HARYANA POWER GENERATION CORPORATION LIMITED AND OTHERS

v.

HARKESH CHAND AND OTHERS

(Civil Appeal No. 100 of 2013)

JANUARY 07, 2013

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

Service Law:

Assured Career Progression (ACP) Scale – Entitlement – Whether period spent in apprenticeship would be counted towards regular satisfactory service – For the purpose of grant of ACP scale – Held: The period spent in apprenticeship cannot be counted for grant of ACP Scale, because apprentices are trainees and not workmen – Apprentices Act, 1961 – ss. 2(aa), 2(aaa) and 18.

Words and Phrases – 'apprentice' and 'apprenticeship training' – Meaning of, in the context of Apprentices Act, 1961.

Respondents filed writ petition claiming their second assured Career Progression (ACP) Scale on completion of 20 years of service. They took the plea that the period should include the period of training as apprentice. They asserted that while grant of first ACP on completion of 10 years of service, period of apprenticeship was included. During pendency of the writ petition, the appellant-department withdrew the first ACP Scale, in view of clause (4) of Notification dated 14.3.1990. Single Judge of the High Court held that regular satisfactory service would include the period spent in apprenticeship and clause (4) of Notification dated 14.3.1990 cannot override the order dated 27.2.198 which provided reckoning of regular satisfactory service. In Writ appeal,

Division Bench of High Court upheld the order of Single Judge. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. Section 2(aa) of the Apprentices Act, 1961 (for short "the 1961 Act") defines "apprentice" which means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship. Section 2(aaa) defines "apprenticeship training" which means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different categories of apprentices. Section 18 clearly states that apprentices are trainees and not workers. An apprentice does not have a statutory right to claim an appointment and the employer is not under any statutory obligation to give him employment. However, if the terms of the contract of apprenticeship lay down a condition that on successful completion of apprenticeship an employer would offer him an employment, then it is obligatory on his part to do so. In the absence of such a condition, there is no obligation. It depends on the terms of the contract. [Paras 20, 21 and 27] [606-D-F; 609-E-F]

2. The respondents in the present case, were appointed as apprentices ITI trainee for a period of two years. Each of them were paid a fixed salary of Rs.350/-. After completion of the training, it was mentioned in the letter of appointment that they may be appointed to the post of Officiating Technical Grade-II in the pay scale of Rs.400/ 700 on temporary basis. The employer had only stated that on successful completion of the training, the apprentice may be appointed as Plant Attendant/Technician Grade-II. Thus, it was not a mandatory term incorporated in the agreement casting an obligation on the employer to appoint him. [Paras 19 and 27] [606-C-D; 609-G]

U.P. State Electricity Board v. Shiv Mohan Singh and Anr. **(2004) 8SCC 402: 2004 (4) Suppl. SCR 953;** *Narinder Kumar and Ors. v. The State of Punjab and Ors.* **AIR 1985 SC 275: 1985 (2) SCR 52;** *Dhampur Sugar Mills Ltd. v. Bhola Singh* **(2005) 2 SCC 470: 2005 (1) SCR 1123;** *Mukesh K. Tripathi v. Senior Divisional Manager, LIC* **(2004) 8 SCC 387: 2004 (4) Suppl. SCR 127 – relied on.**

3. In view of the promotion policy, the ACP Scheme and the communications, the High Court has erred in its appreciation of the contents of the promotion policy and the conditions incorporated in the scheme and the clarificatory letters issued from time to time and their essential purport. The respondents were appointed as apprentices ITI trainee on 28.3.1987 and they were not given any kind of post. It is only mentioned that they may be appointed as Plant Attendant Grade-II/Technician Grade-II. Thereafter, they were appointed on different dates as Officiating Technician Grade-II. The regular pay scale was given from the date of appointment. Prior to that, it was a fixed pay. They were not working on a post. They did not belong to any cadre. In fact, they were not recruited and, hence, the term trainee which has been referred to in various clarificatory letters has been misconstrued by the High Court. [Para 28] [611-C-D; 612-A-C]

4. The Board had issued clarification that the benefit of grant of annual increment under the provisions as contained in the letter dated 27.3.1991 was to be given to the trainees of all categories whose services had been regularized on 29.1.1991 or thereafter, and the consequential benefit should accrue only from the date on which the regular pay scale has been granted to the trainees of all categories. Clause 5 of the ACP Scheme which provides for eligibility criteria, in its note stipulated that for the purpose of the scheme, regular satisfactory

service would mean continuous service counting towards seniority under the Board including the continuous service in PSEB before reorganization. It has been clearly stated that period spent on *ad hoc* basis, work charged basis, contingent basis and daily wages would not be counted for the purpose of counting the prescribed length of regular satisfactory service for the scheme. The respondents, as is evident, were appointed on different dates, i.e., 30.10.1988, 17.10.1988 and 25.10.1988 respectively as Technicians Grade-II in the pay scale on regular basis. Their period of probation was for two years. The letter/circular dated 27.3.1991 emphasizes the terms from the date of joining in the cadre. [Para 28] [610-D-H; 611-A]

5. However, it is clarified that if any financial benefit had been availed by the respondents, the same shall not be recovered, but their dates for grant of ACP Scale shall remain as determined by the appellants. [Para 29] [612-D]

Case Law Reference:

2004 (4) Suppl. SCR 953	**Relied on**	**Para 22**
1985 (2) SCR 52	**Relied on**	**Para 25**
2005 (1) SCR 1123	**Relied on**	**Para 26**
2004 (4) Suppl. SCR 127	**Relied on**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 100 of 2013.

From the Judgment & Order dated 26.7.2010 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 865 of 2010 in CWP No. 1383 of 2009.

Shivendra Dwivedi, Rajesh Mahale, Rokokieno Mor, Krutin R. Joshi for the Appellants.

R.K. Kapoor, Ranjvijay, Shweta Kapoor, Anis Ahmed Khan for th Respondents.

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 and order dated 26th July, 2010 passed by the High Court of Punjab and Haryana at Chandigarh in LPA No. 865 of 2010 whereby the Division Bench concurred with the view expressed by the learned single Judge in CWP No. 1383 of 2009 whereunder the respondents were held entitled for grant of Assured Career Progression Scale (for short "the ACP Scale") on completion of ten years of service which included training as apprentice.

3. The facts as have been undraped are that the three respondents invoked the writ jurisdiction of the High Court claiming the benefit of the second ACP Scale on completion of twenty years of service on the base that their period of training as apprentice had to be taken into consideration. Such a claim was founded on the assertion that they had joined as trainees between 17.4.1987 to 30.4.1987 and were subsequently absorbed and brought into the cadre. On completion of ten years from the date they entered the service as trainees, the first ACP Scale was granted to them. However, when conferring of the benefit of the second ACP Scale arose, the same was not extended to them. The said action of the employer compelled them to knock at the doors of the High Court and during the pendency of the writ petition, by proceeding dated 23.4.2009, the benefits conferred under the first ACP Scale was withdrawn referring to a notification issued on 11.3.1990 which stipulated in clause (4) that the trainees referred to therein would be entitled to increment only on successful completion of their training and in case of Plant Attendant Grade-II and Technician Grade-II, increment on successful completion of training would be granted but without

arrears. Though the writ petition was confined to grant of the second ACP Scale, yet the learned single Judge required the counsel for both the sides to address about the justifiability of withdrawal of the benefit of the first ACP Scale and decided both the facets. The said exercise was undertaken by the learned single Judge as the primal issue in respect of both the ACP Scales rested on the question whether the period spent during training could be counted towards regular satisfactory service or not.

4. It is not in dispute that the respondents were appointed as Apprentice ITI Trainees by the erstwhile Haryana State Electricity Board (for short "the Board") for a period of two years on fixed pay of Rs.350/- per month in 1987. The Board, vide Office Order No. 706/Finance dated 27.2.1998, set out the eligibility criteria for conferment of benefit of the ACP Scales. There is no dispute that the respondents, who were Technicians Grade-II, were not excluded from the application of the same. The only question that really emerged for consideration before the learned single Judge as well as by the Division Bench was the relevant date from which the regular satisfactory service was to be computed for grant of ACP Scales. The learned single Judge, after referring to the clause and the communications issued by the Board from time to time, came to hold that the regular satisfactory service would include the period spent by the persons as trainees. As regards the withdrawal of the first ACP Scale, the learned single Judge, referring to the notification dated 14.3.1990 and especially to clause (4) which dealt with grant of increment and thereafter applying the same reasoning, came to hold that clause (4) would have no operation to override the Office Order dated 27.2.1998 which provides how the regular satisfactory service could be reckoned and, eventually, came to hold that the ACP Scale that had been withdrawn during the pendency of the writ petition was absolutely erroneous. Being of this view, he quashed the withdrawal order and issued a writ of mandamus commanding the respondents therein to grant both the first and second ACP

Scales reckoning the period of training towards the regular satisfactory service.

5. In the Letters Patent Appeal, the Division Bench analysed the anatomy of clause 3(q) dealing with grant of the second ACP Scale and the eligibility criteria, placed reliance on the memorandum dated 27.3.1991 circulated to all the departments to the effect that the period of training of all employees should be treated as duty for all intents and purposes, referred to the memo dated 2.1.1992 which stated that the period of training shall be treated as duty for all intents and purposes, i.e., seniority, leave, etc. and for experience in service for the purpose of promotion and further relying on the memorandum dated 20.1.1992 which has laid down that such period would be counted as experience in service for the purposes of promotion, concurred with the opinion expressed by the learned single Judge and declined to entertain the appeal. Hence, the present appeal by the appellants.

