal, AIR 1999 SC 3325, it was held that mere lack of details in the pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties.

III. <u>ADMISSIBILITY OF A DOCUMENT:</u>

14. In *State of Bihar & Ors. v. Radha Krishna Singh & Ors.,* AIR 1983 SC 684, this Court held as under:

> "Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil....
>
> Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.
>
> The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

15. Reiterating the above proposition in *Madan Mohan Singh & Ors v. Rajni Kant & Anr,* AIR 2010 SC 2933, this Court held that a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. (See Also : *H.Siddiqui (dead) by Lrs. v. A.Ramalingam* AIR 2011 SC 1492; *Laxmibai (dead) thr. Lrs. & Anr v. Bhagwantbuva (dead) thr Lrs. & Ors.,* JT 2013(2) SC 362)

IV. ONUS OF PROOF:

16. In *Thiruvengada Pillai v. Navaneethammal & Anr.,* AIR 2008 SC 1541, this Court held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The first appellate Court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

17. In *K. Laxmanan v. Thekkayil Padmini & Ors.,* AIR 2009 SC 951, this Court held that when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator.

18. In *Krishna Mohan Kul @ Nani Charan Kul & Anr. v. Pratima Maity & Ors.,* AIR 2003 SC 4351, it was held that when fraud, mis-representation or undue influence is alleged by a

party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence.

19. The instant case is required to be exercised in the light of the aforesaid settled proposition of law.

20. There is no dispute that by the settlement deed dated 27.8.1981, late Shri B.P. Sandy had given House No. 23 admeasuring 2413 Sq. Ft. to the daughter – respondent no.1 and House No. 22 admeasuring 730 Sq. Ft. to the son – appellant. None of the attesting witnesses to these documents had been examined by either of the parties, to ascertain whether late B.P. Sandy, father of the parties, had expressed any intention in respect of the properties before them. Ex.A-6 dated 28.10.1983 a unregistered document is subsequent to Exs.A1 & A2, by which the father had expressed his will that House No. 23 should be given to the son – appellant. The appellant has examined one of the attesting witnesses Shri A. Bernard but the High Court came to the right conclusion that as the respondent no.1 was not a party to the document, it has no effect, whatsoever in law, on the case. Thus, in such a fact-situation, it remains to be seen as what is the effect of document dated 1.6.1982 Ex.A-3, the Memorandum of Agreement, and as to whether it had been obtained by the appellant by undue influence. In the document, it is stated that **mistakes**, in the settlement deed made by their father, having been discovered only in the last week of May 1982, the parties, have decided to **rectify** the error and for that purpose, they would execute and register necessary documents to **rectify** the

mistake. The intention behind such rectification being, to make the appellant entitled to House No.23 and respondent No.1 to House No. 22.

21. Before the trial court, only the parties and Shri A. Bernard, the attesting witness to the Deed (Ex.A-6), were examined. The appellant also did not examine his father who was alive till 26.12.1983. The appellant could have taken resort to the provisions under Order XVIII Rule 16 of the Code of Civil Procedure, 1908, to examine this witness immediately. The examination of Shri A. Bernard, (PW-2) as to the genuineness of Ex.A-6 was a futile exercise, as the said document could not have any bearing on the decision of the case.

22. The trial court had reasoned that, even though the appellant did not examine the attesting witness of Ex.A-3, the defendant could have done it and prove the allegations she had made against her brother – appellant, and thus in the process had wrongly shifted the burden of proof. The Court, further held that it was the appellant who had wanted to get Ex.A-3 executed, thus, onus to prove was on him, had he discharged the same, only then it could be shifted to the respondent no.1/ defendant.

23. The court further held that as the respondent was an educated woman and was serving as a teacher, her allegation of undue influence to sign on blank non-judicial stamp papers, cannot be relied upon and, thereby concluded that Ex.A-3 was a document executed by her voluntarily and by free will and, hence, it was binding on her and it was not permissible for her to say that it was a forged document.

The learned trial court had also taken note of a letter dated 19.7.1983 (Ex.B-3) written by the father of the parties to respondent no.1 in which it was stated that he had given her House No. 23. However, the said letter was simply brushed aside by the court without giving any reason whatsoever.

24. The High Court while dealing with the above issues, came to the conclusion that Ex.A-6 was totally incongruous to

the natural human conduct and if the settlor i.e. the father of the parties, had so intended to rectify the mistake, he could have very well registered the rectification deed. The court further held that once the Trial Court came to the conclusion that Ex.A-6 was not worth of acceptance, it was not permissible for it to grant an equitable relief of rectification of deed. After relying upon a large number of judgments of this Court, the High Court further came to the conclusion that it was a case of undue influence and as on the date of executing the alleged document Ex.A-3, the respondent no.1 was unmarried and was dependent on her father and brother for settling her marriage and for sustenance, as her marriage was solemnised only on 1.6.1983. The respondent no.1 having contended that the plaintiff was in a position to dominate her will, thus, the document Ex.A-3 was termed as an unconscionable. It was a case, wherein, after obtaining the signatures of the respondent no. 1 on some papers, the document had been scribed. With respect to the document, the High Court held that the said document Ex.A-3 being a typed document, ought to have contained the name of the person who had scribed it. It further reasoned that the language used therein suggests that it was drafted by an expert in the field and thus, the whole document is clouded with suspicion and unexplained circumstances.

25. The High Court further held that Ex.A-3 being an unregistered document, could not have been relied upon and it had wrongly been admitted. In our opinion, such a view may not be legally correct. However, reversal of the said finding would not tilt the balance in favour of the appellant.

26. In view of the law referred to hereinabove, it is crystal clear that even though the document may be admissible, still its contents have to be proved and in the instant case, as the appellant did not examine either the attesting witnesses of the document, nor proved its contents, no fault can be found with the judgment impugned before us. Section 26 of the Act, provides for rectification of a document if the parties feel that they have committed any mistake. Also, it was only, the father

of the parties who could have sought rectification of the deed. Mere rectification by parties herein does not take the case within the ambit of Section 26 of the Act. Taking note of the statutory provisions of Section 16 of the Contract Act and the parameters laid down by this Court for application of doctrine on undue influence, the High Court has reached a correct conclusion.

27. In view of the above, we reached the following inescapable conclusions:

(i) Neither of the party has examined the attesting witness to document Ex.A-3. As such a witness could have explained the conduct of the parties and deposed as to who had prepared the document Ex.A-3.

(ii) It is evident from the language of the deed (Ex.A-3) that it has been prepared either by a lawyer or a deed writer.

(iii) The said document (Ex.A-3) does not bear either the signature, or the address of the scribe. The appellant has also not examined the scribe, nor has he disclosed who such person was. This would have revealed the correct position with respect to whether the respondent no.1 had signed blank papers, or whether she had come to him for the execution of the document with the attesting witnesses and appellant. Additionally, the scribe could have explained who had bought the non judicial stamp paper for the document Ex. A-3.

(iv) The consideration for executing document (Ex.A-3) seems to be the redemption of the property mortgaged jointly by both the parties, to one Advocate Krishnaswamy, with whom the deeds of title Ex.A1 and Ex.A2 had been kept as security. The said mortgagee has not been examined by the appellant to show as to whether the respondent No.1 was also a party to the mortgage and who had placed the title deed of her property with him.

(v) In his examination-in-chief, the appellant had made a false statement that he was not made aware of the settlement

deed Ex.A-1 till 26th June of 1982, as it was given to him by his mother on that date before her death. Such a statement stands completely falsified, as the document Ex.A-1 reveals, that he had been put in possession by his father, with the permission of respondent No.1 , as the property in Door No.23 had been given to her and it was made clear that the respondent No .1 had absolute right of enjoyment to the said property.

(vi) Document Ex. B3 dated 29th July 1983 is subsequent to document Ex.A-6, wherein settlor Mr. Sandy had written to respondent No.1 that he had given Door No.23 to her. Thus, the settlor never intended otherwise.

(vii) The document Ex.A3 shows that the **mistake** was discovered in the last week of May 1982. So it was agreed to **rectify** the error, therefore the parties undertook the same as a rectification under Section 26 of the Act. In the written statement filed by the appellant, in the suit filed by the respondent No.1 , Paragraph no. 7 & 9 refers to the mistake and also, the rectification. Thus, the document Ex.A-3 cannot be read as an "agreement to exchange." It can be read only as a rectification deed, which could have been done only by the settlor and not by the contesting parties.

(viii) Considering the respective area of the properties bearing nos.22 and 23, the contract can definitely be held "unconscionable".

28. In view of the above, we are of the considered opinion that appeals are devoid of any merit. The same are accordingly dismissed. No costs.

CIVIL APPEAL NOs. 2184-2185 OF 2004

These appeals are squarely covered by the aforesaid decision in the main matters i.e. C.A No. 2178-2179 of 2004. The same are, accordingly, dismissed.

R.P. Appeals dismissed.

ESCORTS LTD.
v.
UNIVERSAL TRACTOR HOLDING LLC
(Special Leave Petition (Civil) No. 35092 of 2012)

MARCH 13, 2013

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

Arbitration and Conciliation Act, 1996 - ss.48(1)(e) and 202 - New York Convention, as adopted under the Act - Respondent-company and Escorts AMI were respectively holding 49% and 51% shares in another company, "BCH"- Agreement whereby respondent sold its shareholding in BCH to Escorts AMI for a price to be paid in installments - Escorts AMI defaulted in payment of installments - Suit filed by respondent against Escorts AMI in a North Carolina Court in the United States - Consent order passed therein wherein both the parties agreed to refer the matter to arbitration - Arbitration followed by award in favour of the respondent - Respondent sought execution of that award by filing execution petition in India, since the Escorts AMI subsequently merged with the petitioner - Execution objected to by the petitioner, and those objections rejected by the High Court - Whether under the terms of agreement, it was necessary for the respondent to go for confirmation of the award in the concerned Court in United States and unless a confirmation of the award by the foreign Court was obtained, the award could not be executed in India - Held: Even as per the requirement of the US Law, a notice of three months is required to be given in case a party does not want the award to be enforced - In the instant case, the consent order clearly recorded that the award given by the arbitrator shall be final and binding on the parties - If the petitioner wanted to dispute it, it was required of them to have issued necessary notice which it had not done - The submission that the respondent ought to proceed for

confirmation of the award under the US Law and then come to India for execution is not tenable in view of the changed law and doing away of the rule of double excequatur - Federal Arbitration Act of U.S. - s.9.

Oil and Natural Gas Commission vs. Western Company of North America **(1987) 1 SCC 496: 1987 (1) SCR 1024 and** *Harendra H. Mehta an Ors. Vs. Mukesh H. Mehta and Ors.* **(1995) 5 SCC 108 - referred to.**

Russeel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd. and Others **(1991) Vol. 2 Lloyd's Law Reports 625 and** *Florasynth, Inc. v. Alfred Pickholz* **750 F. 2d 171 - referred to.**

Case Law Reference:

1987 (1) SCR 1024	**referred to**	**Para 5**
(1991) Vol. 2 LLR 625	**referred to**	**Para 7**
750 F. 2d 171	**referred to**	**Para 7**
(1995) 5 SCC 108	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 35092 of 2012.

From the Judgment and Order dated 13.07.2012 of the High Court of Delhi at New Delhi in Exp. No. 372 of 2010.

Parag P. Tripathi, Simran Mehta, Chanchal Kumar Ganguli, Yogita Sunari, Vipul Sharma for the Petitioner.

Dharmendra Rautray, Tara Shahani, Meera Mathur for the Respondent.

The following order of the Court was delivered

O R D E R

1. This special leave petition seeks to challenge the

judgment and order dated 13th July, 2012 passed by the learned Single Judge of the Delhi High Court in Execution Petition No.372 of 2010.

2. The short facts leading to this petition are this wise: The respondent herein and Escorts Agri Machinery Inc., ("Escorts AMI") which was a subsidiary of the petitioner, were holding following percentage of shares in another company, by name, Beever Creek Holdings ("BCH"). The respondent held 49% of shares and Escorts AMI held 51%. There was an agreement between the two parties whereby the respondent sold its shareholding in BCH for a price of Rs.1.2 Million Dollars which was to be paid in four installments. The Escorts AMI paid the first two installments but defaulted in the payment of the other two. This led to a suit being filed by the respondent in the Wake Country Superior Court in the State of North Carolina, USA. A consent order was passed therein on 19th June, 2009, wherein both the parties agreed to refer the matter to arbitration. The arbitration was followed by an award in favour of the respondent herein. The respondent sought the execution of that award by filing the aforesaid execution petition in India, since the Escorts AMI has subsequently merged with the petitioner herein. The execution was objected to by the petitioner, and those objections have been rejected by the impugned order. Therefore, this special leave petition has been preferred by Escorts Limited.

3. The main submission of Mr. Parag Tripathi, learned senior counsel appearing for the petitioner is that under the terms of agreement, it was necessary for the respondent to go for confirmation of the award in the concerned Court in United States. He relied upon paragraphs 2 and 8 of the consent order dated 19th June, 2009. These two paragraphs read as under:

> "2. The case will be stayed from the date and time of entry of this Order until completion of arbitration between plaintiff and EAMI. Upon the issuance of a decision by the arbitrators, this Court may confirm and enter judgement upon such decision in accordance with the Federal Arbitration Act and may conduct such further proceedings as are necessary to resolve plaintiff's claims against Escorts Limited."
>
> "8. The plaintiff agree that entry of this order resolves defendants motion to dismiss. The Court shall retain jurisdiction for the purposes of entering an order confirming the arbitration decision pursuant to the Federal Arbitration Act."

4. The submission of Mr. Tripathi is that unless a confirmation of the award by the foreign Court was obtained, the award could not be executed in India. He relied upon Section 9 of the Federal Arbitration Act of U.S. which reads as follows:

> "& 9. Award of arbitrators; confirmation; jurisdiction; procedure
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application maybe made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party

or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."

5. Mr. Tripathi submitted that ultimately what one has to see is whether the consent award was a binding one as required under Section 48(1)(e) of the Arbitration and Conciliation Act, 1996 and that unless a confirmation of the award was obtained, the award could not be said to be binding and, therefore, not executable in India. Mr. Tripathi referred to and relied upon paragraph 15 of the judgment of this Court in *Oil and Natural Gas Commission Vs. Western Company of North America,* (1987) 1 SCC 496, wherein this Court held that recognition and enforcement of the award will be refused if the award has not become binding on the parties.

6. Mr. Rautray, learned counsel appearing for the respondent, on the other hand, pointed out that the relevant Section of the Federal US Law is concerning the domestic awards and when it comes to foreign awards, there is a separate chapter under the US Law and in that behalf he referred to Section 202 of the said Act which reads as follows:

"202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one

or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

7. He pointed out that the requirement of this double excequatur has been removed in view of the provisions of the New York Convention which has been now adopted under the Arbitration and Conciliation Act, 1996. He further pointed out that even in England, this has been accepted. He referred to and relied upon the judgment in the case of *Russeel N.V. V. Oriental Commercial & Shipping Co. (U.K.) Ltd. and Others,* reported in (1991) Vol. 2 Lloyd's Law Reports 625. He referred to and relied upon an American judgment in the case of Florasynth, Inc. V. Alfred Pickholz, 750 F. 2d 171, to the same effect.

8. *The Oriental Commercial & Shipping Company's judgment* (supra) refers to the commentary of Dr. Albert Jan van den Berg which noted the features emerging out of the New York Convention. It records that the burden of proving that the award is not enforceable lies on the party which has raised the issue. It also points out that if any such additional procedure is required to be followed, this will be a proceeding of no consideration or any substance. It will be a procedural addition resulting into further delay into getting the fruits of the award of the party which has succeeded.

9. He also drew our attention to certain observations of this Court in paragraph 33 in *Harendra H. Mehta and Ors. Vs. Mukesh H. Mehta and Ors.,* reported in (1995) 5 SCC 108. It was in a situation where a judgment had, in fact, been obtained before going for execution. However, the Court also observed that it was not material for the purpose of enforcement of a foreign award under the Foreign Awards Act that the award in any country other than India is made enforceable by a judgment.

10. We have noted the submissions of both the counsel

appearing for the parties. It is also material to note that even as per the requirement of the US Law, a notice of three months is required to be given in case a party does not want the award to be enforced. In the instant case, paragraph 7 of the consent order clearly recorded that the award given by the arbitrator shall be final and binding on the parties. If the petitioner wanted to dispute it, it was required of them to have issued necessary notice which they had not done. The submission of Mr. Tripathy, which was emphasised, was that the respondent ought to proceed for confirmation of the award under the US Law and then come to India for execution. In our considered view, the said submission is not tenable in view of the changed law and doing away of the rule of double excequatur. We, therefore, see no error in the order passed by the learned Single Judge of the High Court. The special leave petition is, therefore, dismissed.

B.B.B. SLP dismissed.

UNION OF INDIA & ORS.
v.
ANIL KUMAR SARKAR
(Civil Appeal No. 2537 of 2013)

MARCH 15, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

SERVICE LAW:

Promotion - Sealed cover procedure - Recommendation of DPC for promotion of respondent not given effect to on the ground that subsequently memorandum of charges were issued to him - Held: When respondent's batch mates were promoted, admittedly, on that date he was not under suspension, no charge sheet was served upon him nor was he facing any criminal prosecution - In such circumstances, in terms of paragraph 2 of O.M. dt. 24.09.1992, recommendation of DPC has to be honored and there is no question of applying 'sealed cover process' - Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training O.M. No. 22011/4/91/ Estt.(A) dated 24.9.1992.

Disciplinary proceedings - Commencement of - Held: Disciplinary proceedings commence only when a charge sheet is issued.

The respondent, while working as Senior AFA/T-1 in North-east Frontier Railway, was considered by the Departmental Promotion Committee convened on 26.2.2002 for promotion of Group 'B' Officers of Accounts Department to Group A (Jr. Scale) of Indian Railways Accounts Service and his name was placed in the extended select panel. By office order dated 21.4.2003, the batch-mates of the respondent were promoted but he

was not promoted. He, therefore, filed representations, which were rejected. He then filed an O.A. before the Central Administrative Tribunal. It was the case of the department that during the year 1994-95, the respondent committed gross misconduct in the matter of checking and passing of bills of various firms, for which four memorandum of charges were issued to him on 13.8.2003, 1.9.2003 and 5.11.2003. Further, on similar charges an FIR was lodged by CBI, and 3 special cases were registered against him in the year 2004. The Tribunal dismissed the O.A. But the High Court allowed the writ petition of the respondent.

Dismissing the appeal filed by the department, the Court

HELD: 1.1 There is no dispute as to the fact that the Office Memorandum No. 22011/4/91-Estt(A), Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training, New Delhi dated 14.09.1992 is applicable to the case on hand. As per paragraph 2 of the memorandum, at the time of consideration of the Government servants for promotion, the following details of Government servants in the consideration zone for promotion falling in the categories mentioned should be specifically brought to the notice of the DPC, viz., (i) Government servant is under suspension; (ii) Government servant has been served with a charge sheet and the disciplinary proceedings are pending; and (iii) Government servant is facing prosecution for a criminal charge and the said proceedings are pending. As rightly observed by the High Court, if the above conditions are available, even one of them, then the DPC has to apply the 'sealed cover process'. In the case on hand, it is not in dispute that the relevant date is 21.04.2003, when the respondent's batch-mates were promoted, admittedly, on that date the respondent was not under suspension, nor any charge sheet was served upon him

nor was he facing any criminal prosecution. In such circumstances, in terms of paragraph 2, the recommendation of the DPC has to be honored and there is no question of applying 'sealed cover process'. [para 8 and 11] [402-D-E, 405-E-H; 406-A]

1.2 Paragraph 7 of the memorandum makes it clear that a government servant, who is recommended for promotion by the DPC, if any of the circumstances mentioned in para 2 of the said memorandum arises after the recommendations of the DPC are received, but before he is actually promoted, will be considered as if his case has been placed in a sealed cover by the DPC. On the relevant date, namely, 21.04.2003, when batch mates of the respondent were promoted, none of the conditions was in existence. Admittedly, the respondent was not placed under suspension, charge sheet was issued only on 13.08.2003 i.e. nearly after 4 months, no disciplinary proceedings were initiated or pending as on 21.04.2003. Disciplinary proceedings commence only when a charge sheet is issued. In such circumstances, the High Court is fully justified in issuing direction based on para 2 of the memorandum. [para 12 and 15] [406-C-D, E-F; 409-F]

Union of India and Others vs. K.V. Jankiraman and Others, **1991 (3) SCR 790 = (1991) 4 SCC 109 - relied on.**

Coal India Limited & Ors. vs. Saroj Kumar Mishra **2007 (5) SCR 233 = AIR 2007 SC 1706;** *Chairman-cum-Managing Director, Coal India Limited and Others vs. Ananta Saha and Others,* **2011 (5) SCR 44 = (2011) 5 SCC 142- referred to.**

Union of India and Another vs. R.S. Sharma **2000 (3) SCR 151 = (2000) 4 SCC 394 - held inapplicable.**

Case Law Reference:

1991 (3) SCR 790	**relied on**	**para 12**

2007 (5) SCR 233	**referred to**	**para 14**
2011 (5) SCR 44	**referred to**	**para 15**
2000 (3) SCR 151	**held inapplicable**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2537 of 2013.

From the Judgment and Order dated 27.04.2010 of the High Court of Guwahati, Assam in Writ Petition No. 744 of 2010.

Mohan Jain, ASG, D.K. Thakur, Sadhana Sandhu, Rashmi Malhotra, Manmeet Kaur, S.N. Terdal and Arvind Kumar Sharma for the Appellants.

Rakesh Kumar Singh and Prem Prakash for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order dated 27.04.2010 passed by the Gauhati High Court at Gauhati in Writ Petition (C) No. 744 of 2010 whereby the Division Bench of the High Court allowed the writ petition filed by the respondent herein and set aside the order dated 21.08.2009 passed by the Central Administrative Tribunal, Gauhati Bench, Gauhati in O.A. No. 251 of 2007.

4. **Brief facts**

a) Anil Kumar Sarkar, the respondent herein, joined the Northern Railways as a Junior Clerk on 04.11.1977. He was promoted to various posts and while he was working as senior AFA/T-1 in the office of the Financial Adviser and Chief

Accounts Officer of Northeast Frontier (N.F.) Railway at Maligaon, a Departmental Promotion Committee (DPC) was convened by the Union Public Service Commission (UPSC) on 26.02.2002 and 27.02.2002 to consider eligible Group 'B' officers of the Accounts Department for their substantive promotion to Group 'A' (Jr. Scale) of Indian Railways Accounts Service (IRAS) against the vacancies for various Zonal Railways/Production Units. In the said DPC, the respondent's name was also considered against the vacancies in N.F. Railway for the year 2001-2002 and accordingly, his name was placed in the extended select panel.

b) It was alleged by the appellants herein that during the year 1994-95, while the respondent was working as Assistant Accounts Officer in the Central Stores Accounts (Bills) in the office of the Financial Adviser and Chief Accounts Officer (Open Line), N.F. Railway, Maligaon, he committed gross misconduct in the matter of checking and passing the bills of various firms involved in manufacturing and supplying of cast iron sleeper plates to N.F. Railways. For the said acts, four memorandum of charges were issued to the respondent, out of which two were issued on 13.08.2003 and others on 01.09.2003 and 05.11.2003. On the basis of the said memorandums, four departmental proceedings were initiated against the respondent at three different places, i.e., Delhi, Kolkata and Gauhati, enquiries were completed and show cause notices were served.

c) Based on the similar charges, in the year 2004, the CBI lodged 11 FIRs against the respondent herein on different dates under Section 120B/420 of the Indian Penal Code, 1860 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and accordingly, cases were registered against him. Subsequently, 11 cases were amalgamated into 3 cases being numbered as Special Case Nos. 59/04, 60/04 and 62/04. According to the appellants, on the basis of these charges, the respondent was not promoted to Group 'A' (Jr. Scale).

d) By office order dated 21.04.2003, the batch mates of the respondent were promoted. Being aggrieved, the respondent herein filed several representations to the Department for consideration of his case for promotion which were duly rejected. Challenging the non-consideration of his case for promotion, the respondent filed O.A. No. 251 of 2007 before the Central Administrative Tribunal, Gauhati Bench for a direction to the appellants herein to promote him to Group 'A' (Jr. Scale) of IRAS w.e.f. 05.03.2002 in terms of the recommendations of the DPC held on 26.02.2002 and 27.02.2002 wherein his name was figured in the extended panel list. Vide order dated 21.08.2009, the Tribunal dismissed his application.

e) Challenging the order of the Tribunal, the respondent herein filed a petition being W.P.(C) No. 744 of 2010 before the Gauhati High Court. The High Court, by impugned order dated 27.04.2010, allowed the petition and set aside the order passed by the Tribunal and directed the appellants herein to issue appropriate order in favour of the respondent herein for promotion with all consequential benefits.

f) Challenging the said order, the Union of India has filed this appeal by way of special leave.

5. Heard Mr. Mohan Jain, learned Additional Solicitor General for the Union of India and Mr. Rakesh Kumar Singh, learned counsel for the respondent.

Contentions:

6. Mr. Mohan Jain, learned ASG, after taking us through the Office Memorandum dated 14.09.1992 issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, submitted that paragraph 2 of the said memorandum has to be considered along with paragraph 7 of the same. According to him, the High Court is not justified in considering paragraph 2 of the

memorandum alone. He further submitted that at the relevant time, 4 charge sheets were issued to the respondent and enquiries were completed and notices to show cause had already been served upon the respondent. On the other hand, Mr. Rakesh Kumar Singh, learned counsel for the respondent submitted that as on the date i.e. 21.04.2003, when his juniors were promoted, neither the respondent was under suspension nor any charge sheet was served upon him and he was not facing any criminal prosecution, hence, there was no impediment in promoting him.

7. We have carefully considered the rival submissions and all the relevant materials including the decision of the Tribunal and the impugned order of the High Court.

Discussion:

8. There is no dispute as to the fact that the Office Memorandum No. 22011/4/91-Estt(A), Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training, New Delhi dated 14.09.1992 is applicable to the case on hand. In fact, learned ASG appearing for the appellants and learned counsel for the respondent heavily relied on the said memorandum. The relevant paragraphs for our present purpose are 2 and 7 which are reproduced hereunder:

"No. 22011/4/91-Estt(A)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel & Training

North Block, New Delhi-110001
Dated: 14.09.1992

OFFICE MEMORANDUM

Subject : Promotion of Government servants against whom disciplinary/court proceedings are pending or whose

conduct is under investigation. Procedure and guidelines to be allowed.

Board's L/No. E(D&A) 88RG6-21 dt. 21.9.88 & 2.7.90	In supersession of all instructions contained in Bd's letters referred to in the margin on the above subject, the procedure and guidelines laid down below shall be followed in the matter of promotion from Group 'B' to Group 'A' and within Group 'A' of Railway Officers against whom disciplinary/Court proceedings are pending.
Cases of Govt. to whom sealed cover procedure will be applicable.	2. At the time of consideration of the cases of Govt. servants for empanelment details of Govt. servants in the consideration zone for promotion falling under the following categories should be specifically brought to the notice of the Departmental Promotion Committee:-
	(i) Government Servants under suspension;
	(ii) Government servants in respect of whom a charge sheet has been issued and the disciplinary proceedings are pending;
	(iii) Government servants in respect of whom prosecution for a criminal charge is pending.

	.....
	.....
	.....
Sealed cover procedure applicable to officers coming under cloud-holding of DPC but before promotion.	7. A Govt. servant, who is recommended for promotion by the Departmental Promotion Committee but in whose case any of the circumstances mentioned in para 2 above arise after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a Sealed Cover by the DPC. He shall not be promoted until the conclusion of disciplinary case/criminal proceedings and the provisions contained in this letter will be applicable in his case also."

9. It is not in dispute that the respondent had joined the Northern Railways as a Junior Clerk on 04.11.1977, and got promoted time and again. While he was working as a Group 'B' Officer, his case was taken up for promotion to Group 'A' (Junior Scale) of the Indian Railways Accounts Service (IRAS). It is also not in dispute that in the meetings of the DPC conducted on 26.02.2002 and 27.02.2002, the respondent's name was considered and he was placed in the extended select panel. It is further seen that up to 21.04.2003, the date on which the respondent's batch mates were promoted to IRAS, neither any criminal proceedings was initiated against him nor any departmental enquiry was initiated, nor any charge

sheet was served upon him and nor he was placed under suspension. Aggrieved by the non-consideration of his representations for promotion, the respondent filed O.A. before the Central Administrative Tribunal. Learned counsel for the Railways, by placing reliance on the Office Memorandum dated 14.09.1992, contended before the Tribunal that a Government servant who is recommended for promotion by the DPC and in whose case the circumstances mentioned in paragraph 2 are in existence, he shall not be promoted. Accepting the above stand of the Railways, the Tribunal rejected the petition filed by the respondent herein.

10. Aggrieved by the said decision of the Tribunal, the respondent herein filed a petition before the High Court, wherein, the said memorandum, particularly paragraph 2, was pressed into service. The High Court, taking note of the conditions prescribed in paragraph 2 and in the absence of any such condition as on the relevant date, i.e., 21.04.2003, set aside the order of the Tribunal and directed the Railways to consider the case of the respondent for promotion.

11. As per paragraph 2 of the said memorandum, at the time of consideration of the Government servants for promotion, the following details of Government servants in the consideration zone for promotion falling in the categories mentioned should be specifically brought to the notice of the DPC, viz., (i) Government servant is under suspension; (ii) Government servant has been served with a charge sheet and the disciplinary proceedings are pending; and (iii) Government servant is facing prosecution for a criminal charge and the said proceedings are pending. As rightly observed by the High Court, if the above conditions are available, even one of them, then the DPC has to apply the 'sealed cover process'. In the case on hand, it is not in dispute that the relevant date is 21.04.2003, when the respondent's batch mates were promoted, admittedly on that date the respondent was not under suspension, no charge sheet was served upon him nor he was

facing any criminal prosecution. In such circumstances, in terms of paragraph 2 referred to above, the recommendation of the DPC has to be honored and there is no question of applying 'sealed cover process'.

12. Mr. Mohan Jain, learned ASG submitted that paragraph 2 has to be read along with paragraph 7 of the office memorandum dated 14.09.1992. We have already extracted paragraph 7 of the memorandum which makes it clear that a government servant, who is recommended for promotion by the DPC if any of the circumstances mentioned in para 2 of the said memorandum arises after the recommendations of the DPC are received, but before he is actually promoted will be considered as if his case has been placed in a sealed cover by the DPC. After extracting para 2, we also highlighted the three conditions prescribed therein. Though, learned ASG has mentioned that four charge sheets were issued to the respondent, enquires were completed and show cause notices had already been served on the respondent, on the relevant date, namely, 21.04.2003, when his batch mates were promoted, none of the conditions was in existence in the case of the respondent. Admittedly, the respondent was not placed under suspension, charge sheet had been issued only on 13.08.2003 i.e. nearly after 4 months, no disciplinary proceedings were initiated or pending as on 21.04.2003. In such circumstances, we are of the view that the High Court is fully justified in issuing direction based on para 2 of the memorandum. No doubt, the learned ASG heavily relied on later part of para 7 of the memorandum which reads as under:

> "He shall not be promoted until the conclusion of disciplinary case/criminal proceedings and the provisions contained in this letter will be applicable in his case also."

Inasmuch as none of the circumstances was in existence as on 21.04.2003, reliance placed on the later part of para 7 cannot be accepted or even not applicable.

13. It is not in dispute that an identical issue was considered by this Court in *Union of India and Others vs. K.V.Jankiraman and Others,* (1991) 4 SCC 109. The common questions involved in all those matters were:

(1) What is the date from which it can be said that disciplinary/criminal proceedings are pending against an employee? (2) What is the course to be adopted when the employee is held guilty in such proceedings if the guilt merits punishment other than that of dismissal? and (3) To what benefits an employee who is completely or partially exonerated is entitled to and from which date?. Among the three questions, we are concerned about question No.1. As per the rules applicable, the "sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/ criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over. Inasmuch as we are concerned about the first question, the dictum laid down by this Court relating to the said issue is as follows:-

> "16. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are

> serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy.

In para 17, this Court further held:

> 17. … The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee…."

After finding so, in the light of the fact that no charge sheet was served on the respondent-employee when the DPC met to consider his promotion, yet the sealed cover procedure was adopted. In such circumstances, this Court held that *"the Tribunal has rightly directed the authorities to open the sealed cover and if the respondent was found fit for promotion by the DPC, to give him the promotion from the date of his immediate junior Shri M. Raja Rao was promoted pursuant*

to the order dated April 30, 1986. The Tribunal has also directed the authorities to grant to the respondent all the consequential benefits…..We see no reason to interfere with this order. The appeal, therefore, stands dismissed." The principles laid down with reference to similar office memorandum are applicable to the case on hand and the contrary argument raised by the appellant-Union of India is liable to be rejected.

14. In *Coal India Limited & Ors. vs. Saroj Kumar Mishra,* AIR 2007 SC 1706, this Court, in para 22, has held that a departmental proceeding is ordinarily said to be initiated only when a charge-sheet is issued.

15. In *Chairman-cum-Managing Director, Coal India Limited and Others vs. Ananta Saha and Others,* (2011) 5 SCC 142, this Court held as under:

> "27. There can be no quarrel with the settled legal proposition that the disciplinary proceedings commence only when a charge-sheet is issued to the delinquent employee. (Vide *Union of India v. K.V. Jankiraman,* (1991) 4 SCC 109 and *UCO Bank v. Rajinder Lal Capoor,* (2007) 6 SCC 694)"

We also reiterate that the disciplinary proceedings commence only when a charge sheet is issued. Departmental proceeding is normally said to be initiated only when a charge sheet is issued.

16. Learned ASG, by drawing our attention to the decision of this Court in *Union of India and Another vs. R.S. Sharma,* (2000) 4 SCC 394 submitted that in spite of decision of this Court in *Jankiraman's* case (supra) in view of para 7 of the office memorandum and in the light of the fact that proceedings were initiated both criminal and departmentally, the High Court committed an error by overlooking para 7 of sealed cover process and contended that the direction issued by it cannot

be sustained. We have carefully gone through the factual position and the ultimate ratio laid down by this Court in *R.S. Sharma's* case (surpa). Even though in the said decision, this Court has distinguished the decision in *Jankiraman's* case (supra) and held that the same is not applicable to its case, in the light of the conditions mentioned in para 2 as well as para 7 of the office memorandum dated 14.09.1992 and of the categorical finding that none of the conditions mentioned therein has been fulfilled, we are of the view that the decision in *R.S. Sharma's* case (supra) is not helpful to the case of the appellant.

17. In the light of the above discussion and in view of factual position as highlighted in the earlier paras, we hold that the ratio laid down in *Jankiraman's* case (supra) are fully applicable to the case on hand, hence we are in agreement with the ultimate decision of the High Court. Consequently, the appeal filed by the Union of India fails and the same is dismissed. However, there will be no order as to costs.

R.P. Appeal dismissed.

RAJESH PATEL
v.
STATE OF JHARKHAND
(Criminal Appeal No. 1149 of 2008)

MARCH 15, 2013.

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

PENAL CODE, 1860:

s.376 - Conviction by courts below - Held: In the instant case, prosecution version as narrated by prosecutrix, is most improbable and unnatural - The witness who is stated to have rescued the prosecutrix from the place of occurrence and the employer of the prosecutrix did not support the prosecution case - The doctor who medically examined the prosecutrix and the IO were not examined - Courts below erred in holding that their non-examination did not prejudice the defence - Further, the inordinate delay of 11 days is fatal to prosecution case - The testimony of the prosecutrix is most unnatural and improbable to believe and, therefore, it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence - Prosecution case has created reasonable doubt - Therefore, the benefit of doubt must enure to the appellant - The impugned judgment is set aside - Constitution of India, 1950 - Art.136.

The appellant was prosecuted for committing rape on her acquaintance and class-mate, who was working as a nurse. The trial court convicted the appellant u/s 376 IPC and sentenced him to undergo 7 years RI. The High Court affirmed the conviction and the sentence.

Allowing the appeal, the Court

HELD: 1.1 The prosecution story as narrated by the prosecutrix is most improbable and unnatural. The prosecutrix is the solitary witness to prove the charge. Her version is sought to be corroborated by her mother PW2 who has supported the prosecution case on the basis of narration of the alleged offence by the prosecutrix to her. It is an undisputed fact that both the appellant and the prosecutrix were class-mates and had good acquaintance with each other as they were exchanging books. The prosecutrix stated that on 14.2.1993, she went to the house of the appellant to take her book and when she entered the house he locked the door from inside, and committed rape on her and threatened her with a knife; that the appellant then locked her in the house and went away; that after about half an hour, PW3, a common friend of both, unlocked the room. During this period she did not raise alarm to draw the attention of the neighbours. This would clearly go to show that the testimony of the prosecutrix is most unnatural and improbable to believe and it does not inspire confidence. [para 8] [418-H; 419-B-F]

1.2 Further, there is an inordinate delay of nearly 11 days in lodging the FIR. The explanation given by the prosecutrix is that she went to her house and narrated the incident to her mother, and on assurance of PW3 that he would take action in the matter, her mother remained silent for 2-4 days. The inordinate delay of 11 days in lodging the FIR is fatal to the prosecution case. The findings and observations made by the courts below in accepting the delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law. [para 9] [420-B-C; 421-B-C]

1.3 Besides, PW3, who is a common friend of the appellant and the prosecutrix and stated to have rescued

her from the place of occurrence, has categorically stated that he does not know anything about the case. He has, thus, not supported the version of the prosecution. PW4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber. He has been treated as hostile and was cross-examined by the prosecution. In his cross-examination he has categorically stated that he had told the police that he did not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident. The evidence of PW3 and PW4 has seriously affected the prosecution case. [para 10 and 12] [421-D-E, F-G; 422-F]

1.4 Further, neither the Doctor, who is stated to have medically examined the prosecutrix, nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the High Court that non-examination of the said two important witnesses has prejudiced his case. Therefore, the finding and reasons recorded by both the trial court as well as the High Court that non-examination of the doctor and the I.O. has not prejudiced the case of the appellant is totally an erroneous approach. For this reason also, the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law. [para 11-12] [421-H; 422-A; 423-C-E]

1.5 The courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence punishable u/s 376, IPC. The prosecution case is neither natural nor consistent nor probable to believe to sustain the conviction and sentence of the appellant. Therefore,

the benefit of doubt must enure to the appellant. The impugned judgment requires to be interfered with by this Court in exercise of its jurisdiction, and is accordingly set aside. [para 12, 15 and 16] [422-F-G; 425-D-F-G]

Raju v. State of Madhya Pradesh **(2008) 5 SCC 133 - referred to**

Ram Kumar v. State of Haryana **(2006) 9 SCC 589 - cited.**

Case Law Reference:

(2006) 9 SCC 589	**cited**	**para 5**
(2008) 5 SCC 133	**referred to**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1149 of 2008.

From the Judgment & Order dated 14.11.2006 of the High Court of Jharkhand in Criminal Appeal No. 58 of 1999.

Sanjay Hegde, Shankar N., Arijit Majmudar (For N. Annapoorani) for the Appellant.

Anil Kumar Jha, S.K. Divakar for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This criminal appeal is directed against the judgment of the High Court of Jharkhand at Ranchi passed in Criminal Appeal No.58 of 1999 dated 14.11.2006 wherein it has confirmed the judgment and order passed by the 1st Additional Sessions Judge, Jamshedpur in S.T.No.168 of 1994/172 of 1995. By the said judgment, the appellant herein was convicted under Section 376, I.P.C. and was sentenced to undergo rigorous imprisonment for a period of seven years.

2. The prosecution case in nutshell is stated hereunder for

the purpose of appreciating the rival legal contentions urged in this appeal.

3. The prosecutrix in this case has made a statement before the police at Ghatsila police station, stating that she has narrated the incident which took place on 14.2.1993 at 11.00 a.m. in the house of the appellant. She stated that she was working as a nurse in the Nursing Home of Dr. Prabir Bhagat at Moubhandar in the jurisdiction of Ghatsila, East Singhbhum District. The house of the appellant Rajesh, who appears to be a classmate of prosecutrix, is situated near the Nursing Home in which the prosecutrix was working as a nurse. It is the case of the prosecution that at the request of the appellant she went to his house in order to get back her book from him. As soon as she entered the house of the appellant, he closed the door from inside. At that time the members of the appellant's family were not present inside the house. When the prosecutrix tried to raise alarm, she was terrorized by the appellant who threatened her that she would be killed by a knife if she raises alarm. Thereafter, the appellant committed rape on her. When she felt pain on her private part, she wanted to cry but she was silenced by the appellant by displaying a knife to her. After committing the offence of rape the appellant left the house and locked the door from outside. After half an hour, one Purnendu Babu of Chundih came and unlocked the house and the prosecutrix returned to her house silently. It is further the case of the prosecution that she went to her house and narrated the incident to her mother. However, the mother of the prosecutrix remained silent for two to four days on the assurance of Mr. Purnendu Babu that he would take action in the matter. Additionally, it was alleged that the appellant at the time of committing the offence had also threatened the prosecutrix that she would be killed if she lodges a complaint against him.

4. The trial court convicted the accused and sentenced him to undergo imprisonment of seven years. The correctness of the same was challenged before the High Court of Jharkhand

by filing Criminal Appeal No.58 of 1999 urging various legal contentions. After considering the legal contentions on behalf of the appellant, the High Court has affirmed the conviction and sentence of the accused and dismissed the appeal. The correctness of the same is challenged in this appeal urging the following legal contentions: that the courts below have failed to appreciate that the sole testimony of the prosecutrix could not have been used against the appellant to hold him guilty of offence under Section 376, IPC; that the prosecution has not examined either the doctor who conducted the medical examination of the prosecutrix or the investigating officer. Therefore, the finding of fact holding that the appellant is guilty of the offence is erroneous in law and liable to be set aside. Another ground urged by Mr.Sanjay Hegde, the learned counsel for the appellant, is that the courts below failed to appreciate that the story of confinement of the prosecutrix in the house of the appellant cannot be sustained. This is because PW3 Purnendu Babu, a common friend of the appellant and the prosecutrix, who is alleged to have rescued the prosecutrix from the alleged confinement, did not support the same, thereby breaking the chain of events of the prosecution story. Further, it is urged by him that the courts below failed to note the delay in lodging the FIR which has not been adequately explained. The Courts below have explained the delay in filing FIR on the basis of the intervention of PW3 and PW4, namely, Purnendu Babu and the Doctor of the Nursing Home in which the prosecutrix was working, as they assured the victim to settle the matter between the parties. However, both of these witnesses were declared either tendered by the prosecution or hostile during the course of the trial. Further, the appellant contends that the learned courts below failed to take into consideration of the serious contradiction in the version of the prosecutrix and her mother. The prosecutrix in her cross examination has stated that Dr. Prabir Bhagat – PW4 was in his chamber in the evening when the appellant along with Purnendu Babu- PW3 went to the Nursing Home whereas the mother of the prosecutrix in her testimony has stated that the

incident could not be reported to Dr.Prabir Bhagat on the date of the occurrence since the Doctor was in TATA. According to the appellant, the courts below have ignored the contradiction in the version of the prosecutrix. On one hand she says that she never met the appellant till 21.2.93, on the other hand she has stated that on the evening of the alleged occurrence, she met the appellant at the dispensary of Dr.Prabir Bhagat. It was further contended by the appellant regarding the prosecution explanation that she could not raise alarm when the house was locked and offence was being committed on her as she was threatened by the appellant with a knife is improbable to believe her statement. This is because she could have raised an alarm when the appellant allegedly locked the prosecutrix inside the house for half an hour after the appellant committing offence of rape on her. For all the abovementioned grounds, the appellant's counsel contends that the conviction and sentence imposed upon the appellant cannot be allowed to sustain.

5. Alternatively, the learned counsel contends that if, the physical relationship between the appellant and the prosecution is established, it was a case of consensual sex. Both of them were majors to enter into such alliance and they were classmates and familiar with each other as well as on visiting terms prior to the alleged occurrence of offence. Therefore, the appellant has not committed offence as alleged. On the issue of sentencing, the learned counsel has relied upon the decision of this Court in the case of *Ram Kumar v. State of Haryana*[1], as the appellant in the present case had already undergone the imprisonment of more than 1 year and 8 months and more than 20 years have elapsed from the date of commission of the offence and therefore the appeal may be allowed by passing appropriate order. The prosecutrix and the appellant are both married and settled in life and further the appellant is of a young age. Therefore, this Court may exercise its power by recording special and adequate reasons as provided under proviso to Section 376, IPC and the sentence imposed may be reduced

1. (2006) 9 SCC 589.

to the period already undergone in judicial custody by the appellant and treat the same as imprisonment and relief may be granted to him to this extent as was observed in *Ram Kumar* case (Supra), if the case urged on behalf of the appellant is not acceptable.

6. On the other hand, the prosecution sought to justify the concurrent findings of fact recorded by the High Court and the Trial Court on the charge against the accused. The learned counsel for prosecution would contend that the Courts below, while accepting the testimony of the prosecutrix and her mother, have rightly convicted and sentenced the accused to undergo imprisonment for seven years and the same need not be interfered with by this Court in this appeal in exercise of its jurisdiction. Further, it is contended by the learned counsel that the judgment referred to supra by the appellant's counsel is inapplicable to the facts situation of the present case and therefore, discretionary power of this court for reduction of the sentence need not be exercised and prayed for dismissal of this appeal.

7. With reference to the aforesaid rival legal contentions urged on behalf of the parties, we have carefully examined the case to find out as to whether the impugned judgment warrants interference of this Court on the ground that the concurrent finding of fact by the High Court on the charge leveled against the appellant under Section 376, IPC, and the finding recorded on this charge against the appellant on the basis of the evidence on record is erroneous in law and if so, whether it requires interference of this Court in exercise of its jurisdiction. The said points are answered in favour of the appellant by assigning the following reasons:

8. The prosecution case is that the appellant has committed the offence of rape on the prosecutrix on 14.2.1993. She is the solitary witness to prove the charge. The same is sought to be corroborated by her mother PW2 who has supported the prosecution case on the basis of narration of the

alleged offence by the prosecutrix to her. It is an undisputed fact that both the appellant and the prosecutrix are class-mates and had good acquaintance with each other as they were exchanging books. The case of the prosecution is that she had given her book to the appellant. She asked him to return the same and he asked her to go to his house on 14.2.93 to take back the book. Accordingly, she went to the house of the appellant. When she entered the house he locked the door of the house from inside. At that time she has not raised an alarm, except stating that she insisted not to lock the door of the house as there were no other inmates in the house at that point of time. The version of the prosecutrix is that she could not raise alarm as the appellant has threatened her with knife. Further case of the prosecution is that he had then committed offence of rape on her. Further she has stated that while the appellant was committing rape on her she got pain in her private part at that point of time also she wanted to raise alarm, but he has shown the knife to her not to raise alarm. Thus, the prosecution story as narrated by the prosecutrix is most improbable and unnatural. This contention of the appellant is further supported by the contention urged on his behalf that after the offence was committed, the appellant locked her in the house and went away from the house. After about half an hour Mr.Purnendu Babu –PW3, who is a common friend of both the appellant and the prosecutrix came there and unlocked the room till then she did not raise alarm drawing the attention of the neighbours. The aforesaid circumstance would clearly go to show to come to the conclusion that the case of the prosecution is not natural and probable. Neither the prosecutrix nor the PW3 has informed the police with regard to the alleged offence said to have committed by the appellant after the prosecutrix was unlocked from the house. The reason given by the prosecution is that PW3 was making sincere efforts to bring about the settlement of marriage between the appellant and the prosecutrix. The same did not materialize and, therefore, the complaint was lodged with the jurisdictional police on 25.2.93. The above said version of PW1 regarding settlement between her and the

appellant is not proved as PW3 has stated in his evidence that he does not know anything regarding the alleged offence.

9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police. The explanation given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on assurance of Purnendu Babu – PW3, the mother remained silent for two to four days on the assurance that he will take action in the matter. Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation. Further, the reason assigned by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment. In addition to that, further observation made by the High Court regarding the delay is that the prosecutrix as well as her mother tried to get justice by interference of PW3, who is a common friend of both of them and PW4, the Doctor with whom the prosecutrix was working as a Nurse. When the same did not materialize, after lapse of 11 days, FIR was lodged with the jurisdictional police for the offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that prosecutrix had every opportunity to give different date of occurrence instead of 14.2.93 but she did not do it which reason is not tenable in law. Further, the High Court accepted the observation made by the learned trial Judge wherein the

explanation given by the prosecutrix in her evidence about being terrorized to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution case. This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law.

10. Further in the case in hand, PW3, who is a common friend of the appellant and the prosecutrix, according to the prosecution case, he has categorically stated that he does not know anything about the case for which he had received the notice from the court to depose in the case. PW4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber for the last three years as on the date of his examination, namely, on 16.11.95. He has stated in his examination-in-chief that on 14.2.93 when he opened his chamber the prosecutrix came to his chamber and further stated that her mother did not tell him anything. He has been treated as hostile by the prosecution, he was cross-examined by the prosecutor, in his cross-examination he has categorically stated that he has told the police that he does not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident and further stated that he does not know anything about the case.

11. Further, neither the Doctor nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court

as well as the High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her. Non-examination of the doctor who has examined her after 12 days of the occurrence has not prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.

12. In view of the above statement of evidence of PW3 and PW4 whose evidence is important for the prosecution to prove the chain of events as per its case, the statement of evidence of the aforesaid witnesses has seriously affected the prosecution case. Therefore, the courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence under Section 376, IPC. Further, according to the prosecutrix, PW3 who is alleged to have rescued her from the place of occurrence of offence, has clearly stated in his evidence that he does not know anything about the incident in his statement thereby he does not support the version of prosecution. The High Court has erroneously accepted the finding of the trial court that the appellant has not been prejudiced for non-examination of the doctor for the reason that she was working

as a Nurse in the private hospital of PW4 and being a nurse she knew that the information on commission of rape is grave in nature and she would not have hesitated in giving the information to the police if the occurrence was true. Further, the finding of the courts below that non-examination of the I.O. by the prosecution who has conducted the investigation in this case has not caused prejudice to the case of the appellant, since the prosecution witnesses were unfavorable to the prosecution who were either examined or declared hostile by the prosecution, which reasoning is wholly untenable in law. Therefore, the finding and reasons recorded by both the trial court as well as the High Court regarding non-examination of the above said two witnesses in the case has not prejudiced the case of the appellant is totally an erroneous approach of the courts below. For this reason also, we have to hold that the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law.

13. The finding with regard to the sentence of the appellant recorded by the trial court which is accepted by the High Court on the basis of the solitary testimony of prosecutrix which is supported by the evidence of her mother PW2 is once again an erroneous approach on the part of the High Court. The offence of rape alleged to have committed by the appellant is established without any evidence as the prosecution failed to prove the chain of events as stated by the prosecutrix. Since the evidence of PW3 & PW4 did not support the prosecution case, but on the other hand, their evidence has seriously affected the story of prosecution. Therefore, the courts below could not have found the appellant as guilty of the charge and convicted and sentenced him for the offence of rape.

14. Further, one more strong circumstance which has weighed in our mind is that they had good acquaintance with each other as they were class-mates and they were in terms

of meeting with each other. The defence counsel had alternatively argued that the appellant had sex with her consent. The High Court proceeded not to accept the said argument by giving reasons that the appellant failed to explain as to under what circumstance he had sex with the consent of the prosecutrix when she was confined in his house. The contention urged on behalf the appellant that it was consensual sex with the prosecutrix is to be believed for the reason that she herself has gone to the house of the appellant though her version is that she went there at the request of the appellant to take back her book which she had given to him. This is a strong circumstance to arrive at the conclusion that the defence case of the appellant is a consensual sex. Further, the prosecution case is that after the offence was committed by the appellant he had locked the room from outside and left. After half an hour Purnendu Babu- PW3 arrived and unlocked the room. This story is improbable to believe and the prosecutrix has not lodged the complaint either immediately or within reasonable period from the date of occurrence. The complaint was undisputably lodged after lapse of 11 days by the prosecutrix. In this regard, it is pertinent to mention the judgment of this Court in *Raju v. State of Madhya Pradesh*[2], the relevant paragraph of which is extracted hereunder for better appreciation in support of our conclusion:

> "12. Reference has been made in Gurmit Singh case to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear

2. (2008) 5 SCC 133.

presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

15. For the aforesaid reasons the prosecution case is not natural, consistent and probable to believe to sustain the conviction and sentence of the appellant for the alleged offence said to have committed by him.

16. The trial court as well as the High Court should have appreciated the evidence on record with regard to delay and not giving proper explanation regarding delay of 11 days in filing FIR by the prosecutrix and non-examination of complainant witnesses, viz. the Doctor and the I.O. which has not only caused prejudice to the case of the appellant but also the case of prosecution has created reasonable doubt in the mind of this Court. Therefore, the benefit of doubt must enure to the appellant. As we have stated above the testimony of the prosecutrix is most unnatural and improbable to believe and therefore it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence. Therefore, we are of the view that the impugned judgment requires to be interfered with by this Court in exercise of its jurisdiction. Accordingly, we allow the appeal and set aside the impugned judgment.

17. If the appellant has executed the bail bonds, the same may be discharged.

R.P. Appeal allowed.

NAGENDRAPPA NATIKAR
v.
NEELAMMA
(Special Leave Petition (Civil) No. 11800 of 2013)

MARCH 15, 2013

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

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956:

s.18 - Suit claiming maintenance by wife - Held: Is maintainable inspite the compromise reached between the parties, under O. 23, r. 3 CPC and an order u/s 125 CrPC based thereon granting permanent alimony - Code of Criminal Procedure, 1973 - s.125 - Code of Civil Procedure, 1908 - O. 23, r.23 - Contract Act, 1872 - s.25.

In the instant petition filed by the husband, the question for consideration before the Court was: whether a compromise entered into by husband and wife under O. 23, r. 3 CPC, agreeing for a consolidated amount towards permanent alimony, thereby giving up any future claim for maintenance, accepted by the court in a proceeding u/s 125 CrPC, would preclude the wife from claiming maintenance in a suit filed u/s 18 of the Hindu Adoption and Maintenance Act, 1956.

Dismissing the petition, the Court

HELD: 1.1 Any order passed u/s 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife u/s 18(2) of the Hindu Adoptions and Maintenance Act, 1956. Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final

determination of the status and personal rights of parties, which is in the nature of a civil proceeding; and the order made u/s 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court. [para 10-11] [431-B-D-E]

1.2 Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a court of law and such an agreement is void, since the object is unlawful. [para 11] [431-D-E]

1.3 The Family Court and the High Court have rightly held that the suit u/s 18 of the Hindu Adoption and Maintenance Act, 1956 is perfectly maintainable, in spite of the compromise reached between the parties under O. 23. r. 3 C.P.C. [para 9] [431-A-B]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 11800 of 2013.

From the Judgment & Order dated 28.03.2011 of the High Court of Karnataka, Circuit Bench at Gulbarga in MFA No. 31979 of 2010.

Raja Venkatappa Naik, Raja Raghavendra Naik, S.K. Tandon, R.K. Gupta, Rameshwar Prasad Goyal for the Petitioner.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Delay condoned.

2. The question that is raised for consideration in this case is whether a compromise entered into by husband and wife under Order XXIII Rule 3 of the Code of Civil Procedure (CPC), agreeing for a consolidated amount towards permanent alimony, thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure (CrPC), would preclude the wife from claiming maintenance in a suit filed under Section 18

of the Hindu Adoption and Maintenance Act, 1956 (for short "the Act').

3. The marriage between the petitioner (husband) and respondent (wife) took place on 24.5.1987. Alleging that the petitioner is not maintaining his wife, respondent filed an application under Section 125 CrPC for grant of maintenance before the 1st Additional JMFC at Gulbarga, being Misc. Case No. 234 of 1992. While the matter was pending, an application was preferred by the parties under Order XXIII Rule 3 CPC on 3.9.1994 stating that the parties had arrived at a compromise, by which the respondent had agreed to receive an amount of Rs.8,000/- towards permanent alimony and that she would not make any claim for maintenance in future or enhancement of maintenance. Consent letter dated 30.3.1990, which is in Kannada, the English translation of the same reads as follow:

"Consent letter:

I, Neelamma W/o Nagendra Natikar, Age 23 years, R/o Old Shahabad, do hereby execute this consent letter in favour of my husband Nagendra Natikar with free will and consent without coercion and misrepresentation. After my marriage with Nagendra Natikar, I could not lead marital life happy with my husband due to my ill health as prior to my marriage I was suffering from backache, Paralysis stroke to my left hand and left leg and was also suffering from epilepsy (Fits disease) and therefore I have myself decided to withdraw from marital life. I have given my consent for mutual divorce. I have no objection if my husband would contract second marriage with someone. Prior to my marriage I was suffering from chronic disease. I had asked my father not to celebrate her marriage with anyone. My father forcibly got marriage with Nagendrappa Natikar. Henceforth I will not make any further claims and also forfeit my rights in future and I will not claim compensation or maintenance or alimony. I am satisfied

with the payment of Rs.8000/- and I will not make any further claims against my husband.

I have executed this consent letter in favoaur of my husband without any force of anybody and free from misrepresentation or coercion. My father-mother or nay other family members have no objection for executing this consent letter.

Signature of Executant
Neelamma
(Signed in Kannada))

Signature of witnesses:

1. Tippanna (signed in Kannada)

2. Devindrappa (signed in Kannada)

3. Syed Zabiullah Sahab (signed scribe)"

The Court, on the same day, passed the following order:

"Parties both present. Both parties and advocates files compromise petition. The contents of the compromise petition is read over and explained to them. They admit the execution of the same before court. Respondent paid Rs.8000/- (eight thousand) before court towards full satisfaction of the maintenance as per compromise recorded. In view of the compromise, petition dismissed."

4. Respondent wife then filed a Misc. Application no. 34 of 2003 under Section 127 Cr.P.C. before the Family Court, Gulbarga for cancellation of the earlier order and also for awarding future maintenance, which was resisted by the petitioner stating that the parties had already reached a compromise with regard to the claim for maintenance on 3.9.1994 and hence the application for cancellation of the earlier order is not maintainable. The Court accepted the plea of the husband and took the view that since such an order was still in

force and not set aside by a competent Court, it would not be possible to entertain an application under Section 127 Cr.P.C. The application was, therefore, dismissed on 31.7.2006.

5. We notice, while the application under Section 127 Cr.P.C. was pending, respondent wife filed O.S. No. 10 of 2005 before the Family Court, Gulbarga under Section 18 of the Act claiming maintenance at the rate of Rs.2,000/- per month. The claim was resisted by the petitioner husband contending that, in view of the compromise reached between the parties in Misc. Case No. 234 of 1992 filed under Section 125 CrPC, respondent could not claim any monthly maintenance and hence the suit filed under Section 18 of the Act was not maintainable. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125 Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act.

6. The suit was then finally heard on 30.9.2010 and the Family Court decreed the suit holding that the respondent is entitled to monthly maintenance of Rs.2,000/- per month from the defendant husband from the date of the filing of the suit.

7. Aggrieved by the said order, petitioner took up the matter before the High Court by filing an appeal, being M.F.A. No. 31979 of 2010, which was dismissed by the High Court by its judgment dated 28.3.2011, against which this SLP has been preferred.

8. Shri Raja Venkatappa Naik, learned counsel appearing for the petitioner, husband, submitted that suit filed under Section 18 of the Act is not maintainable, in view of the order dated 3.9.1994, accepting the consent terms and ordering a consolidated amount towards maintenance under Section 125 Cr.P.C.

9. We are in complete agreement with the reasoning of the Family Court and confirmed by the High Court that the suit under Section 18 of the Act is perfectly maintainable, in spite of the compromise reached between the parties under Order XXIII Rule 3 C.P.C. and accepted by the Court in its order dated 3.9.1994.

10. Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court.

11. Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. Proceeding under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act.

12. The above being the legal position, we find no error in the view taken by the Family Court, which has been affirmed by the High Court. The Petition is, therefore, dismissed in limine.

R.P. SLP dismissed.

SHANTILAL GULABCHAND MUTHA
v.
TATA ENGINEERING & LOCOMOTIVE CO. LTD. & ANR.
(Civil Appeal No. 6162 of 2005)

MARCH 18, 2013.

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

CODE OF CIVIL PROCEDURE, 1908:

O. 8, r.10 - Judgment on failure of defendant to file written statement - Held: Relief under O. 8, r. 10 is discretionary, and court has to be more cautious while exercising such power where defendant fails to file written statement -Court must be satisfied that there is no fact which need to be proved in spite of deemed admission by defendant, and court must give reasons for passing such judgment - In the instant case, trial court has not examined as to whether the suit was filed within limitation and whether on the basis of pleadings, the relief granted by it could have been granted - Court did not even consider it proper to examine the case prima facie before passing the decree - As trial court failed to meet the parameters laid down by Supreme Court to proceed under O. 8 r. 10, judgment and decree passed by it is set aside and the case is remanded to it to decide afresh - Appellant is at liberty to file written statement within the period provided.

Balraj Taneja & Anr. v. Sunil Madan & Anr. **1999 (2) Suppl. SCR 258 = AIR 1999 SC 3381;** *Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani,* **2007 (12) SCR 1153 = AIR 2008 SC 911;** *Ramesh Chand Ardawatlya v. Anil Panjwani* **2003 (3) SCR 1149 = AIR 2003 SC 2508 - relied on.**

Case Law Reference:

1999 (2) Suppl. SCR 258	**relied on**	**para 3**
2007 (12) SCR 1153	**relied on**	**para 5**
2003 (3) SCR 1149	**relied on**	**para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6162 of 2005.

From the Judgment & Order dated 22.06.2005 of the High Court of Judicature at Bombay in Appeal No. 478 of 2005 in Notice of Motion No. 503 of 2004 in Suit No. 1924 of 1998.

Prasenjeet Keswani, Pawan Kr. Bansal (for V.D. Khanna) for the Appellant.

Debmalya Banerjee (for Manik Karanjawala) for the Respondents.

The following order of the Court was delivered

O R D E R

1. This appeal has been preferred against the judgment and order dated 22.6.2005 of the High Court of Judicature at Bombay, passed in Appeal No.478 of 2005 in Notice of Motion No.503 of 2004 in Suit No.1924 of 1988.

2. Facts and circumstances giving rise to this appeal are:

A. That the appellant had purchased five Tata Diesel Vehicles from the respondent No.1 for a sum of Rs.9,58,913/- which was to be paid in 8 installments through respondent No.2 as per repayment schedule. The appellant alleges that eight Bills of Exchange were drawn by the respondent no.1 upon the respondent no.2 - banker of the appellant and by way of which the entire amount was paid. Respondent no.1 filed Suit No.1924 of 1988 on 2.6.1988 against the appellant as well as the banker for recovery of sum of Rs.5,66,000/- alongwith interest. Summons were served upon the appellant and he entered appearance through advocate to contest the suit.

However, subsequently under the impression that the entire amount had already been paid, he did not file the written statement. The High Court decreed the suit vide judgment and decree dated 12.11.2003 under the provisions of Order VIII Rule 10 of the Code of Civil Procedure 1908, (hereinafter referred to as 'CPC') without considering any issue involved therein or taking note of the pleadings in the plaint itself.

B. Aggrieved, the appellant took out a Notice of Motion bearing no.503 of 2004 in the said suit for setting aside ex parte decree dated 12.11.2003, however, it stood rejected vide order dated 10.12.2004 holding it to be not maintainable in view of division bench judgment of the Bombay High Court wherein it had been held that any decree passed under Order VIII Rule 10 CPC could not be subjected to the application under Order IX Rule 13 CPC.

C. Aggrieved, the appellant filed the appeal which has been dismissed vide order dated 22.6.2005 concurring with the learned Single Judge.

Hence, this appeal.

3. We have heard Shri Prasenjit Keswani, learned counsel for the appellant and Shri Debmalaya Banerjee, learned counsel for respondent no.1 and perused the record.

4. This Court in *Balraj Taneja & Anr. v. Sunil Madan & Anr.,* AIR 1999 SC 3381 dealt with the issue and held that even in such fact-situation, the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the defendant traversing the facts set out by the plaintiff therein. Where a written statement has not been filed by the defendant, the court should **be little cautious in proceeding under Order VIII, Rule 10, CPC**. Before passing the judgment against the defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly by passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and,

therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who failed to file the written statement. However, if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. The power of the court to proceed under Order VIII, Rule 10 CPC is discretionary. The court further held that judgment as defined in Section 2(9) CPC means the statement given by the Judge of the grounds for a decree or order. Therefore, the judgment should be self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. The court further held as under:-

> "Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or **is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10,** the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved." (Emphasis added)

5. In *Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani,* AIR 2008 SC 911, this Court while reiterating a similar view observed that a decree under Order VIII, Rule 10 CPC should not be passed unless the averments made in plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved.

(See also: *Ramesh Chand Ardawatlya v. Anil Panjwani,* AIR 2003 SC 2508)

6. In view of the above, it appears to be a settled legal proposition that the relief under Order VIII Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which need to be proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understood what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed.

7. The instant case is required to be examined in the light of the aforesaid settled legal propositions. It is evident from the plaint that eight Bills of Exchange, all dated 4.6.1982 for the respective amounts had been inclusive of interest and each one of the said bills were accepted by the appellant payable at the Mercantile Bank Ltd. Bombay and the said bills were discounted by the respondent/plaintiff with its bankers. It is further admitted in the plaint that the bank of the appellant paid the said amount to the respondent/plaintiff on the respective dates, as the five amounts have been mentioned in para 5 of the plaint. However, as the same did not satisfy the entire demand, the suit was filed with the following prayer:-

> "That the Defendant No.1 and Defendant No.2 may be ordered and decreed to pay to the plaintiff the sum of Rs.999388.30p. as mentioned in paragraph 7 above together with interest on the sum of Rs.5,66,000/- at the rate of 18.5% per annum from the date of suit till payments."

8. The Trial Court while deciding Suit No.1924 of 1988 decreed the suit vide judgment and decree dated 12.11.2003, which reads as under:-

> "Advocate for the plaintiffs is present. Nobody is present for the defendants. The matter is on board for proceeding against the defendants for want of written statement. Suit

is of 1988. So far no written statement is filed. Therefore, there shall be decree in favour of the plaintiffs and against the defendants under Order VIII Rule10 of the Code of Civil Procedure for a sum of Rs.9,99,388.30 with interest on the amount of Rs.5,66,000/- at 12% p.a. from the date of the suit till realization and costs. Prayer (a) only of the plaint is granted in the above terms. Decree be drawn up accordingly."

9. The appellant take Notice of Motion to set aside the aforesaid judgment and decree which was dismissed and the said order of dismissal has been approved by the division bench. We are not examining the issue as to whether such a judgment and decree ex parte could be subjected to the provisions of Order IX Rule 13 CPC but the court has not examined as to whether the suit was filed within limitation and whether on the basis of pleadings, the relief granted by the court could have been granted. The court did not even consider it proper to examine the case prima facie before passing the decree, as is evident from the above quotation. The same is complete impugned judgment.

10. As the Trial Court failed to meet the parameters laid down by this court to proceed under Order VIII Rule 10 CPC, the judgment and decree of the Trial Court dated 12.11.2003 is set aside and the case is remanded to the Trial Court to decide afresh. The appellant is at liberty to file the written statement within a period of 3 weeks from today and the Trial Court is at liberty to proceed in accordance with law thereafter. As the matter is very old, we request the Trial Court to conclude the trial expeditiously. The Original Record, if any, may be sent back forthwith.

Before parting with the case, we would like to clarify that we have not decided the issue as to whether application under Order IX Rule 13 CPC in such a case is maintainable.

11. The appeal is disposed of accordingly.

R.P. Appeal disposed of.

BABU AND ANR.

v.

STATE REP. BY INSPECTOR OF POLICE, CHENNAI

(Criminal Appeal No. 353 of 2008 etc.)

MARCH 19, 2013.

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

PENAL CODE, 1860:

s.302/34 and s.300, Exception 4 - Conviction by trial court of 5 accused u/s 302/149 IPC - Acquittal of one accused by High Court - Held: The evidence of eye-witness makes it clear that the deceased was attacked by the four appellants in furtherance of their common intention and, as such, they all were liable u/s 302/34 for causing this death - Further, deceased was unarmed and the accused-appellants were armed with knives and attacked him even after he fell down - They took undue advantage and acted in cruel and unusual manner towards the deceased - Besides, keeping in view the injuries on the deceased, Exception 4 to s.300 is not attracted - Conviction and sentence of appellants u/s 302/34 upheld.