6. We have heard Mr. Shivendra Dwivedi, learned counsel for the appellants, and Mr. R.K. Kapoor, learned counsel appearing for the respondents.

7. At the very outset, we may note that the respondents were granted the first ACP Scale on 16.6.1997, 13.1.1999 and 30.6.1998 with effect from 1.5.1997 instead of 1.11.1998 as on that date, they completed ten years of service. The same was withdrawn during the pendency of the writ petition where the grievance pertained to non-grant of the second ACP Scale in terms of the Scheme dated 27.2.1998 introduced by the Board. It is also apt to note here that the respondents have already been granted second ACP Scale with effect from 1.11.2008. Thus, the only grievance is that the period shall differ in respect of each respondent if the training period is not computed.

8. In the backdrop of the aforesaid narrow controversy, we think it apposite to scrutinize the various documents brought on

record and how they are to be understood, appreciated and interpreted regard being had to the contextual meaning of the term 'training'.

9. The respondent No. 1 was appointed as Apprentice ITI Trainee vide letter dated 28.3.1987 by the Board. It was stipulated in the said letter that during the period of training, he would get a fixed pay of Rs.350/- per month and on successful completion of the training, he may be appointed as Plant Attendant Grade-II/Technician Grade-II in the scale of Rs.400-700 on temporary basis and he would be exclusively posted in the Thermal Organisation. It was also stipulated therein that he would enter into an agreement with the Board that he would serve the Board for at least five years after successful completion of training and in case he would leave the service of the Board, he would remit the entire cost incurred by the Board in connection with the training during the period and thereafter during the course of his appointment together with interest. Similar letter was issued to the other respondents. Vide Office Order No. 303/EOM/G-263 dated 6.6.1989, number of persons including the respondents were appointed as Officiating Technicians Grade-II in the pay-scale of 950-20-1150-ED-25-1500 with effect from the dates mentioned against their names. The respondents were appointed on regular basis with effect from 30.10.1988, 17.10.1988 and 25.10.1988 respectively with the stipulation that they would remain on probation for a period of two years.

10. As the factual narration would exposit, the Board, in exercise of power under Section 79 of the Electricity (Supply) Act, 1948, issued a notification on 14.3.1990 by bringing certain amendments in the recruitment and promotion for employees working in Thermal Power Projects. The relevant part of the amendment reads as follows: -

"Para 3(i) of Part-A shall be substituted and read as follows:

50% posts shall be filled-up by direct recruitment from amongst persons having passed 2 years ITI Course with Matric as minimum qualification. Such directly recruited Plant attendant Gr-II shall remain on training for a period of two years in regular pay scale of Plant Attendant Gr-II to be allowed by the Board from time to time. The Competent Authority may terminate the services of a Plant Attendant Gr-II (Trainee) without notice and without assigning any reason, if his work and conduct during the period of training is not found satisfactory."

"Para-3 (i) of Part-B shall be substituted and read as follows:

50% posts shall be filled-up by direct recruitment from amongst persons having passed 2 years ITI Course with Middle examination with 2 years experience or ITI one year course and Middle Examination and with 3 years experience on similar works. Such directly recruitment Technician Gr-II shall remain on training for a period of two years in the regular pay scale to be allowed by the Board from time to time. The Competent Authority may terminate the services of a Technician Gr-II (Trainee) without notice and without assigning any reason, if his work and conduct during period of training, is not found satisfactory.

The trainees referred to above shall be entitled to the increment only on successful completion of their training. In case of Plant attendant Gr-II and Technician Gr-II, increment on successful completion of training shall be granted, but without arrears."

[underlining is ours]

11. We have referred to the substituted clauses in extenso to appreciate the use of the word 'training' therein after appointment to a post and the stipulation relating to the grant of increment. In the context of this notification, the policy relating

to ACP Scale granted under the ACP Scheme and the clarificatory communications are to be understood.

12. Coming back to the narration, recruitment and promotion policy as amended, the F.A. & C.A.O., PTPS, HSE, Panipat, vide Memo dated 7.12.1990 sought certain clarification in relation to grant of increments. The clarification sought was to the following effect: -

"In this connection it may please be clarified whether the period of training in all the cases will count towards increment, leave salary and pension. The above clarification may please be issued at the earliest so that the cases are dealt with accordingly on account of grant of increment and leave salary etc."

13. On 27.3.1991, the Secretary, HSEB, clarified the position by stating as follows: -

"Board vide its notification No. 57, 58, 59, 60/Reg-137, dated 14.03.1990 and Notification No. 76/Reg-39/L, dated 13.09.90 have granted regular pay scales to the trainee(s) of all categories w.e.f. 29.1.1990. In this respect the Field Officers have sought for a clarification whether the period spent by the trainee on training is to be treated as duty for all intents and purposes or not.

After considering the pros and cons of the case, it has been decided that the period spent by the trainee(s) of all categories on training shall be treated as duty for all intents and purposes i.e. grant of increment in accordance with the provisions as contained in the Policy, leave and seniority i.e. from the date of joining in this cadre."

[emphasis supplied]

14. In continuation of the aforesaid clarificatory memorandum dated 27.3.1991, the Board issued another memorandum on 22.11.1991. The said clarification related to

grant of regular pay scale to the trainees of all categories and in that letter, it has been stated as follows: -

> "In this connection, it is stated that some field offices have sought for a clarification as to whether the benefit for the grant of annual increment under the provisions as contained in letter dated 27.3.91 is to be given to all trainee(s), who were appointed during the year, 1987, 1988 & 1989 etc."

15. After referring to the issue which required clarification, the Board clarified that it has decided that monetary benefits of regular pay scale had to be granted to the trainee(s) of all categories with effect from 29.1.1990 but the benefit of grant of annual increment under the provisions as contained in letter dated 27.3.1991 has to be given to the trainee(s) of all categories whose services have been regularized on 29.1.1991 or thereafter. It had been further stated that the consequential benefits would accrue only from the date on which the regular pay scale has been granted to the trainees of all categories.

16. As the facts have been further uncurtained, on 27.1.1998, the Board introduced the Assured Career Progression Scheme (for short "the ACP Scheme") with the objective to provide such Board employees who fall within the scope of the Scheme at least two financial upgradations including the financial upgradation, if any, availed by such Board employees as a consequence of the functional promotion. Clause 2 excludes certain categories of employees, namely, appointed on ad hoc basis, work charged basis, part time paid out of contingencies and a daily wager from getting the benefit of the Scheme. Clause 3 deals with the definitions. It defines in Clause 3(b) "direct recruit fresh entrant". The same, being relevant, is reproduced below: -

> "(b) "Direct Recruited Fresh Entrant" with reference to a post or a Board Employee means the post on which such Board employee was recruited as a regular and direct

> recruitee in the Board service and is in continuous employment of Board since such recruitment;"

17. Clause 5 deals with the eligibility for grant of ACP Scales. That being the thrust of the controversy the relevant part of the said clause is reproduced below: -

> "5. Eligibility for Grant of ACP Scales:
>
> (1) Every Board employee who, after a regular satisfactory service for a minimum period of 10 years, has not got any financial upgradation in terms of grant of a pay scale higher than the functional pay scale prescribed for the post as on 31.12.1995, on which he was recruited as direct recruited fresh entrant: -
>
> (a) either as a consequence of his functional promotion in the hierarchy, or
>
> (b) as a consequence of the revision of pay scale for the same post, or
>
> (c) as a consequence of any other event through which the functional pay scale of the post has been upgraded, with respect to the functional pay scale prescribed for the post as on 31.12.1995, shall for the purposes of drawal of pay; be eligible for placement into the First ACP scale with reference to him.
>
> (2) Every Board employee who, after a regular satisfactory service for a minimum period of 20 years, has not got more than one financial upgradation in terms of grant of pay scale higher than the functional pay scale prescribed for the post as on 31.12.1995 on which he was recruited as a direct recruited fresh entrant: -

(a) either as a consequence of his functional promotion in the hierarchy, or

(b) as a consequence of the revision of pay scale for the same post, or

(c) as a consequences of any other event through which the functional pay scale of the post has been upgraded, with respect to the functional pay scale prescribed for the post as on 31.12.1995, shall for the purposes of drawal of pay; be eligible for placement into the First ACP scale with reference to him.

Provided that grant of ACP scale shall also be considered financial upgradation for the purpose of this para.

NOTE *:* For the purposes of this scheme regular satisfactory service would mean continuous service counting towards seniority under H.S.E.B. including continuous service in P.S.E.B. before reorganization, commencing from the date on which the board employee joined his service after being recruited through the prescribed procedure or rules regulations etc. for regular recruitment, in the cadre in which he is working at the time of being considered his eligibility for grant of ACP scales under this scheme and further fulfilling all the recruitments prescribed for determining the suitability of grant of ACP scales. The period spent on ad hoc basis; work charged basis; contingent basis and daily wages will not be counted for the purpose of counting of prescribed length of "Regular Satisfactory Service" for this scheme."

[emphasis supplied]

18. In this backdrop, it is to be seen whether the period spent in apprenticeship would be counted towards regular satisfactory service. The learned single Judge as well as the

Division Bench has returned a finding in favour of the respondents solely on the basis of the clarificatory letters and communications. Before we advert to the quintessential tenor of the said communications, it is necessitous to understand the nature of appointment, the concept of an apprentice, his rights under the law and the basic ingredients of regular satisfactory service.

19. As has been stated earlier, the respondents were appointed as apprentices ITI trainee for a period of two years. Each of them were paid a fixed salary of Rs.350/-. After completion of the training, it was mentioned in the letter of appointment that they may be appointed to the post of Officiating Technical Grade-II in the pay scale of Rs.400/700 on temporary basis.

20. Section 2(aa) of the Apprentices Act, 1961 (for short "the 1961 Act") defines "apprentice" which means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship.

21. Section 2(aaa) defines "apprenticeship training" which means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different categories of apprentices. Section 18 clearly states that apprentices are trainees and not workers.

22. In *U.P. State Electricity Board v. Shiv Mohan Singh and Another*[1], A.K. Mathur, J., speaking for Hegde, J. and himself, while dealing with the status of apprentice, has stated thus: -

> "Therefore a combined reading of the sections as well as Rules makes it clear that apprentices are only persons undergoing training and during that training they are entitled to get a particular stipend, they have to work for fixed hours

1. (2004) 8 SCC 402.

and at the end of period of training they have to appear in the test and a certificate is issued to them. There is no obligation on the part of the employer to give them any employment whatsoever. The position of the apprentice remains as an apprentice trainee and during the period of training they will not be treated as workmen. Only obligation on the part of the employer is to impart them training as per provisions of the Act and Rules and to pay them stipend as required under Rule 11 and beyond that there is no obligation on the part of the employer to accept them as his employees and give them the status of workmen. There is no relation of master and servant or employer and employee."

23. Be it noted, in the said case, in paragraph 51, it has been laid down that the 1961 Act is a complete code in itself and it lays down the conditions of the apprentices, their tenure, their terms and conditions and their obligations and what are the obligations of the employer. It also lays down that the apprentices are trainees and not workmen and if any dispute arises, then the settlement has to be made by the Apprenticeship Advisor as per Section 20 of the Apprentices Act, 1961 and his decision thereof is final. The nature and character of the apprentice is nothing but that of a trainee and he is supposed to enter into a contract and by virtue of that contract, he is to serve for a fixed period on a fixed stipend and that does not change the character of the apprentice to that of a workman under the employer where he is undergoing the apprenticeship training. Sub-section (4) of Section 4 only lays down that such contract should be registered with the Apprenticeship Adviser, but by non-registration of the contract, the position of the apprentice is not changed to that of a workman. From the scheme of the Act, the apprentice is recruited for the purpose of training as defined in Section 2(*aa*) of the Apprentices Act, 1961 and from the language employed in Sections 6 and 7, it is more than clear that the nature and character of the apprentice is that of a trainee only and on the

expiry of the training, there is no corresponding obligation on the part of the employer to employ him.

24. Thereafter, the majority, referring to Section 22 of the Act, opined as follows: -

"Section 22 makes it abundantly clear that at the end of the apprenticeship training, it is not obligatory on the part of the employer to offer an employment to an apprentice who has completed the period of apprenticeship. It is only if the terms of the contract of the apprenticeship lay down a condition that on successful completion of an apprenticeship training, an employer will offer him an employment then it is obligatory on the part of the employer to do so. If there is no such condition stipulated in the apprenticeship contract then the employer cannot be compelled to offer employment to such apprentice. At the same time, it is not obligatory on the part of the apprentice to serve that employer if there is no such stipulation to this effect. So it is a mutual thing and it depends on the terms of contract. The survey of all these provisions of the Acts and the Rules as mentioned above, makes it clear that the character and status of apprentice remains the same and he does not become workman and labour laws are not attracted."

S.B. Sinha, J., in his concurring opinion, has stated thus: -

"Moreover in terms of Section 22 of the Act, the employer has no statutory liability to give employment to an apprentice."

25. In *Narinder Kumar and Others v. The State of Punjab and Others*[2], a two-Judge Bench dwelt upon the letter of appointment of apprentices and came to hold that the employer was bound to appoint the apprentices in the available vacancies because of Section 22(2) of the 1961 Act and the contractual

2. AIR 1985 SC 275.

obligations arising out of para 2 of the letter of appointment which stated that the apprentices shall be absorbed in the department if there are vacancies. Be it noted, emphasis was laid on the nature of the contract.

26. In *Dhampur Sugar Mills Ltd. v. Bhola Singh*[3], while dealing with an award passed by the Labour Court under the U.P. Industrial Disputes Act relating to apprentices, a two-Judge Bench opined thus: -

> "14. If the respondent was appointed in terms of the Apprentices Act, 1961, he will not be a workman, as has been held by this Court in *Mukesh K. Tripathi v. Senior Divisional Manager, LIC*[4] *and U.P. SEB v. Shiv Mohan Singh (supra)*.
>
> 15. In terms of the provisions of the Apprentices Act, 1961, a trainee or an apprentice has no right to be absorbed in services."

27. We have referred to the aforesaid pronouncements solely for the purpose that an apprentice does not have a statutory right to claim an appointment and the employer is not under any statutory obligation to give him employment. However, if the terms of the contract of apprenticeship lay down a condition that on successful completion of apprenticeship an employer would offer him an employment, then it is obligatory on his part to do so. In the absence of such a condition, there is no obligation. It depends on the terms of the contract. In the case at hand, as the letter of appointment would show, the employer had only stated that on successful completion of the training, the apprentice may be appointed as Plant Attendant/ Technician Grade-II. Thus, it was not a mandatory term incorporated in the agreement casting an obligation on the employer to appoint him.

3. (2005) 2 SCC 470.

4. (2004) 8 SCC 387.

28. Having dealt with the rights of an apprentice, we may presently proceed to dwell upon the issue whether any of the clarificatory letters/circulars conferred any benefit on these employees so that they could be treated to be in regular service. On a perusal of the notification issued by the Board, it is clear as crystal that it relates to two categories of direct recruits who shall undergo training for a period of two years in the regular pay scale. Thus, the said notification has no application to apprentices who avail the training. In the clarification issued on 27.3.1991, there is a mention with regard to the regular pay scale in the notification dated 13.9.1990. The query was limited to the issue whether the training period of such a trainee would be counted for all intents and purposes or not. In that context, it was clarified that the period spent by the apprentice of all categories shall be treated as duty for all intents and purposes, i.e., for grant of increment in accordance with the provisions as contained in the policy, leave and seniority, i.e., from the date of joining in this cadre. It is worth noting that the Board had issued further clarification that the benefit of grant of annual increment under the provisions as contained in the letter dated 27.3.1991 was to be given to the trainees of all categories whose services had been regularized on 29.1.1991 or thereafter, and the consequential benefit should accrue only from the date on which the regular pay scale has been granted to the trainees of all categories. Clause 5 of the ACP Scheme which provides for eligibility criteria, in its note stipulates that for the purpose of the scheme, regular satisfactory service would mean continuous service counting towards seniority under the Board including the continuous service in PSEB before reorganization. It has been clearly stated that period spent on ad hoc basis, work charged basis, contingent basis and daily wages would not be counted for the purpose of counting the prescribed length of regular satisfactory service for the scheme. The respondents, as is evident, were appointed on different dates, i.e., 30.10.1988, 17.10.1988 and 25.10.1988 respectively as Technicians Grade-II in the pay scale on regular basis. Their period of probation was for two

years. The letter/circular dated 27.3.1991 emphasizes the terms from the date of joining in the cadre. As is perceptible from the clarificatory letter dated 27.3.1991, the trainees of all categories have been granted regular pay scale from 21.1.1990 and decision had been taken that the training period or period spent as trainees of all categories shall be treated as duty for all intents and purposes. On 20th of January, 1992, it was further clarified that the period spent by the trainees of all categories on training would be counted as experience in service for the purposes of promotion. On a scrutiny of the promotion policy, the ACP Scheme and the communications, we find that the High Court has erred in its appreciation of the contents of the promotion policy and the conditions incorporated in the scheme and the clarificatory letters issued from time to time and their essential purport. The Board, on 14.3.1990, substituted and added certain clauses to the recruitment and promotion policy. We have reproduced the same earlier and on a proper scrutiny, it is perceivable that 50% posts are to be filled by direct recruitment from amongst persons who have passed 2 years ITI course with Matric as minimum qualification and such directly recruited Plant Attendants Grade-II would remain on training for a period of two years on the regular pay scale of Plant Attendant Grade-II to be allowed by the Board from time to time, and the other 50% is be filled up by direct recruitment from amongst persons who have passed two years ITI course with middle examination with two years experience or ITI one year course with middle examination and with three years experience of similar works. Such directly recruited Technician Grade-II shall remain on training for a period of two years in the regular pay scale. The clarificatory letter has to be read in the said context and we are disposed to think so as the persons appointed under the policy in the regular pay scale are required to go on training. The clarification sought related to grant of increment and computation of period that is spent as trainee in the capacity of Plant Attendant Grade-II and in that context, the clarification issued was that the training of all categories on training would be counted. It is worthy to note that the

respondents were not recruited under the said policy. They were appointed as apprentices ITI trainee on 28.3.1987 and they were not given any kind of post. It is only mentioned that they may be appointed as Plant Attendant Grade-II/Technician Grade-II. Thereafter, they were appointed on different dates as Officiating Technician Grade-II. The regular pay scale was given from the date of appointment. Prior to that, it was a fixed pay. They were not working on a post. They did not belong to any cadre. In fact, they were not recruited and, hence, the term trainee which has been referred to in various clarificatory letters has been misconstrued by the High Court.