The four appellants along with two others were prosecuted for committing offences punishable u/ss 147, 148, 341, 324 and 302 IPC. The prosecution case was that there was previous enmity between 'R' the younger brother of the informant (PW-1) and 'E', one of the accused-appellant. On 25.1.2004 at around 5.30 P.M., 'E' telephoned the wife of 'R' and threatened her. At about 10.15 p.m. 'R' asked 'E' about this, whereupon 'E' and his companions attacked 'R' and PW-1 with knives. 'R' died on the spot. The trial court convicted A-1, A-2, A-3 and A-4 u/ss 148, 324/149 and s.302/149 IPC; and A-6 u/ss 147, 324/149 and 302/149 IPC. However, A-5 was acquitted of all the charges. High Court further acquitted A-6, but

maintained the conviction of A-1, A-2, A-3 and A-4.

In the instant appeals filed by the convicts, it was, inter alia, contended for the appellants that on acquittal of two accused, conviction of the four appellants u/s 302/ 149 ICP was not sustainable; that there was doubt about the date, time and place of registration of FIR; that there were discrepancies in the evidence of PW-1, PW-2 and PW-3. Alternatively, it was contended that the offence committed by the appellants would fall under Exception 4 to s.300 IPC and as such they would, at best, be liable u/s 304 IPC.

Dismissing the appeal, the Court

HELD: 1.1 On the evidence, the conviction of the appellants u/s 302, IPC can be sustained without the aid of ss.141 and 149, IPC. The evidence of PW-1, PW-2 and PW-3 makes it clear that the deceased was attacked by A-1, A-2, A-3 and A-4 in furtherance of their common intention and, therefore, all the four accused persons (the appellants) were liable for the criminal act of causing the death of the deceased u/s 302 read with s. 34, IPC, as if the criminal act was done by each of them alone. [para 13] [448-B-E-F]

Dhanna etc. v. State of M.P. **1996 (4) Suppl. SCR 28 = (1996) 10 SCC 79 - relied on.**

1.3 As regards the discrepancies in the eye-witness account of the occurrence given by PW-1, PW-2 and PW-3, these witnesses were examined more than one and a half years after the incident and it was natural for them to differ in some respects of what they saw and what they remembered. [para 14] [449-A-B]

State of Rajasthan v. Smt. Kalki and Another **1981 (3) SCR 504 = (1981) 2 SCC 752 - relied on.**

1.4 With regard to the registration of the FIR, the Inspector of Police who has been examined as PW-13 has stated very clearly in his evidence that on 25.01.2004 at 10.45 pm when he was at the Police Station, PW-1 lodged a complaint and he wrote it down and read it over to PW-1, obtained his signature and registered the case. The evidence of PW-13 is supported by the evidence of PW-1. On a reading of the evidence of PW-1, in its entirety, one can only come to the conclusion that the FIR was lodged by PW-1 on 25.01.2004 soon after the incident between 10.30 p.m. to 11 p.m. but PW-1 was confused as to the designation of the officer before whom he lodged the FIR, the Sub-Inspector or the Inspector. Therefore, there is no doubt that the FIR was lodged at the Police Station within half an hour of the incident on 25.01.2004. [para 15] [449-E-F-H; 450-B-C

Meharaj Singh (L/Nk.) etc. v. State of U.P. **(1994) 5 SCC 188 - distinguished.**

1.5 In the instant case, there is no evidence to show that the deceased was armed in any manner when he questioned A-1 as to why he had threatened his wife. On the other hand, the appellants were armed with knives and attacked the deceased on his head and face even after he fell down. Thus, A-1, A-2, A-3 and A-4, who were the offenders, have taken undue advantage and acted in a cruel and unusual manner towards the deceased. Besides, there were six injuries on the head and face of the deceased. Thus, Exception 4 to s.300 IPC is not attracted. [para 17-18] [451-A-D-F]

1.6 Considering the nature of the injuries, there is no doubt that the common intention of A-1, A-2, A-3 and A-4 was to cause the death of the deceased. Accordingly, A-1, A-2, A-3 and A-4 (the appellants) were guilty of the offences punishable u/s 302 read with s. 34, IPC. [para 18] [452-E-F]

Felix Ambrose D'Souza v. State of Karnataka **(2009) 16 SCC 361,** *State of Andhra Pradesh v. Thummala Anjaneyulu* **2010 (14) SCR 925 = (2010) 14 SCC 621 and** *Veeran and Others v. State of Madhya Pradesh* **2011 (5) SCR 300 = (2011) 11 SCC 367 - cited.**

Case Law Reference:

(1994) 5 SCC 188	**distinguished**	**para 8**
2009 (16) SCC 361	**cited**	**para 10**
2010 (14) SCR 925	**cited**	**para 10**
2011 (5) SCR 300	**cited**	**para 10**
1996 (4) Suppl. SCR 28	**relied on**	**para 13**
1981 (3) SCR 504	**relied on**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 353 of 2008.

From the Judgment & Order dated 06.09.2007 of the High Court of Judicature at Madras in Crl. A. No. 552 of 2006.

WITH

Crl. A. Nos. 358-359 of 2008.

P.R. Kovilan Poonakuntran, Geetha Kovilan, Anjani Aiyagari Ram Lal Roy, K. Ramkumar (for K. Ramkumar & Associates) for the Appellants.

B. Balaji, R. Rakesh Sharma, P. Krishna Moorthy, M. Yogesh Kanna for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are appeals against the judgment dated 06.09.2007 of the Division Bench of the Madras High Court in Criminal Appeal Nos.641, 551 and 552 of 2006.

FACTS

2. The facts very briefly are that on 25.01.2004 at 22:45 hours, Dhanaprabhu (hereafter referred to as the 'informant') lodged a First Information Report in Police Station K.4, Anna Nagar. In this First Information Report, the informant stated: his father and he had been running a plastic company in the name of 'Economic Plastic Industries' and his younger brother, Ravi, is also in the said business. There was previous enmity between Ravi and one Elumalai and on 25.01.2004 at around 5.30 p.m. Elumalai telephoned to the wife of Ravi, Vijayalakshmi, and threatened her saying 'Ask your husband to behave or else, things will be different' and Vijayalakshmi informed this to her husband Ravi. On the same day, at around 10.00 p.m., the informant, Ravi and his friend Gubendiran were on their way to Naduvankarai Pillaiyar Kovil Street, through the Naduvankarai Bridge. While crossing the Seema Matriculation School at around 10.15 in the night, they saw Elumalai, and Ravi asked Elumalai as to why he telephoned to his wife and threatened her, and at once Elumalai and Prakash retaliated and took out knives from their hips and hacked Ravi on his head. Ravi's head got cut and smashed and Ravi fell down in a pool of blood. Gubendiran, who attempted to prevent the attack, was hacked by Prakash with a knife and this was intercepted by Gubendiran with his left hand and Gubendiran started bleeding. Thereafter, Babu, Senthil and Nagaraj, who were with Elumalai, hacked on the head of Ravi with their knives and all of them ran away with their knives towards the East and Ravi died on the spot. Pursuant to the FIR, a case was registered under Sections 147, 148, 341, 324 and 302 of the Indian Penal Code, 1860 (for short 'the IPC'). After investigation, a charge-sheet was filed against Elumalai (A-1), Prakash (A-2), Babu (A-3), Senthil (A-4), Nagaraj (A-5) and Udaya (A-6).

3. At the trial, the informant was examined as PW-1. Gubendiran, who accompanied Ravi on 25.01.2004 to the place of occurrence and witnessed the occurrence and got injured, was examined as PW-2. Nagarajan, who had gone in search of Ravi on 25.01.2004 at about 10 O' clock in the night and come to the place of occurrence, was examined as PW-3. On the basis of the evidence of PW-1, PW-2 and PW-3 as well as other witnesses, the trial court convicted A-1, A-2, A-3 and A-4 under Sections 148 and 324 IPC read with Section 149 IPC and Section 302 IPC read with Section 149 IPC and also convicted A-6 under Sections 147 and 324 IPC read with Section 149 IPC and Section 302 IPC. The trial court, however, acquitted A-5 of all the charges. Aggrieved, the appellants filed Criminal Appeal Nos. 509, 641, 551 and 552 of 2006 before the High Court and by the impugned judgment, the High Court acquitted A-6 (the appellant in Criminal Appeal No. 509 of 2006), but maintained the convictions of A-1, A-2, A-3 and A-4. Aggrieved, A-1, A-2, A-3 and A-4 have filed these criminal appeals.

CONTENTIONS ON BEHALF OF THE PARTIES

4. Mr. P.R. Kovilan Poonakunpran, learned counsel appearing for A-3 and A-4, the appellants in Criminal Appeal No. 353 of 2008, and Mrs. Anjani Aiyagari, learned counsel appearing for A-1 and A-2, the appellants in Criminal Appeal Nos. 358-359 of 2008, submitted that originally eight accused persons were charged for the offence under Section 302 read with 149 of the IPC, but two of these accused persons were juveniles and were proceeded against under the Juvenile Justice (Care and Protection of Children) Act, 2000, and out of the remaining five accused persons, the trial court acquitted A-5 and the High Court acquitted A-6 and there remain only four accused persons (A-1 to A-4) who have been convicted under Section 302/149 of the IPC. They submitted that for a conviction under Section 302 of the IPC with the aid of Section 149 of the IPC, a minimum of five accused persons have to form an unlawful assembly with the common object of causing

the death of a person and in this case since after the acquittal of A-6 by the High Court, there are only four accused persons, the conviction under Section 302/149 of the IPC is not sustainable. In support of this submission, they relied on the decision of this Court in *Mohan Singh and Another v. State of Punjab* (AIR 1963 SC 174), *Shaji and Others v. State of Kerala* [(2011) 5 SCC 423] and *Raj Kumar alias Raju v. State of Uttaranchal (now Uttarakhand)* [(2008) 11 SCC 709].

5. Learned counsel for the appellants next submitted that the offence under Section 302 of the IPC is in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body", whereas Sections 141 and 149 of the IPC are in Chapter VIII of the IPC, which is titled "Of Offences against the public tranquility". They submitted that the provisions relating to unlawful assembly thus deal with offences against public tranquility and can have no application to offences against the human body and therefore the High Court is not right in maintaining the conviction of the appellants under Section 302 of the IPC with the aid of Section 149 of the IPC.

6. Learned counsel for the appellants argued that the very foundation of the prosecution case is that on 25.01.2004 at about 5.30 p.m. A-1 had telephoned to the wife of the deceased and threatened her and the wife of the deceased informed the deceased and at 10.00 p.m. on the same day the deceased along with PW-1 and PW-2 went to the place where the incident took place, but the prosecution has not been able to prove that there was a telephone in the house of the deceased. In this context, learned counsel for the appellants referred to the evidence of the Investigating Officer, PW-13, to the effect that he had not enquired whether the deceased had a telephone facility at his residence. They submitted that since the foundation on which the prosecution case begun has not been proved, the trial court and the High Court should not have held the appellants guilty.

7. Learned counsel for the appellants submitted that the

evidence of PW-1, PW-2 and PW-3, who claim to be eye-witnesses, should not have been believed by the trial court and the High Court to convict the appellants. They submitted that only PW-2 was with the deceased at the time of the occurrence, and PW-1 in fact came to the place of occurrence in search of the deceased after the occurrence had taken place. They submitted that there were discrepancies in the evidence of PW-1, PW-2 and PW-3. They pointed out that while PW-1 has stated that when the incident took place there were 40 persons at the place of occurrence, PW-2 has stated that there was nobody nearby except the accused persons and PW-3 has stated that he has neither seen PW-1 nor PW-2 at the place of occurrence. Learned counsel for the appellants submitted that the truth is that PW-2 had earlier named someone else as the accused, but he was put up in the lockup and pressurized by the police to name the appellants as the accused persons. They referred to the evidence of PW-2 to show that he was actually put in the lockup for five days and that he had given the oral complaint to the authorities in this regard.

8. They further submitted that there were several doubts with regard to the date and time when the FIR was lodged as well as the place where the FIR was lodged. They referred to the evidence of PW-10, the Head Constable of K.4 Police Station where the FIR was registered, to show that he has not stated that the FIR was registered at the Police Station. They submitted that PW-1 has also stated in his evidence that when he went between 10.30 p.m. and 11.00 p.m. to the Police Station to lodge the FIR, he saw the Sub-Inspector and the Sub-Inspector wrote the FIR, but he admits that he does not know the name of the Sub-Inspector and that he saw the Inspector on the next day and on the day when he lodged the FIR, he did not see the Inspector. On the other hand, the FIR (Ext. P-21) shows that the Inspector of Police had himself signed the FIR on 25.01.2004. They cited the decision of this Court in *Meharaj Singh (L/Nk.) etc. v. State of U.P.* [(1994) 5 SCC 188] for the proposition that where there is delay in lodging of the FIR, there

is danger of introduction of a false prosecution story as an afterthought.

9. Learned counsel for the appellants submitted that the investigation was defective inasmuch as the knives (MO 1 to MO 5), which were alleged to have been used on the deceased by the appellants and recovered by the Police, have not been examined by finger print experts to find out the real accused persons. They submitted that the appellants should be acquitted of the charge under Section 302/149 of the IPC for the same reasons for which A-5 and A-6 have been acquitted by the trial court and the High Court.

10. Finally, learned counsel for the appellants submitted that the evidence led through PW-1, PW-2 and PW-3, in any case, shows that after provocation by the deceased there was a sudden fight between the accused persons on the one hand, and the deceased, PW-2 and PW-3, on the other hand, and therefore the offence allegedly committed by the appellants falls under Exception 4 to Section 300 of the IPC and the appellants are at best to be guilty of culpable homicide not amounting to murder and are liable to punishment under Section 304 of the IPC. They submitted that the appellants have already undergone 11 years of imprisonment and should now be set at liberty. In support of this submission, they relied on the decisions of this Court in *Felix Ambrose D'Souza v. State of Karnataka* [(2009) 16 SCC 361], *State of Andhra Pradesh v. Thummala Anjaneyulu* [(2010) 14 SCC 621] and *Veeran and Others v. State of Madhya Pradesh* [(2011) 11 SCC 367].

11. In reply, learned counsel for the State, Mr. V. Balaji, submitted that both the trial court and the High Court have believed the evidence of PW-1, PW-2 and PW-3 and there is no good ground shown for this Court to discard the evidence of the aforesaid three eye-witnesses. He further submitted that it is not correct that the deceased did not have a telephone at his house as the evidence of PW-1 would show that

Vijayalakshmi, the wife of the deceased, had a cell phone. He further submitted that PW-2 is a witness who was injured in the occurrence and this will be clear from the FIR in which it is stated that PW-2, who attempted to prevent the attack on the deceased, was hacked by Prakash with a knife and as a result he got a cut on the left hand. He submitted that the discrepancies in the evidence of PW-1, PW-2 and PW-3 pointed out by the learned counsel for the appellants, if any, are not material and in any event do not belie the prosecution case against the appellants that the knives with which the offence was committed (MO 1 to MO 5) have not been examined by finger print experts. He further submitted that the FIR also corroborated the substantive evidence of PW-1, PW-2 and PW-3 and was registered within half an hour of the incident without any delay. He submitted that the contention of the appellants that date and time of the lodging of the FIR was doubtful has no substance as would be clear from Exts. P-1 and P-21 as well as the evidence of PW-1 and PW-13.

12. In reply to the contention of the appellants that the appellants are at best guilty of culpable homicide not amounting to murder under Section 304 of the IPC, he submitted that a perusal of the post mortem report (Ext. P-7) and the evidence of the Doctor who conducted the postmortem, PW-7, would show that there were multiple injuries on the face and head of the deceased on account of which the deceased died. He argued that the injuries were of a very grave nature and would in the ordinary course cause death of a person and therefore the appellants by causing the injuries intended to cause the death of the deceased and are guilty of the offence under Section 302 of the IPC.

FINDINGS OF THE COURT

13. It is not necessary for us to deal with the contention of the learned counsel of the appellants that the provisions of Sections 141 and 149, IPC, relating to unlawful assembly would not be attracted in case of offences affecting the human body

such as the offence under Section 302, IPC, nor is it necessary for us to deal with the contention of the appellants that after the acquittal of A-5 and A-6 by the trial court and the High Court respectively, there were only four accused persons and for constituting 'unlawful assembly', a minimum of five persons are necessary because we find from the evidence that the conviction of A-1, A-2, A-3 and A-4, the appellants herein, under Section 302, IPC can be sustained without the aid of Sections 141 and 149, IPC. PW-1 has stated that at 10.25 p.m. on 25.01.2004, they saw that A-1 and A-2 had threatened the deceased and at that time A-2 was standing close to A-1 and when the deceased abused A-1, all of them hacked the deceased on his head and the deceased swooned and fell down and at once A-1, A-2, A-3 and A-4 along with three others attacked the deceased with the knives. PW-2 has similarly stated that when the deceased asked A-1 as to why he was threatening his wife by phone, at once A-1 took out his knife from his hip and hacked the deceased and the deceased fell down and A-1 cut his head and face and thereafter A-1, A-2, A-3, A-4 and three other persons hacked the deceased. PW-3 has also stated that when he went to Naduvankarai to meet the deceased, A-1 and A-2 hacked the deceased and the other accused persons kicked the deceased and tortured the deceased and the accused were armed with knives. Thus, the evidence of PW-1, PW-2 and PW-3 makes it clear that the deceased was attacked by A-1, A-2, A-3 and A-4 in furtherance of their common intention and therefore all the four accused persons (the appellants) were liable for the criminal act of causing the death of the deceased under Section 34, IPC, as if the criminal act was done by each of them alone. In *Dhanna etc. v. State of M.P.* [(1996) 10 SCC 79], this Court has held that where the Court finds that the strength of the assembly was insufficient to constitute it into "unlawful assembly", but the remaining persons who participated in the crime had shared common intention with the main perpetrators of the crime, the Court can take the aid of Section 34 of the IPC even if the said Section was not specifically mentioned in the charge.

14. We have considered the discrepancies in the eye-witnesses account of the occurrence given by PW-1, PW-2 and PW-3 pointed out by the learned counsel for the appellants with regard to the names and number of persons who were present at the place of occurrence when the incident took place on 25.01.2004, but we find that PW-1, PW-2 and PW-3 were examined on 21st September, 2005 more than one and a half years after the incident and it was natural for them to differ in some respects of what they saw and what they remember. As has been held by this Court in *State of Rajasthan v. Smt. Kalki and Another* [(1981) 2 SCC 752], in the depositions of witnesses there are always normal discrepancies however honest and truthful the witnesses may be and these discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like.

15. We have also considered the contention of the learned counsel for the appellants that it is doubtful that the FIR was registered at the Police Station and that the FIR may not have been registered on 25.01.2004 but on the next day when PW-1 met the Inspector of the Police Station. We, however, find that the Inspector of Police who has been examined as PW-13 has stated very clearly in his evidence that on 25.01.2004 at 10.45 pm when he was at the Police Station, PW-1 lodged a complaint and he wrote down that complaint and read it over to PW-1 and obtained his signature and registered Crl No.181/2004 under Sections 147, 148, 341, 324 and 302, IPC. The complaint written by PW-1 has been marked as Ext.P-1 and the printed FIR prepared by PW-13 has been marked as Ext.P-21. PW-13 has further stated that the printed FIR was sent to the 5th Metropolitan Magistrate and the copies were sent to the higher officials concerned and immediately he visited the place of occurrence at 11.30 p.m. The evidence of PW-13 is supported by the evidence of PW-1 who has stated that after his brother died, he informed his house and informed the police

at K.4 Anna Nagar Police Station and the police came and saw the place at which the murder was committed. In his cross examination, however, he has stated that Sub-Inspector had written the FIR and that he did not know the name of the Sub-Inspector and he saw the Inspector on the next day and when he lodged the complaint he has not seen the Inspector. On a reading of the evidence of PW-1, in its entirety, one can only come to the conclusion that the FIR was lodged by PW-1 on 25.01.2004 soon after the incident between 10.30 p.m. to 11 p.m. but PW-1 was confused as to the designation of the officer before whom he lodged the FIR, the Sub-Inspector or the Inspector. We have, therefore, no doubt that the FIR was lodged at the K.4 Police Station within half an hour of the incident on 25.01.2004. Hence, the decision of this Court in *Meharaj Singh (L/Nk.) etc. v. State of U.P.* (supra) that where there is delay in lodging of the FIR, there is danger of introduction of a false prosecution story does not apply to the facts of the present case.

16. We also do not find any merit in the submission of learned counsel for the appellants that there was no evidence to show that at the residence of the deceased there was a telephone through which the wife of the deceased received the threat call from A-1 at 5.30 p.m. on 25.01.2004. PW-1 has stated that the wife of the deceased Vijayalakshmi had a mobile phone and A-1 had talked over cell phone to Vijayalakshmi. Similarly, we do not find any merit in the submission of learned counsel for the appellants that the prosecution case should not be believed as the knives (MO 1 to MO 5) which have been recovered had not been examined by the finger print experts to find out the real accused persons because in this case there is direct evidence of three eye witnesses, PW-1, PW-2 and PW-3, to establish beyond reasonable doubt that the appellants had struck the deceased with knives. If a defect in the investigation does not create a reasonable doubt on the guilt of the accused, the Court cannot

discard the prosecution case on the ground that there was some defect in the investigation.

17. We are also not convinced with the submission of the learned counsel for the appellants that this was a case which fell under Exception 4 to Section 300, IPC. Exception 4 to Section 300, IPC is quoted hereinbelow:

> "Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

The language of *Exception* 4 to Section 300 is, thus, clear that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel provided the offender has not taken undue advantage or acted in a cruel or unusual manner. In this case, there is no evidence to show that the deceased was armed in any manner when he questioned A-1 as to why he had threatened his wife. On the other hand, the appellants were armed with knives and attacked the deceased on his head and face even after he fell down. Thus, A-1, A-2, A-3 and A-4, who were the offenders, have taken undue advantage and acted in a cruel and unusual manner towards the deceased who is not proved to have been armed.

18. Moreover, we find from the evidence of PW-7, the doctor who conducted the post mortem of the deceased on 26.01.2004 at around 12.45 hours, that he found as many as six injuries on the head and face of the deceased. These injuries are extracted hereinbelow:

> "Injury 1: A bruised injury in red colour admeasuring 3x2 cm on the left cheek and in 2x2 cm at the tip of the nose.
>
> Injury 2: An oblique incised injury 3x0.05 cm bone deep on the lower jaw.

> Injury 3: An incised injury vertical, 2x0.5 cm bone deep on th4 left side of the lower jaw.
>
> Injury 4: An incised injury, oblique 3x05 cm muscle deep on the lower lip on its right side.
>
> Injury 5: Several incised injuries crosswise and longitudinal. On opening it, it was found that the tissues on the cranium were found bruised and the bones of the skull fractured and brain smashed and visible from outside.
>
> Injury 6: An incised injury seen horizontally and gaping in between the eyes, 22x6 cm. on dissecting, it was found that, all the tissues, nerves and blood vessels had got cut the face was smashed and the upper jaw bone and the lower jaw bone crumbled. Both the eyes had got completely smashed and seen outside the eye-sockets. The teeth in the upper jaw and those of the lower jaw were broken and some fallen."

PW-7 has further stated that due to these injuries sustained on his head and face, the deceased would have died as has been expressed by him in the post mortem report Ext.P-7. Considering the nature of the injuries and, in particular, injury nos.5 and 6, we have no doubt that the common intention of A-1, A-2, A-3 and A-4 was to cause the death of the deceased. Accordingly, A-1, A-2, A-3 and A-4 (the appellants) were guilty of the offences under Section 302 read with Section 34, IPC.

19. In the result, we find no merit in the appeals and we accordingly dismiss the same.

R.P. Appeals dismissed.

J. SUNDRAMMA
v.
STATE OF KARNATAKA & ANR.
(Civil Appeal No. 2648 of 2013)

MARCH 21, 2013.

[SURINDER SINGH NIJJAR AND PINAKI CHANDRA GHOSE, JJ.]

CONSTITUTION OF INDIA, 1950:

Art.142 - Allotment of plot cancelled for deficiency in payment - Stand of allottee that being an illiterate widow, she could not notice the amount that remained to be paid - Held: It may be that the Development Authority did not have any discretion either to extend the time for payment or to regularize the allotment which had been initially made in favour of husband of appellant - Therefore, decision rendered by Single Judge, as confirmed by Division Bench of High Court cannot be said to be legally erroneous - However, it also cannot be ignored that appellant is an illiterate widow and has two minor children - This apart, it has been pointed out that the site which was allotted to her is still available and can be given to her - In view of peculiar facts and circumstances of the case, and, purely in the interest of justice on humanitarian grounds, in exercise of jurisdiction under Art. 142 of the Constitution, it is directed that the site which was originally allotted to appellant's husband and subsequently allotted to her, be regularized and registered in her name - She will, however, make payment of balance amount along with 18% interest from due date.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2648 of 2013.

From the Judgment and order dated 17.01.2011 of the

High Court of Karnataka at Bangalore in WA No. 901 of 2010.

P. Vishwanatha Shetty, M.C. Dhingra, D.L. Chidananda, Gaurav Dhingra, Anitha Shenoy, Sharan Thakur, Vijay Kumar Paradesi and Dr. Sushil Balwada for the appearing parties.

The following order of the Court was delivered

O R D E R

1. Heard learned counsel for the parties.

2. Leave granted.

3. The appellant is the widow of the original applicant, S. Ramakrishna, who was allotted a site bearing No.7119 measuring 6 meters x 9 meters in Vijayanagar, 4th Stage, 2nd Phase, Mysore, by the Mysore Urban Development Authority, under general category. The allottee made part payment of the consideration amount, however, the payment was not made within the stipulated time. The husband, however, passed away on 25th May, 1994, as a result of which the appellant made an application for allotment of the plot in her name. This application was accepted on 5th March,1998 and the plot was allotted in the name of the appellant. The total price of the site was fixed at Rs.10,000/-. The appellant deposited Rs.1157/- along with the application and Rs.1500/- within the stipulated fifteen days of receipt of the allotment letter. She was to pay Rs.7343/- within ninety days from the date of the issuance of the grant certificate. By mistake, being illiterate, she deposited only Rs.5000/-, leaving a sum of Rs.2343/- unpaid. The Mysore Urban Development Authority issued a notice on 19th January, 2005 indicating that the total price of the site is Rs.10,000/-, out of which the allottee had paid only Rs.7657/-, thus leaving a balance, to be paid, of Rs.2343/-. She was directed to give proof of payment within 15 days of the receipt of the show cause notice in case the entire consideration amount has been paid. It appears that the appellant made an application seeking

extension of time through application dated 8th August, 2006. However, by order dated 7th November, 2006, the aforesaid request of the appellant was rejected and the allotment made in her name was cancelled. Whilst rejecting the claim of the appellant, the respondent - Mysore Urban Development Authority notices that after the death of the husband, the appellant was granted the site on 28th August, 1998. It was noticed that "the sale consideration of the said site is Rs.10,000/-, out of the sale consideration, she paid total amount of Rs.7657/- (Rupees seven thousand six hundred and fifty seven only) but she has not paid the remaining sale consideration of Rs.2343/- (Rupees two thousand three hundred and forty three only) till this day, therefore, now there is no provision to receive the sale consideration of the granted site". On the basis of the above, the site allotted to the appellant was cancelled.

4. The appellant challenged the aforesaid order dated 7th November, 2006 by filing Writ Petition No.4995 of 2010 (LB-RES). The Writ Petition was, however, dismissed on the ground that the appellant had not shown due diligence in making the payments, as required under the allotment order. It was also noticed that eleven years had elapsed since the allotment was made and, therefore, the appellant could not claim any equity in her favour also. The appellant challenged the aforesaid order of dismissal of the writ petition by filing a Writ Appeal No.901 of 2010 (LB-RES) which has also been dismissed by the impugned order dated 17th January, 2011. While dismissing the writ appeal, the High Court observed that since the appellant was guilty of laches inasmuch as the order of cancellation dated 7th November, 2006 was challenged in the writ petition in the year 2010, she is not entitled to any relief. The claim made by the appellant that she belongs to backward community, was also rejected. It was noticed that the original allotment had been made in favour of her husband as a general category applicant and not as a person belonging to backward community. The aforesaid order is challenged by the appellant by filing Special

Leave to Appeal (Civil) No.18231 of 2011 giving rise to the present Civil Appeal.

5. Mr. M.C.Dhingra, learned counsel appearing for the appellant submitted that the appellant is an illiterate widow with two minor children and, therefore, the High Court erred in not granting her relief in exercise of its discretionary jurisdiction under Article 226/227 of the Constitution of India.

6. Mr. P.Vishwanatha Shetty, learned senior counsel appearing for respondent No.2-Mysore Urban Development Authority that in matters of allotment of plots, the relief cannot be granted on compassionate grounds, as the allotment is governed by the strict rules and procedures and, therefore, no relief could have been granted to the appellant.

7. According to the strict letter of the law, Mr. Shetty would be right in his submission that respondent No.2 did not have any discretion either to extend the time for payment or to regularize the allotment which had been initially made in favour of the husband of the appellant. Therefore, the decision rendered by the learned Single Judge, as confirmed by the Division Bench, cannot be said to be legally erroneous. We, however, also cannot ignore the submission of Mr. Dhingra that the appellant is an illiterate widow and has two minor children. This apart, Mr. Dhingra pointed out that the site which was allotted to her is still available and can be given to the appellant.

8. In view of the peculiar facts and circumstances of this case and, purely in the interest of justice on humanitarian grounds, in exercise of our jurisdiction under Article 142 of the Constitution of India, we direct that the site bearing No.7119 measuring 6 meters x 9 meters in Vijayanagar, 4th Stage, 2nd Phase, Mysore, which was originally allotted to the husband of the appellant and subsequently allotted to her, be regularized and registered in the name of the appellant. She will, however, make payment of the balance amount along with 18% interest from the due date. Let the amount be paid within a period of

three months from today. The possession of the site will be handed over to her on payment of the entire amount.

9. It is made clear that since this order has been passed purely on humanitarian grounds, it shall not be treated as a precedent in any other similar matter which may have been decided or is pending before respondent No.2.

10. The appeal is, accordingly, disposed of.

R.P. Appeal disposed of.

PRAKASH

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 26 of 2008 etc.)

MARCH 22, 2013.

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

PENAL CODE, 1860:

ss. 302, 364 and 120-B - Minor boy kidnapped and murdered by three accused - Circumstantial evidence - Conviction and sentence of life imprisonment - Affirmed by High Court - Held: Cogent and acceptable evidence adduced by prosecution has established the deceased last seen with accused, recovery of incriminating articles pursuant to disclosure statements of accused, motive for the crime, i.e. enmity between complaint and accused and threat given by accused to finish the family of complainant - It leads to a conclusion that appellants/accused kidnapped and murdered the deceased - Conviction and sentence upheld - Evidence - Circumstantial evidence - Motive.

The minor son of PW-1 left for school on 15.4.1908, as usual, but did not return. On 19.4.1998 his dead-body was found on a hillock. The investigation culminated in a charge sheet being filed against A-1, A-2 and A-3 for offences punishable u/ss 302, 364 and 120-B IPC. The trial court convicted the accused of the offences charged and sentenced each of them, inter alia, to imprisonment for life. The High Court affirmed the conviction and the sentences. Only A-2 and A-3 filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1 The prosecution case rests solely on the circumstantial evidence. In Sharad Birdhichand Sharda's

case, this Court has laid down golden principles of standard of proof in a case of circumstantial evidence. The relevant and material circumstances heavily relied on by the prosecution are: (i) The deceased was last seen in the company of the appellants-accused; (ii) Recovery of incriminating articles in pursuance of the information given by the appellants; and (iii) motive. [para 4-6] [462-F; 463-A-B; 464-D-F]

Sharad Birdhichand Sarda vs. State of Maharashtra, **1985 (1) SCR 88 = (1984) 4 SCC 116 - relied on.**

1.2 With regard to the last seen theory, prosecution examined three persons, namely, PW-3, PW-4 (both goldsmiths) and PW-10. PW-3 has stated that he was known to complainant, A-1 and A-2. He further stated that on the date of the incident at about 12 he had seen all the accused persons on a scooter and the son of the complainant sitting in between the three accused persons on the scooter. PW-4 has stated that on the date of the incident at about 12.15 he had seen the accused moving in a scooter along with the small boy. Further, PW-10 stated that on 15.4.2008 (the date of incident), he saw the accused along with a boy moving towards the Hillock. He stated that he was known to all the three accused persons and the child. He was cross-examined at length but nothing was elicited disproving his statement. The prosecution very much relied on PWs 3, 4 and 10 to prove the last seen theory and the courts below rightly accepted their version. This Court is satisfied that the prosecution has succeeded in establishing the circumstance of last seen theory. [para 11-12] [467-G-H; 468-A-E]

1.3 In the course of investigation and in pursuance of the information given by A-1, his pant and shirt stained with blood were recovered from his house in the

presence of PWs 21 and 23. As per FSL report, the stains of blood on the pant and shirt are of human origin. [para 15] [469-C-D]

1.4 The analysis of the evidence, particularly the evidence o PW-1 and his wife PW-7, clearly shows that the prosecution has succeeded in establishing that the relations betweens the family of the complainant and the appellants-accused were hostile. In fact one of the accused had threatened the complainant and his wife of finishing their family. On the date her son went missing she had seen the three accused with a scooter near her house. This Court is satisfied that the prosecution has proved motive on the part of the appellants for committing the murder of the son of PWs 1 and 7. [para 13] [468-F-G]

1.5 In the facts and circumstances, this Court holds that the prosecution has established all the circumstances by cogent and acceptable evidence and it leads to a conclusion that it were the appellants/ accused who kidnapped and committed the murder of the deceased. The trial court has rightly accepted the prosecution case and awarded life sentence which was rightly affirmed by the High Court. [para 16] [469-D-E]

Case Law Reference:

1985 (1) SCR 88 relied on para 4

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 26 of 2008.

From the Judgment and Order dated 02.03.2006 of the High Court of Rajasthan at Jodhpur in DB Crl. No. 154 of 2002.

Seeraj Bagga for the Appellant.

Shovan Mishra and Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the final judgment and order dated 02.03.2006 passed by the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 154 of 2002, whereby the High Court dismissed the appeal filed by the appellants herein and confirmed the order dated 31.01.2002 passed by the Additional Sessions Judge, Barmer, Rajasthan in Sessions Case No. 28 of 1998 by which the appellants herein were convicted for the offence punishable under Sections 302, 364 and 120-B of the Indian Penal Code (in short "IPC") and sentenced them to undergo imprisonment for life under Section 302 and to pay a fine of Rs.5000/- each.