29. In view of the aforesaid analysis, we conclude and hold that the judgments rendered by the learned single Judge as well as by the Division Bench are unsustainable and are, accordingly, set aside. However, we clarify that if any financial benefit had been availed by the respondents, the same shall not be recovered, but their dates for grant of ACP Scale shall remain as determined by the appellants. Accordingly, the appeal is disposed of. The parties shall bear their respective costs.

K.K.T. Appeal disposed of.

VENKATESHA

v.

STATE OF KARNATAKA

(Criminal Appeal No. 135 of 2005)

JANUARY 8, 2013

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 302, 307, 427 r/w s. 34 – Explosive Substances Act, 1908 – s. 3 r/w s. 34 IPC – Prosecution under – Bomb planted by A3 at the instruction of A1 and A2 at the shop of PW-14 with intention to kill him – Resulted in death and injuries to the employees of PW14 – A3 was granted pardon and examined as approver – Conviction of A1 and A2 by courts below – Appeal by A2 – Held: Prosecution case is supported by the eye-witnesses, injured witnesses and the approver – Motive established – Conviction justified.

Evidence Act, 1872 – s. 133 – Evidence of accomplice – Evidentiary value – A conviction cannot be held illegal merely because it proceeds upon the uncorroborated testimony of an accomplice – But it is established rule of practice that it is unsafe to record a conviction on the testimony of an approver unless the same is corroborated in material particulars by some untainted and credible evidence – In the instant case, the evidence of approver was duly corroborated in the form of oral depositions as also forensic evidence.

The appellant-accused No.2, along with accused No. 1, was prosecuted for offences punishable u/ss. 302, 307, 427 r/w s. 34 IPC and s. 3 of the Explosive Substances Act, 1908 r/w s. 34 IPC. As per the prosecution, in furtherance of a common intention to kill PW-14, A-3, at the instruction of A-1 and A-2, kept a tape recorder loaded with an explosive substance (bomb) at the shop owned

by PW-14. The explosion of the tape recorder resulted in death of one employee of PW-14 and injuries to two other employees ie. PW-1 and PW-7. The motive for killing PW-14 was that A-1 carried the impression that his domestic troubles were because of interference of PW-14. A-1 had also threatened PW-14 to kill him. Appellant-A-2 had joined him in extending that threat. A-3 was granted pardon u/s. 306 Cr.P.C. and was treated as an approver and accordingly examined as PW-2.Trial court found A1 and A2 guilty and convicted them for the alleged offences. The trial court order was upheld by the High Court.

Dismissing the appeal, the Court

HELD: 1. There is no perversity or miscarriage of justice arising out of appreciation of evidence by the trial court or the High Court to warrant interference. There is nothing irrational or perverse in the findings recorded by the trial Court and the High Court on the question of motive for the commission of offence, which was intended to target PW-14 but claimed the life of the deceased who was innocent and an un-intended victim of the crime. The depositions of PW-4, PW-8, PW-10, PW-11, the Approver- PW-2 and the injured witnesses, all support the prosecution case. [Paras 13 and 28] [621-B-D; 630-C-D]

2.1 Though s. 133 of the Evidence Act, makes an accomplice a competent witness against the accused person and declares that a conviction shall not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the established rule of practice is that it is unsafe to record a conviction on the testimony of an approver unless the same is corroborated in material particulars by some untainted and credible evidence. This practice is treated as a rule of law. Courts, therefore, not only approach the evidence

of an approver with caution, but insist on corroboration of his version before resting a verdict of guilt against the accused, on the basis of such a deposition. The juristic basis for that requirement is the fact that the approver is by his own admission a criminal, which by itself makes him unworthy of an implicit reliance by the Court, unless it is satisfied about the truthfulness of his story by evidence that is independent and supportive of the version given by him. That the approver's testimony needs corroboration cannot, therefore, be doubted as a proposition of law. [Para 15] [621-G-H; 622-A-C]

2.2 Regarding the question of corroboration of the deposition of the approver in the instant case, the courts below concurrently held that the same was available in abundance in the form of the depositions of PW-1, PW-3, PW-4, PW-7, PW-9, PW-21 and PW-27. The High Court has, upon a careful and detailed reappraisal of the evidence, concurred with the view taken by the trial Court and rightly held that there was sufficient corroboration to the version of the approver, both in the form of oral depositions of the witness as also forensic evidence, that clearly support the prosecution case that the injuries resulting in the death of the deceased were caused by an explosive substance planted by A-1 and A-2 to kill PW-14. The medical evidence and the nature of the injuries caused, is also supportive of the prosecution version that the deceased died on account of an explosion. [Paras 16, 21 and 25] [622-D-E; 625-G-H; 626-A; 628-G-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 135 of 2005.

From the Judgment & Order dated 16.03.2004 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 511 of 2000.

Tanuj Bagga Sharma (A.C.) for the Appellant.

Gurudatta Ankolekar, Azeem A. Kalebudde, V.N. Raghupathy, Sanjay R. Hedge for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The appellant in this appeal by Special Leave was tried and convicted for offences punishable under Sections 302, 307, 427 read with Section 34 of the IPC and Section 3 of the Explosive Substances Act, 1908 read with Section 34 of the IPC by the XXI Additional City Civil & Sessions Judge, Bangalore. For the offence of murder punishable under Section 302 read with Section 34 of the IPC the appellant was sentenced to undergo rigorous imprisonment for life and a fine of Rs.5,000/-, in default of payment whereof a further simple imprisonment for three months was awarded to the appellant. Similarly, for the offence punishable under Section 307 read with Section 34 IPC the appellant was sentenced to undergo five years' rigorous imprisonment and a fine of Rs.1000/-. In default of payment of fine the appellant was awarded a further simple imprisonment for a period of one month. For the offence punishable under Section 427 read with Section 34 IPC the appellant was awarded a sentence of one year's rigorous imprisonment while a sentence of ten years' rigorous imprisonment and a fine of Rs.2000/- was awarded to the appellant under Section 3 of the Explosive Substances Act read with Section 34 of the IPC. Criminal Appeal No.514/2000 filed by the appellant before the High Court against the judgment and order of the trial Court having failed the appellant has filed the present appeal to assail his conviction and the varying sentences awarded to him, for different offences mentioned above.

2. Prosecution case in brief is that in furtherance of a common intention to kill Muniraju (PW-14), Hanif (A-3) kept a tape recorder loaded with an explosive substance (bomb) at what was known as "Friends Hair Style" shop owned by Muniraju (PW-14) situated on the 6th Cross of Someshwaranagar in Bangalore. When the tape recorder was

switched on by the deceased-Shankar, who was employed by Muniraju (PW-14) to work as a barber in the shop, the bomb planted in the same exploded causing injuries to the said Shankar that culminated in his death. Injuries were also caused to Krishna (PW-1) and Shivaram (PW-7), two others similarly employed to work in the shop. The use of the bomb, according to the prosecution, was with the intention and knowledge and under circumstances that if by that act it had caused the death of Krishna (PW-1) and Shivaram (PW-7) also the accused would have been guilty of murder.

3. After completion of investigation and filing of chargesheet but before committal of the case to the Sessions Court competent to try the same the committal Court by its order dated 6th January, 1998 allowed an application filed on behalf of Hanif (A-3) under Section 306 of the Cr.P.C., granted pardon to him and treated him as an approver in the case. A-3 was accordingly examined at the trial as an Approver. Briefly stated the prosecution case and the genesis of the occurrence that led to the killing of deceased-Shankar and injuries to Krishna and Shivaram was as under:

4. G. Venkatesh Murthy (A-1) was married to Alamelu (PW-8), daughter of PW-10. While PW-8 was living with her husband A-1 at his Kanakapura house, there were frequent quarrels between the husband and wife. In an attempt to sort out the differences and restore conjugal harmony between the two, the parents of PW-8 accompanied by Muniraju (PW-14) visited the house of A-1 and his wife to advise them not to quarrel with each other. Despite the efforts made by the parents of PW-8 and Muniraju (PW-14) the relationship between the husband and wife had continued to remain sour forcing PW-8 to return to her parents' house. Matrimonial disharmony between the couple eventually led the parties to report the matter to the police, in which connection Muniraju (PW-14) also played a role in support of the wife PW-8.

5. The prosecution case is that A-1 carried the impression

that his domestic troubles were largely because of the role played by PW-14. Its further case is that A-1 had threatened that he would finish PW-14 within a week. Venkatesha (A-2) appears to have joined him in extending that threat. These events are said to constitute the motive for the incident in question which was in reality intended to eliminate Muniraju (PW-14) but instead resulted in the death of the deceased-Shankar, in a sequence of events that may be summarised below:

6. On the 2nd of April, 1996, the fateful day, (PW-7) along with (PW-1) and (PW-5) and the deceased-Shankar opened the hair cutting saloon at about 6.00 a.m. in the morning as instructed by Muniraju (PW-14) who was going away to Chikka Tirupathi. Around 9.00 a.m. in the morning (PW-1) is alleged to have gone for breakfast to the house of PW-14. Shortly thereafter Hanif (A-3) came to the saloon to have a shave. He brought along with him a cardboard box and kept the same on the table in the saloon. The deceased-Shankar attended to A-3 and gave him a shave while PW-5 and PW-7 were also present in the saloon and inquired about the contents of the cardboard box which he had brought with him and kept on the table in the saloon. Hanif (A-3) said that the box contained a tape recorder. He also told them that he did not know about the price and the same had been given to him by a friend. Hanif (A-3) left the shop after getting the shave leaving behind the card board box, saying that he would return to collect the same later.

7. Krishna (PW-1) in the meantime returned to the saloon after taking his breakfast, whereafter at about 11 or 11.30 a.m. in the morning (PW-5) left the shop to have his breakfast. Shortly after his departure from the shop the deceased-Shankar told PW-7 that he should switch on the tape recorder contained in the box. The deceased-Shankar accordingly opened the cardboard box left behind by A-3 and switched the same on. Smoke started coming out of the box which exploded with a

huge sound damaging the shop and several articles lying around. As a result of the blast the deceased-Shankar as well as PW-1 and PW-7 who were present in the shop sustained injuries. PW-1 and PW-7 were rushed to the NIMHANS hospital in an auto-rickshaw from where they were shifted to the Victoria hospital. Shankar-deceased was also rushed to the Victoria hospital in an ambulance but succumbed to the injuries sustained by him. Muniraju (PW-14) who was away from Bangalore rushed back after hearing about the bomb blast in his shop. A first information report about the occurrence was lodged by PW-1 that set the investigation rolling. In the course of investigation Hanif (A-3) offered to make a confession and was tendered pardon as already mentioned above and later examined as PW-2 at the trial.

8. It is in the above background that G. Venkatesh Murthy (A-1), son of Gopala, and the appellant-Venkatesha (A-2), son of Gurappa were tried for the offences referred to earlier, found guilty and sentenced by the Trial Court and which conviction and sentence has been upheld by the High Court as noticed above.

9. When the matter came up before us on 14th March, 2012 learned counsel for the respondent-State placed on record a communication dated 13th March, 2012 stating that G. Venkatesh Murthy son of Gopala appellant in Criminal Appeal No.134 of 2005 has since been released prematurely on 15th August, 2006 in terms of order dated 14th August, 2006. Appellant-Venkatesha son of Gurappa in Criminal Appeal No.135 of 2005, however, continues in custody and has undergone 12 years' imprisonment. It was in the light of the said statement that Criminal Appeal No.134 of 2005 was dismissed as infructuous in the light of the subsequent development while Criminal Appeal No.135 of 2005 was set down for final hearing.

10. We have heard Ms. Tanuj Bagga Sharma, Advocate (Amicus Curiae) appearing for the appellant and counsel appearing for the State at some length who have taken us through the judgment and order under challenge and the

material portion of the evidence adduced at the trial. Both the courts below have found on a detailed appraisal of the evidence on record that the prosecution had successfully proved the charges framed against the appellant.

11. Dealing with the question of motive for the commission of offence, the trial Court held:

> "24……. I have considered the evidence tendered by the witnesses before the court and looking to their oral evidence, I am of opinion that the prosecution has clearly established that the accused no.1 was quarrelling with PW-8 Alamelu and PW-14 Muniraju also used to advice A-1 and once he had been to the house of A-1 to lead a happy martial life with PW-8 Alamelu and the prosecution has also established that PW-14 Muniraju. PW-10, PW-4 and PW-11 and also A-1 and A-2 gathered in Kanakpura Police Station and in the Kanakpura Police Station, A-1 posed life threat to Muniraju on the ground that he is interfering in his family affairs and A-2 in support of A-1 also posed life threat to PW-14 Muniraju. Hence looking to the evidence of the above mentioned prosecution witness, I am of the opinion that the prosecution has established the alleged motive against A-1 and A-2."

12. The High Court has affirmed the above finding on a re-appraisal of the evidence led at the trial. The High Court has added:

> "It is to be seen therefore from the above materials placed on record by the prosecution that all was not well between the accused and PW-14 Muniraju at the relevant time of this incident. There were strained or bitter feelings between them. When the Prosecution has succeeded in showing that there was some sort of enemity, hatredness or hostility between the parties, the inability on the part of the prosecution to further put on record the manner in which such hostility would have swelled up in the mind of the

accused to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution."

13. There is nothing irrational or perverse in the findings recorded by the trial Court and the High Court on the question of motive for the commission of offence, which was intended to target Muniraju (PW-14) but claimed the life of Shankar who was totally innocent and an un-intended victim of the crime. The depositions of M. Venkatesh (PW-4), Smt. Alamelu (PW-8), Smt. Venkatalakshamma (PW-10) and Ramachandru (PW-11) all support the prosecution case that the accused had an animus towards Muniraju (PW-14) and that the planting of the bomb, was actually intended to kill him, rather than Shankar the deceased. So also the fact that Hanif was deputed to carry the cardboard box to the shop of Muniraju (PW-14) and to leave the same there on the pretext that he would collect it from there later is proved by the depositions of the Approver-Hanif examined at the trial as PW-2 and the injured witnesses examined at the Trial.

14. It was contended on behalf of the appellant that an approver's evidence is unsafe for recording a finding of guilt against the accused unless the same is corroborated by other evidence in material particulars. This corroboration was not, according to the learned Amicus Curiae, forthcoming in the present case; which should, argued the learned counsel, entitle the appellant to an acquittal.

15. Section 133 of the Evidence Act, makes an accomplice a competent witness against the accused person and declares that a conviction shall not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Even so, the established rule of practice evolved on the basis of human experience since times immemorial, is that it is unsafe to record a conviction on the testimony of an approver unless the same is corroborated in material particulars by some untainted and credible evidence. So consistent has

been the commitment of the courts to that rule of practice, that the same is now treated as a rule of law. Courts, therefore, not only approach the evidence of an approver with caution, but insist on corroboration of his version before resting a verdict of guilt against the accused, on the basis of such a deposition. The juristic basis for that requirement is the fact that the approver is by his own admission a criminal, which by itself makes him unworthy of an implicit reliance by the Court, unless it is satisfied about the truthfulness of his story by evidence that is independent and supportive of the version given by him. That the approver's testimony needs corroboration cannot, therefore, be doubted as a proposition of law. The question is whether any such corroboration is forthcoming from the evidence adduced by the prosecution in the present case.

16. Dealing with the question of corroboration of the deposition of Hanif, the Approver, both the Courts below have concurrently held that the same was available in abundance in the form of the depositions of Krishna (PW-1), Lamboo Venkatesh (PW-3), Venkatesh (PW-4), Shivaram (PW-7), Thyagaraja (PW-9), P.R. Jayaramu (PW-21) and Dr. Shivannagouda (PW-27). The trial Court has while dealing with the question of corroboration of the approver's version observed:

> "So looking to the evidence of these three witnesses, the doctors who examined the deceased Shankar and also the injured PW-1 Krishna and PW-7 Shivaram, have clearly opined that the injuries they have mentioned in the PM report and also the injury certificate respectively can be caused by bomb blast. Even PW-21 stated in his evidence that articles 1-5 contained explosive substance. He has also stated that when the articles were sent to him, the seals were intact and he opened these seals and examined these articles 1-7. PW-21 denied the suggestion that if the glycerine reacts with the soap, it will produce nitroglycerine and he has also denied the suggestion that

articles 1-5 are not the explosives. PW-27 doctor examined the dead body of the deceased Shankar alias Ravi, clearly stated in the re-examination that injury No.1 could be necessarily caused by bomb blast. In the cross examination of these three witnesses, nothing has been elicited from their mouth by the learned advocate for A-1 and A-2 so as to disbelieve their version that the injuries sustained by deceased Shankar, Krishna PW-1 and Shivaram PW-7 are because of the bomb blast."

17. The Trial Court has while appraising the deposition of Thyagaraja (PW-9) noticed the role played by the appellant and observed:

"18. PW.9 Thyagaraja deposed in his evidence in the examination-in-chief that he knows pw.3 Lamboo Venkatesh and during April, 1996, himself and A.2 Venkatesh had been to Anekal to call pw.3 Lamboo Venkatesh. At that time, pw.3 was not at all there in his house and while himself and A.2 were returning, they had meals at Dhaba at Bannerghatta and at that time, A.2 told him that himself and A.1 made arrangement for the bomb blast in the hair cutting saloon of CW.5 Muniraju and he also told that the person they had expected did not expire and also asked him not to disclose this fact to others. A.2 also told him that himself and A.1 intended to kill CW.5 Muniraju. He enquired with A.2 Venkatesh what is the enmity between himself, A.1 and CW.5 Muniraju and A.2 also told him that CW.5 Muniraju is interfering in the matrimonial affairs of pw.8 Alamelu and A.1 Venkateshamurthy and he also told him that galata also took place one week prior to the incident at Kanakapura police station."

18. PW-3 – Lambu Venkatesh made a detailed deposition about A.1 to A.3 and the box changing its hands. The following had been noted by the Trial Court.