2. **Brief facts:**

a) This is a case of kidnapping and murder of a 7 year old child out of enmity.

b) On 16.04.1998, Leeladhar (PW-1) lodged a report at Police Station, Barmer stating that on 15.04.1998 his son Kamlesh aged about 7 years left for the school in the morning but did not return home till evening at 7.00 p.m. In pursuance of the said report, the police made a search. On 19.04.1998, on an information by Hansraj (PW-8), Khet Singh (PW-9) and Bheemaram (PW-11) that a dead body of a boy was found lying on the hill of Sujeshwar in mutilated condition, the police along with one Leeladhar (PW-1) went to the spot. They found that some parts of the dead body were eaten by the animals. From the clothes, shoes, socks and school bag, PW-1 identified the dead body as that of his son.

c) On 19.04.1998, another report of kidnapping and murder was lodged by Leeladhar (PW-1) suspecting the involvement of Ramesh S/o Dashrath, Prakash s/o Gautamchand, Ramesh @ Papiya S/o Bhanwar Lal, Pannu, Inder S/o Murlidhar, Ganesh and Pappu. After the investigation

and recovery, the police arrested Prakash, Ramesh @ Papia and Ramesh Khatri on 22.04.1998 and a charge sheet under Sections 302, 364 and 120-B of IPC was filed against the accused persons.

d) By order dated 31.01.2002 in Sessions Case No.28 of 1998, the Additional Sessions Judge, Barmer convicted all the three accused persons for the offences punishable under Sections 302, 364 and 120-B of IPC and sentenced them under Section 302, to undergo life imprisonment with a fine of Rs.5000/- each, in default of payment of fine, further to undergo rigorous imprisonment for one year, under Section 364, RI for 7 years with a fine of Rs.2000 each, in default of payment of fine, further to undergo RI for 6 months and under Section 120-B to undergo 7 years RI with a fine of Rs.2000 each, in default of payment of fine, further to undergo 6 months RI.

e) Challenging the order of conviction and sentence, the appellants filed appeal being D.B. Criminal Appeal No. 154 of 2002 before the High Court. By order dated 02.03.2006, the High Court dismissed the appeal filed by the appellants herein.

f) Aggrieved by the said order, the appellants have preferred these appeals by way of special leave.

3. Heard Mr. Seeraj Bagga, learned Amicus Curiae for the appellants and Mr. Shovan Mishra, learned counsel for the respondent-State.

Discussion:

4. In the case on hand, the prosecution case rests solely on the basis of circumstantial evidence. It was contended by the learned amicus curiae for the appellants that in the absence of direct evidence, the slightest of a discrepancy, depicting the possibility of two views would exculpate the accused of guilt, on the basis of benefit of doubt. Before considering the materials placed by the prosecution and the defence, let us analyse the legal position as declared by this Court on the

standard of proof required for recording a conviction on the basis of circumstantial evidence. In a leading decision of this Court in *Sharad Birdhichand Sarda vs. State of Maharashtra,* (1984) 4 SCC 116, this Court elaborately considered the standard of proof required for recording a conviction on the basis of circumstantial evidence and laid down the golden principles of standard of proof required in a case sought to be established on the basis of circumstantial evidence which are as follows:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra,* (1973) 2 SCC 793 where the observations were made: [SCC para 19, p. 807):

"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

5. Though learned counsel for the appellants referred other decisions, since the above principles have been followed in the subsequent decisions, we feel that there is no need to deal with the same elaborately. With the above "five golden principles", let us consider the case of the prosecution and find out whether it satisfies all the tests.

6. The relevant and material circumstances heavily relied on by the prosecution are:

(i) The deceased was last seen in the company of the appellants-accused.

(ii) Recovery of incriminating articles in pursuance of the information given by the appellants.

(iii) Motive.

7. Learned amicus curiae for the appellants as well as learned counsel for the respondent-State took us through the entire evidence, both oral and documentary. We scrutinized the same and also considered the respective submissions made by them. Before proceeding further, it is relevant to note that among these three accused, A-1 has not challenged his conviction and sentence. The present appeals are filed by A-2

and A-3, wherein we refer the appellants which relates to A-2 and A-3 alone.

8. The first witness examined by the prosecution was Leeladhar (PW-1) - father of the deceased. In his deposition, PW-1 deposed that he is residing at Hathidhora, near Shiv Temple, Barmer. He had two sons and one daughter. His one son died prior to the incident. His eldest son was Kamlesh, thereafter his daughter Khushbu and then youngest son Narendra. He is doing the work of light fitting. He usually goes to work at 8.30-9.00 in the morning and returns back home at 8.00-8.30 in the night. Amongst his three children, Kamlesh used to go to School. He studied in Alesh Narayan Khatri School. On 15.04.1998, his son had gone to school at 11.30 a.m. At that time, son of Peetamber accompanied him. He further narrated that at 5.45 p.m., when he was working at the place of Cobblers, he received the news that his son Kamlesh has not come back from the school. On receipt of the said information, he went home where his wife informed that Kamlesh has not come back from the school. Thereafter, he went to the school and enquired from the school teacher, who told that Kamlesh had not come to school on that day. Thereafter, he enquired from all his relatives at Barmer and searched for him but could not locate him. Then he lodged a complaint with City Police Station stating that his child is not traceable. Five days thereafter at about 7 p.m. the police informed him that they found a dead body. Thereafter, he along with Premji Ghanshyamji went up to the hills. There is a mountain behind the Shivji temple. He was taken up to that mountain and Premji, Ghanshyamji and Moola had gone to the mountain top where the dead body was lying. On seeing the dead body, all the three came to C.I. Sahib and told that it was the dead body of his son Kamlesh. During night, it was not possible to lift the dead body, therefore, next morning he again went to that place and collected the dead body of his son tied in a cloth and brought the same to his home and buried it. He also stated that the right hand of the dead body was cut and the same was

missing. The head of the dead body was also missing. There was a white shirt with black spots, black pant, black belt and black shoes put on the dead body. There was also a school bag with the dead body, which was of his son Kamlesh. The clothes worn on by the dead body was also of his son.

9. He further narrated that on the second day after missing of his son, suspicion rose on Pappu who had gone to Delhi. He further explained that three months prior to the incident, Ramesh Khatri had entered into the house of Indramal Brahmin, whose house is adjacent to his house. In this regard he made a complaint to the parents of the girl as well as to the persons of the locality. The girl was of Indramal. Then Ramesh put the poison packet in the house of Indramal over the wall. Later on, the daughter of Indramal died by consuming that poison. Thereafter, Ramesh Khatri and Indramal Brahmin used to threaten him that they would take revenge of it and would abduct his son at the time of going to school. Three months after the said threat, they committed the murder of his son after abducting him when he was on the way to school. C.I. Sahib of police had taken away the clothes in his presence and also collected pant with black belt, a small blood smeared shit with black spot design, two shoes and socks etc. He lodged a report (Ex.P-01) with police station on the same day stating that his child did not come back home from school. He also informed the police that the dead body of his son was found five days after his missing. After conducting inquest, the police handed over the dead body of his son.

10. The next witness relied on by the prosecution is PW-7, mother of the deceased. In her evidence, she deposed that she had three children. The name of the third child was Kamlesh. She narrated that about 14 months ago, she had sent Kamlesh to school. On the relevant date, when she was standing outside her house, the accused persons, namely, Pappu, Ramesh and Prakash present in the court were standing at the shop of Pappu. Amongst them, Pappu went to

his house and brought scooter and went on the scooter in the same direction in which Kamlesh and Santosh had gone. Thereafter, she went inside her home. At the relevant time, her husband was doing the work of light fitting and he used to go to work spot at 9 'O Clock in the morning return home at 8 'O Clock in the evening. On the relevant date, when he returned home, she informed him that their son Kamlesh had not come back from the school. Thereafter, her husband PW-1 went in search of Kamlesh along with her brother Prem. She also narrated the incident about Ramesh that 12 months prior from the date of her missing of her son, at 11 O clock, she had seen the accused Ramesh entering the house of Indrammal which is close to her house. Ramesh had relationship with the daughter of Indrammal, namely, Pappuni. The said Ramesh used to enter their house even during night. She informed the same to Indrammal's wife. She also disclosed this fact to other neighbours. According to her, on coming to know of the said incident, Indrammal and his sister beat her for which she had lodged a complaint with the police due to which they threatened that they would take revenge of it. One month after the said incident, Pappuni died by consuming poison and, thereafter, the accused Ramesh used to quarrel with her and many times threatened her. She also reported the matter to the police. With the assistance of the local people, the matter was compromised with him. However, she complained that after compromise, her son Kamlesh was missing and subsequently murdered. She narrated the motive for killing of her son by the accused persons. She also asserted that Pappu, Ramesh and Prakash had made her son disappear and according to her, they did it on account of the death of Pappuni and thereafter, murdered her son.

11. Apart from the evidence of PWs 1 and 7 with regard to the last seen theory, prosecution examined three persons, namely, Moolchand (PW-3), Gautam Chand (PW-4) both are goldsmiths and Biglaram (PW-10). In his evidence, PW-3 has stated that he was known to Leeladhar, Ramesh and Prakash.

He further stated that on the date of the incident, in the afternoon at about 12 he had seen all the accused persons moving towards Panchpati Circle Road on a scooter. He had also seen the son of Leeladhar sitting in between the three accused persons on the scooter. Gautam Chand (PW-4), who is also a goldsmith, in his evidence has stated that on the date of the incident at about 12.15 he had seen the accused moving in a scooter along with the small boy. Though both PWs 3 and 4 did not identify the accused persons in the identification parade, in view of their assertion, we are satisfied that the prosecution has succeeded in establishing the circumstance of last seen theory.

12. The next witness relied on by the prosecution to support the last seen theory is Bijlaram (PW-10). In his evidence, he stated that on 15.04.1998, he had gone to Sujesar Hillock for collecting firewood. While he was returning on Gelu Road, he saw the accused along with a boy moving towards the Hillock. The boy was wearing black pant and white shirt and black shoes. He further narrated that all the three accused and the child moved towards the Hillock. He identified all the accused in the Court. He also admitted that he was known to all the three accused persons and the child. He was cross-examined at length but nothing was elicited disproving his statement relied on by the prosecution. The prosecution very much relied on by PWs 3, 4 and 10 to prove the last seen theory and the courts below rightly accepted their version.

13. The analysis of the above evidence discussed so far clearly show that the prosecution has succeeded in establishing that the relations betweens the family of Leeladhar and the appellants-accused were hostile. In fact, Ramesh Khatri, one of the accused had threatened Leeladhar and his wife of finishing their family. We are satisfied that the prosecution has proved motive on the part of the appellants for committing the murder of Kamlesh, son of PWs 1 and 7.

14. It is true that counsel appearing for the appellant

pointed out the discrepancy in the evidence of PWs 11, 12, 16 and 21 about the condition of the dead body. It is relevant to point out that these prosecution witnesses are villagers and further the body was recovered only on 20.04.1998 whereas the incident occurred on 15.04.1998. In fact, PWs 9 and 11 cattle grazers have deposed that the dead body was partly eaten by dog. In view of the same, merely because the prosecution witnesses were not consistent in describing the dead body of 14 year old boy, the entire prosecution case cannot be disbelieved.

15. In the course of investigation and in pursuance of the information given by A-1, pant and shirt stained with blood of Ramesh were recovered from his house in the presence of PWs 21 and 23. The pant and shirt were seized and sealed in a packet marked as S-8. It is further seen that as per FSL report, Exh.P-86, the presence of blood on the pant and shirt are of human origin.

16. In the light of the above discussion, we hold that the prosecution has established all the circumstances by cogent and acceptable evidence and if we consider all the circumstances it leads to a conclusion that it was the appellants/accused who kidnapped and committed the murder of the deceased Kamlesh. We are satisfied that the trial Court has rightly accepted the prosecution case and awarded life sentence which was affirmed by the High Court. We fully concur with the said conclusion. Consequently, the appeals fail and the same are dismissed.

R.P. Appeals Dismissed.

M/S. DEEP TRADING COMPANY
v.
M/S. INDIAN OIL CORPORATION AND ORS.
(Civil Appeal No. 2673 of 2013)

MARCH 22, 2013.

[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

ss. 11(6) and 11(8) - Appointment of arbitrator - Forfeiture of right of Corporation to appoint arbitrator as provided in arbitration clause of agreement - Held: Corporation has forfeited its right to appoint arbitrator - Matter referred to Chief Justice of High Court for consideration of application of appellant-dealer u/ss 11(6) afresh.

An agreement for kerosene/LDO dealership was entered into between respondent no. 1-Corporation and the appellant-dealer. There arose a dispute between the parties and by a notice dated 9.8.2004 the dealer made a demand to the Corporation to refer the dispute to the arbitrator. On 6.12.2004, the dealer filed an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. On 28.12.2004, the Corporation appointed one of its senior Managers as the sole arbitrator. The Chief Justice of High Court by order dated 6.12.2007, dismissed the dealer's application u/s 11(6) of the Act holding that the arbitrator had already been appointed by the Corporation.

Allowing the appeal, the Court

HELD: 1. Sub-s. (6) of s.11 of Arbitration and Conciliation Act, 1996 makes provision for making an application to the Chief Justice for appointment of an

arbitrator in three circumstances, (a) a party fails to act as required under the agreed procedure or (b) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. If one of the three circumstances is satisfied, the Chief Justice may exercise the jurisdiction vested in him u/s 11(6) and appoint the arbitrator. In the instant case, the dealer moved the Chief Justice of the High Court u/s 11(6)(a) for an appointment of the arbitrator as the Corporation failed to act as required under Clause 29 of the agreement. [para 12] [478-B-D]

Datar Switchgears Ltd. v. Tata Finance Ltd. and Another: **(2000) 8 SCC 151;** *Punj Lloyd Ltd. v. Petronet MHB Ltd.:* **(2006) 2 SCC 638 - relied on.**

1.2 Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement. [para 19 and 21] [480-D-E; 481-B-C]

Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited: **2008 (12) SCR 216 = (2008) 10 SCC 240 - referred to.**

1.3 In the instant case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the appellant-dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made u/s 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction u/s 11(6) in the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings u/s 11(6) was of no consequence, and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice u/s 11(6). [para 20 and 23] [481-A-B; 482-F-H]

M/s. Newton Engineering and Chem. Ltd. v. Indian Oil Corporation Ltd. & Ors. **2013 (4) SCC 44 - held inapplicable.**

1.4 Since the Corporation did not agree to any of the names proposed by the appellant for appointment as arbitrator, the matter is sent back to the Chief Justice of the High Court for an appropriate order on the application made by the appellant u/s 11(6). The impugned order is set aside. Arbitration Case No. 107 of 2004, is restored to the file of the High Court for fresh consideration by the Chief Justice or the designate Judge, as the case may be, in accordance with law and in light of the observations made in the judgment. [para 24-25] [483-B-D]

Case Law Reference:

(2000) 8 SCC 15	**relied on**	**para 14**
(2006) 2 SCC 638	**relied on**	**para 14**
2008 (12) SCR 216	**referred to**	**para 15**
2013 (4) SCC 44	**held inapplicable**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2673 of 2013.

From the Judgment & Order dated 06.12.2007 of the High Court of Allahabad in Arbitration Case No. 107 of 2004.

Amit Sharma for the Appellant.

Abhinav Vashishta, Priya Puri, Sagar Singhal, Anuj Malhotra for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The questions that arise for consideration in this appeal, by special leave are, whether respondent No. 1 has forfeited its right to appoint the arbitrator having not done so after the demand was made and till the appellant had moved the court under Section 11(6) and, if the answer is in the affirmative, whether the appointment of the arbitrator by respondent No. 1 in the course of the proceedings under Section 11(6) is of any legal consequence and the Chief Justice of the High Court ought to have exercised the jurisdiction and appointed an arbitrator?

3. The above questions arise from these facts : On 01.11.1998, an agreement for kerosene/LDO dealership was entered into between the first respondent - Indian Oil Corporation (for short, "the Corporation") and the appellant - Deep Trading Company (for short, "the dealer") for the retail sales supply of kerosene and light diesel oil in the area specified in the schedule. In the course of dealership agreement allegedly some violations were committed by the dealer. Following the show cause notice dated 04.03.2004, the Corporation on 12.03.2004 suspended the sales and supplies of all the products to the dealer with immediate effect.

4. Aggrieved by the action of the Corporation, the dealer

filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "1996 Act") before the District Judge, Etawah seeking an order of injunction against the Corporation from stopping the supply of Kerosene/LDO. On 25.03.2004, the District Judge, Etawah passed a restraint order against the Corporation.

5. The Corporation challenged the order of the District Judge, Etawah dated 25.03.2004 before the Allahabad High Court and also prayed for an interim relief. On 12.07.2004, the Allahabad High Court refused to grant any interim relief to the Corporation.

6. On 09.08.2004, the dealer made a demand to the Corporation by a written notice to refer the disputes between the parties to the arbitrator under the terms of the agreement. In the demand notice, it was also stated by the dealer that if the Corporation fails to appoint the arbitrator, the dealer may be constrained to approach the court under Section 11 of the 1996 Act.

7. It appears that the Corporation challenged the order of the Allahabad High Court in the special leave petition before this Court but that was dismissed on 06.12.2004 being an interlocutory order.

8. On or about 06.12.2004, the dealer moved the Chief Justice of the Allahabad High Court under Section 11(6) for the appointment of an arbitrator as the Corporation had failed to act under the agreement. While the said proceedings were pending, on 28.12.2004, the Corporation appointed Shri B. Parihar, Senior Manager, (LPG Engineering) of its U.P. State Office as the sole arbitrator.

9. When the above application came up for consideration, the Chief Justice found no reason to appoint the arbitrator, as sought by the dealer, since the arbitrator had already been appointed by the Corporation. The brief order dated

06.12.2007, by which the dealer's application under Section 11(6) was dismissed by the Chief Justice of the Allahabad High Court, reads as under:

"1. Heard Mr. Siddharth Singh, in support of this application and Mr. Prakash Padia, learned counsel appearing for the respondents.

2. The dispute in this matter is regarding suspension of the petitioner's agency as a kerosene dealer for sometime. The applicant applied for appointment of an arbitrator by writing a letter in March, 2004, but filed the present proceeding on 06.12.2004. An Arbitrator was appointed by the respondents on 28.12.2004. Earlier arbitrator has been replaced by another arbitrator.

3. The contract of the applicant is continuing with the respondents in view of an injunction granted by the Civil Court.

4. The submission of the applicant is that the respondents ought to have moved within thirty days from the date of a request being made. In any case arbitrator has been appointed within thirty days from the filing of the application. Mr. Siddharth Singh, says that the arbitrator conduct should have been appointed after filing of an application under Section 11 of the Arbitration and Conciliation Act.

5. In my view, there is no reason to appoint any fresh arbitrator, as sought by the applicant.

6. The application is dismissed."

10. Clause 29 of the agreement dated 01.11.1998 provides as under:

"29. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission on account

of any of the parties here to arising out or in relation to this Agreement shall be referred to the sole arbitration of the Director (Marketing) of the Corporation, or of some Officer of the Corporation who may be nominated by the Director (Marketing). It is known to the parties to the Agreement that the arbitrator so appointed is a share holder and employee of the Corporation. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Director (Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the Agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Director (Marketing) or a person nominated by such Director (Marketing) of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties, to the Agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

The award shall be made in writing within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint."

11. Sub-sections (1), (2), (6) and (8) of Section 11 are relevant for consideration of the present matter which read as follows :

"11. Appointment of arbitrators.-(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) to (5) xxx xxx xxx

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) xxx xxx xxx

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) to (12) xxx xxx xxx".

12. Sub-sections (3), (4) and (5) of Section 11 have no application in the present case as the parties have agreed on a procedure for appointing the arbitrator in Clause 29. Sub-section (2) provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section (6) makes provision for making an application to the concerned Chief Justice for appointment of an arbitrator in three circumstances, (a) a party fails to act as required under the agreed procedure or (b) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. If one of the three circumstances is satisfied, the Chief Justice may exercise the jurisdiction vested in him under Section 11(6) and appoint the arbitrator. In the present case, the dealer moved the Chief Justice of the Allahabad High Court under Section 11(6)(a) for an appointment of the arbitrator as the Corporation failed to act as required under Clause 29.

13. The three basic facts are not in dispute, namely, (i) on 09.08.2004, the dealer called upon the Corporation by a written notice to appoint an arbitrator in accordance with the terms of Clause 29 of the agreement; (ii) the dealer made an application under Section 11(6) for appointment of the arbitrator on 06.12.2004; and (iii) the Corporation appointed the sole arbitrator on 28.12.2004 after the application under Section 11(6) was already made by the dealer.

14. On behalf of the appellant, Mr. K.K. Venugopal, learned senior counsel, relied heavily upon decisions of this Court, (one) *Datar Switchgears*[1] and (two) *Punj Lloyd*[2] and submitted that the learned Chief Justice erred in holding that there was no reason to appoint any fresh arbitrator since the arbitrator has been appointed by the Corporation.

1. Datar Switchgears Ltd. v. Tata Finance Ltd. and Another: [2000) 8 SCC 151.
2. Punj Lloyd Ltd. v. Petronet MHB Ltd.: [(2006) 2 SCC 638.

15. Mr. Abhinav Vashishta, learned senior counsel for the respondents, on the other hand, relied upon a decision of this Court in *Northern Railway Administration*[3] and submitted that while considering application under Section 11(6) for appointment of arbitrator, the Court must keep in view twin requirements of Section 11(8) and, seen thus, the view of the learned Chief Justice in the impugned order does not call for any interference.

16. In *Datar Switchgears*[1], a two-Judge Bench of this Court considered the scheme of Section 11, noted the distinguishing features between Section 11(5) and Section 11(6) and then considered the question whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after the expiry of thirty days from the date of demand. This Court held that in cases arising under Section 11(6), if the opposite party has not made an appointment within thirty days of the demand, the right to make appointment is not forfeited but continues, but such an appointment has to be made before the first party makes application under Section 11 seeking appointment of an arbitrator. If no appointment has been made by the opposite party till application under Section 11(6) has been made, the right of the opposite party to make appointment ceases and is forfeited.

17. In *Punj Lloyd*[2], the agreement entered into between the parties contained arbitration clause. The disputes and differences arose between the parties. Punj Lloyd (appellant) served a notice on Petronet (respondent) demanding appointment of an arbitrator and reference of disputes to him. Petronet failed to act. On expiry of thirty days, Punj Lloyd moved the Chief Justice of the High Court for appointment of the arbitrator under Section 11(6). Petronet had not made appointment till the date of moving the application. The designate Judge refused to appoint the arbitrator holding that

3. Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited: [(2008) 10 SCC 240].

the remedy available to it was to move in accordance with the agreement. Aggrieved by the said order, a writ petition was filed which was dismissed and the matter reached this Court. A three-Judge Bench of this Court referred to *Datar Switchgears*[1] and held that the matter was covered squarely by that judgment and the view taken by the designate Judge in dealing with the application under Section 11(6) and the Division Bench was not right. This Court restored the application under Section 11(6) before the Chief Justice of the High Court for fresh consideration and appointment of the arbitrator in accordance with Section 11(6).

18. We are in full agreement with the legal position stated by this Court in *Datar Switchgears*[1] which has also been followed in *Punj Lloyd*[2].

19. Section 11(8) provides that Chief Justice or the designated person or institution, in appointing an arbitrator, shall have due regard to two aspects, (a) qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In *Northern Railway Administration*[3], a three-Judge Bench of this Court considered the scheme of Section 11. Insofar as Section 11(8) is concerned, this Court stated that appointment of the arbitrator or arbitrators named in the arbitration agreement is not a must, but while making the appointment the twin requirements mentioned therein have to be kept in view.

20. If we apply the legal position exposited by this Court in Datar Switchgears1 to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 09.08.2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation

only during the pendency of the proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.

21. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement.

22. Learned senior counsel for the Corporation, however, referred to an unreported order of this Court in *Newton Engineering*[4]. The arbitration clause in that case was similar to the arbitration clause in the present case. The contractor had written to the Corporation to appoint E.D. (NR) as sole arbitrator as per the agreement. But the Corporation wrote back to the contractor that office of E.D. (NR) has ceased to exist due to internal re-organisation. The Corporation offered to the contractor to substitute E.D.(NR) with Director (Marketing) to which contractor did not agree. The Corporation then appointed Director (Marketing) as arbitrator. The contractor made an application under Section 11(6)(c) read with Sections 13 and 15 of the 1996 Act for appointment of a retired Judge as a sole arbitrator. The Single Judge dismissed the petition filed by the contractor. Against that order, the special leave petition was filed by the contractor. This Court in paragraph 9 of the order stated as follows :

> "9. Having regard to the express, clear and unequivocal arbitration clause between the parties that the disputes between them shall be referred to the sole arbitration of the ED(NR) of the Corporation and, if ED(NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED(NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED(NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED(NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in light of the reasons indicated above."

4. M/s. Newton Engineering and Chem, Ltd. v. Indian Oil Corporation Ltd. & Ors.: [Civil Appeal No. 7587 of 2012; Decided on 18.10.2012.

23. We are afraid that what has been stated above has no application to the present fact situation. In *Newton Engineering*[4], this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in *Newton Engineering*[4] was entirely different. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made under Section 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction under Section 11(6) in the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings under Section 11(6) was of no consequence.

24. In the course of arguments before us, on behalf of the appellant certain names of retired High Court Judges were indicated to the senior counsel for the Corporation for appointment as sole arbitrator but the Corporation did not agree to any of the names proposed by the appellant. In the circumstances, we are left with no choice but to send the matter back to the Chief Justice of the Allahabad High Court for an appropriate order on the application made by the dealer under Section 11(6).

25. Civil Appeal is, accordingly, allowed. The impugned order is set aside. Arbitration Case No. 107 of 2004, M/s. Deep Trading Company v. M/s. Indian Oil Corporation and others, is restored to the file of the High Court of Judicature at Allahabad for fresh consideration by the Chief Justice or the designate Judge, as the case may be, in accordance with law and in light of the observations made above. No costs.

R.P. Appeal allowed.

AMALENDU KUMAR BERA & ORS.

v.

THE STATE OF WEST BENGAL

(Civil Appeal No. 2677 of 2013)

MARCH 22, 2013

[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

DELAY/LACHES:

Decree against State Government - Execution of - Objection u/s 47 - Rejected - Delay in filing revision - Held: In the application for condonation of delay, no sufficient cause has been shown which may entitle the respondent to get a favourable order for condonation of delay - Merely because the respondent is the State, delay in filing appeal or revision cannot and shall not be mechanically considered; and in absence of 'sufficient cause' delay shall not be condoned - Code of Civil Procedure, 1908 - s.47 - Limitation Act, 1963 - s.5.

Delay - 'Sufficient cause' - Consideration of.

In the execution case filed in 2009 to get the decree dated 7.8.1969 in a suit for declaration of title and permanent injunction, executed against the respondent-State Government, the objection u/s 47 CPC filed by respondent in the year 2010, was rejected by the executing court on 17.8.2010. Another objection u/s 47 CPC filed by the State on 15.9.2011 was also rejected. The respondent-State then filed a civil revision along with an application for condonation of delay before the District Judge challenging the earlier order dated 17.8.2010. The delay in filing the revision was condoned. The High Court declined to interfere.

Allowing the appeal, the Court

HELD: 1.1 Merely because the respondent is the State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in absence of 'sufficient cause' delay shall not be condoned. In the instant case, admittedly, the earlier objection filed by the respondent-State u/s 47 CPC was dismissed on 17.8.2010. Instead of challenging the said order the respondent after about one year filed another objection on 15.9.2011 u/s 47 which was also rejected by the executing court. It was only after a writ of attachment was issued by the executing court that the respondent preferred civil revision against the first order dated 17.8.2010 along with a petition for condonation of delay. Curiously enough in the application for condonation of delay no sufficient cause has been shown which may entitle the respondent to get a favourable order for condonation of delay. The expression 'sufficient cause' should be considered with pragmatism in justice oriented approach rather than the technical detection of 'sufficient cause' for the explaining every day's delay. The delay in official business requires its pedantic approach from public justice perspective. [para 9-10] [490-F-G; 491-A-D; 492-B]

Union of India vs. Nirpen Sharma **AIR 2011 SC 1237 - referred to.**

1.2 True it is, that courts should always take liberal approach in the matter of condonation of delay, particularly, when the appellant is the State but in a case where there is serious laches and negligence on the part of the State in challenging the decree passed in the suit and affirmed in appeal, the State cannot be allowed to wait to file objection u/s 47 till the decree holder puts the decree in execution. The delay in filing the execution case cannot be a ground to condone the delay in filing the

revision against the order refusing to entertain objection u/s 47 CPC. This aspect of the matter has not been considered by the High Court while deciding petition for condoning the delay. [para 10] [491-E-F; 492-A-B]

1.4 There is no justification in condoning the delay in filing the revision petition. The impugned order passed by the High Court is set aside. Consequently, petition for condonation of delay in filing the revision petition stands rejected. [para 11] [492-C-D]

Case Law Reference:

AIR 2011 SC 1237 referred to para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2677 of 2013.

From the Judgment and Order dated 22.03.2012 of the High Court at Calcutta in C.O. No. 602 of 2012.

Ranjan Mukherjee, S. Bhowmick, Soumen Kr. Dutta, B.P. Yadav, Sarla Chandra for the Appellants.

Joydeep Mazumdar, Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was deliverd by

M.Y. EQBAL, J. 1. Leave granted.

2. Aggrieved by the order dated 22nd March, 2012 passed by the Calcutta High Court in C.O. No. 602 of 2012, the petitioner-decree-holder preferred this appeal. The High Court in exercise of power under Article 227 of the Constitution of India had refused to interfere with the order passed by the District Judge, Purba, Medinipur in Civil Revision No.1 of 2011, condoning the delay in filing the Revision Petition.

3. Although the Courts have always exercised discretion

in favour of the person seeking condonation of delay in filing the appeal or revision, but in the facts and circumstances of this case, whether the District Judge was justified in condoning the delay occurred in filing the revision petition?

4. The facts of the case lie in the narrow compass.

5. The plaintiff- appellant filed a suit in the year 1967 being Title Suit No.483 of 1967 for declaration of title in respect of the suit property and also for a decree for permanent injunction restraining the Respondent-State from interfering with the possession of the suit property. The suit was contested by the Respondent- State of West Bengal by filing written statement. The Trial court passed a contested decree in favour of the appellant in respect of the suit property in terms of judgment and decree dated 7.8.1969. Dissatisfied with the judgment and decree the Respondent - State filed an appeal being Title Appeal No.653 of 1969. The appeal was finally heard and dismissed by the Additional District Judge, 1st Court Midnapore on 13.8.1970. No further appeal or revision was filed by the Respondent-State. The appellant-decree holder then put the decree in execution by levying execution case No.27 of 2009. In the said execution case, the respondent state filed objection under Section 47 of the Code of Civil Procedure, which was converted into miscellaneous case No.18 of 2010. The objection inter-alia was that the execution case is barred by law of limitation and that the suit land is a Khasmahal land of the Government. The petitioner decree holder has no right title and interest in the suit property. It was further stated that the judgment and decree passed in the suit is without jurisdiction and is a nullity. The executing court by reasoned order dated 17.8.2010 dismissed the objection petition. By the said order passed in Miscellaneous Case No.18 of 2010 the Court held that the judgment and decree attained finality and the decree-holder who is pursuing the litigation since 1967 should not be deprived of from the fruit of the decree. The executing court further held that the objection under Section 47,

C.P.C. challenging executability the decree is a futile attempt by the State to delay the execution proceedings of the decree holder.

6. After the dismissal of the objection filed by the respondent-State, the executing Court proceeded with the Execution Proceedings and steps were taken for issuance of writ of attachment of moveable property of the judgment debtor-state. In the meantime, the respondent State filed another objection on 15.9.2011 under Section 47 CPC for setting aside the decree passed in the suit and also for recall of the writ of attachment. The executing court after hearing the respondent-State rejected the said petition by order dated 15.9.2011. For better appreciation, the order dated 15.9.2011 is reproduced herein-below:-

> "The record is put up for petition filed by the Jdr. Who also files a petition under Section 47 of C.P.C. for setting aside the decree passed by the Court in T.S. 483/1967 along with a petition for recalling the writ of execution.
>
> Copy served and objected to:
>
> It manifest from the record that decree in T.S. 483/67 was passed on 7.8.1969. Apparently, an appeal was preferred by the defendants/state against such judgment and decree, but the same was also dismissed.
>
> Eventually, the decree holder files the instant executing case for executing decree so obtained, after taking fresh steps upon the JDR. JDR/State appeared and files a w/o against the instant executing case on 6.4.2010 and the same was registered as J. Miscellaneous No.18/2010 under Section 47 of C.P.C. Upon contested hearing of the J. Miscellaneous case, this Court by way of order No.18 dated 17.8.2010 rejected the J. Miscellaneous case on contest observing inter alia that the said objection under

Section 47 of C.P.C. is a fulfill attempt by the State of W.B. to delay the executing proceeding of the decree holder.

Thereafter, the decree holder took steps for executing of the decree passed on 7.8.1969 and then in course of the time. Writ of Attachment of moveable property under order 21 Rule 30 CPC was issued, and the date has been fixed on 20.09.2011 for return of such writ upon execution.

Now, the JDR/State has filed fresh petition under Section 47 of C.P.C. along with a prayer for recall writ of attachment. However, since the state had already instituted an objection case under Section 47 of C.P.C. and the same has already been disposed of and there present petition under Section 47 of C.P.C. is misconceived and liable to be rejected. Consequently, the petition for recall of writ is also misconceived and liable to be rejected."

Hence, it is

Ordered

That the petition under section 47 of C.P.C. dated 15.9.2011 is considered and rejected.

That the petition dated 15.9.2011 for recall of writ of attachment , issued on 20.08.2011 is consequently rejected.

To date."

7. After the said objection under Section 47 was rejected on 15.9.2011, the Respondent-State filed a Civil Revision before the District Judge challenging the earlier order dated 17.8.2010, whereby the objection under Section 47 C.P.C. in miscellaneous case No.18 of 2010 was dismissed. Along with the said revision petition, a separate application under Section 5 of the Limitation Act was filed for condonation of delay in filing

the revision petition. The learned District Judge stayed the operation of the order dated 17.8.2010 on the ground that the interest of the State will be adversely affected and the very object of the filing the revision petition will be frustrated. The said stay order was passed on 2.11.2011.

8. On 3.2.2011, the Limitation Petition filed by the respondent under Section 5 of the Limitation Act for condoning the delay in filing the Revision Petition was taken up for hearing. Although, the District Judge in its order dated 3.2.2012 noticed that the Courts do not have unlimited and unbridled discretionary powers to condone the delay and the discretion has to be exercised within reasonable bounds, known to law. Even then the Court allowed the Limitation Petition and condoned the delay in filing the revision Petition. Aggrieved by the said order the appellant-decree holder moved the Calcutta High Court by filing a revision petition being C.O. No.602 of 2012. The High Court by impugned order dated 23.3.2012 dismissed the revision petition on the ground inter-alia that a liberal attitude should be adopted in the matter of condonation of delay when there is no gross negligence or deliberate inaction or lack of bona-fide on the part of the State. Hence, this appeal by the appellant-decree holder challenging the aforesaid order passed by the High Court in Revision Petition.

9. We have heard the learned counsel appearing for the appellant and the learned counsel appearing for the Respondent-State. There is no dispute that the expression 'sufficient cause' should be considered with pragmatism in justice oriented approach rather than the technical detection of 'sufficient cause' for the explaining every days' delay. However, it is equally well settled that the Courts albeit liberally considered the prayer for condonation of delay but in some cases the Court may refuse to condone the delay in as much as the Government is not accepted to keep watch whether the contesting respondent further put the matter in motion. The delay in official business requires its pedantic approach from public justice

perspective. In a recent decision in the case of *Union of India vs. Nirpen Sharma* AIR 2011 SC 1237 the matter came up against the order passed by the High Court condoning the delay in filing the appeal by the appellant-Union of India. The High Court refused to condone the delay on the ground that the appellant-Union of India took their own sweet time to reach the conclusion whether the judgment should be appealed or not. The High Court also expressed its anguish and distress, the way the State conduct the cases regularly in filing the appeal after the same became operational and barred by limitation.

10. In the instant case as noticed above, admittedly earlier objection filed by the Respondent-State under Section 47 of the Code was dismissed on 17.8.2010. Instead of challenging the said order the Respondent-State after about one year filed another objection on 15.9.2011 under Section 47 of the Code which was finally rejected by the executing court. It was only after a writ of attachment was issued by the executing court the respondent preferred civil revision against the first order dated 17.8.2010 along with a petition for condonation of delay. Curiously enough in the application for condonation of delay no sufficient cause has been shown which entitle the respondent to get a favourable order for condonation of delay. True it is, that courts should always take liberal approach in the matter of condonation of delay, particularly when the appellant is the State but in a case where there is serious laches and negligence on the part of the State in challenging the decree passed in the suit and affirmed in appeal, the State cannot be allowed to wait to file objection under Section 47 till the decree holder puts the decree in execution. As noticed above, the decree passed in the year 1967 was in respect of declaration of title and permanent injunction restraining the Respondent-State from interfering with the possession of the suit property of the plaintiff-appellant. It is evident that when the State tried to interfere with possession the decree holder had no alternative but to levy the execution case for execution of the decree with regard to interference with possession. In our

opinion their delay in filing the execution case cannot be a ground to condone the delay in filing the revision against the order refusing to entertain objection under Section 47 CPC. This aspect of the matter has not been considered by the High Court while deciding petition for condoning the delay. Merely because the Respondent is the State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in absence of 'sufficient cause' delay shall not be condoned.

11. For the aforesaid reasons we do not find any justification in condoning the delay in filing the revision petition. This appeal is, therefore, allowed and the impugned order passed by the High Court is set aside. Consequently, petition for condonation of delay in filing the revision petition stands rejected.

R.P. Appeal allowed.

EXECUTIVE ENGINEER, NANDUR, MADHAMESHWAR CANAL

v.

VILAS EKNATH JADHAV AND OTHERS

(Civil Appeal No. 2919 of 2013 etc.)

APRIL 02, 2013

[SURINDER SINGH NIJJAR AND PINAKI CHANDRA GHOSE, JJ.]

LAND ACQUISITION ACT, 1894:

Dispossession of land owner prior to notification u/s 4(1) - Damages - Held: In case the land owner has been dispossessed prior to the issuance of the preliminary Notification u/s 4(1) of the Act, it will be open to such land owner to recover the possession of his land by taking appropriate legal proceeding - In case the possession is not recovered, he would be entitled to rent or damages for use and occupation for the period Government retained possession of the property.

R.L. Jain (D) by LRs. versus D.D.A. and Others **2004(2) SCR 1156 = AIR 2004 SC 1904 - relied on.**

Case Law Reference:

2004 (2) SCR 1156 relied on para 1

CIVIl APPELLATE JURISDICTION : Civil Appeal No. 2919 of 2013.

From the Judgment and Order dated 28.04.2009 of the High Court of Judicature of Bombay, Bench at Aurangabad in Writ Petition No. 2458 of 2009.

WITH

C.A. No. 2920 of 2013.

Babu Marlapalle, Sudhanshu S. Choudhari for the Appellant.

Shankar Chillarge, Asha Gopalan Nair for the Respondents.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. In spite of service, none has appeared on behalf of respondent Nos. 1 to 4, the persons whose land was acquired. Mr. Babu Marlapalle, learned senior counsel appearing for the appellant submits that the judgment of the High Court is contrary to the law laid down by this Court in *R.L. Jain(D) by LRs. versus D.D.A. and Others* reported in AIR 2004 SC 1904. He submits that the appellant had taken possession of the land of respondent Nos. 1 to 4 on 3.6.2001 whereas the Notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') was issued on 30th December, 2006. Undoubtedly, the aforesaid respondents would have been entitled to interest on the statutory benefits under the Act calculated from the date when the Notification under Section 4 of the Act was issued. However, for the period between 3.6.2001 and 30.12.2006, they would only be entitled to rental compensation. On the rental compensation determined by the Land Acquisition Officer, the respondents would also be entitled to the interest at Bank rate. In support of this, he relies on observations made in paragraph 18 of the judgment in *R.L. Jain(D)* supra. In the aforesaid paragraph, this Court has observed as follows :-

"18.In a case where the land owner is dispossessed prior to the issuance of preliminary Notification under Section 4(1) of the Act the Government merely takes

possession of the land but the title thereof continues to vest with the land owner. It is fully open for the land owner to recover the possession of his land by taking appropriate legal proceedings. He is therefore only entitled to get rent or damages for use and occupation for the period the Government retains possession of the property. Where possession is taken prior to the issuance of the preliminary Notification, in our opinion, it will be just and equitable that the Collector may also determine the rent or damages for use of the property to which the land owner is entitled while determining the compensation amount payable to the land owner for the acquisition of the property. The provision of S.48 of the Act lend support to such a course of action. For delayed payment of such amount appropriate interest at prevailing bank rate may be awarded."

3. The aforesaid observations make it abundantly clear that in case the land owner has been dispossessed prior to the issuance of the preliminary Notification under Section 4(1) of the Act, it will be open to such land owner to recover the possession of his land by taking appropriate legal proceeding. In case the possession is not recovered, he would be entitled to rent or damages for use and occupation for the period Government retained possession of the property.

4. These observations fully support the submissions made by learned senior counsel for the appellant.

5. In view of the above, the appeals are allowed. The judgment and order of the High Court is modified to that extent.

R.P. Appeals allowed.

NATIONAL FERTILIZERS LTD.

v.

TUNCAY ALANKUS & ANR.

(Contempt Petition (Civil) No. 320 of 2009)

IN

(Criminal Appeal No. 926 of 2006)

APRIL 2, 2013.

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 129 - Contempt petition filed for violation of order of Supreme Court - Held: Respondent cannot be held guilty of contempt of court on the definite charge that he withdrew a very large amount from his account in Pictet in violation of the orders of Supreme Court - The amount had been withdrawn prior to the order restraining the respondent from withdrawing the amount from the account in question - Further, the amount had been withdrawn during the period when there was no attachment order in respect of the account - That being the position, there could be no question of committing any violation of Court's order by respondent - The order holding the respondent guilty of contempt is based on an erroneous premise, and is, therefore, recalled - Supreme Court Rules, 1966 - O. 47 - Rules to Regulate Proceedings for Contempt of Supreme Court, 1975 - r. 3(c).

On failure of a company in Turkey, of which respondent no. 1 was the Manager, to supply urea in spite of the petitioner-company having paid the full price, a criminal case was registered in India against a number of accused including respondent no. 1 (accused No. 11). Respondent no. 1 and another accused were extradited to India on 3.10.1997. In the SLP filed by the petitioner before the Supreme Court, it moved an application

requiring respondent no. 1 not to withdraw any portion of the defrauded amount lying in foreign jurisdiction. On 4.9.2006, Supreme Court passed an interim order restraining respondent no. 1 from withdrawing the amounts from the accounts in Swiss Bank. By order dated 14.12.2006 the interim order dated 4.9.2006 was made absolute. On 9.3.2009, the bank concerned informed that they did not hold any asset on behalf of respondent no. 1. The instant contempt petition was filed alleging violation of orders dated 4.9.2006 and 14.12.2006. By order dated 1.4.2010, the respondent was held guilty of contempt of court. The case was directed to be listed on 12.4.2010 for passing the sentence on the contempt giving liberty to respondent no. 1 meanwhile to deposit the amount. However, respondent no. 1 did not deposit the amount.

Dismissing the petition, the Court

HELD: 1.1 A careful scrutiny of the material facts makes it clear that respondent No.1 cannot really be held guilty of contempt. [para 31] [507-F-G]

1.2 In the connected proceedings in Switzerland, on June 19, 1996, the petitioner was able to obtain a criminal attachment order against the three accounts in Pictet, including account No.91925 in the name of respondent no. 1. However, the criminal attachment order was defreezed on April 1, 2003 as the trial was not concluded within one year and respondent no. 1 was not freed on bail during that period as per the terms stipulated by the Swiss authorities. [para 21] [505-D-E]

1.3 From the facts, it is clear that the attachment against the respondent's account was lifted on 1.6. 2006 when the Swiss Supreme Court dismissed the petitioner's appeal and the petitioner was able to obtain the next

attachment order only on 15.12.2006. There was, thus, a period of slightly over six months when there was no attachment order in respect of the account and according to the bank's statement, the amount was withdrawn on June 21, 2006 (i.e. twenty days after the attachment order was lifted) and the account was closed on 25.7.2006. It is, thus, clear that on 4.9.2006 when this Court passed the order prohibiting respondent No.1 from withdrawing any money from the account there was actually no money in the account. That being the position, there could be no question of committing any violation of this Court's order by respondent No.1, therefore, cannot be held guilty of contempt of court on the definite charge that he withdrew a very large amount from his account in Pictet in violation of the orders of this Court. [para 36 and 37] [510-F-H; 512-A-E]

Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh and Others **2010 (2) SCR 1086 = 2010 (3) SCC 705;** *Chhotu Ram v. Urvashi Gulati and Another* **2001 (7) SCC 530 - referred to.**

Rajendra Sail v. M.P. High Court Bar Association and Others **2005 (3) SCR 816 = 2005 (6) SCC 109 - held inapplicable.**

1.4 The order dated 1.4. 2010 by which this Court held that the respondent had withdrawn money from his account with Pictet by flouting the orders of this Court, is founded on the premise that the respondent had not denied the allegation made by the petitioner against him. It is, however, to be noted that the respondent in his reply to the contempt petition filed on March 3, 2010 had stated to the effect that he did not withdraw any amount after the orders passed by this Court. The order dated April 1, 2010, was, thus, clearly based on an erroneous premise of fact. It is, accordingly, recalled. [para 44-45] [513-D-G]

Case Law Reference:

2010 (2) SCR 1086	**referred to**	**para 38**
2001 (7) SCC 530	**referred to**	**para 39**
2005 (3) SCR 816	**held inapplicable**	**para 40**

CIVIL ORIGINAL JURISDICTION : Contempt Petition (Civil) No. 320 of 2009.

IN

Criminal Appeal No. 926 of 2006.

Gaurav Banerjee, ASG, Arjun Krishnan, Ghanshyam Joshi for the Appellant.

Shanti Bhushan, Bahar U. Barqi, Mahmood Alam (for Aftab Ali Khan) for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This petition is filed under Article 129 of the Constitution of India read with Order XLVII of the Supreme Court Rules, 1966 and rule 3(C) of the Rules to regulate proceedings for Contempt of the Supreme Court, 1975 making the prayer to punish respondent No.1 for withdrawing a very large sum of money from his bank account in a Swiss bank in violation of this Court's orders dated September 4, 2006 and December 14, 2006. As a matter of fact, by an earlier order passed by the Court on April 1, 2010, in course of the proceedings of the case, respondent No.1 has actually been held guilty of contempt of court; it is a brief order, wherein Paragraphs 6 & 7, the Court observed and held as follows:

> "6. For the allegations made in the contempt petition, a notice had been issued to the contemnor. In the notices it was specifically mentioned that the charge against him is that he has violated the order of this Court dated 4.9.2006.

> In fact, the respondent No.1-contemnor has filed his reply thereto. However, from a perusal of the reply filed by the contemnor it is clear that he has not denied the allegation of the petitioner that he has withdrawn money by flouting the order of this Court dated 4.9.2006.
>
> 7. From the above discussion, we are satisfied that there is sufficient material on the record to suggest that contemnor-respondent No. 1 has committed contempt of Court. Therefore, we hold the contemnor guilty of Contempt of Court."

2. On that date, however, the Court did not give any punishment to the respondent but directed the case to be listed on April 12, 2010 for passing the sentence on the contempt, observing further that, in the meanwhile, if the contemnor deposited the amount withdrawn from the bank, the Court might consider recalling the order passed on that date.

3. The respondent did not deposit the amount allegedly withdrawn by him from the bank account but on April 6, 2010 filed a petition for recall of the order holding him guilty of contempt of court. He took the plea that the order dated April 1, 2010 was based on the incorrect premise that in the reply to the contempt petition filed by him, he did not deny the allegation that he had made withdrawals from his bank account by flouting the Court's order dated September 4, 2006. He pointed out that in the reply petition, he had clearly and repeatedly said that he had not withdrawn any money from his bank account after the orders of this Court, dated September 4, 2006 and December 14, 2006 and he reiterated that statement in the petition for recall of the order.

4. After that, the case was heard on a number of dates and was finally taken up on July 17, 2012 when the matter was practically heard all over again also on the question whether or not the respondent had committed contempt of court by withdrawing money from his bank account in the Swiss bank

in violation of the Court's orders dated September 4, 2006 and December 14, 2006.

5. The relevant facts necessary to appreciate the respective contentions made on behalf of the parties may be stated thus. The petitioner, National Fertilizers Ltd., is a company registered under the provisions of the Companies Act owned and controlled by the GOI.

6. Karsan Danismanlik Turizm Sanayi Ve Ticaret Limited STI (hereinafter: Karsan) is a Turkish company. The respondent, Tuncay Alankus was the manager of Karsan with individual signature and one Cihan Karanci (not a party to this proceeding) was his deputy manager and counselor. Both Alankus and Karanci were the beneficiaries of Karsan.

7. The petitioner company entered into an agreement, dated November 9, 1995 with Karsan, which presented itself as a producer of urea. The contract was for supply of two lakh metric tons of urea, 46 N fertilizer at a price of US$ 190 per metric ton. The total value of the contract was US$ 38,000,000. In terms of the contract, the petitioner company was to pay to Karsan the full contract value in advance by way of two remittances i.e., (1) US$ 380,000 towards insurance premium before entering into the contract and (2) US$ 37,620,000 towards cost of urea after entering into the contract.

8. On November 22, 1995, three bank accounts in the names of Karsan, Alankus and Karanci were opened with Pictet and Cie Bank (hereinafter: Pictet) in Geneva. The form for opening the account of Karsan indicated that Alankus and Karanci as the beneficial owners.

9. The three freshly opened accounts were numbered as (i) Account No. 91923, (ii) Account No. 91924 and (iii) Account No. 91925. In this case, we are concerned with the operations in Alankus's account number 91925 with Pictet.

10. On November 23, 1995, Karsan asked the petitioner

company to wire the sale price of urea on its account, opened with Pictet. On November 29, 1995, the amount US$37,620,000 was paid by the petitioner company on that account.

11. On November 30, 1995, the account of Karsan was debited and the sum of US$ 28,100,000 was transferred to the account of Alankus (Account No. 91925) with Pictet; from that amount, the sum of US$12,500,000 was split between November 30, 1995 and May 20, 1996, on the accounts of Alankus, his daughter and Cihan Karanci in banks in Ankara, Almaty and Geneva.

12. Despite making full payment of the contract money, the petitioner did not receive a single grain of urea and it later came to light that the insurance cover taken out in connection with the contract did not provide any protection against the loss suffered by the petitioner. Enquiries were made in India and on May 28, 1996, the CBI lodged a first information report under section 120B read with sections 409/420 of the Penal Code and section 13(2) read with section 7/11/13(1)(c) and (d) of the Prevention of Corruption Act, 1988 against a number of accused, including Cihan Karanci and Tuncay Alankus respondent No.1 (as accused No. 11).

13. In connection with the criminal case, Alankus and Karanci were arrested in Geneva on September 16, 1996 and were extradited to India on October 3, 1997. On being brought to India, both the accused were remanded to judicial custody and after several years of custody Alankus was released on bail subject to the condition that he would not leave Delhi.

14. In the trial of the case, after the prosecution had led its evidence and Alankus was also examined under section 313 of the Code of Criminal Procedure, a petition was submitted on his behalf for examining 63 persons, living in 10 different countries, through video-conferencing, as defence witnesses. The trial court by order, dated October 11, 2004 gave

permission for examination of only 6 out of the 63 witnesses. Against the order of the trial court, Alankus filed criminal revision No.126 of 2005 before the Delhi High Court on which the High Court by order dated July 14, 2005 allowed him to examine, in addition to the 6 witnesses allowed by the trial court, 21 more witnesses, of whom a list was placed on record before the High Court, at the expense of the State.

15. Against the order of the Delhi High Court, two special leave petitions came to this Court. One, being SLP (Criminal) No.6291 of 2005 was filed by the CBI and the other, SLP (Criminal) No.13 of 2006, was filed by the present petitioner. The petitioner in its SLP also moved an application making the prayer for a direction to respondent No.1 (Tuncay Alankus) "to furnish an undertaking to the effect that he will not withdraw any portion of the defrauded amount identified and lying in foreign jurisdiction in general and Geneva and Monaco in particular.

16. Both the aforesaid special leave petitions were tagged together and on August 21, 2006 during the hearing of the SLPs, the Court enquired from the counsel appearing for respondent No.1 whether he was willing to give an undertaking that he would not withdraw the money from his Swiss bank account. The counsel appearing for the respondent asked for a short adjournment to take instructions regarding the undertaking asked for by the Court and the SLPs were, therefore, directed to be listed on September 4, 2006.

17. On September 3, 2006, the respondent communicated to his lawyer Miss Seema Juneja in writing, stating that he had been in jail for about 7.5 years and after release on bail, under one of the conditions of the bail, he was not permitted to leave Delhi. His request for permission to travel abroad and meet his advocates for consultation had been declined. Therefore, he could not get any information. He further stated in the communication to his lawyer that he had asked Pictet bank for information by fax but he had not received any response. Referring further to the various kinds of proceedings going

before the Swiss courts, he requested his lawyer to inform the Supreme Court that he was in India for 10 years and he had no access to his accounts in Switzerland and to submit before the Court that the matter had already been decided after lapse of 10 years (sic). He had not received any reply and he was waiting for further instructions.

18. On September 4, 2006 this Court was informed about the response of the respondent in regard to the undertaking sought for from him and on that date this Court passed the following order:

> "Instead of giving an undertaking, learned counsel has produced before us a letter dated 3rd September, 2006, said to have been written by the respondent to his advocate, Ms. Seema Juneja, trying, inter alia, to say that he is in India for ten years and has no access to his accounts in Switzerland. It is stated that, in view of what is stated in this letter, the respondent is not in a position to give an undertaking, as noticed in the order dated 21st August, 2006. Be that as it may, we grant leave and expedite the hearing of the appeals which shall be listed for hearing within a period of three months. All the parties agree that the appeal be heard on the existing record. Additional documents, if any, may be filed within two weeks.
>
> Pending disposal of the appeals, the order of stay granted by this Court on January, 2006, will continue to operate. However, the trial can go on and the respondent, if so advised, can produce such witnesses which have been allowed by the order of this Special Judge. **We restrain the respondent from withdrawing the amounts from the accounts in Swiss Bank till the decision of these appeals."**
>
> (emphasis added)

19. The special leave petitions were finally allowed by order, dated December 14, 2006 by which this Court set aside the order of the High Court and remanded the matter for a fresh consideration by the High Court. While concluding the judgment, this Court made the following direction:

> **"The interim order dated 4.9.2006 is made absolute to the effect that the respondent is restrained from withdrawing the amount from the accounts in Swiss Bank till the decision of the matter. The appeals are allowed accordingly."**
>
> (emphasis added)

20. This contempt petition is filed alleging violation of the aforementioned two orders, dated September 4, 2006 and December 14, 2006.

21. Let us now take a look at some of the connected proceedings in Switzerland. On June 19, 1996, the petitioner was able to obtain a criminal attachment order against the three accounts in Pictet, including account No.91925 in the name of Tuncay Alankus. However, the criminal attachment order was defreezed on April 1, 2003 as the trial was not concluded within one year and Alankus was not freed on bail during that period as per the terms stipulated by the Swiss authorities.

22. Besides the criminal attachment, dated June 19, 1996, the petitioner was also able to obtain the civil attachment of the three bank accounts in question on October 3, 2000 from the Court of First Instance, Geneva.

23. On September 30, 2002, Pictet and Cie Bank, Geneva, informed the Federal Department of Justice and Police, Geneva, as follows:

> "Please share below the total balance of the sued accounts.

> Their credits (value on 30.09.2002) are as follows:
>
> Account No.91923 owner Karsan Ltd. – US$ 232,253/
>
> Account No.91924 owner Mr. Cihan Karanci – US$ 394,757/
>
> Account No.91925 owner Mr. Tuncay Alankus – US$10,763,412."

24. The civil attachment order dated October 3, 2000 became inoperative on June 1, 2006 when the petitioner lost its appeal in Swiss Supreme Court. And it was presumably for that reason that the stay petition was filed by the petitioner in SLP(criminal) No.13 of 2006 which was apparently on an altogether different issue. Nonetheless, this Court deemed fit to pass the order dated September 4, 2006 prohibiting respondent No.1 from withdrawing any money from the accounts in Swiss bank.

25. On September 9, 2006, the advocate of the petitioner sent a copy of the order dated September 4, 2006 passed by this Court to Pictet which was received by Pictet on September 21, 2006.

26. On December 12, 2006, the petitioner's Swiss lawyer applied for attachment in respect of the amounts lying in Pictet including the amount lying in the accounts of respondent No.1.

27. On December 15, 2006, the Court of the First Instance at Geneva granted attachment in favour of the petitioner against respondent No.1 and others in respect of the amount lying in Pictet. Pictet acknowledged the Sequestration order sent by the petitioner's Swiss attorneys vide its communication dated, December 20, 2006 which is as under:

> Concerns: sequestration no. 06 070 321 Z-C/30199/06
>
> Dear Sir,

We acknowledge receipt of your mail dated 15 December 2006 and have taken good note of its contents.

Remaining at your disposal and with regards.

For PICTET & CIE
Signature"

28. Apparently this attachment too lapsed and finally on March 4, 2009, the petitioner's Swiss lawyer obtained a fresh attachment order from the Court of First Instance, Geneva, but on March 9, 2009 Pictet informed the Debts Collection Office at Geneva that they do not hold any assets, inter alia, on behalf of respondent No.1.

29. On April 23, 2009, the Debts Collection Office at Geneva forwarded the letter dated March 9, 2009 of Pictet to the Swiss Attorneys of the petitioner and, completely surprised by the bank's response. the petitioner filed this contempt petition on August 26, 2009.

30. Mr. Gourab Banerjee, learned Additional Solicitor General appearing for the petitioner strongly argued that respondent No.1 had withdrawn a huge sum of money amounting to US$10,763,412 from his account No.91925 with Pictet in brazen violation of this Court's prohibitory orders, dated September 4, 2006 and December 12, 2006 and he is, therefore, liable to be given the most stringent punishment.

31. At first sight the conduct of the respondent may indeed appear contumacious but, a careful scrutiny of the material facts makes it clear that respondent No.1 cannot really be held guilty of contempt.

32. It may be recalled here that on November 21, 2011 on hearing counsel for the parties, this Court had passed the following order:

"Mr. Shanti Bhushan, senior advocate appearing for the contemnor -Tuncay Alankus, stated that on September 04, 2006, when this Court passed the interim order of injunction against his client (which was later confirmed by order dated December 14, 2006), there was no money in his account No. 91925 with the PICTET & CIE Bank, Geneva. There is, therefore, no question of any withdrawals from that account after that date in violation of the court's orders.

In support of the statement, Mr. Bhushan placed great reliance on the decision of the Swiss Supreme Court dated June 01, 2006. The decision of the Swiss Supreme Court indeed takes note of the fact that on November 29, 1995, the petitioner (National Fertilizers Limited) paid a sum of $3,76,20,000 into Account No. 91923 held by Karsan Danismanlik Turizm Sanayi Ve Ticaret Limited STI (shortly known as 'Karsan'). It then goes on to give a break up of the aforesaid sum of $3,76,20,000 from which, on the following day, i.e. on November 30, 1995, a sum of $2,81,00,000 was transferred to the contemnor's personal account No. 91925.

From the Swiss Court decision, it is not clear that on the date this Court passed the injunction order restraining the contemnor from withdrawing any amount from his account, the account was already bereft of any money.

Mr. Bhushan also relied upon a Certificate issued by the Bank, according to which the account in question was closed on July 25, 2006.

Mr. Gourab Banerjee, Additional Solicitor General appearing for the petitioner, submitted that on the date this Court passed the interim order against the contemnor, there was substantial money in his account. In support of this averment, he referred to the order dated June 24, 1996

passed by the Special Judge, Delhi, granting bail to the contemnor and a certificate dated September 30, 2002 issued by the Bank (a copy of which is at Annexure P-3 of the Contempt Petition).

On the basis of the materials so far produced before us, we are not satisfied and we find it difficult to hold with any conviction that on the date the interim order of injunction was passed against the contemnor, there was, in fact, no money in his account with the PICTET& CIE, Geneva.

However, one thing is clear from the decision of the Swiss Court; that is, on November 30, 1995, a sum of $2,81,00,000 was credited to the contemnor's personal account from the amount deposited by the petitioner in the account of Karsan.

We would like to see the bank statement of the contemnor's Account No. 91925 held with PICTET & CIE Bank from November 30, 1995 till the date of the closure of the account on July 25, 2006 to see the inflow and outflow of money from that account.

Mr. Bhushan prays for some time for producing the bank statement. As prayed by him, put up after six weeks.

Let a copy of this order be given to the counsel for the contemnor."

33. In pursuance of the aforesaid order, respondent No.1 has filed an affidavit enclosing a copy of the bank statement certified by Pictet and Cie bank, Geneva. From the bank statement it appears that the entire amount in account No.91925 was withdrawn by June 21, 2006 and on that date, the balance had become nil. The bank has also issued a certificate dated September 13, 2010 stating that account No.91925 was closed in their books on July 25, 2006.

34. Mr. Banerjee submitted that no reliance could be placed on the bank statement and the number of affidavits filed on behalf of respondent No.1. He referred to the acknowledgement made by Pictet bank on September 30, 2002 according to which, on that date, a sum of US$10,763,412 was lying in account No.91925 of Tuncay Alankus. Mr. Banerjee submitted that the aforesaid amount must have remained in the account until June 1, 2006, the date on which the Swiss Supreme Court dismissed the appeal preferred by the petitioner. Further, Pictet in its communication of January 8, 2007 had clearly acknowledged the sequestration order and had assured that it had taken good note of its contents. It is, therefore, not possible to believe that the account had come to nil on June 21, 2006 and it was closed on July 25, 2006.

35. In the letter of Pictet dated January 8, 2007, a copy of which is enclosed as Annexure P15 (collectively) the debtor's name is given as "Karsanrizm"; further, the letter does not state that on that date account No. 91925 in the name Alankus was alive and was bearing some amount. Moreover, the bank is not a party to the present proceedings and, therefore, we would not like to make any comment on the conduct of the bank. But on the materials produced before us, it is very difficult to hold the respondent guilty of contempt and to punish him for committing contempt of court.

36. From the facts stated above, it is clear that the attachment against the respondent's account was lifted on June 1, 2006 when the Swiss Supreme Court dismissed the petitioner's appeal and the petitioner was able to obtain the next attachment order only on December 15, 2006. There was, thus, a period of slightly over six months when there was no attachment order in respect of the account and according to the bank's statement, the amount was withdrawn on June 21, 2006 (i.e., twenty days after the attachment order was lifted) and the account was closed on July 25, 2006. It is, thus, clear

that on September 4, 2006 when this Court passed the order prohibiting respondent No.1 from withdrawing any money from the account there was actually no money in the account. That being the position, there could be no question of committing any violation of this Court's order by respondent No.1.

37. Mr. Banerjee referred to the many affidavits filed by respondent No. 1 and submitted that in those affidavits he has been taking inconsistent stands. It is true that the respondent has filed as many as eight affidavits and in all those affidavits his position does not appear to be completely consistent. But, it must be recalled that as far back as in September, 2006 and long before this contempt proceeding commenced, the respondent had instructed his counsel to submit before this Court, that he was not permitted to leave Delhi for the past ten years and since he was not getting any response from the Swiss banks, he was not aware of the state of his affairs in Switzerland and was, therefore, unable to give the undertaking as asked for by this Court. Moreover, any inconsistencies in the stand of the respondent before this Court coupled with the ambiguities in the communications from Pictet may give rise to a suspicion of wrong doing. But without anything else we find it very difficult to hold the respondent guilty of contempt of court on the definite charge that he withdrew a very large amount from his account in Pictet in violation of the orders of this Court.

38. In *Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh and Others*[1] , this Court after referring to a number of earlier decisions, in paragraph 19 of the judgment, observed as under:

> "In *S. Abdul Karim v. M.K. Prakash, Chhotu Ram v. Urvashi Gulati, Anil Ratan Sarkar v. Hirak Ghosh, Daroga Singh v. B.K. Pandey and All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi,* this Court held that burden and standard of proof in contempt proceedings being quasi-criminal in nature, is the standard of proof required in criminal proceedings, for the reason that contempt proceedings are quasi criminal in nature."

1. (2010) 3 SCC 705.

39. In *Chhotu Ram v. Urvashi Gulati and Another*[2] , this Court in paragraph 2 and 3 of the judgment held as under:

> "2. As regards the burden and standard of proof, the common legal phraseology "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the "standard of proof", be it noted that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond all reasonable doubt.
>
> 3. Lord Denning (in Bramblevale Ltd., Re) lends concurrence to the aforesaid and the same reads as below: (All ER pp. 1063H-1064 C).
>
> > "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence…. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."

40. Mr. Banerjee submitted that a charge of contempt may

2. (2001) 7 SCC 530

also be established on preponderance of circumstances and in support of the submission he relied upon a decision of this Court in *Rajendra Sail v. M.P. High Court Bar Association and Others*[3].

41. We have gone through the decision relied upon by Mr. Banerjee and we find that in Rajendra Sail, the Court held the contemnor guilty on the basis of "preponderant circumstances". In other words, all the circumstances taken together led to the unimpeachable finding of the contemnor's guilt. But that is not to say that in Rajendra Sail this Court relaxed or diluted the standard or degree of proof to establish the guilt of contempt.

42. In the case in hand on taking into account all the circumstances as discussed above, we are of the view that it would not be wholly reasonable to hold that the respondent withdrew large amounts from his account with Pictet in violation of this Court's orders.

43. For the reasons discussed above, we hold that the respondent cannot be held guilty of contempt.

44. Coming back to the order, dated April 1, 2010 by which this Court held that the respondent had withdrawn money from his account with Pictet by flouting the orders of this Court, it is to be noted that that order is founded on the premise that the respondent had not denied the allegation made by the petitioner against him. It is, however, to be noted that the respondent in his reply to the contempt petition filed on March 3, 2010 had stated in paragraph 2 (XIV) as under:

> "The Respondent takes liberty for reiterating that he has not withdrawn any amount in spite of (sic.) the order passed by this Hon'ble Court."

45. The order dated April 1, 2010, was, thus, clearly based on an erroneous premise of fact. It is, accordingly, recalled.

46. For the reasons discussed above, we find no merit in the contempt petition. It is dismissed.

R.P. Contempt Petition dismissed.

3. (2005) 6 SCC at paragraphs 45.

SOOGURU SUBRAHMANYAM

v.

STATE OF A.P.

(Criminal Appeal No. 164 of 2008)

APRIL 04, 2013

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

PENAL CODE, 1860:

s.302 - Murder - Circumstantial evidence - Husband suspecting fidelity of wife - Dead body of wife found in the premises in exclusive possession of the couple - Death caused by smothering - Husband absconded after the incident - Held: All the links in the chain of evidence are established beyond reasonable doubt and the established circumstances are consistent with the singular hypothesis that the accused is guilty of the crime and it is totally inconsistent with his innocence - Conviction and sentence as awarded by trial court and affirmed by High Court, upheld - Evidence - Circumstantial evidence - Criminal law - Motive.

The appellant was prosecuted for the murder of his wife. The prosecution case was that the appellant suspected the character of his wife. In the morning of 17.10.2000, the wife of the appellant was found dead in their house. The appellant was absconding. The medical evidence established that it was a case of homicidal death and not of suicide as the deceased had died due to smothering. The trial court convicted the appellant u/s 302 IPC and sentenced him to imprisonment for life. The High Court affirmed the conviction and sentence.