"… On enquiry, A.1 told that some person from Harohalli has to pay the amount and he wants to collect the money and asked him to accompany him. Thereafter A.1 took him on his TVS near his shop. Then A.1 opened the lock of his shop and opened the door and brought a box like article from his shop. Thereafter, A.1 took him to the bus-stand. At that time, A.2 Venkatesh was in the bus-stand. A.1 kept the said box in the bus-stand and asked him to wait near the same and went away saying that he has to meet some person. At about 7 or 7-15 a.m., A.1 and A.2 returned…"

19. The deposition of PW-3 in his cross-examination, is noted by the Trial Court in the following words:

"… During the journey A.1 and A.2 were not conversing with A.3. Even in the autorickshaw also, when they got down at the TB Hospital, they were not conversing with each other. A.1 and A.2 gave Rs.105/- and also the box into the hands of A.3 Hanif. After getting down from the autorickshaw, he handed over the box to A.1 Venkateshmurthy. Then A.1 and A.2 asked A.3 Hanif to keep Rs.100/- with him and to have the shave with Rs.5/- and also they have told that they will come within half an hour. A.1 and A.2 paid the amount and the box to A.3 at the grave yard. A.1 and A.2 took A.3 stating that they will show the shop. He enquired with A.1 and A.2 that they have brought the taperecorder from Kanakapura and now it is not there and what is the matter. Then A.1 and A.2 told them that there in one bomb in that box and it is kept in the shop of his enemy and if anybody filed a case, they will look after the same. He enquired who is that enemy and then A.1 and A.2 told him that CW.5 Muniraju is their enemy."

20. The Trial Court has similarly dealt with the deposition of Lamboo Venkatesh (PW-3) and observed:

"… Even pw.3 Lambu Venkatesh also deposed in his

evidence that he too accompanied A.1 and A.2 and Hanif to Bangalore along with the box in the saloon shop of PW.14 Muniraju and A.1 gave Hanif Rs.105/- and asked Hanif that after keeping the box in the shop, to have the shave and come back. Looking to the cross examination of both pw.2 and pw.3, so far as they coming to Bangalore from Kanakapura on 2-4-1996 and this Hanif taking the box into the shop, nothing has been elicited from the mouth of pw.2 and pw.3 by the learned counsel appearing for A.1 and A.2 so as to disbelieve their version…. But, it has come on record in the evidence of pw.2 and pw.3 that when they came back to Kanakapura after leaving the box in the shop of pw.14 Muniraju and when questioned at Kanakapura by pw.2 and pw.3, A.1 and A.2 confessed before them that they have kept the bomb in the said box to take the life of their enemy – pw.14 Muniraju and threatened them not to disclose this fact before anybody and if they disclosed the same, they will also be involved in this case.

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… But, as I have already discussed above, regarding the leaving of the box in the shop of pw.14 Muniraju and also regarding the extrajudicial confession made by A.1 and A.2, it is not only the evidence of the approver that is available on record, but the said facts have also been independently proved with the evidence of another witness pw.3 Lambu Venkatesh…"

21. The High Court has, upon a careful and detailed reappraisal of the evidence, concurred with the view taken by the trial Court and, in our view, rightly held that there was sufficient corroboration to the version of the Approver, both in the form of oral depositions of the witness as also forensic evidence, that clearly support the prosecution case that the injuries resulting in the death of Shankar were caused by an

explosive substance planted by A-1 and A-2 to kill Muniraju (PW-14). The High Court has held:

> "In the instant case, we are not satisfied with the submission that the conviction of the accused is solely based upon the testimony of the witness PW-2 and his deposition is not corroborated in material particulars. The direct as well as circumstantial evidence produced in the case is sufficient to connect the accused with the commission of the crime. It does not lead to any other inference than the one of their involvement in the crime."

22. The High Court additionally notes the testimony of Puttaswamy (PW-25) who was a Police Inspector at CCB and who ultimately came to investigate the matter under orders of the DCP (Crime). In his testimony he has mentioned CW-15 and PW-20, who had identified A.1 and A.2 as having bought gelatine sticks and detonators and the tape recorder respectively. The High Court noted:

> "… As per the voluntary statement of Accused Nos.1 and 2, he had searched for one Honnegowda and he came to know that he is dead, but the colleague of Honnegowda by name Boregowda identified the accused and reported that accused had collected the gelatin sticks and electric detonator on the pretext of catching the fish at the pond. Accordingly he recorded the statement of the said Boregowda CW-15. After receiving the information that Honnegowda belongs to the village Bheemagondanahalli, he secured Muniyappa CW-16 who is the brother of Honnegowda and also one Srinivas CW-17 and recorded their statements and from their statements, it was transpired that Honnegowda is dead. The accused persons A1 and A2 took him and his staff near one Thattekare village and shown the spot as the one where they had experimented the gelatin stick and the electric detonator with the help of the battery.

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There the accused persons A1 and A2 took them to the shop of one Mahadeswar Radio and Musical Stores and identified one Madappa PW-20 as the proprietor of the said shop stating that they had purchased one tape recorder from PW-20 which was used in the commission of the crime in this case. The said fact he learnt from the proprietor of the shop viz., Madappa PW-20. He examined and recorded the statements of the said Madappa PW-20 in this regard."

23. The High Court further noted the testimony of PW-3, Lamboo Venkatesh :

"… Thereafter the Accused No.1 took him on his TVS moped near his shop. Then the Accused No.1 opened the lock of his shop and brought a box like article from inside his shop. Thereafter the Accused No.1 took him to the bus stand. At that time A2 Venkatesh was in the bus stand. The Accused No.1 kept the said box in the bus stand and asked him to wait near the same and while so saying, he went therefrom saying that he has to meet some person. At about 7 or 7.15 a.m. both A1 and A2 returned back. At about the same time, the Accused No.3 also came there.

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The accused persons A1 and A2 gave Rs.105/- and also the box into the hands of A3 Haneef. After getting down from the auto, he had handed over the box to Accused No.1. Then Accused no.1 and Accused no.2 asked Accused no.3 Haneef to keep Rs.100/- with him and to have the shave with the help of Rs.5/- and they also told that they will come within half an hour. Accused no.1 and Accused no.2 paid the amount and gave the box to Accused no.3 at the graveyard… Then Accused no.1 and Accused no.2 took Accused no.3 stating that they will show

the shop. After about half an hour Accused no.1 and Accused no.2 returned back and when he asked them about Accused no.3, they told him that he is getting the shave and he will come. He has further stated that he made enquiries with Accused no.1 and Accused no.2 that they have brought the tape recorder from Kanakapura and now that the same is not available with them and for that he was told by Accused no.1 and Accused no.2 that there was one bomb in that box and the same has been kept in the shop of their enemy and if anybody were to file the case, they will look to the same. He enquired as to who is that enemy and for that he was told by Accused no.1 and Accused no.2 that PW-14 is their enemy."

24. The High Court accepted the testimony of PW-3 and noted that:

"It is to be seen therefore that PW-3 Lamboo Venkatesh is a relative of both A-1 and A-2 and he has no axe to grind against them. No doubt, he is also a relative of PW-14. But it appears that they were not on visiting terms to each others houses frequently. Be that as it may be. There is no reason for PW-3 to falsely implicate the Accused in such ghastly crime, more so, when he happened to be their relative. Therefore, we find no good reason to discard the evidence of PW-3. The circumstances brought out in the evidence of PW-3 Lamboo Venkatesh would substantially support the evidence of PW-2 in the case. … There is nothing to disbelieve the version of PW-3 given in Court and he has absolutely no reason to depose falsely against the accused."

25. The medical evidence adduced at the trial and the nature of the injuries caused is also supportive of the prosecution version that the deceased died on account of an explosion. The medical evidence comprising the deposition of Dr. Shivannagouda (PW-27) has described the injuries sustained by the deceased as under:

"1) Extensive laceration over front of lower part of the abdomen and front of both thighs, measuring 40 cm x 35 cm. x muscle deep, exposing lacerated muscles, vessels and nerves, covered by burnt pieces of plastic wires and metal pieces.

2) Multiple abrasions, and lacerations over front of trunk, inner aspect of right axilla, right arm and forearm and lower part of chin, inner aspect of left arm and outer aspect of left forearm. Abrasions measuring 4 cm. x 2 cm. to 1 cm. x 0.5 cm and lacerations ranging from 3 cms x 2 cms and muscle deep to 1 cm x 0.5 cms skin deep.

On dissections of the dead body, I did not find any internal injuries."

26. So, also the injuries sustained by injured witnesses PWs 1, 5 and 7 were, according to the medical evidence, caused because of the explosion. Dr. Shivannagouda (PW-27) has testified to that effect and specifically stated so.

27. Not only that, the forensic evidence led by the prosecution in the instant case also shows that there was an explosion. This is evident from the report of the Sri P.R. Jayaramu (PW-21), Scientific Officer in the FSL at Bangalore. The relevant portion whereof is to the following effect:

"…. Article no.1 contained metal pieces, 2 pin plug with wire pieces and a piece of magnet spring. Article no.2 contained metal piece condenser and 10 debris of a suspected transistor/cassette player. Article no.3 contained yellow coloured torn polythene piece, light green rexin seat cover, a torn cloth piece and a torn old printed story book, a piece of cord wire with 2 pin plug and broken metal pieces and small piece of debris collected from the crime spot. Article no.4 contained one blood stained torn half sleeved shirt and a light green coloured torn old pant of an injured person. Article no.5 contained one multi

coloured torn shirt of an injured person. Article no.6 contained a cotton swab of the wound of the deceased Shankar. Article no.7 contained one sealed small bottle said to contain foreign material recovered from the wound of the injured person. After opening all these above mentioned articles, he examined them and found the presence of nitro glycerine, nitro cellulose and ammonium nitrate. That is to say, the presence of nitro glycerine, nitro cellulose and ammonium nitrate were detected in article nos. 1 to 5 and it is highly explosive…"

28. There is, in our opinion, no perversity or miscarriage of justice arising out of appreciation of evidence by the trial Court or the High Court to warrant interference. In the result this appeal fails and is hereby dismissed.

K.K.T. Appeal dismissed.

CHINNAM KAMESWARA RAO AND ORS.
v.
STATE OF A.P. REP. BY HOME SECRETARY
(Criminal Appeal No.1116 of 2011)

JANUARY 10, 2013

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 302 and 324 r/w s. 34 – Prosecution under – Injured victim and 4 others eye-witnesses – Incident in question was sequel to an incident on previous day, wherein the deceased was threatened by accused of dire consequences – Acquittal by trial court – Conviction by High Court – Held: The conviction was justified in view of depositions of injured victim and other eye-witnesses – Facts of the case prove that the incident was premeditated – Absence of charge u/s. 34 would not affect the legality of conviction, as such omission caused no prejudice to the accused.

Code of Criminal Procedure, 1973 – s. 386 – Appeal against acquittal – Scope of – Held: While deciding appeal against acquittal, the power of appellate court not circumscribed by any limitation – It has power to review the entire evidence – Appellate court can reverse the acquittal order, if, on appraisal of evidence, it finds that the view taken by court, while acquitting the accused was not a possible view.

Criminal Trial – Conviction on the basis of s. 34 IPC for which the accused was not charged – Held: Mere omission s. 34 in charge-sheet does not ipso facto or ipso jure lead to any inference or presumption of prejudice having been caused to the accused – Prejudice from such omission needs to be satisfactorily demonstrated – In the instant case, no prejudice shown to have been caused – Penal Code, 1860 – s. 34.

The appellants-accused, alongwith accused No. 4 were alleged to have caused death of one person and caused injuries to another. The prosecution case was that all the accused persons stopped the deceased and PW1 (the injured witness). All the accused except A-4 were armed with casuarinas sticks. They assaulted the deceased and PW-1 and caused injuries to them. The deceased later succumbed to the injuries. The incident was a sequel to an incident which had taken place one day before the day of the incident between the accused persons on one hand and the deceased and PWs-1 on the other and the same was pacified at the intervention of PW-3. Appellant No.1 had also threatened the deceased with dire consequences. Charges were framed against the appellant accused u/ss. 302 and 324 IPC. A-4 was charged u/ss. 302 and 324 IPC with the aid of s. 34 IPC. PWs 2,3,4 and 6 were examined as eye-witnesses. Trial court acquitted all the accused. High Court maintained the acquittal order as regards A-4, while reversed the acquittal order as regards appellants-accused and convicted them u/s. 302/34 and 324/34IPC.

In appeal to this Court, appellants contended that High Court was not correct in reversing the acquittal order by fresh appraisal of the evidence; that appellants-accused were not charged u/s. 34 IPC and hence could not have been convicted by the High Court with the aid of s. 34; and that there was no basis for the High Court to hold that the appellants had common intention to commit the murder.

Dismissing the appeal, the Court

HELD: 1. The High Court committed no error in holding the appellants guilty especially when the statement of PW-1 who was also injured in the incident was found to be credible. The depositions of PW-1, PW-

2, PW-3, PW-4, PW-6 all supported the prosecution version that the deceased was assaulted by the appellants resulting in grievous injuries to him that culminated in his death. The trial court fell in error in rejecting the testimony of these witnesses on minor contradictions which was not sufficient to shatter their credibility. The acquittal recorded by the trial court was not thus a reasonably possible view in the matter which the High Court was entitled to reverse while hearing the appeal. [Para 17] [647-E-G]

2.1 A reading of s. 386 Cr.P.C. leaves no manner of doubt that in an appeal against an order of acquittal the appellate court may reverse such order and direct that further inquiry be made or that the accused be re-tried, as the case may be, or impose a sentence upon him according to law. Similarly in the case of appeal from a conviction, the appellate court has the power to reverse the findings recorded by the trial court and discharge the accused or pass an order for his re-trial etc. [Para 10] [639-G]

2.2 While deciding appeal against acquittal, the power of the appellate court is in no way circumscribed by any limitation and that power is exercisable by the appellate court to comprehensively review the entire evidence. The appellate court must bear in mind that in the case of acquittal, the innocence of the accused is doubly assured by his acquittal. Consequently, if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the findings of the acquittal recorded in favour of the accused. [Para 11] [639-H; 640-A-B]

2.3 If the appellate court finds that the view taken by the trial court acquitting the accused was not a reasonably possible view, it can reverse the view taken by the trial court and hold the accused guilty. On the

contrary, if the view is not a reasonably possible view, the appellate court is duty bound to interfere and prevent miscarriage of justice by suitably passing the order by punishing the offender. Just because the trial court had recorded an acquittal in favour of the appellants, it cannot be said that the appellate court had any limitation on its power to reverse such an acquittal. [Para 12] [641-E-G]

Dhanna etc. v. State of Madhya Pradesh **(1996) 10 SCC 79: 1996 (4) Suppl. SCR 28;** *Kallu @ Masih and Ors. v. State of Madhya Pradesh* **(2006) 10 SCC 313: 2006 (1) SCR 201;** *Murugesan and Ors. v. State* **2012 (10) SCALE 378;** *Chandrappa and Ors. v. State of Karnataka* **(2007) 4 SCC 415: 2007 (2) SCR 630 – relied on.**

3. Mere omission of s. 34 IPC from the charge-sheet does not *ipso facto* or *ipso jure* lead to any inference or presumption of prejudice having been caused to the accused in cases where the conviction is recorded with the help of that provision. It is only if the accused persons plead and satisfactorily demonstrate that prejudice had indeed resulted from the omission of a charge u/s. 34 IPC that any such omission may assume importance. No prejudice has been caused in the present case. The absence of charge u/s. 34 IPC did not, therefore, affect the legality of the conviction recorded by the High Court. [Para 15] [646-A-D]

Krishna Govind Patil v. State of Maharashtra **AIR 1963 SC 1413:1964 SCR 678;** *Darbara Singh v. State of Punjab* **2012 (8)SCALE 649;** *Gurpreet Singh v. State of Punjab* **(2005) 12 SCC615: 2005 (5) Suppl. SCR 90 – relied on.**

4. It is not correct to say that there was no evidence to show common intention on the part of the appellants to commit the murder of the deceased. The evidence on record sufficiently proves that the appellants had confronted the deceased and PW-1 on the previous date

which was defused with the interference of PW-3 who was witness to the threat extended by the appellants to the deceased of dire consequences. The circumstances of the instant case leave no manner of doubt that the appellants shared the common intention to kill the deceased and that they acted under a premeditated plan. The incident in instant case had a history behind it; and that the appellants had not only threatened the deceased previously but were lying in wait for his arrival at the place of occurrence clearly showed that the commission of the offence was preconcerted. [Para 16] [646-E-F; 647-C-D]

Case Law Reference:

1996 (4) Suppl. SCR 28	**Relied on**	**Para 11**
2006 (1) SCR 201	**Relied on**	**Para 11**
2012 (10) SCALE 378	**Relied on**	**Para 11**
2007 (2) SCR 630	**Relied on**	**Para 11**
1964 SCR 678	**Relied on**	**Para 13**
2012 (8) SCALE 649	**Relied on**	**Para 14**
2005 (5) Suppl. SCR 90	**Relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1116 of 2011.

From the Judgment & Order dated 08.02.2011 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1055 of 2007.

M.S. Ganesh, T. Anamika for the Appellant.

D. Mahesh Babu, Mayur Shah, Savita Devi, Suchitra Hrangkhawl, Amit K. Nain, M.B. Shivdu for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 assails a judgment and order dated 8th February, 2011 passed by the High Court of Andhra Pradesh at Hyderabad, whereby the High Court has partly allowed the acquittal appeal filed by the State and while reversing the judgment and order passed by the trial Court convicted the appellants for offences punishable under Section 302 read with Section 34 of the IPC and sentenced them to undergo imprisonment for life besides levying a fine of Rs.1,000/- each. In default of payment of fine the appellants have been sentenced to undergo simple imprisonment for a period of one month each. The appellants have been further convicted for an offence punishable under Section 324 read with Section 34 of the IPC and sentenced to undergo simple imprisonment for three months each with the direction that the sentences shall run concurrently.

2. Briefly stated the prosecution case is that on 27th April, 2003, at around 7.00 p.m., the appellants along with one Papisetti Praveen who was arrayed as accused no.4 stopped the deceased-Bezawada Srinivasa Rao and PW.1-Alapati Seshadri while the latter were on their way home at Bethavolu Park Centre - the place of occurrence. An altercation between the accused persons on the one hand and the deceased and PW-1 on the other had according to the prosecution taken place on the previous day i.e. on 26th April, 2003, while the deceased and PW.1 were bringing some palmyrah nuts from the fields. PW-3-Sonti Koteswara Rao, a shopkeeper who runs a *pan* shop in the vicinity, claimed to be a witness to that incident and had intervened and pacified the parties which passed off without any physical harm to either side except that according to the prosecution appellant no.1-Chinnam Kameswara Rao had threatened the deceased with dire consequences. With the above incident in the background on 27th April, 2003, the accused persons allegedly confronted the deceased and PW-1-Alapati Seshadri, armed with stout

casuarina sticks except accused no.4 who was unarmed. An altercation followed between the two sides as a sequel to the incident of the previous day in the course whereof appellant no.1-Chinnam Kameswara Rao is alleged to have struck a blow on the head of the deceased. When PW-1-Alapati Seshadri intervened, the remaining two appellants came down upon him and gave stick blows on his head also. The injured, as also Alapati Seshadri-PW-1 fell to the ground, whereupon A-4 is alleged to have kicked and given fist blows to the deceased while A-1 to A-3 continued to indiscriminately hit both of them with their sticks which caused bleeding injuries to both the injured. Taking both of them as dead, the appellants are alleged to have run away from the spot towards the house of appellant no.1. Sonti Srinivasa Rao S/o Nageswara Rao (PW-2), Sonti Koteswara Rao (PW-3), Sonti Srinivasa Rao, S/o Veeraiah (PW-4) and M.V. Gopala Krishna Murthy (PW-6) are alleged to have witnessed the incident. PW-2-Sonti Srinivasa Rao with the help of one P. Vasudeva Rao shifted both the injured to the Government Hospital, Gudivada for treatment who informed the Gudivada Town I Police Station about the arrival of the injured in the hospital whereupon PW-9-B. Jaya Raju, ASI, reached the hospital and recorded the statement of the deceased, marked Exhibit P-6. A case under Section 324 read with 34 IPC was on the basis of that statement registered and the injured shifted to the University General Hospital, Vijaywada for further treatment. Around 2.50 a.m. on 28th April, 2003, the deceased succumbed to his injuries in the hospital at Vijayawada whereupon the Investigating Officer altered the offence from Section 324 read with Section 34 IPC to Section 302 read with Section 34 IPC.