Dismissing the appeal, the Court'

HELD: 1.1 The deceased had died of asphyxia as a

result of smothering. The injuries and the opinion has clearly revealed that the death was homicidal. There can be no iota of doubt that the death was homicidal and not suicidal and further it was not a case of rape and murder. [para 9] [522-F-H]

1.2 From the testimony of PW-8, the younger sister of the deceased and PW-9, another relative of the deceased, it is evidence that the accused, for whatever reason, had garnered suspicion against the attitude and character of his wife. Further, PW-7, who in his 161 Statement had stated that the accused has told him about the anguish relating to his wife's character, though has turned hostile, yet the same would not make any difference to arrive at the conclusion on the basis of the evidence of PWs-8 and 9 that he had a suspicious mind as regards the character of his wife. [para 11-13] [523-C-E, F-H]

1.3 It has been established on the basis of the material on record that the premises had been taken on rent by the accused and he was residing with his wife in the said premises. From the evidence of PW-1, the land lady and her son (PW-5), it is evident that the deceased had died about 6.30 a.m., The evidence of PW-12, the Councillor, and PW-13, the Investigating Officer, established that after breaking open the lock the dead body was found in the room. [para 14] [524-A-B, D-E, F-G]

1.4 It is worthwhile to note that the accused did not take the plea of alibi. On the contrary, the factum of abscondence has been proven. Under these circumstances, the cumulative effect is that the husband was present in the house when the death of the wife occurred. The circumstances soundly establish that the deceased was with the accused during the night, there was a locking of the door from outside which could not have been done by anyone else except him and further he absconded from the scene of the crime and did not report

to the police. Thus, the irresistible and inescapable conclusion is that the accused was the culprit in committing the murder of his wife. [para 15] [525-B-C, D-E]

1.5 In the case at hand, there is material on record which suggests that there was some ire that had swelled up in the mind of the accused to extinguish the life spark of the wife. It is to be borne in mind that suspicion pertaining to fidelity has immense potentiality to commit irreversible wrongs as it corrupts the mind and corrodes the sense of rational thinking and further allows liberty to the mind to pave the path of evil. [para 17 and 18] [526-G; 527-A-B]

Nathuni Yadav and Others v. State of Bihar and Another **1996 (10) Suppl. SCR 905 = (1998) 9 SCC 238 - referred to.**

1.6 Therefore, this Court holds that all the links in the chain of evidence are established beyond reasonable doubt and the established circumstances are consistent with the singular hypothesis that the accused is guilty of the crime and it is totally inconsistent with his innocence. [para 19] [527-C-D]

Sharad Birdhichand Sarda v. State of Maharashtra **1985 (1) SCR 88 =AIR 1984 SC 1622** *Padala Veera Reddy v. State of Andhra Pradesh and Ors.* **AIR 1990 SC 79;** *Balwinder Singh v. State of Punjab***1995 (5) Suppl. SCR 10 = AIR 1996 SC 607,** *Harischandra Ladaku Thange v. State of Maharashtra* **2007 (9) SCR 562 =AIR 2007 SC 2957 and** *Jagroop Singh v. State of Punjab* **2012 SCR 91 = AIR 2012 SC 2600 - relied on.**

Case Law Reference:

1996 (10) Suppl. SCR 905	**referred to**	**para 16**
1985 (1) SCR 88	**relied on**	**para 19**
AIR 1990 SC 79	**relied on**	**para 19**

1995 (5) Suppl. SCR 10	**relied on**	**para 19**
2007 (9) SCR 562	**relied on**	**para 19**
2012 SCR 91	**relied on**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 164 of 2008.

From the Judgment and Order dated 28.08.2006 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 1478 of 2004.

Ashok Kumar Sharma, Avinash Kumar Jain for the Appellant.

Shishir Pinaki, D. Mahesh Babu, Mayur Shah for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The accused-appellant had entered into wedlock with Nagamani, the deceased, on 30.4.1998 and for some time, they lived in marital bliss at Hindupur. After four months, the needs of life compelled the couple to shift to Srikalahasti where the father of the deceased was working. The experience of life not being satisfactory hardly after eight months, at the insistence of the wife, they shifted back to Hindupur. The shifting to Hindupur did not bring satisfaction as expected and hence, eventually, they shifted to Madanapalle town where the accused was working prior to the marriage. As the prosecution story further unfurls, at the time of occurrence, i.e., on 17.10.2000, the accused was staying in the rented portion of the house belonging to Dhanalakshmi, PW-1. The other portion was occupied by one Imamvalli, father of S. Syed Basha, PW-5. Imamvalli was staying with his children and his wife was away at Quwait and the proximity of stay, as alleged by the prosecution, gradually developed to an illicit intimacy between him and the deceased. Twelve days prior to the

incident, the deceased was found in the company of Imamvalli in an auto-rickshaw by the accused, who dragged him out from the auto-rickshaw and assaulted him. The accused took the deceased to the house and warned her. The differences between the couple grew to bitterness which resulted in severe quarrels during nights. On 16.10.2000, there was a quarrel and, as the prosecution version proceeds, the accused had expressed his agony and anger before Pavankumar, PW-7, that if the deceased did not discontinue her illicit relationship, he might be compelled to send her back to her matrimonial home or get rid of her.

2. As the version of the prosecution has been further depicted, on 17.10.2000, about 6.30 a.m., the deceased was found dead in the house and the doors were locked from outside. PW-1, the landlady, lodged an FIR and a crime was registered. During the course of investigation, the lock of the room was opened by PW-13, the Investigating Officer, in the presence of one Babu Naidu, PW-12, and another. The further investigation led to seizure of incriminating material from the scene of the offence. Thereafter, inquest was held over the dead body of the deceased and it was sent for post mortem. The investigating agency examined number of witnesses and after completing the investigation, placed the charge-sheet for an offence punishable under Section 302 of the Indian Penal Code (for short "the IPC") against the accused-husband before the competent court which, in turn, committed the matter for trial to the Court of Session.

3. The accused abjured his guilt and pleaded false implication and claimed to be tried.

4. The prosecution, in order to substantiate the offence as alleged against the accused, examined as many as 15 witnesses, got 29 documents exhibited and 15 material objects marked. PWs-1 to 5 and 7 turned hostile and they were cross-examined by the prosecution. PW-1 was the landlady who had lodged the FIR, Ext.-1, and PWs-2 to 5 and 7 were the

neighbours and all of them resiled from their original version. The learned trial Judge took note of the fact that there was no direct evidence to prove the involvement of the accused in the crime, but taking note of the series of facts, namely, that the death was homicidal and not suicidal; that the deceased was in the house of the husband and her dead body was found in the house; that the house was locked from outside and the husband had absconded; that there was no complaint by the husband with regard to the death of his wife; that the cross-examination of the hostile witnesses would indicate that the deceased and the accused were staying together and the incident occurred as per the FIR, Ex. P-1; that the testimony of PWs-8 to 10 clearly established that the accused was suspecting the character of the deceased and had picked up quarrels alleging illicit intimacy with another person; that the suggestion on behalf of the accused that there was violent intercourse on the deceased was found to be false on the base of the evidence of PW-11, Dr. Paul Ravi Kumar; that from the evidence of PW-1, Dhanalakshmi, it was quite obvious that she was aware of the death of Nagamani before she gave the report; and that during the investigation, Exs. P-21 and P-22 were found in the house of the accused and Ex. P-21 which was disputed to have been written by him was found to be false in view of the evidence of PW-15, K. Vani Prasada Rao, the hand-writing expert who had clearly stated that the writings in Ex. P-21 were that of the accused and that the cumulative effect of all the circumstances did go a long way to show that the chain was complete to establish that it was the accused and the accused alone who had committed the crime and none else, and, accordingly, convicted him under Section 302 of the IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs.200/- in default, to suffer simple imprisonment for one month.

5. On appeal being preferred, the Division Bench of the High Court, appreciating the evidence brought on record, concurred with the view of the learned trial Judge, regard being

had to the circumstances which had been taken note of by him, especially that the premises was in exclusive possession of the accused; that the accused had lived with the deceased during that night; that the door was locked from outside; that the accused had absconded for a long time and, accordingly, gave the stamp of approval to the judgment of conviction and order of sentence of the learned trial Judge. Hence, the present appeal by way of special leave by the accused-appellant.

6. Mr. Ashok Kumar Sharma, learned counsel appearing for the appellant, in support of the appeal, has submitted that the trial court as well as the High Court has erroneously come to the conclusion that the chain of circumstances have proven the guilt of the accused though on a proper scrutiny of the evidence, it is perceivable that there are many a missing link in the version of the prosecution. The learned counsel would submit that the very presence of the accused on the site and the foundation of the prosecution relating to harbouring of suspicion by the accused relating to the character of the wife are extremely doubtful and cannot, by proper appreciation of evidence, be said to have been proven. It is urged by him that the circumstances have been stretched to an unimaginable length on the basis of surmises and conjectures ignoring the relevant facets of the evidence, more importantly, that there was amicable relationship between the husband and wife and the same has been clearly borne out in the testimony of PWs 1 to 5 and 7. It is his further submission that when the neighbours have not supported the case of the prosecution, it was absolutely improper on the part of the learned trial Judge to ignore the compatible relationship between the accused and the deceased and accept the prosecution version of suspicion by the husband on the basis of some sketchy material on record to proceed to the ultimate conclusion for finding the accused guilty of the offence. That apart, submits the learned counsel that no motive has been exhibited to rope the appellant in the crime and convict him. The learned counsel would emphatically put forth that the High Court has not appositely

appreciated the evidence brought on record which amounts to failure of the legal obligation cast on the appellate Court and, therefore, both judgments of the appellate Court as well as of the trial Court deserve to be annulled and the appellant should be acquitted of the charge.

7. Mr. Shishir Pinaki, learned counsel for the State, resisting the aforesaid proponements of the learned counsel for the appellant, would contend that each of the circumstances has been properly weighed by the learned trial Judge and has been keenly scrutinized by the High Court and, hence, there is no perversity of approach to nullify the judgment of conviction. It is canvassed by him that the mere repetition by the neighbours that the husband and wife lived in an atmosphere of harmony and compatibility should not be given more credence than the testimony of the witnesses that there was suspicion in the mind of the husband, the presence of the husband in the house, his abscondence and absence of positive plea in the statement recorded under Section 313 of the Code of Criminal Procedure and the injuries found on the body of the deceased. The learned counsel would urge with immense conviction that the suspicion which was at the root of the crime, as the circumstances unfold, shows the ultimate causation of death in a violent manner by the accused.

8. To appreciate the rival submissions raised at the bar, it is obligatory to see the nature of the injuries sustained by the deceased and the opinion of the doctor on the same. PW-11, Dr. Paul Ravi Kumar, who had conducted the post mortem, has stated that he had found the following external and internal injuries on the dead body of the deceased: -

"External injuries:

There is bloody discharge coming out from both the nostrils. Tongue tip bluish in colour seen in between the upper and lower teeth. Lips blackish in colour with diffuse abrasions over both the lips. Nose bluish discolour tim

present over right nostril, ears - bluish black discolour of the left pinna.

1. An abrasion of 4 x 2 cm over left mandibular margin.
2. An abrasion of ½ x ½ cm over left upper lid.
3. An abrasion of 2 x ½ cm over right leg anterior aspect.
4. A linear abrasion of 2 x 1/3 cm over dorsum of right foot.

Internal injuries:

Neck - Hyoid normal, thyroid, cricoid cartligas normal, larynx - congested. Trache - Bronchi - normal. Lungs - Normal, cut section congested, stomach - normal and they are congested. Intestines distended gases, urinary bladder empty. Uterus - normal. Scalp: A diffuse contusion of 10 x 8 cm over left occipto-partial region. On reflexion of scalp a diffuse hematoma of 8 x 8 cm over left occipto partial region present. Skull, bones, base of the skull-normal. Meninges - normal, brain - normal size congested. Spine bones of the extremities - normal."

9. On the basis of the said injuries, he has expressed the opinion that the deceased had died of asphyxia as a result of smothering and the time of death was 36 to 40 hours prior to his examination. The aforesaid injuries and the opinion has clearly revealed that the death was homicidal. In examination-in-chief, he has deposed that the external injuries mentioned by him vide Ex. P-8 are possible when a person places a pillow on the face and presses and the result is struggle. In the cross-examination, it has been suggested to him that the injuries recorded by him could be possibly by participating in violent sexual intercourse but the same has been categorically denied. Thus, there can be no iota of doubt that the death was homicidal and not suicidal and further it was not a case of rape and murder.

10. Once it is held that the death was homicidal and the injuries were not the result of any violent sexual intercourse, the circumstances are to be scrutinized to see the complicity of the accused in the crime.

11. First, we shall advert to the issue whether the suspicion relating to the illicit relationship by the accused-appellant has been established. True it is, the neighbours, PWs-1 to 5, who have turned hostile, have stated that the husband and wife had an amicable relationship but the version of the other witnesses project otherwise. From the testimony of PW-8, Triveni, the younger sister of the deceased, it is apparent that on 1.10.2000, the deceased had come to their house at Hindupur and had told her that the accused was harassing her on the pretext that she had developed illicit relationship with someone and was not providing her food. She has deposed that she advised the deceased that quarrels are common in family life and she should adjust herself and, accordingly, she went back to her husband. In the cross-examination, nothing has been elicited to discredit her testimony.

12. PW-9, P. Gangappa, another relative of the deceased, has deposed about the deceased agonisedly describing before him the harassment meted out to her by her husband on the excuse that she had developed illicit intimacy with someone. There has been absolutely no cross-examination on this score.

13. In view of the aforesaid, we are disposed to think that the accused, for whatever reason, had garnered suspicion against the attitude and character of his wife. We may hasten to add that PW-7, who in his 161 Statement had stated that the accused has told him about the anguish relating to his wife's character, though has turned hostile, yet the same would not make any difference to arrive at the conclusion on the basis of the evidence of PWs-8 and 9 that he had a suspicious mind as regards the character of his wife.

14. Presently, we shall proceed to consider certain other circumstances. It has been established on the basis of the material on record that the premises had been taken on rent by the accused and Imamvalli from the landlady, PW-1. PW-1 has admitted that she had given the accused a portion of the house on rental basis. PW-5, son of Imamvalli, has admitted that the accused and his wife were residing on rent in the next portion of their house. Thus, they were close neighbours. PW-1 in her evidence has stated that she was not aware if the deceased was alive or not. The learned trial Judge has commented on her conduct which we need not further expatiate. The fact remains that she has deposed that when she got up in the morning, she found that there was some commotion in the portion which she had given on rent and it was informed to her that someone had died. It is interesting to note that she has admitted the FIR Ex. P-1. In the cross-examination, she has also admitted that the contents of Ex. P-1 were read over and explained to her before she signed it. PW-5 has deposed that Nagamani, the deceased, had died about 6.30 a.m., when PW-1, the landlady, was shouting. PW-12, N. Babu Naidu, the councillor of 26th Ward, has stated that after coming to know about the death of the deceased, he went to her house and found it locked and the same was opened after the police came and the dead body was found on the ground with a pillow on her face. His testimony has gone undented, for nothing has been put to him in the cross-examination except that he was making efforts to oblige the police. It has come in the evidence of PW-13, the Investigating Officer, that the lock was broke open in the presence of the witnesses and the dead body was found in the room. He has spoken about the seizure of Ex. P-21, the writing of the accused on a book. In the cross-examination, apart from a singular question relating to the Inquest Report, nothing has been asked.

15. At this juncture, it is apt to note that PW-1, in the cross-examination, has stated that she had gone to Sai Baba Bhajan. The said aspect has not been believed by the learned trial

Judge and we are inclined to think correctly. On the contrary, the circumstances have clearly established that she was in her house. The evidence on record clearly shows that there was a commotion in the morning, she had lodged the FIR, the police arrived and found the house locked from outside and it was broke open in the presence of the witnesses. It is worthwhile to note that the accused did not take the plea of alibi. On the contrary, the factum of abscondence has been proven. Under these circumstances, the cumulative effect is that the husband was present in the house when the death of the wife occurred. The suggestion of rape and murder which has been put in the form of violent sexual act has been found to be untrue on the basis of medical evidence and there is no reason to differ with the said finding. The husband has not come with any explanation where he was on the fateful night and how the door was locked. As has been stated earlier, he had absconded for long. He has not taken any step to report the unnatural death of his wife. From the aforesaid aspects, the circumstances soundly establish that the deceased was with the accused during the night, there was a locking of the door from outside which could not have been done by anyone else except him and further he absconded from the scene of the crime and did not report to the police. Thus, the irresistible and inescapable conclusion is that the accused was the culprit in committing the murder of his wife.

16. Now, we may deal with the submission that the prosecution has not been able to prove any motive for the commission of the crime because the suspicion on the part of the husband has not been established. We have already recorded an affirmative finding on that score. However, we may, in this context, profitably refer to the pronouncement in *Nathuni Yadav and Others v. State of Bihar and Another* [1] wherein a two-Judge Bench has laid down thus: -

"17. Motive for doing a criminal act is generally a difficult

1. (1998) 9 SCC 238.

area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in *R. v. Palmer*[2] thus:

> "But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties."

Though, it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant."

17. In the said case, it was also observed that in some cases, it may not be difficult to establish motive through direct evidence, while in some other cases, inferences from circumstances may help in discerning the mental propensity of the person concerned. In the case at hand, as is noticed, there is material on record which suggests that there was some ire that had swelled up in the mind of the accused to extinguish the life spark of the wife.

2. Shorthand Report at p. 308 CCC May 1856.

18. It is to be borne in mind that suspicion pertaining to fidelity has immense potentiality to commit irreversible wrongs as it corrupts the mind and corrodes the sense of rational thinking and further allows liberty to the mind to pave the path of evil. In fact, it brings in baseness. It quite often impures mind, takes it to the devil's den and leads one to do unjust acts than just deeds. In any case, it does not give licence to commit murder. Thus, the submission pertaining to the absence of motive has no substance.

19. In view of the aforesaid analysis, we conclude and hold that all the links in the chain of evidence are established beyond reasonable doubt and the established circumstances are consistent with the singular hypothesis that the accused is guilty of the crime and it is totally inconsistent with his innocence. We have said so on the basis of the pronouncements in *Sharad Birdhichand Sarda v. State of Maharashtra*[3], *Padala Veera Reddy v. State of Andhra Pradesh and Ors.*[4], *Balwinder Singh v. State of Punjab*[5], *Harischandra Ladaku Thange v. State of Maharashtra*[6] and *Jagroop Singh v. State of Punjab*[7].

20. Consequently, the appeal, being sans substratum, stands dismissed.

R.P. Appeal dismissed.

3. AIR 1984 SC 1622.
4. AIR 1990 SC 79.
5. AIR 1996 SC 607.
6. AIR 2007 SC 2957.
7. AIR 2012 SC 2600.

SYED YOUSUF HUSSAIN
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 539 of 2013)

APRIL 05, 2013

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

PREVENTION OF CORRUPTION ACT, 1988:

ss. 7 and 13(1)(d) read with s.13(2) of the Act, read with s. 34 IPC - Demanding and accepting of illegal gratification - Conviction of two accused by courts below - Plea of appellant that he did not demand nor did he receive the amount - Held: It has been established by the evidence on record that both the accused persons were on duty at the relevant time and place, the vehicle was intercepted, tainted currency notes were recovered from co-accused, documents were returned back to complainant and no case for any traffic violation was registered - Conclusion arrived at by trial court that the appellant was involved in commission of the crime, as affirmed by the High Court cannot be found fault with - Penal Code, 1860 - s.34.

The appellant and A-2, who were members of Traffic Police, were prosecuted for demanding and accepting illegal gratification. The case of the prosecution was that on 4.1.1994 the vehicle driven by PW-2 was intercepted by the appellant and A-2. The appellant took the documents of the vehicle. A demand for Rs.100 was made to return the documents and not to book any case for traffic violations. PW-2 made a complaint. A trap was laid. A-2 accepted the bribe in presence of the appellant and returned the documents. On signal being given, the trap party reached the place and seized the amount from A-2. The trial court convicted both the accused persons

u/ss 7 and 13(1)(d) read with s.13(2) of the Prevention of Corruption Act, 1988 and s. 34 IPC and sentenced each of them to imprisonment for 1 year u/s 7 and 2 years u/s 13(1)(d) read with s.13(2) of the Act. The High Court affirmed the conviction but reduced the sentence to six months and one year respectively. The SLP of A-2 was dismissed.

In the instant appeal, it was contended for the appellant that the prosecution had failed to establish the common intention.

Dismissing the appeal, the Court

HELD: On a careful appreciation of the evidence, certain aspects are absolutely clear, namely, (i) interception of the vehicle at the instance of the appellant, (ii) the presence of the appellant at the place of occurrence along with A-2 (iii) the direction given by the appellant to PW-2 to contact A-2 who was standing nearby (iv) his presence at the police station in the central room when PW-2 went to meet A-2, (v) recovery of tainted currency from A-2; (vi) delivery of documents of the vehicle; and eventually, (vii) non-registration of any case for traffic violation against PW-2. The conclusion arrived at by the trial Judge which has been concurred with by the High Court that the appellant was involved in the commission of the crime, cannot be found fault with. [para 15] [538-A-D]

Mohan Singh v. State of Punjab **1962 Suppl. SCR 848 = AIR 1963 SC 174;** *Suresh and Another v. State of U.P.* **2001 (2) SCR 263 = (2001) 3 SCC 673;** *Lallan Rai and Others v. State of Bihar* **2002 (4) Suppl. SCR 188 = 2003 (1) SCC 268;** *Rotash v. State of Rajasthan* **2006 (10) Suppl. SCR 264 = 2006 (12) SCC 64 - relied on.**

Barendra Kumar Ghosh v. King Emperor **AIR 1925 PC 1;** *Mahbub Shah v. Emperor* **AIR 1945 PC 118 - referred to.**

Case Law Reference:

AIR 1925 PC 1	**referred to**	**para 9**
AIR 1945 PC 118	**referred to**	**para 10**
1962 Suppl. SCR 848	**relied on**	**para 11**
2001 (2) SCR 263	**relied on**	**para 12**
2002 (4) Suppl. SCR 188	**relied on**	**para 13**
2006 (10) Suppl. SCR 264	**relied on**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 539 of 2013.

From the Judgment and Order dated 29.02.2012 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 466 of 2005.

Subrat Birla, Subhash Chandra Birla for the Appellant.

D. Mahesh Babu, Mayur R. Shah, Pinaki Shishir for the Respondent.

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 judgment of conviction and order of sentence dated 29.12.2012 in Criminal Appeal No. 466 of 2005 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad whereby the Division Bench, while maintaining the conviction for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for brevity "the Act") read with Section 34, I.P.C. since the accused-appellant was convicted along with another accused,

namely, Mohd. Shafi-Ul-Haq, recorded by the Principal Special Judge for S.P.E. and A.C.B. Cases-cum-IV Additional Chief Judge, City Civil Court, Hyderabad, in C.C. No. 11 of 1995, reduced the sentence to that of simple imprisonment for six months for the offence punishable under Section 7 and to one year under Section 13(1)(d) read with Section 13(2) of the Act instead of one year and two years respectively as imposed by the learned Special Judge with the further stipulation that both the sentences shall be concurrent.

3. The facts in a nutshell are that on 4.1.1994, PW-2, Mohd. Shareef, a driver in the Cuddapah Transport Company, Hyderabad was driving a lorry bearing No. AP 04-T-372 in Hyderabad near Tadbund and was proceeding towards Musheerabad locality via Santoshnagar cross-road, the places situated in between Hyderabad-Secunderabad twin cities. When the said lorry reached Santoshnagar cross-road, the accused-appellant (hereinafter referred to as "the accused") along with the other accused stopped the vehicle on the pretext that the lorry had entered the 'No Entry Zone'. The accused took away the documents of the vehicle from the driver, PW-2, and all excuses fell on deaf ears and a demand was made for Rs.100/- towards illegal gratification for return of the documents and not to book a case against him. PW-2, who was asked to pay the amount by the evening, did not have any intention to give the bribe and, accordingly, approached the Deputy Superintendent of Police, Hyderabad, PW-6, and lodged a complaint, Ext. P-15, on 4.1.1994 about 3.45 P.M. and the said complaint was registered as F.I.R., Ext. P-16. PW-6 held a pre-trap proceeding by securing the presence of four persons including one S. Prakash, who has been examined as PW-5 by the prosecution. As the evening approached, the trap party along with others and PW-2 reached Kamal Talkies about 7.00 P.M. where PW-2 met the accused persons at Chadarghat Junction. As the story further gets unfurled, PW-2 was asked by the accused to meet accused No. 2, Mohd. Shafi-Ul-Haq, who, in turn, directed him to wait at the Traffic Police Station

where the documents of the vehicle were kept. About 7.20 P.M., PW-2 reached the Traffic Police Station and the trap party followed him as per the previous arrangement. Accused No. 2 accepted the bribe amount of Rs.100/- in the presence of the present appellant and returned the documents. Thereafter, on signal being given, PW-6 along with the trap party reached the place, seized the amount from the shirt pocket of accused No. 2 and completed the other formalities. After completing the investigation, chargesheet was laid before the learned Special Judge who, on the basis of the materials brought on record, framed charges against them on 5.12.1995. The accused persons pleaded not guilty and claimed to be tried.

4. The prosecution, in order to bring home the guilt of the accused persons, examined seven witnesses, got sixteen documents exhibited and marked eleven material objects. On the basis of the evidence brought on record, the learned Special Judge came to hold that the money was recovered from accused No. 2 and there being no cogent, credible and acceptable explanation given by him and regard being had to the other circumstances, the presumption as provided under Section 20 of the Act was attracted. That apart, the learned Special Judge held that there was a consensus as regards the demand and acceptance of the money and, therefore, the prosecution had brought home the charge against both the accused persons and, accordingly, sentenced them as has been stated hereinbefore.

5. On appeals being preferred by the accused persons, the High Court took note of the fact that though PW-2, the de facto complainant, had resiled from the allegations made in Ext. P-15, yet his evidence could not be totally discarded, especially, the testimony leading to the trap and recovery. The High Court scrutinized the evidence of the said complainant and opined that it was clear from the evidence that the money was recovered from the accused No. 2 and, therefore, there was no reason to discard the genuineness of Ext. P-15 and payment

of the amount to accused No. 2. The learned Judge, as is demonstrable, has studiedly scanned the evidence of PWs-5 and 6 and found that their evidence is consistent with the evidence of PW-2 and, therefore, the trial court was justified in taking aid of Section 20 of the Act. Because of the aforesaid analysis, it was opined that the prosecution had proved the acceptance of the amount by the accused No. 2. Thereafter, the High Court has analysed the evidence and recorded a finding that the accused was very much on the site and had intercepted the vehicle and taken away the documents of the vehicle and further was also present in the other room when the transaction took place and, hence, he was involved in the commission of the offence. Being of this view, it sustained the conviction and reduced the sentence as mentioned earlier.

6. We have heard the learned counsel for the parties. It is submitted by the learned counsel for the appellant that the evidence brought on record by the prosecution is absolutely sketchy and do not even hazily point out towards the involvement of the accused. Per contra, learned counsel for the State would submit with emphasis that the learned trial Judge as well as the High Court has scrutinized the evidence in detail and correctly reached the conclusion that the demand and acceptance was done with his consent. It is urged by him that he had abetted in the commission of the crime and definitely had the intention to demand and accept the bribe.

7. At the very outset, it is obligatory to state that the Special Leave Petition (Crl.) No. 5867 of 2012, preferred by the accused No. 2, has been dismissed by this Court vide order dated 30.7.2012. Thus, the recovery of the tainted money and the demand and acceptance of the amount as illegal gratification which is the sine qua non for constituting an offence under the Act have been put to rest as far as the accused No. 2, Mohd. Shafi-Ul-Haq, is concerned.

8. In the present appeal, what is necessary to be dwelled upon is the involvement of the accused-appellant in the crime

in question. In this regard, we notice that PW-2, though who has been declared hostile, has stated in his examination-in-chief at one point of time that it was a home guard who had demanded the amount, yet later on, he has deposed that when he enquired from accused No. 2, he had told him that the documents would be available at the police station and at that time, the accused was present. In his cross-examination, he has accepted that both the accused persons were present together. We may note with profit that the plea taken that currency notes were thrust in the pocket of the accused No. 2 has been disbelieved. The High Court, as is evident, has accepted the genuineness of Ext. P-15 and the evidence leading to the payment of the amount to accused No. 2. After a careful appreciation and analysis of the evidence, it has been held by the learned trial Judge that the vehicle was intercepted by the accused and the same has been accepted by the High Court. We have bestowed our anxious consideration and on a keen scrutiny of the same, we find that PW-2 has admitted that the vehicle was intercepted. Though he has adroitly introduced the story of a home guard, yet the same has not been given any credence and, rightly so, by the learned trial Judge on consideration of the totality of the evidence brought on record. It is worth noting that PW-6, a retired Joint Director of ACB, has deposed that the accused had demanded a bribe of Rs.100/- for not booking a case for traffic violation and, in fact, no case was registered. It is interesting to note that PW-2, the de facto complainant, has stated that when he went to Chadarghat Chowrasta, the accused had asked him to contact accused No. 2 who was present there. The accused No. 2 asked him to come to Yakutpura Police Station as the documents of the vehicle were at the police station. He has admitted that the accused was in the central room and the accused No. 2 was in the adjacent room at the police station. At this juncture, a reference may be made to the testimony of PW-1, who was working as Traffic Sub-Inspector during the relevant period. The learned trial Judge, on analysis of his evidence, has opined that both the accused persons were to attend the duty at Shaidabad "T"

Junction, and Shaidabad and Santoshnagar are adjacent to each other. The trial court has referred to Ext. P-12, the order book of the Traffic Police Station, Yakutpura. It is apt to note that on behalf of the accused, a question was put in cross-examination that one Sivarama Krishna, S.I., was in-charge from Chadarghat to Nalgonda Cross-road on that day, and to nullify the effect of the same, the learned counsel appearing for the accused, in the course of argument, had sought the indulgence of the trial court to substitute the name as "Yousuf Hussain", i.e., the accused. Appreciating the cumulative effect of the aforesaid evidence, the trial Judge had come to the conclusion that both the accused persons were on duty at the relevant place at the relevant time and the vehicle was intercepted and the documents were taken away by the accused and the same has been accepted by the High Court.

9. Learned counsel for the appellant has submitted that the prosecution has failed to establish the common intention in the present case. Both the accused were charged for substantive offences in aid of Section 34 IPC. Section 34 IPC is intended to cover a situation wherein the accused persons have done something with common intention to constitute a criminal act. To get Section 34 attracted, certain conditions precedent are to be satisfied. The act must have been done by more than one person and they must have shared a common intention either by omission or commission in effectuating the crime. It is always not necessary that every accused must do a separate act to be responsible for the ultimate criminal act. What is required is that an accused person must share the common intention to commit the act. In *Barendra Kumar Ghosh v. King Emperor*[1], it has been held as follows: -

> "Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself,

1. AIR 1925 PC 1.

> for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it.

10. In *Mahbub Shah v. Emperor*[2], it has been held thus:-

> "Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. *To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone."*

11. The learned counsel would further submit that there is no material on record that the accused persons acted in furtherance of common intention to attract the liability in aid of Section 34 IPC. The Constitution Bench in *Mohan Singh v. State of Punjab*[3], while dealing with the scope of Section 34 IPC, has ruled thus: -

> "Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question

2. AIR 1945 PC 118.
3. AIR 1963 SC 174.

animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34."

12. In *Suresh and Another v. State of U.P.*[4], Thomas, J. opined that to attract Section 34 IPC, two conditions precedent are imperative: -

"23. Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons."

13. In *Lallan Rai and Others v. State of Bihar*[5], relying upon the dictum laid down in *Barendra Kumar Ghosh* (supra) and *Mohan Singh* (supra), this Court opined that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It has been stated therein that such consensus can be developed at the spot, but in any case, such a consensus must be present in the commission of the crime itself.

14. In *Rotash v. State of Rajasthan*[6], it has been opined that the common intention to commit a crime can be gathered from the totality of the circumstances.

4. (2001) 3 SCC 673.
5. (2003) 1 SCC 268.
6. (2006) 12 SCC 64.

15. In the case at hand, on a careful appreciation of the evidence which we have done in the earlier part of our decision, certain aspects, namely, (i) interception of the vehicle at the instance of the accused, (ii) the presence of the accused at the place of occurrence along with accused No. 2, (iii) the direction given by the accused to PW-2 to contact accused No. 2 who was standing nearby at Chadarghat, (iv) his presence at the police station in the central room when PW-2 went to meet accused No.2, (v) recovery of tainted currency from accused No. 2; (vi) delivery of documents of the vehicle; and eventually, (vii) non-registration of any case for traffic violation against PW-2, are absolutely clear. The conclusion arrived at by the learned trial Judge which has been concurred with by the High Court that the accused was involved in the commission of the crime cannot be found fault with for the said conclusion is in consonance with the principles stated in the aforesaid pronouncements.

16. Consequently, we do not perceive any flaw in the analysis and the ultimate conclusion arrived at by the learned trial Judge which has been concurred with by the High Court and, accordingly, the appeal, being devoid of merit, stands dismissed.

R.P. Appeal dismissed.

MAHADEO (D) THROUGH LRS & ORS.
v.
STATE OF U.P. & ORS.
(Civil Appeal No. 2944 of 2013 etc.)

APRIL 08, 2013

[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

LAND ACQUISITION ACT, 1894:

s.48 - Resolution by Development Authority to withdraw acquisition in respect of a part of the land acquired - Held: Once the land is acquired and mandatory requirements are complied with including possession having been taken, the land vests in the State Government free from all encumbrances - Merely because some land was left at the relevant time, that does not give any right to the Authority to send proposal to the Government for release of the land in favour of the land owners.

By Notification dated 27.1.1990 issued u/s 4(1) of the Land Acquisition Act, 1894, land admeasuring 246.931 acres was proposed to be acquired for the purpose of construction of residential/commercial buildings under Planned Development Scheme by the Meerut Development Authority (MDA). Declaration u/s 6 read with ss. 17(1) and (4) was made on 18.3.1990. Notice u/s 9 was issued. Award was passed on 17.3.1992. By resolution dated 17.9.1997, the MDA decided to withdraw the acquisition of the land except 42.018 aces for which compensation had been paid. However, the State Government decided not to accede to the decision of MDA for de-requisition of the land. In the writ petitions, the High Court, inter alia, directed MDA to press its resolution dated 17.9.1997 if it was not in need of the land so acquired.

Dismissing the appeals, the Court

HELD: 1.1 It is the settled proposition of law that once the land is acquired and mandatory requirements are complied with including possession having been taken the land vests in the State Government free from all encumbrances. Even if some unutilised land remains, it cannot be re-conveyed or re-assigned to the erstwhile owner by invoking the provisions of the Land Acquisition Act. [para 16] [546-H; 547-A]

Govt. of A.P. and Anr. vs. V. Syed Akbar **2004 (6) Suppl. SCR 208 = AIR 2005 SC 492;** *Satendra Prasad Jain & Ors. vs. State of U.P. and Ors.,* **1993 (2) Suppl. SCR 336 = AIR 1993 SC 2517 - relied on.**

1.2 Indisputably, land in question was acquired by the State Government for the purpose of expansion of city i.e. construction of residential/commercial building under planned development scheme by the Meerut Development Authority and that major portion of the land has already been utilized by the Authority. Merely because some land was left at the relevant time, that does not give any right to the Authority to send proposal to the Government for release of the land in favour of the land owners. The impugned orders passed by the High Court directing the Authority to press the Resolution are absolutely unwarranted in law. [para 18] [549-B-C]

Case Law Reference:

2004 (6) Suppl. SCR 208	**relied on**	**para 16**
1993 (2) Suppl. SCR 336	**relied on**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2944 of 2013.

From the Judgment and order dated 09.04.2010 of the

High Court of Judicature at Allahabad in CMRA No. 44945 of 2010 in CMWP No. 21407 of 2002.

WITH

Civil Appeal Nos. 2945, 2946 and 2947 of 2013.

Vijay Hansaria, Sanjay Sarin, Mahesh Singh, Gagan Deep Kaur, Manjusha Wadhwa for the Appellants.

L. Nageswara Rao, Irshad Ahmad, AAG, Abhisth Kumar, Raman Yadav, Vishwajit Singh, Abhindra Maheswari, Pankaj Singh, Gunnam Venkateswara Rao, M.P. Shorawala, Jyoti Saxena, N.M. Popli, Bhagmal Singh, Tajendra Kaur, Anurag, B. Sunita Rao, Jitendra Mohan Sharma, Sandeep Singh, Harsh Vardhan for the Respondents.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. These appeals are directed against the orders dated 2.12.2009 passed by a Division Bench of the Allahabad High Court in Civil Misc. Writ Petition Nos. 7748 of 2002 and 21407 of 2002 whereby the writ petitions filed by the appellants herein were disposed of with a direction to respondent No. 4 - Meerut Development Authority to press its resolution dated 17.09.1997 if the said Authority is not in need of the land so acquired and the orders dated 9.4.2010 whereby the review applications filed against the orders dated 2.12.2009 in the said writ petitions were rejected.

3. The facts of the case lie in a narrow compass. The appellants filed the aforementioned writ petitions seeking the following reliefs:

> i. Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 1 to accept the proposal for withdrawing from acquisition in view of the resolution dated 17.9.97 submitted by the Meerut Development Authority at the earliest within a period to be fixed by this Hon'ble Court.
>
> ii. Issue a writ, order or direction in the nature of certiorari quashing the entire land acquisition proceedings in pursuance of the notification u/s 4 dated 27.1.1990 and declaration u/s 6 of the Act dated 7.3.90.
>
> ii-a. Issue a writ, order or direction in the nature of certiorari quashing the order/decision communicated by letter dated 24.08.2002 (Annexure-16 to the writ petition).
>
> iii. Issue a writ, order or direction in the nature of mandamus commanding the respondents not to dispossess the petitioners from their respective lands forcibly in pursuance of the acquisition for declaration was issued u/s 6 of the Act on 6.3.90.
>
> iv. Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the damages for financial loss, mental agony and pain to the petitioners in view of section 48(2) of the Act.
>
> v. Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.
>
> vi. Award cost of the writ petition to the petitioners."

4. It appears that vide Notification dated 27.1.1990 under Section 4(1) of the Land Acquisition Act, 1894 (for short, "the Act"), the State of U.P. proposed to acquire 246.931 acres of land situated at Village Abdullapur, Pargana, Tehsil and District Meerut. Since the land was alleged to have been urgently required by the State, the provision of Section 17(1) of the Act was invoked. The aforesaid land was sought to be acquired for the purpose of construction of a residential/commercial building under planned Development Scheme by the Meerut Development Authority (for short, "the MDA"). Since Section

17(1) of the Act was invoked, inquiry under Section 5A of the Act was dispensed with. Thereafter, declaration under Section 6 read with Section 17(1)&(4) of the Act was made on 18.3.1990 which was published in a daily newspaper. Consequently, notice under Section 9 of the Act was issued and pursuant to that appellants are said to have filed their objections. On 17.3.1992, respondent No. 3 - the Special Land Acquisition Officer, Meerut passed an award. After the said award, the appellants applied before the Land Acquisition Officer on 24.4.1992 for making a reference under Section 18 of the said Act and accordingly respondent No. 3 referred the matter to the District Judge vide order dated 22.9.1997.

5. The appellants' case is that by resolution dated 17.9.1997, respondent No. 4 - the MDA decided to withdraw the acquisition of the land except the land measuring 42.018 acres for which compensation was paid. The MDA is said to have decided to de-requisition the land measuring 204.912 acres. It appears that in 2001-2002 meetings were held and correspondences exchanged between the authorities, the District Magistrate, Meerut and the State Government and ultimately the State Government decided not to accede to the decision of the MDA for de-requisition of the land. The appellants, therefore, on these facts, filed the aforementioned writ petitions seeking the reliefs quoted hereinbefore.

6. We have heard Mr. Vijay Hansaria, learned senior counsel appearing for the appellants and the learned Additional Advocate General appearing for the respondent-State.

7. Learned counsel appearing for the respondent-State at the very outset submitted that although the appellants sought several reliefs in the writ petitions before the High Court but the relief was confined to only a direction upon respondent No. 4 to press the resolution dated 17.9.1997. The High Court, therefore, by the impugned orders disposed of the writ petitions with a direction to the Development Authority to press its resolution if the Authority is not in need of the said land. The

impugned orders passed by the High Court dated 2.12.2009 is reproduced hereinbelow:

> "In this petition, the original owners are …… They have not pressed other reliefs, except the relief seeking a writ of mandamus to command the Meerut Development Authority, Respondent No. 4 to press the resolution dated 14.05.02, which has been rejected by the Government. A perusal of the rejection order reveals that rejection is not based for other reasons, except that the land proposed to be released under Section 48 of the Land Acquisition Act, has been thrust upon the development authority to sell it out so that its financial position is improved. This is no reason. The acquisition under the Land Acquisition Act is made for the public purpose if needed. No doubt the town plan development of the council is a public purpose done by the development authority but the development authority when itself says that is not needed, then the condition of acquisition is not fulfilled as contained in the Land Acquisition Act. Therefore reason of rejection is not germane to the provisions of the Land Acquisition Act. The Development Authority is directed to press its resolution if the authority is not in need of the said land.
>
> The petition is accordingly disposed of."

8. Dissatisfied with the orders passed by the High Court, the appellants have moved these appeals by special leave.

9. Learned senior counsel appearing for the appellants assailed the orders passed by the High Court, firstly on the ground that there is apparent error in the orders of the High Court inasmuch as the appellants never confined their reliefs only to the extent of directing the MDA to press its resolution if the Authority is not in the need of the said land. Learned counsel submitted that the MDA in clear terms already expressed its opinion in the resolution dated 17.9.1997 that the land is not required by the Authority for any development purpose. Thus,

the High Court fell in error in placing onus again on the MDA to press for resolution. According to the learned counsel, the refusal of the State Government in rejecting the proposal of the Authority is illegal and liable to be set aside.

10. Some of the important facts which are not in dispute can be summarized as under:

(i) Notification under Section 4 and Declaration under Section 6 were issued for the acquisition of 246.931 acres of the land for the purpose of construction of residential/ commercial building under the planned Development Scheme in the District of Meerut by the MDA;

(ii) Inquiry under Section 5A of the Act was dispensed with since provision of Section 17(1)&(4) was invoked;

(iii) In response to the notice under Section 9(1) of the Act, the appellant-land owners filed their objections and finally the award under Section 11 of the Act was passed on 17.3.1992 by the Special Land Acquisition Officer; and

(iv) As requested by the appellants and other land owners, reference under Section 18 of the Act was made on 22.9.1997.

11. The respondent-MDA has filed a detailed counter affidavit stating inter alia that the land was acquired for Ganga Nagar Housing Extension Scheme because of the need for housing accommodation and to prevent unplanned growth of construction. Notices were issued under Section 9(1) inviting objections and after completing all the procedure award was passed on 17.03.1992.

12. After the said award, a sum of Rs. 5.32 crores out of the total amount of Rs.5.51 crores was deposited. The appellants filed reference application for enhancement of compensation in 2002. It was further stated that possession of the land so acquired was taken by the State Government and

delivered to MDA in 2002. The MDA further stated that out of 246 acres of land, approximately 125 acres of land has already been allotted for residential and institutional use as per the Master Plan.

13. It is stated that the MDA has already spent Rs. 21 crores for development since 2002 which includes construction of overhead tanks, roads, sewage treatment plant etc. It is stated that the earlier request of MDA was withdrawn by passing fresh resolution on 15.03.2002 in order to develop the entire acquired land as Ganga Nagar Colony. The MDA further stated that rest of the acquired land is also being developed making a huge investment on roads, sewage and other civic amenities.

14. Lastly, it has been brought on record that some of the appellants were not the original owners of the land at the time when notifications under Section 4, 6 and 9 of the Act were issued. It has further been brought to our notice that some of the appellants are the purchasers of the land from the land owners after the notification was issued under Section 4 of the Act.

15. On these facts, the sole question, therefore, that falls for consideration is as to whether merely because of internal correspondences between the MDA and the State that by the resolution dated 17.9.1997 the MDA took a decision to withdraw the acquisition and to get approval from the State Government, a writ of mandamus can be issued directing the State or the MDA to denotify or de-requisition the land which was acquired after following the due process of law and an award to that effect has been passed by the Special Land Acquisition Officer.

16. There is no dispute with regard to the settled proposition of law that once the land is acquired and mandatory requirements are complied with including possession having been taken the land vests in the State Government free from

all encumbrances. Even if some unutilised land remains, it cannot be re-conveyed or re-assigned to the erstwhile owner by invoking the provisions of the Land Acquisition Act. This Court in the case of *Govt. of A.P. and Anr. vs. V. Syed Akbar* AIR 2005 SC 492 held that :-

> "It is neither debated nor disputed as regards the valid acquisition of the land in question under the provisions of the Land Acquisition Act and the possession of the land had been taken. By virtue of Section 16 of the Land Acquisition Act, the acquired land has vested absolutely in the Government free from all encumbrances. Under Section 48 of the Land Acquisition Act, Government could withdraw from the acquisition of any land of which possession has not been taken. In the instant case, even under Section 48, the Government could not withdraw from acquisition or to reconvey the said land to the respondent as the possession of the land had already been taken. The position of law is well settled. In *State of Kerala and Ors. v. M. Bhaskaran Pillai & Anr.* (1997) 5 SCC 432 para 4 of the said judgment reads: (SCC p. 433)
>
> "4. In view of the admitted position that the land in question was acquired under the Land Acquisition Act, 1894 by operation of Section 16 of the Land Acquisition Act, it stood vested in the State free from all encumbrances. The question emerges whether the Government can assign the land to the erstwhile owners? It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of sale to the erstwhile owner, the land should be put to public auction and the amount fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution. In the present case, what we find is that the

> executive order is not in consonance with the provision of the Act and is, therefore, invalid. Under these circumstances, the Division Bench is well justified in declaring the executive order as invalid. Whatever assignment is made, should be for a public purpose. Otherwise, the land of the Government should be sold only through the public auctions so that the public also gets benefited by getting a higher value."

17. In the case of *Satendra Prasad Jain & Ors. vs. State of U.P. and Ors.,* AIR 1993 SC 2517, a 3-Judge Bench of this Court after considering various provisions including Section 17 of the Act observed as under:

> "14. Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the land owner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision

in the said Act by which land statutorily vested in the Government can revert to the owner."

18. Indisputably, land in question was acquired by the State Government for the purpose of expansion of city i.e. construction of residential/commercial building under planned development scheme by the Meerut Development Authority and that major portion of the land has already been utilized by the Authority. Merely because some land was left at the relevant time, that does not give any right to the Authority to send proposal to the Government for release of the land in favour of the land owners. The impugned orders passed by the High Court directing the Authority to press the Resolution are absolutely unwarranted in law.

19. For the reasons aforesaid, there is no merit in these appeals which are accordingly dismissed.

R.P. Appeals dismissed.

MUNICIPAL CORPORATION OF DELHI

v.

YASHWANT SINGH NEGI

(Special Leave Petition (Civil) No. 4616 of 2010)

APRIL 08, 2013

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

CONSTITUTION OF INDIA, 1950:

Art. 136 - SLP challenging the order passed by High Court in review petition and not the main judgment - Held: Not maintainable - Once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply - Principle of merger.

In the instant petition for special leave to appeal against the order passed by the High Court in a review petition, the respondent raised a preliminary objection that since the main judgment rendered by the High Court was not challenged, the SLP was not maintainable.

Dismissing the petition, the Court

HELD: Once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. Therefore, the instant SLP is not maintainable, since the main order was

not challenged but the order passed in the review petition alone was challenged. [para 3-4] [553-A-B; 554-G-H]

Eastern Coalfields Limited v. Dugal Kumar **2008 (11) SCR 369 = (2008) 14 SCC 295 - held inapplicable.**

Manohar S/o Shankar Nale and Others v. Jaipalsing S/o Shivlalsing Rajput and Others **2007 (12) SCR 364 = (2008) 1 SCC 520** *DSR Steel (Private) Limited v. State of Rajasthan and Others* **2012 (5) SCR 583 = (2012) 6 SCC 782 - relied on.**

Case Law Reference:

2008 (11) SCR 369	**held inapplicable**	**para 2**
2007 (12) SCR 364	**relied on**	**Para 3**
2012 (5) SCR 583	**relied on**	**Para 3**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 4616 of 2010

From the Judgment and Order dated 11.09.2009 of the High Court of Delhi at New Delhi in Review Petition No. 79 of 2009.

Sanjiv Sen, Anirudh Gupta, P. Parmeswaran for the Petitioner.

Nidesh Gupta, Tarun Gupta, S. Janani for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. This special leave petition has been preferred against the order dated 11.09.2009 passed by the High Court of Delhi in Review Petition No.79 of 2009 in LPA No.1233 of 2006. Mr. Nidhesh Gupta, learned senior counsel appearing for the respondent raised a preliminary objection that the special leave petition is not maintainable since the main judgment rendered by the High Court on 5.11.2008 in LPA No.1233 of 2006 was not challenged.

2. Mr. Sanjiv Sen, learned counsel appearing for the petitioner placed considerable reliance on the judgment of this Court in *Eastern Coalfields Limited v. Dugal Kumar* (2008) 14 SCC 295 and submitted that the said judgment would apply to the facts of this case and the SLP is perfectly maintainable, even though the petitioner had not challenged the original order passed by the High Court on 5.11.2008. Learned counsel submitted that on dismissal of the review petition, the earlier order stood merged, in the order passed in the review petition, consequently, the SLP is perfectly maintainable. Considerable reliance was placed on paragraphs 21 and 22 of the above Judgment, which read as under:

> "21. Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be partly allowed. So far as the technical objection raised by the Company with regard to territorial jurisdiction of the High Court of Calcutta is concerned, in our opinion, it would not be appropriate to set aside the order passed in favour of the writ petitioner on that ground. It is clear from the record that the writ petition came up for admission hearing on 6-9-1999 and the counsel for the appellant Company was present. Not only that he did not raise any objection as to territorial jurisdiction of the court, he expressly made a statement before the court to pass "usual order". Accordingly, an order was passed directing the Company to allot "balance quantity of 1008 MT" of coal to the writ petitioner. We are, therefore, unable to uphold the contention of the learned counsel for the appellant Company that the High Court of Calcutta had no territorial jurisdiction to entertain the writ petition.
>
> 22. But we are also unable to uphold the contention of the writ petitioner that the appeal is not maintainable since the Company had challenged the order passed in review petition dated 28-1-2002 and not the main order dated 17-2-2000 dismissing intra-court appeal."

3. We find ourselves unable to agree with the views expressed by this Court in *Eastern Coalfields Limited* (supra). In our view, once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. In this connection reference may be made to the Judgment of this Court in *Manohar S/o Shankar Nale and others v. Jaipalsing S/o Shivlalsing Rajput and Others* (2008) 1 SCC 520 wherein this Court has taken the view that once the review petition is dismissed the doctrine of merger will have no application whatsoever. This Court in *DSR Steel (Private) Limited v. State of Rajasthan and Others* (2012) 6 SCC 782 also examined the various situations which might arise in relation to the orders passed in review petitions. Reference to paragraphs 25, 25.1, 25.2 and 25.3 is made, which are extracted below for ready reference:

> "25. Different situations may arise in relation to review petitions filed before a court or tribunal.
>
> 25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.
>
> 25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.
>
> 25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition."

4. We are in complete agreement with the principle laid down by this Court in *DSR Steel (Private) Limited* (supra) and applying the 3rd situation referred to therein in paragraph 25.3, we are inclined to dismiss this special leave petition. We find force in the contention made by the learned senior counsel appearing for the respondent that this SLP is not maintainable, since the main order was not challenged but only the order passed in the review petition alone was challenged in this SLP. Hence, the SLP is, therefore, not maintainable and the same is dismissed.

R.P. SLP dismissed.

MOHINDER

v.

STATE OF HARYANA

(Criminal Appeal No. 1564 of 2008)

APRIL 8, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

ss. 18 and 54 - Accused carrying a tin containing 3 ½ kg. opium - Conviction and sentence of 10 years RI with a fine of Rs. 1 lakh awarded by trial court affirmed by High Court - Held: In the light of oral and documentary evidence and in view of s. 54 of the Act and in the absence of any evidence from the accused discharging the presumption as to the possession of the contraband, there is no reason to interfere with conviction and the sentence.

The accused-appellant was apprehended with a tin suspected to contain contraband. He was produced before DSP (PW-5). The tin contained 3 ½ kg. of opium. The trial court convicted the appellant u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentenced him to 10 years RI and to pay a fine of Rs. 1 lakh. The High Court affirmed the conviction and the sentence.

Dismissing the appeal, the Court

HELD: 1.1 The prosecution is supported by the evidence of PWs-1, 5 and 6 apart from the evidence produced on record through PWs 2 and 4. Head Constable (PW-1) and I.O. (PW-6) explained the manner in which they had seen the appellant carrying a tin,

interception and seizure of the tin containing opium. Immediately after the message, within 10 minutes DSP (PW-5) had reached the scene and 3 ½ kgs of opium was recovered from the tin held by the appellant in his hand. Even though the only independent witness (PW-3) who stood as a witness for recovery has not supported the prosecution and was declared hostile, however, he did not deny the existence of his signature on Ext.PA. [para 7] [559-G-H; 560-A-C]

1.2 Regarding the absence of evidence as to conscious possession, as rightly observed by the High Court, once the appellant was asked by the court that he was carrying a tin in his hand and opium was recovered therefrom, the aspect of conscious possession of the contraband is presumed and in the absence of any contra evidence, there is no reason to disbelieve the prosecution version. [para 11] [561-A-C]

1.3 In the light of the materials placed by the prosecution in the form of oral and documentary evidence and in view of s. 54 of the Act and in the absence of any evidence from the accused discharging the presumption as to the possession of the contraband, this Court is in entire agreement with the conclusion arrived at by the courts below. [para 12] [561-D-E]

1.4 As regards reduction of sentence, it is not in dispute that possession of 3 ½ kgs of opium involves commercial quantity and, therefore, in terms of sub-s. (b) of s.18, imprisonment shall not be less than 10 years. Admittedly, there is no enabling provision to the court for reduction of sentence by giving special or adequate reasons in the statute, particularly, in s.18. [para 13] [561-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1564 of 2008.

From the Judgment and Order dated 04.07.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 72-SB of 1994.

Shubhashis R. Soren, Delhi Law Chambers for the Appellant.

Kamal Mohan Gupta, Mohd. Zahid Hussain, Sanjeev Kumar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been filed against the final judgment and order dated 04.07.2007 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 72-SB of 1994 whereby the High Court dismissed the appeal preferred by the appellant herein and confirmed the order dated 05.02.1994 passed by the Court of Additional Sessions Judge, Sirsa in Sessions Case No. 11 of 1993 convicting him under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act') and sentenced him to undergo rigorous imprisonment (RI) for a period of 10 years and to pay a fine of Rs. 1 lakh, in default, to further undergo RI for a period of two years.

2. Brief facts:

(a) According to the prosecution, on 23.08.1991 at about 1.30 p.m., S.I/SHO Dalbir Singh (PW-6), who was then posted at P.S. Ellenabad was present at Chowki of Mamera Khurd along with Head Constable Jagdish Rai (PW-1) and Constables Pratap Singh and Jang Singh and one Rameshwar (PW-3). The accused-appellant came there and on seeing the police party, he sneaked into the field of Narma crop. He was apprehended on suspicion by Dalbir Singh (PW-6). At that time, the appellant was carrying a tin in his hand and on suspecting that he was carrying narcotic substance, Dalbir Singh (PW-6) sent a V.T. Message to DSP Ram Gobind (PW-5) who

reached the scene at about 2 p.m. Dalbir Singh (PW-6) presented the appellant before DSP Ram Gobind (PW-5) along with Exh. PB for conducting the search of the tin carried by him in terms of the provisions of Section 50 of the Act.

(b) On search being conducted by DSP Ram Gobind (PW-5), 3 ½ kgs of opium was found in the tin and out of the same, 200 gms. was separated from the same as sample and the residue contraband were sealed. An FIR dated 23.08.1991 came to be registered at Police Station Ellenabad by Dilbag Singh (PW-4) at 3.40 p.m. under Section 18 of the Act. The case property was deposited and duly sealed. Before reaching the Police Station, S.I. Dalbir Singh submitted a report to the DSP Ram Gobind (PW-5) under Section 57 of the Act.

(c) On 28.08.1991, the sample was handed over by Dilbag Singh to constable Khazan Singh (PW-2) for being taken to FSL, Madhuban and PW-2 delivered the said sample duly intact on 30.08.1991 at the FSL. A report dated 20.04.1992 was received from FSL, Madhuban to the effect that the sample was that of opium.

(d) On completion of the evidence and hearing, learned Addl. Sessions Judge, Sirsa, by judgment and order dated 05.02.1994 in Sessions Case No. 11 of 1993 convicted the appellant and sentenced him to RI for 10 years and imposed a fine of Rs. 1 lakh, in default of payment of fine, shall further undergo RI for a period of two years.

(e) Aggrieved by the conviction and sentence awarded by the Addl. Sessions Judge, the appellant preferred Criminal Appeal No. 72 (SB) of 1994 before the High Court of Punjab and Haryana at Chandigarh. By impugned judgment dated 04.07.2007, the High Court confirmed the conviction and sentence as recorded by the trial Court and dismissed the appeal. Hence the present appeal by way of special leave.

3. Heard Mr. Shubhashis R. Soren, learned counsel for the

appellant and Mr. Kamal Mohan Gupta, learned counsel for the respondent-State.

Contentions:

4. Mr. Soren, learned counsel for the appellant, after taking us through the entire materials mainly contended that the entire investigation is defective and not in accordance with Section 50 of the Act read with Section 100 of the Code of Criminal Procedure, 1973 (in short "the Code"). He also submitted that there was a delay of 2 days in sending the contraband for chemical analysis. He further pointed out that there is no evidence as to conscious possession of contraband. He also submitted that the appellant being a rustic villager, the imposition of sentence of 10 years is on the higher side.

5. On the other hand, Mr. Gupta, learned counsel for the State submitted that there is no violation of any of the statutory provisions. Even otherwise, according to him, in the absence of any search, there is no question of compliance of Section 50 of the Act. He also submitted apart from the police officers, one independent witness was also examined. In respect of the allegation relating to delay of two days in sending the contraband to the laboratory, it is pointed out that in view of the fact that the container was duly packed/sealed, the appellant has no way prejudiced and nothing has been elicited from any of the prosecution witnesses. He further pointed out that in view of Section 54 of the Act, it is for the appellant to discharge his burden.

6. We have carefully considered the rival contentions and perused the relevant materials.

Discussion:

7. It is seen that the case of the prosecution is supported by the evidence of PWs-1, 5 and 6 apart from the evidence produced on record through PWs 2 and 4. Head Constable

Jagdish Rai, (PW-1) and I.O. Dalbir Singh (PW-6) explained the manner in which they had seen the appellant carrying a tin, interception and seizure of the tin containing opium. It is also seen that immediately after the message, within 10 minutes DSP (PW-5) had reached the scene and 3 ½ kgs of opium was recovered from the tin held by the appellant in his hand. Even though the only independent witness Rameshwar (PW-3) who stood as a witness for recovery has not supported the prosecution and declared hostile, however, as rightly pointed out by the state counsel, he did not deny the existence of his signature on Ex.PA.

8. We have also perused the evidence of DSP Ram Gobind (PW-5) who explained the recovery and drawing of the sample. He also made an entry of his visit in the logbook. Though, learned counsel for the appellant pointed out that the prosecution was not definite where the recoveries and writings were made either under a tree or sitting on the road, on perusal of the evidence of PWs 1, 5 and 6, we feel that the said discrepancies are trivial in nature and there is no serious infirmity in the version of PWs 1, 5 and 6.

9. Regarding the delay in sending the contraband for examination by the FSL, it was PW-2, who carried the samples from the Police Station to FSL at Madhuban but he was not asked any question in the cross examination, though opportunity was given to the defence. Even otherwise, FSL report Ex. P1 would show that the sample was received at the FSL in tact with the seal which tallied with the specimen seals forwarded. Accordingly, the said objection is liable to the rejected.

10. Even though it is argued that there is discrepancy as to the quantity of sample, it is highlighted by the state counsel that sample weighing 200 gms. was drawn by PW-5 himself and the weight of the same was found to be approximately 250 gms. by the FSL. It is relevant to note that the weight at FSL was inclusive of the container and not of the contraband alone drawn as a sample.

11. Regarding the absence of evidence as to conscious possession, it is brought to our notice that search was conducted by DSP leading to recovery of 3 ½ kgs of opium from a tin retained by the appellant. Nothing has been explained or denied by the appellant in his Section 313 statement nor examined anyone as a defence witness. As rightly observed by the High Court, once the appellant was asked by the court that he was carrying a tin in his hand and opium was recovered therefrom, the aspect of conscious possession of the contraband is presumed and in the absence of any contra evidence, there is no reason to disbelieve the prosecution version. Further, it is not the case of the appellant that incriminating circumstances were not put to him under Section 313 of the Code.

12. In the light of the materials placed by the prosecution in the form of oral and documentary evidence and in view of Section 54 of the Act and in the absence of any evidence from the accused discharging the presumption as to the possession of the contraband, we are in entire agreement with the conclusion arrived at by the trial Court and the High Court.

13. As regards the reduction of sentence, it is not in dispute that possession of 3 ½ kgs of opium involves commercial quantity and if that is so, in terms of sub-section (b) of Section 18, imprisonment shall not be less than 10 years. Admittedly, there is no enabling provision to the court for reduction of sentence by giving special or adequate reasons in the statute particularly in Section 18. Accordingly, we reject the request of the learned counsel for the appellant.

14. In the light of the above discussion, we are in entire agreement with the conclusion arrived at by the courts below. Consequently, the appeal fails and the same is dismissed.

R.P. Appeal dismissed.

SARVA U.P. GRAMIN BANK & ORS.
v.
MANOJ KUMAR CHAK
(Civil Appeal Nos. 2970-2975 of 2013 etc.)

APRIL 09, 2013.

[SURINDER SINGH NIJJAR AND H.L. GOKHALE, JJ.]

REGIONAL RURAL BANKS (APPOINTMENT AND PROMOTION OF OFFICERS AND OTHER EMPLOYEES) RULES, 1998:

rr. 2(d), (e), (f) and (j) - Promotions to be made "on the basis of seniority-cum-merit" - Connotation of - Circulars dated 30.11.2009 and 12.7.2010, enabling the management to eliminate from zone of consideration such employees who have been rated Grade 'D' in performance appraisal or who have suffered punishment - Set aside by High Court - Held: Rules do not provide the criteria introduced by the two circulars - The procedure prescribed under the two circulars clearly has the effect of supplanting the provision of eligibility, which is not permissible - Determination of the bare minimum criteria is the function of the DPC and cannot be taken-over by management - Misconduct committed by employee/officer would be a matter for DPC to take into consideration at the time of performance appraisal - The two circulars being contrary to statutory Rules, have rightly been quashed by High Court - Circular No. 17 of 2009 dated 30.11.2009 - Circular dated 12.7.2010 - Service law - Promotion - Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules, 1988.

The instant appeals were filed by the appellant-Banks challenging the judgment passed by the High Court, whereby it set aside the Circular No. 17 of 2009 dated 30.11.2009 and Circular dated 12.7.2010 in so far as they

provide to exclude the employees from consideration for promotion on the basis that they had either obtained the 'D' rating in the annual performance report or were penalized for any misconduct in the preceding 5 years.

Dismissing the appeals, the Court

HELD: 1.1 Statutory rules can be supplemented but cannot be supplanted. The RRB Rules, 1988 clearly provided that promotion shall be made by following the criteria of seniority-cum-merit. There was no provision in the 1988 Rules that an employee/officer, who has been punished in the 5 years preceding the selection process or has been given an adverse remark or graded 'D' shall not be considered for promotion at all. The circular dated 1.12.1987, which talks of promotion with seniority with due consideration to minimum merit/fitness, being clearly contrary to 1988 Rules ceased to have any legal effect on enforcement of the said Rules. The RRB Rules, 1988 were superseded by the RRB Rules, 1998, which incorporated the principle of minimum merit as enunciated by this Court in B.V. Sivaiah. Following the observations of this Court, the RRB Rules, 1998 have introduced a detailed procedure for determining the minimum merit for promotion to the next higher post/grade. The RRB Rules, 1998 clearly provided that officers holding post for 8 years as an officer on regular basis in the RRB shall be considered for promotion to the next higher post. The said Rules do not provide that any employee/officer, who has suffered a punishment or has received an adverse appraisal/Grade 'D' in the performance appraisal, shall not be eligible. However, the Circulars dated 30.11.2009 and 12.7.2010 enable the appellant banks to eliminate such employees, which is clearly contrary to the provisions contained in the statutory service rules. The procedure prescribed under the aforesaid two Circulars clearly has the effect of supplanting the provision of eligibility, which

is not permissible. Such an additional provision can not be justified on the basis that it would form part of the minimum merit required to be considered for promotion. [para 27-32] [583-E-G; 584-B-C-E; 585-B-E]

Sant Ram Sharma Vs. State of Rajasthan & Ors. **(1968) 1 SCR 111 - relied on.**

B.V. Sivaiah & Ors. Vs. K. Addanki Babu & Ors. **1998 (3) SCR 782 = 1998 (6) SCC 720 - referred to.**

Rajendra Kumar Srivastava & Ors. Vs. Samyut Kshetriya Gramin Bank & Ors. **2009 (15) SCR 936 = 2010 (1) SCC 335 - held inapplicable.**

1.2 It can not be said that bare minimum merit can be determined even before the list of candidates is placed before the DPC for consideration of their merit. It is only when all the candidates within the zone of consideration have participated in the selection procedure and their performance is assessed on the basis of written test, interview, and past performance i.e. performance appraisal, that the minimum merit would become relevant. When the bare minimum merit of the candidates is determined, the promotion shall be made on the basis of seniority irrespective of the better performance of the junior candidates in the written test/interview/ performance appraisal. [para 33] [586-E, G-H; 587-A]

Union of India & Ors. Vs. K.V. Jankiraman & Ors. **1991 (3) SCR 790 = 1991 (4) SCC 109- held inapplicable.**

2.1 In *Jankiraman's* case, it has been held that promotion can be justifiably denied to eligible candidate at the time of his/her performance appraisal by the DPC. The fact that the officer/employee has been departmentally punished would form part of the service record and can be taken into account by the DPC. In such

circumstances, the employee cannot possibly claim to have been subjected to a further penalty on the basis of the misconduct which led to his punishment. This, however, would not permit the management to debar an employee from being considered for promotion at the stage of considering whether such an employee is "eligible" to be considered in terms of r. 2(e). [para 34] [587-B; 588-F-H]

2.2 Determination of the bare minimum criteria is the function of the DPC and cannot be taken-over by the management at the time of determining the eligibility of a candidate under r. 2(e). There is, in fact, a complete segregation of r.2 (e) from r. 2(f). Determining the eligibility of candidate is in the nature of a ministerial function. The management merely has to see that the candidate possesses the minimum length of service and that he/she is confirmed in the feeder cadre. The determination of bare minimum merit is on the basis of the performance in the written test/interview and performance appraisal. This is the function of the Selection Committee i.e. Departmental Promotion Committee. [para 35 and 37] [589-F-G; 590-E-F]

Ram Ashish Dixit Vs. Chairman, Purvanchal Gramin Bank & Ors. **2013(6) SCALE 345 - held inapplicable.**

2.3 There is no doubt that punishment and adverse service record are relevant to determine the minimum merit by the DPC. But to debar a candidate, to be considered for promotion, on the basis of punishment or unsatisfactory record would require the necessary provision in the statutory service Rules. There is no such provision under the 1998 Rules. [para 36] [589-H; 590-A]

2.4 It can also not be said that Circular No.17 of 2009 dated 30.11.2009 and Circular dated 12.7.2010 are to ensure that the individual members of the DPC do not

recommend for promotion an individual officer despite having been punished in the preceding 5 years. Such curtailment of the power of the DPC would have to be located in the statutory service rules. The 1998 Rules do not contain any such provision. It is fallacious to presume that under the 1998 Rules, once an officer gets the minimum marks in the written examination, he would be entitled to be promoted on the basis of seniority alone. There is no warrant for such a presumption. The misconduct committed by eligible employee/officer would be a matter for DPC to take into consideration at the time of performance appraisal. The past conduct of an employee can always be taken into consideration in adjudging the suitability of the officer for performing the duties of the higher post. [para 39] [591-F-H; 592-B-C]

2.5 Further, different rules/regulations of the banks provide specific punishments such as "withholding of promotion, reduction in rank, lowering in ranks/pay scales". However, there is another range of penalty such as censure, reprimand, withholding of increments etc. which are also prescribed under various staff regulations. To debar such an employee from being considered for promotion would tantamount to also inflicting on such employee, the punishment of withholding of promotion. In such circumstances, a punishment of censure/ reprimand would, in fact, read as censure/reprimand + 5 years debarment from promotion. Thus the circulars issued by the bank debarring such employees from being considered would be clearly contrary to the statutory rules. [para 40] [592-C-F]

Sant Ram Sharma Vs. State of Rajasthan & Ors. **(1968) 1 SCR 111 - relied on.**

2.6 Therefore, the High Court, has rightly quashed the said two Circulars and directed thpat the respondent be considered for promotion in accordance with the

applicable rules. [para 41] [592-G]

State of Mysore & Anr. Vs. Syed Mahmood & Ors. **1968 SCR 363 = AIR 1968 SC 1113 and** *Haryana State Warehousing Corporation & Ors. Vs. Jagat Ram & Anr.* **2011 (2) SCR 1151 = 2011 (3) SCC 422;** *State of T.N. Vs. Thiru K.S. Murugesan & Ors.* **1995 (2) SCR 386 = 1995 (3) SCC 273,** *L. Rajaiah Vs. Inspector General of Registration & Stamps, Hyderabad & Ors.* **1996 (2) SCR 136 = 1996 (8) SCC 246; and** *Collector of Thanjavur Distt. & Ors. Vs. S. Rajagopalan & Ors.* **(2000) 9 SCC 145 - cited.**

Case Law Reference:

1998 (3) SCR 782	**referred to**	**para 11**
(1968) 1 SCR 111	**relied on**	**para 19**
2009 (15) SCR 936	**held inapplicable**	**para 19**
2013(6) SCALE 345	**held inapplicable**	**para 19**
1968 SCR 363	**cited**	**para 21**
2011 (2) SCR 1151	**cited**	**para 21**
1991 (3) SCR 790	**held inapplicable**	**para 22**
1995 (2) SCR 386	**cited**	**para 24**
1996 (2) SCR 136	**cited**	**para 24**
(2000) 9 SCC 145	**cited**	**para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2970-2975 of 2013.

From the Judgment and order dated 08.12.2010 in WP No. 58206/2005, WP No. 58214/2005, WP No. 59016/2005, WP No. 59018/2005, WP No. 59035/2005 & WP No. 59758/ 2005 of the High Court of Judicature at Allahabad.

WITH

Civil Appeal Nos. 2989-2992 of 2013.
Civil Appeal Nos. 2976-2988 of 2013.
Civil Appeal Nos. 2993-3010 of 2013.

Dhruv Mehta, Yashraj Singh, Rajesh Kumar, Sriram Krishna, Anupama Dhurve, Prashant Narang, Sarv Mitter, (for Mitter & Mitter Co.) for the Appellants.

Fakhruddin, Gopal Krishna, M.K. Chaudhary, Raj Kishore, (For S.K. Verma, K.T. Anantharaman, Vasudevan Raghavan, Neeraj Shekhar, Avdesh Kumar Singh, Ashutosh Thakur, Priya Ranjan Roi for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted in all the Special Leave Petitions.

2. These appeals are directed against the common judgment and final order dated 8th December, 2010 passed by the High Court of Judicature at Allahabad in Writ Petition Nos. 58206 of 2005 and in connected Writ Petition Nos. 58214, 59016, 59018, 59035 and 59758 of 2005, whereby the High Court has allowed all the Writ Petitions and set aside the Circular No. 17 of 2009 dated 30th November, 2009 and Circular dated 12th July, 2010 in so far as they make a provision to exclude the employees from consideration for promotion, who are otherwise eligible to be considered for promotion and are within the zone of consideration, on the basis that they have either obtained the 'D' rating in the annual performance report or have been penalized for any misconduct in the preceding 5 years.

Background:-

3. Before we take up for consideration, the issues involved, it would be appropriate to briefly notice the background leading to the present litigation.

4. There are currently about 82 Regional Rural Banks (for

short "RRBs") sponsored by various nationalized banks, set up under the Regional Rural Banks Act, 1976 (for short "the RRB Act, 1976"). There are about 67,000 employees of the Bank, spread all over India mostly in the interiors.

5. To ensure uniformity amongst all the RRBs, Section 29 read with Section 17 of the RRB Act, 1976 empowers the Central Government to lay down the terms and conditions of service of employees of all the banks. Section 17 of the RRB Act, 1976 empowers the RRBs to appoint such number of officers and other employees as it may consider necessary or desirable in such manner as may be prescribed for the efficient performance of its functions and to determine the terms and conditions of their appointment and service. Section 24 of the Act lays down that in the discharge of its functions, RRBs shall be guided by such directions in regard to matters of policy involving public interest and the Central Government may, after consultation with the National Bank for Agriculture and Rural Development (for short "NABARD"), may prescribe. Under Section 29 of this Act, the Central Government has been empowered to make rules after consultation with the NABARD and the Sponsor Banks for carrying of the provisions of the RRB Act, 1976. By Clause (ba) of sub-section (2) of Section 29, which was inserted by the Regional Rural Banks (Amendment Act), 1988, the Central Government was empowered to make rules relating to the manner in which the officers and other employees of the RRBs shall be appointed.

6. Till the year 1988, there were no statutory rules governing the promotion of employees of RRBs and the same were governed by various Circulars issued by the Central Government and NABARD. On 1st December, 1987, NABARD issued guidelines to all RRBs vide letter No. IDD.RRB.NO. C-78/316(GEN)/87-88, explaining the concept of promotion by "Seniority-cum-Merit" as envisaging promotion by seniority with due considerations to minimum merit/fitness prescribed. Further, it was stipulated that "this rule envisages promotion by seniority with due considerations to minimum

merit/fitness prescribed. Fitness implies that there is nothing against an officer; no disciplinary action is pending against him and none is contemplated. The officer has neither been reprimanded nor any adverse remarks have been conveyed to him in the reasonable recent past". Although the aforesaid Circular was issued in relation to promotion of Managers to the post of Area/Sr. Manager, it was observed that the similar procedure may be followed in case of the promotion of Sr. Clerk and internal promotion to Field Supervisor and Manager Posts.

7. The Central Government vide a Notification dated 28th September, 1988 framed statutory rules, known as Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules, 1988 (for short "the RRB Rules, 1988). These rules were made in exercise of the powers conferred on the Central Government by Section 29 read with Section 17 of the RRB Act, 1976 after consultation with the NABARD and the Sponsor Banks specified in the First Schedule of the Rules.

8. Second Schedule of the aforesaid Rules laid down the criteria for appointment to different categories of posts whether by direct recruitment or by promotion in all the RRBs. The criterion for promotion on all the posts was specified as seniority-cum-merit. With regard to the post of Area / Senior Manager, Clause 7 of Schedule 2 provided that the appointment on the aforesaid post shall be made 100% by promotion from amongst confirmed officers working in the Bank. Promotion will be on the basis of seniority-cum-merit. If suitable officers are not available internally, these posts are to be filled by deputation in another banks or organization on deputation.

9. Clause 7(c) pertains to the mode of selection, which provided for "interview and assessment of performance reports for the preceding 3 years period as officer for promotion". It is relevant to note here that in these rules, the provisions pertaining to merit/fitness contained in the NABARD Circular dated 1st December, 1987 were not incorporated. Even

though, the 1988 Rules have been promulgated in consultation with NABARD and the Sponsor Banks.

10. In spite of the promulgation of the RRB Rules, 1988, the RRBs continued to make promotions by taking into consideration the criteria laid down in the 1987 Circular in addition to the provisions contained in the RRB Rules, 1988. This led to the actions of the RRBs being challenged by way of Writ Petitions in Andhra Pradesh High Court and Madhya Pradesh High Court. Both the Andhra Pradesh as well as the Madhya Pradesh High Court held that if seniority-cum-merit criterion is adopted for the purposes of seniority, then the first senior most eligible employee has to be tested to find out whether he possesses the minimum required merit for holding the higher post and only if he is not found suitable or fit, his immediate junior may be tested for the purpose of promotion. These decisions of the High Courts were challenged by the various RRBs as well as the promoted officers whose promotion has been set aside by this Court.

11. The controversy was laid at rest by this Court in the judgment delivered in the case of *B.V. Sivaiah & Ors. Vs. K. Addanki Babu & Ors.*[1] This Court distinguished the principle of "Merit-cum-Seniority" and the principle of "Seniority-cum-Merit". It has been held that the principle of "Merit-cum-Seniority" lays greater emphasis on merit and seniority plays a less significant role. Seniority is to be given weight only when merit and seniority are approximately equal. As between two officers of "seniority-cum-merit", the criterion of seniority-cum-merit lays greater emphasis on seniority. However, this Court added a caveat that an officer can not claim promotion as a matter of right by virtue of seniority alone and if he is found unfit in the discharge of duties of the higher post, he may be passed over and the officer junior to him may be promoted. The aforesaid judgment of this Court was delivered on 17th July, 1998.

1. (1998) 6 SCC720.

12. Thereafter on 29th July, 1998, in exercise of the powers conferred by Section 29 read with Section 17 of RRB Act, 1976, in supersession of the RRB Rules, 1988, the Central Government, after consultation with the National Bank and Sponsor Bank specified in the Second Schedule, promulgated the Regional Rural Banks (Appointment and Promotion of Officers and other Employees) Rules, 1998. The relevant provision for appointment by promotion as a Scale II officer is as under:-

"2.

(a) Name of Post	Scale II Officer
(b) Classification	Group 'A'
(C) Source of appointment	100 % by promotion
(d) Whether promotion to be made on seniority basis or seniority-cum-merit - basis.	Promotion shall be made on the basis of seniority cum-merit
(e) Eligibility	Officer holding post for eight years as an officer on regular basis in the Regional Rural Bank shall be considered for promotion to Scale-II post in that bank :
	Provided that no officer shall be considered for promotion unless he has been confirmed in feeder grade post:
	Provided further that the Board may, with the prior approval of National Bank relax the qualifying service for a period not exceeding two years, if eligible officers are not available.

Note:

(I) The officers eligible for promotion to the post of Area Managers/Senior Managers/Officers Scale-II on or before publication of this notification, shall continue to be considered for promotion to Scale-II officer Post.

(II) The service of the incumbents, who are holding the post eligible for promotion before publication of this notification, shall continue to be counted for the purpose of promotion to the Scale II officer post.

(f) Mode of Selection	The selection of the candidates shall be made by the committee on the basis of written test, interview and assessment of Performance Appraisal Reports for the preceding five years as an officer in Scale I/ Field Supervisor.
(g) Composition of Committee	The committee (for considering promotion) shall consist of the following persons, namely, (i) The chairman of the concerned Regional Rural Bank-Chairman (ii) A director nominated the sponsor bank-Member. (iii) A director nominated by the National Bank Member.

Note: If none of the members of the Committee belongs to Scheduled Castes/Scheduled Tribes, the Board may nominate a person belonging to Schedule Castes or Schedule Tribe as an additional member and such person shall participate in the

process of selection by the concerned committee.

(h) Reckoning of the minimum eligibility	The minimum eligibility in terms of the number of years of service for promotion shall be reckoned as on the 1st April of the year in which the vacancy is expected to arise or has actually arisen.
(i) Number of candidates To be considered for Promotion	The number of candidates to be considered for promotion from officer Scale I to officer Scale Ishall be restricted to four times the number of vacancies available for promotion.
(j) Selection process for Promotion	The Selection shall be on the basis of performance in the written test, interview and perforlmance appraisal reports for preceding five years as per the division of marks given below.
(A) Written Test	60 Marks
(B) Interview	20 Marks
(C) Performance Appraisal Reports	20 Marks
TOTAL MARKS	100 MARKS
(A) Written test (60 marks)	The candidates shall be required to appear for written test comprising of two parts viz. part (A) covering Banking

Law and Practice of Banking and Part (B) covering Credit Policy Credit Management including priority Sector, Economics andManagement.

60 marks allotted to written test shall be further divided as under :

Part "A" 30 Marks

Part "B" 30 Marks

A list of only those candidates, who secure a minimum of 40% marks in each part shall be prepared and such candidates shall be called for interview. "

13. The Rules also provide that the written test shall be in two parts viz. Part A and Part B, each consisting of 30 marks. It was provided that the list of those candidates shall be prepared, who secure a minimum of 40% marks in each part and such candidates shall be called for interview. Thus the Rules had clearly introduced the minimum necessary merit as laid down by this court in the case of *B.V. Sivaiah* (supra). However, it appears that one of the Sponsor Banks, namely Punjab National Bank issued guidelines dated 27th February, 1999 laying down the "procedure to be adopted in RRBs for promotion in different cadres - clarification thereof", to all its Sponsored Regional Rural Banks.

Present Litigation:

14. Thereafter, the individual officers of erstwhile RRBs filed 13 Writ Petitions before the High Court in the year 2004-2005 on the ground that the Circular sought to debar totally from

consideration for promotion, officers against whom disciplinary action was pending or contemplated as well as those, who had been reprimanded or had obtained a 'D' rating in their annual performance reports in the preceding 5 years before the selection process commences.

15. Whilst the aforesaid matters were still pending, it appears that the Punjab National Bank and Bank of Baroda issued another clarification by the Circular No. 17 of 2009 dated 30th November, 2009. The aforesaid circular entitled "Appointment and Promotion of Officers and other Employees of RRBs" reiterated the provision contained in the Notification dated 29th July, 1998. Pursuant to the aforesaid, Sarva U.P. Gramin Bank issued a Circular dated 12th July, 2010 incorporating the clarification contained in the Circular dated 12th July, 2010, subsequently reiterated on 30th November, 2009. The aforesaid Circulars were also challenged in Writ Petition Nos. 55913, 50638, 50629, 51003 and 50633 of 2010.

16. All the aforesaid writ petitions were clubbed and decided by the High Court of Judicature at Allahabad by a common judgment dated 8th December, 2010. By the aforesaid judgment, the High Court quashed the Circular No. 17 of 2009 dated 30th November, 2009 and Circular dated 12th July, 2010. The appellant bank was directed to consider the claim of the respondents (Writ Petitioners) for promotion in accordance with the procedure and method of punishment provided by the competent authority for selections. The High Court in its judgment concluded :-

"1. Where a person is eligible to be considered for promotion, his exclusion, on the ground that he has suffered minor or major penalties, cannot be a ground to exclude him from consideration. The competent authority, as held in *K.V. Janakiram* (supra) and *B.V. Sivaiah* (supra), can lay down minimum standards required and also prescribe mode of assessment of merit of the employees eligible to be considered for promotion. The

assessment can be made by assigning marks on the basis of appraisal of performance on the service record and interview. The competent authority may also prescribe minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit. The employee, however, cannot be excluded and denied his right to be considered by the selection committee for promotion.

2. The persons, who have been awarded censure entry or other minor punishments, thus cannot be excluded from the zone of consideration for promotion. The question of assessment on merit is to be made by the Selection Committee at the time of selection and not before that by eliminating the person who is within the zone of consideration.

3. We are further of the opinion that the circulars issued by the bank cannot override the statutory Rules nor can supplement it to the extent that the persons, who are otherwise eligible to be considered for promotion, will be rendered ineligible and will not be given a chance to be considered for promotion."

17. Aggrieved by the aforesaid observations and the decision of the High Court, the appellant bank has filed the present appeals.

SUBMISSIONS :

18. We have heard very lengthy submissions by the learned counsel for the parties.

19. We may first briefly notice the submissions on behalf of the appellants. Mr. Dhruv Mehta, learned senior counsel appearing for the appellants submitted that the Circular dated 30th November, 2009 and 12th July, 2010 were not ultra vires of the RRB Rules, 1998. The two Circulars have only

supplemented the RRB Rules, 1998, where they are silent. The Circulars do not have the effect of supplanting the RRB Rules, 1998. He elaborated that the aforesaid Rules do not provide for and/or are silent with regard to the treatment to be given / meted out to the case where "adverse remarks" have been recorded against an officer during the preceding 5 years, i.e., period under consideration for promotion. He submitted that the Sponsor Banks have merely reiterated the earlier Circular issued by the NABARD on 1st December, 1987, which was subsequently clarified on 27th February, 1999. The Circulars dated 30th April, 2009 and 12th July, 2010 have merely reiterated the earlier position. The appellant bank had only reiterated the aforesaid guidelines after the amalgamation of the small RRBs into one RRB (appellant bank) vide Notification dated 30th November, 2007. However, these guidelines were being followed by erstwhile RRBs also prior to amalgamation. Learned senior counsel relied on the judgment in the case of *Sant Ram Sharma Vs. State of Rajasthan & Ors.*[2] to submit that it was permissible for the appellant bank to fill up the gaps and supplement the rules and issue instructions which were not inconsistent with the statutory rules. Learned senior counsel further submitted that the aforesaid Circulars have been issued in order to bring about uniformity as different RRBs were following different procedures for making promotions on similar posts. Since the Rules of 1998 are silent with regard to non-consideration of officers, who have adverse remarks against them in the preceding 5 years, it was necessary to lay down uniform guidelines. He emphasised that DPC under the RRB Rules, 1998 consists of :- (a) Chairman, RRB, (b) Director nominated by Sponsor Banks and (c) Director nominated by NABARD. In the absence of uniform guidelines, DPC consisting of individuals will be conferred with power to decide whether an individual officer despite having been punished in the preceding 5 years should be recommended/selected for promotion or not. According to Mr. Dhruv Mehta, introduction

2. (1968) 1 SCR 111.

of such a process will lead to infusion of arbitrariness in the process of promotion. In such circumstances, the promotion of a particular officer, in spite of having been punished, will be based entirely on the perception of individual members of DPC. This could lead to more litigation by the officers, who are not selected/approved for promotion in spite of having a clean record. He points out that without the aforesaid guidelines, an officer, even though, he has been punished for gross misconduct, would have to be promoted in case he obtains minimum 40% marks in the written test, because in other parameters, namely interview and performance appraisal, the RRB Rules, 1998 do not prescribe minimum marks. Debarring such a person from promotion would not be arbitrary as the rationale behind such procedure is to weed out the unfit at the initial stage. In support of this submission, the learned senior counsel relied on the observations made by this Court in the case of *Rajendra Kumar Srivastava & Ors. Vs. Samyut Kshetriya Gramin Bank & Ors*.[3] The instructions, according to him, merely prescribe minimum merit necessary for discharging the function of the higher post. Therefore, the procedure prescribed in the Circulars would not violate the concept of promotion by seniority-cum-merit. Learned senior counsel further submitted that same procedure will be followed in cases, where an officer has been communicated adverse remarks and graded as 'D' in the 5 years preceding the selection process. In support of this submission, the learned counsel relied on certain observations made by this Court in Civil Appeal No. 6072 of 2012, *Ram Ashish Dixit Vs. Chairman, Purvanchal Gramin Bank & Ors.*

20. The next submission of Mr. Dhruv Mehta was that the employee only has a right to be considered for promotion and does not have an absolute right to be promoted only on the basis of seniority. Learned senior counsel reiterated that criteria of "fitness", i.e., a candidate should not be found to be "unfit to discharge the duties of higher post" is a condition implicit in

3. (2001) 1 SCC 335.

the criteria of promotion on the basis of "seniority-cum-fitness" criteria.

21. Learned senior counsel has further submitted that different rules prescribed different criterias for adjusting the suitability of candidates for promotion viz. "seniority-cum-fitness", "seniority-cum-merit" and "merit-cum-seniority". However, the "fitness" of a candidate to discharge duties of higher post, has to be considered necessary, relevant and an implicit condition of promotions in all the above criterias. He draws support for the aforesaid submission from the judgment of this Court in the case of *State of Mysore & Anr. Vs. Syed Mahmood & Ors.*[4] and *Haryana State Warehousing Corporation & Ors. Vs. Jagat Ram & Anr.*[5]

22. Mr. Dhruv Mehta then submitted that the employee/officers, who have not been promoted in view of the guidelines dated 30th November, 2009 and 12th July, 2010, had not been debarred from consideration as they were, in fact, considered along with all the other officers, who had completed the requisite period of service but have been weeded out/eliminated at the threshold, in view of the fact that they had been either punished or graded 'D' in the 5 years preceding the selection. Learned senior counsel further submitted that non-promotion of those officers, who have either been punished or have been recipient of adverse remarks such as Grade 'D', would not be violative of Article 14 and 16 of the Constitution of India. The candidates, who have been imposed penalty/punishment or whose performance is assessed as unsatisfactory during the period under consideration for promotion can not be placed at par with the candidates, who have not been imposed any punishment/penalty or whose performance has been outstanding, very good or good during the said period. The classification made on the basis of the service record is a reasonable classification and has a nexus with the object sought to be achieved namely

4. AIR 1968 SC 1113.

5. (2011) 3 SCC 422

promotion to the next grade/cadre. In support of this, he relies on the judgment of this Court in the case of *Union of India & Ors. Vs. K.V. Jankiraman & Ors.*[6]

23. Mr. Dhruv Mehta has also brought to the attention of this court the "subject wise bifurcation" of the present special leave petitions, which appears to have been premised on the basis of different levels of punishment imposed on the writ appellants/respondents herein which rendered them ineligible from consideration for promotion. The bifurcation is as under :

(i) SLP (C) No. 9284-9301/2011: The concerned employees in this bunch were rendered ineligible for consideration for promotion due to imposition of punishment on them during the preceding five years.

(ii) SLP (C) No. 9181-86/2011: The assessment of the concerned employees in this bunch was rendered "unsatisfactory", i.e., they were rated "D" in any one year out of preceding five years.

(iii) SLP (C) No. 9432-9444/2011: Some punishment was imposed on the employees herein during the preceding five years and also, their performance was rated as unsatisfactory, i.e., they were rated "D".

(iv) SLP (C) 9306-9309/2011: Issues raised by the writ petitioners herein were not same/similar to the lead matter therein.

24. Lastly, he submits that this Court in a catena of judgments has held that an employee can be validly debarred from consideration for promotion during the rigour of punishment. He has made a reference to the following judgments:-

State of T.N. Vs. Thiru K.S. Murugesan & Ors.[7], *L. Rajaiah Vs. Inspector General of Registration & Stamps,*

6. (1991) 4 SCC 109.

7. (1995) 3 SCC 273.

Hyderabad & Ors.[8] and *Collector of Thanjavur Distt. & Ors. Vs. S. Rajagopalan & Ors.*[9]

25. On the other hand, learned senior counsel for the respondent, Mr. Fakhruddin, submitted that the submissions made by the appellants about the usurpation of the power of selection of the management by the members of the DPC clearly indicates that the two Circulars have not been issued bonafide and are in fact intended to whittle down the role and powers of Independent Selection Committee prescribed in the statutory rules of 1998. The function of selection has been statutorily conferred on the DPC, and can not be permitted to be usurped by the Bank Management. He further submitted that by virtue of Section 29 and Section 17 of the RRB Act, 1976, the powers to determine the service conditions including promotions of the employees of the RRBs are vested in the Central Government. Therefore, the two Circulars can not be permitted to prevail over the provision of the statutory rules of 1998. Mr. Fakhruddin emphasised that Government of India has promulgated the aforesaid rules in consultation with NABARD and the Sponsor Bank. Even then, no provision has been made in the aforesaid rules to debar the employees/ officers for being considered for promotion amongst them who fall in the zone of consideration, on the basis that they have been either penalized or given an unsatisfactory/'D' rating annual performance appraisal report. It is submitted by all the learned counsel appearing for the respondent that the RRB Rules, 1998 are in consonance with the observations made by this Court in the case of *B.V. Sivaiah* (supra) and is a complete code, which does not need to be supplemented by any instructions. It is further submitted that in the guise of laying down minimum marks as a benchmark to determine the suitability/fitness/merit for promotion, the appellants have introduced the criteria of merit-cum-seniority in the place of seniority-cum-merit. Such change in the criteria could only be

8. (1996) 8 SCC 246.

9. (1995) 3 SCC 273.

made by making the necessary amendment in the Rules and not by issuing guidelines/Circulars by the Sponsor Banks or NABARD.

26. Learned senior counsel further submitted that the two Circulars are wholly arbitrary since even the employees who had been only given the lowest penalty of censure or reprimand can be eliminated at the threshold, from being considered for promotion. It is further submitted by the learned counsel for the respondent that blanket debarment will have the effect of giving an unbridled/untrampled power in the hands of the superiors of an employee. Such power can be abused and misused to give/deny "promotion to a particular employee/officer due to personal reasons and likes and dislikes of a particular officer". Learned senior counsel, therefore, submitted that the High Court has correctly quashed the aforesaid two Circulars.

CONSIDERATION/CONCLUSIONS :

27. We have given due consideration to the submissions made by the learned counsel for the parties. It is by now settled beyond cavil that statutory rules can be supplemented but can not be supplanted. This is the ratio of law laid down in the case of *Sant Ram Sharma* (supra). It has been reiterated by this Court in a catena of subsequent judgments. It is, however, not necessary to burden the present judgment by making a copious reference to the other decisions which merely reiterated the same ratio.

28. We have noticed earlier that till 1988, there were no statutory rules governing the promotions of the employees of RRB. The promotions in these banks were governed by various Circulars issued by the Government, NABARD and the Sponsor Banks. One such Circular is dated 1st December, 1987, which provided that the word "merit", provides that criteria of seniority-cum-merit envisages promotion by seniority with due consideration to minimum merit/fitness prescribed. However, the Circular further provided that fitness implies that there is nothing against an officer, no disciplinary action is pending against him and none is contemplated. The officer has

neither been reprimanded nor any adverse remarks have been conveyed to him in the reasonable recent past.

29. The aforesaid Circular is prior in time to the RRB Rules, 1988. The aforesaid rules clearly provided that promotion shall be made by following the criteria of seniority-cum-merit. Rule also provides that any officer/employee having 8 years of service as an officer/employee shall be eligible to be considered for promotion. The criteria for determining the minimum merit required of the candidate for promotion is to be ascertained on the basis of his performance in the written test, interview and his assessment in the performance appraisal report. There is no provision in the Rules that an employee/officer, who has been punished in the 5 years preceding the selection process or has been given an adverse remark or graded 'D' shall not be considered for promotion at all. The Circular dated 1st December, 1987 was, therefore, clearly contrary to the 1988 statutory rules, and, therefore, ceased to have any legal effect from the date of the enforcement of the rules.

30. It is a matter of record that the RRB Rules, 1988 were superseded by the RRB Rules, 1998. The aforesaid rules incorporated the principle of minimum merit as enunciated by this Court in *B.V. Sivaiah* (supra). In Paragraph 18 of the aforesaid judgment, this Court observed as follows:-

> "18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the

basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

31. Following the aforesaid observations, the RRB Rules, 1998 have introduced a detailed procedure for determining the minimum merit for promotion to the next higher post/grade. The RRB Rules, 1998 clearly provided that officers holding post in 8 years as an officer on regular basis in the RRB shall be considered for promotion to the next higher post. The aforesaid rule does not provide that any employee/officer, who has suffered a punishment or has received an adverse appraisal/ Grade 'D' in the performance appraisal, shall not be eligible. However, the Circulars dated 30th November, 2009 and 12th July, 2010 enables the appellant banks to eliminate such employees, which is clearly contrary to the provisions contained in the statutory service rules. The procedure prescribed under the aforesaid two Circulars clearly has the effect of supplanting the provision of eligibility, which is not permissible.

32. Such an additional provision can not be justified on the basis that it would form part of the minimum merit required to be considered for promotion. In our opinion, the reliance placed in support of this proposition on the judgment in the case of *Rajendra Kumar Srivastava* (supra) is wholly misplaced. In the aforesaid judgment, this Court has observed as follows:-

"11. It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of "seniority" and the principle of "merit-cum-seniority". Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and

then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit"

33. These observations clearly apply at the time when the eligible persons are being considered for promotion by the DPC. Eligibility under the rules is on the basis of minimum length of service - eight years, unless relaxed by two years confirmation in the lower/feeder post. It is not possible to accept the submission of Mr. Dhruv Mehta that bare minimum merit can be determined even before the list of candidates is placed before the DPC for consideration of their merit. Rule (2e) clearly provides firstly for the determination of the eligibility, as noticed above. The criteria for promotion (seniority-cum-merit) is provided in Rule 2(d). Rule 2(f) provides for "mode of selection". It is clearly provided that "the selection of the candidates shall be made by the committee……". The second part of Rule 2(f) provides the criteria for determination of the bare minimum merit. In fact, for this very reason, the rules themselves provide that in order to succeed in the written test, a candidate has to secure a minimum 40% marks in each part of the written test consisting of 30 marks each. It is only when all the candidates within the zone of consideration have participated in the selection procedure and their performance is assessed on the basis of written test, interview, and past performance i.e. performance appraisal that the minimum merit would become relevant. When the bare minimum merit of the candidates is determined, the promotion shall be made on the

basis of seniority irrespective of the better performance of the junior candidates in the written test/interview/performance appraisal.

34. Similarly, the reliance placed by Mr. Dhruv Mehta on the judgment of this Court in *K.V. Jankiraman's* case (supra) is also misplaced. In this judgment, this Court considered the circumstances under which the banks could resort to the "sealed cover procedure", when considering the claims of the eligible candidates for promotion. The court also examined the impact of departmental punishment for assessment of the suitability of an employee for promotion. The relevant ratio of this Court is as under :

> "29. According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances. To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any

> administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in praesenti. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. For these reasons, we are of the view that the Tribunal is not right in striking down the said portion of the second sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum. We, therefore, set aside the said findings of the Tribunal."

These observations make it abundantly clear that promotion can be justifiably denied to eligible candidate at the time of his/her performance appraisal by the DPC. The fact that the officer/employee has been departmentally punished would form part of the service record and can be taken into account by the DPC. In such circumstances, the employee cannot possibly claim to have been subjected to a further penalty on the basis of the misconduct which led to his punishment. This, however, would not permit the management to debar an employee from being considered for promotion at the stage of considering whether such an employee is "eligible" to be considered in terms of Rule 2(e).

35. The observations in *Rajendra Kumar Srivastava* (supra) also do not support the submissions made by Mr. Dhruv Mehta. In paragraph 13, it is observed as follows :

> "13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of "seniority-cum-merit". What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit."

These observations also make it clear that whilst assessing the eligibility of the candidates, determination of bare minimum merit is not envisaged. There is, in fact, a complete segregation of Rule 2(e) from Rule 2(f). Determining the eligibility of candidate is in the nature of a ministerial function. The management merely has to see that the candidate possesses the minimum length of service and that he/she is confirmed in the feeder cadre. The determination of bare minimum merit is on the basis of the performance in the written test/interview and performance appraisal. This is the function of the Selection Committee i.e. Departmental Promotion Committee.

36. There is no doubt that punishment and adverse service record are relevant to determine the minimum merit by the DPC. But to debar a candidate, to be considered for promotion, on the basis of punishment or unsatisfactory record would require the necessary provision in the statutory service Rules. There is no such provision under the 1998 Rules.

37. In *B.V.Sivaiah* (supra), this Court laid down the broad contours defining the term "bare minimum merit" in the following words :

> "We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

From the above, it becomes clear that the determination of the bare minimum criteria is the function of the DPC and cannot be taken-over by the management at the time of determining the eligibility of a candidate under Rule 2(e).

38. The reliance placed by Mr. Dhruv Mehta on the judgment of this court in the case of *Ram Ashish Dixit* (supra) is also misconceived. In the aforesaid case, the officer had been considered for promotion during the pendency of the departmental proceedings to Middle Management Grade II. However, the result was kept in a sealed cover. After finalization of the proceedings, the appellants requested the authority to open the sealed cover. He was, however, informed that he can not be promoted in view of the bank Circular dated 28th March, 1998 as he had been punished. Subsequently, again his case was to be considered for promotion in September, 1999.

However, he was denied consideration for promotion in view of the conditions contained in Circular dated 28th March, 1998. It was submitted on behalf of the appellants that the punishment imposed upon the staff of the Bank can not be treated to be an ineligibility for promotion since the eligibility for promotion is prescribed under the RRB Rules, 1988. It was submitted on behalf of the bank (respondent therein) that since stoppage of increment for 3 years is a punishment imposed upon the appellants, during the period, he would be undergoing punishment, he could not have been considered to be eligible for promotion. Therefore, according to the bank, respondent had been rightly held to be ineligible under Circular dated 28th March, 1998. It was also claimed by the bank that the Circular is supplementary in nature and can not be said to be in any manner inconsistent and ultra vires of the rules. In answering the rival submissions, this Court held as under:-

> "The criteria for promotion from Junior Manager Grade-I to Middle Management Grade-II is on the basis of the seniority-cum-merit. Clearly therefore, the fact that the appellant has been punished for a misconduct, the same would form a part of his record of service which would be taken into consideration while adjudging his suitability on the criteria of seniority-cum-merit. If on such assessment of his record of service the appellant is not promoted, it cannot be said to be by way of punishment. It is a non-promotion on account of the appellant not reaching a suitable standard to be promoted on the basis of the criteria."

39. We also do not find any merit in the submission of Mr. Dhruv Mehta that the Circular No.17 of 2009 dated 30th November, 2009 and Circular dated 12th July, 2010 are to ensure that the individual members of the DPC do not recommend for promotion an individual officer despite having been punished in the preceding 5 years. Such curtailment of the power of the DPC would have to be located in the statutory service rules. The 1998 Rules do not contain any such provision. The submission needs merely to be stated, to be rejected. We also do not find any merit in the submission of Mr. Mehta that without the aforesaid guidelines, an officer, even though, he has

been punished for gross misconduct would have to be permitted to be promoted as no minimum marks are prescribed for interview or performance appraisal. In our opinion, it is fallacious to presume that under the 1998 Rules, once an officer gets the minimum marks in the written examination, he would be entitled to be promoted on the basis of seniority alone. There is no warrant for such a presumption. The misconduct committed by eligible employee/officer would be a matter for DPC to take into consideration at the time of performance appraisal. The past conduct of an employee can always be taken into consideration in adjudging the suitability of the officer for performing the duties of the higher post.

40. There is another very good reason for not accepting the submissions ma de by Mr. Dhruv Mehta. Different rules/ regulations of the banks provide specific punishments such as "withholding of promotion, reduction in rank, lowering in ranks/ pay scales". However, there is another range of penalty such as censure, reprimand, withholding of increments etc. which are also prescribed under various staff regulations. To debar such an employee from being considered for promotion would tantamount to also inflicting on such employee, the punishment of withholding of promotion. In such circumstances, a punishment of censure/ reprimand would, in fact, read as censure/reprimand + 5 years debarment from promotion. Thus the circulars issued by the bank debarring such employees from being considered would be clearly contrary to the statutory rules. The circulars clearly do not fall within the ratio in *Sant Ram's* case (supra).

41. In our opinion, the observations made by this Court in the case of *Ram Ashish Dixit* (supra) are a complete answer to the submissions made by the learned counsel for the appellants, Mr. Dhruv Mehta. Therefore the High Court, in our opinion, has rightly quashed the aforesaid two Circulars and directed that the respondent be considered for promotion in accordance with the applicable rules.

42. We, therefore find no merit in the civil appeals filed by the appellant-bank, and are accordingly dismissed. No costs.

R.P. Appeals dismissed.