3. After completion of investigation that included the arrest of the accused persons, post mortem of the dead body of the deceased, seizure of the weapons of offence, the police filed a charge sheet against the appellants for offences punishable under Sections 302 and 307 IPC while A-4 was charged under Sections 302 and 307 read with Section 34 IPC.

4. At the trial the prosecution examined as many as 13 witnesses including PWs.2, 3, 4 and 6, said to be eye witnesses to the incident. The accused did not lead any evidence in their defence. The trial Court all the same came to the conclusion that the prosecution had not been able to establish the charge framed against the accused persons and accordingly acquitted them.

5. Aggrieved by the judgment and order of the acquittal recorded by the trial Court the State filed Criminal Appeal No.1055 of 2007 before the High Court of Andhra Pradesh at Hyderabad which appeal was allowed in part reversing the acquittal of the appellants and convicting them for offences punishable under Section 302 read with Section 34 IPC and Section 324 read with Section 34 of the IPC. The acquittal of accused No.4 was, however, affirmed by the High Court. The appellants were consequently sentenced to undergo imprisonment for life apart from imprisonment for a period of three months under Section 324 IPC as already noticed above. The sentences were directed to run concurrently. The present appeal assails the correctness of the above judgment and order.

6. Appearing for the appellants Mr. M.S. Ganesh, learned senior counsel, made a three-fold submission. *Firstly,* he contended that the High Court was in error in embarking upon a fresh appraisal of the evidence adduced by the prosecution at the trial and interfering with the order of acquittal passed by the trial Court just because in the opinion of the High Court a second view was equally reasonable in the facts and circumstances of the case. He urged that acquittal of the accused persons reinforced their innocence and except in compelling circumstances where the acquittal is seen to have resulted in miscarriage of justice or where appreciation of evidence is perverse or manifestly unsatisfactory, the High Court should not have converted the acquittal into a conviction.

7. *Secondly*, he contended that the High Court could not

have convicted the appellants for offences punishable under Sections 302 and 307 both read with Section 34 IPC when the charges framed against the appellants were only for offences punishable under Sections 302 and 307 of the IPC. It was also contended that accused No.4, since acquitted by the Courts below, alone was charged with Section 302 read with Section 34 IPC. The High Court was not, therefore, justified in convicting the appellants for the offence of murder or attempt to murder with the help of Section 34 of the Code. The absence of a charge under Section 34 had, according to the learned counsel, resulted in prejudice and miscarriage of justice to the appellants.

8. *Thirdly,* it was contended that on a true and proper appreciation of the evidence adduced at the trial there was no real basis for the High Court to hold that the appellants had the common intention to commit the murder of the deceased. In the absence of any evidence to support the allegation that the appellants had a common intention to kill the deceased, their conviction for the offence of murder punishable under Section 302 IPC was not justified. At any rate, the evidence did not support the charge of murder which could be appropriately converted to culpable homicide not amounting to murder punishable under Section 304 Part I or II of the IPC.

9. We propose to deal with the submissions *ad seriatim*.

10. The powers of Appellate Court are stipulated in Section 386 of the Code of Criminal Procedure, 1973. A bare reading of the said provision leaves no manner of doubt that in an appeal against an order of acquittal the Appellate Court may reverse such order and direct that further inquiry be made or that the accused be re-tried, as the case may be or impose a sentence upon him according to law. Similarly in the case of appeal from a conviction the Appellate Court has the power to reverse the findings recorded by the trial Court and discharge the accused or pass an order for his re-trial etc.

11. The plenitude of the power available to the Appellate Court notwithstanding recent pronouncements of this Court has

evolved a rule of prudence according to which the Appellate Court must bear in mind that in the case of acquittal the innocence of the accused is doubly assured by his acquittal. Consequently, if two reasonable conclusions are possible on the basis of the evidence on record the Appellate Court should not disturb the findings of the acquittal recorded in favour of the accused. A long line of decisions rendered by this Court have recognised that while deciding acquittal appeal the power of the Appellate Court is in no way circumscribed by any limitation and that power is exercisable by the Appellate Court to comprehensively review the entire evidence. The decisions of this Court in *Dhanna etc. v. State of Madhya Pradesh* (1996) 10 SCC 79 and *Kallu @ Masih & Ors. v. State of Madhya Pradesh* (2006) 10 SCC 313 aptly summarise the legal position. A recent decision of this Court in *Murugesan & Ors. v. State* 2012 (10) SCALE 378 is a timely reminder of the principles that were succinctly enunciated in an earlier decision of this Court in *Chandrappa & Ors. v. State of Karnataka* (2007) 4 SCC 415, in the following words:

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such

phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

(emphasis supplied)

12. What, therefore, needs to be examined in the light of the settled legal position is whether the view taken by the trial Court acquitting the accused was a reasonably possible view. If the answer is in the negative nothing prevents the Appellate Court from reversing the view taken by the trial Court and holding the accused guilty. On the contrary, if the view is not a reasonably possible view the Appellate Court is duty bound to interfere and prevent miscarriage of justice by suitably passing the order by punishing the offender. We have in that view no hesitation in rejecting the contention that just because the trial Court had recorded an acquittal in favour of the appellants the Appellate Court had any limitation on its power to reverse such an acquittal. Whether or not the view was reasonably possible will be seen by us a little later when we take up the merits of the contention urged by the appellant regarding involvement of the accused persons in the commission of the crime.

13. That brings us to the question whether absence of a charge under Section 34 of the IPC would by itself operate as an impediment in the Appellate Court recording a conviction with the help of that provision. The decision of this Court provide a complete answer to that contention to which we may immediately refer. In *Krishna Govind Patil v. State of Maharashtra* AIR 1963 SC 1413 the trial Court had acquitted all the accused persons while the High Court convicted them under Section 302 read with Section 34 IPC. This Court held that the High Court could convict the accused under Section 34 even if the named accused were acquitted provided the High Court held that there were other unnamed accused persons who were involved in the commission of the offence. The following passage from the said decision is, in this regard, apposite:

"It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under s. 302, read with s. 34, of the Indian Penal Code, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of s. 34 on different situations.

(1) A, B, C and D are charged under s. 302, read with s. 34, of the Indian Penal Code, for committing the murder of E. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) A, B, C and D and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

(3) A, B, C and D are charged under the said sections. But the evidence is directed to prove that A, B, C and D, along with 3 others, have jointly committed the offence.

xxx xxx xxx

But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted, some other unidentified persons acted conjointly along with one of the named persons? If the Court could do so, it would be making out a new case for the prosecution: it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration."

(underlined for emphasis)

14. The legal position was reviewed by a two-Judge Bench of this Court in *Darbara Singh v. State of Punjab* 2012 (8) SCALE 649. In that case also charges were framed against two of the accused persons under Section 302 IPC whereas against the third accused the charge framed was under Section 302 read with Section 34 IPC. The trial Court had acquitted the third accused but convicted the first two accused much in the same manner as is the position in the present case. The contention before this Court was that in the absence of a charge under Section 34 no conviction could be recorded against the appellants under Section 302 especially when the injury inflicted by one of the accused persons was not held to be sufficient in the ordinary course of nature to cause death.

Repelling the contention this Court observed:

"12. It has further been submitted on behalf of the Appellant that, as the appellant was never charged under Section 302 r/w Section 34 Indian Penal Code, unless it is established that the injury caused by the Appellant on the head of the deceased, was sufficient to cause death, the Appellant ought not to have been convicted under Section 302 Indian Penal Code simplicitor. The submission so advanced is not worth consideration for the simple reason that the Learned Counsel for the Appellant has been unable to show what prejudice, if any, has been caused to the Appellant, even if such charge has not been framed against him. He was always fully aware of all the facts and he had, in fact, gone alongwith Kashmir Singh and Hira Singh with an intention to kill the deceased. Both of them have undoubtedly inflicted injuries on the deceased Mukhtiar Singh. The Appellant has further been found guilty of causing grievous injury on the head of the deceased being a vital part of the body. Therefore, in the light of the facts and circumstances of the said case, the submission so advanced does not merit acceptance.

xxx xxx xxx

14. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Code of Criminal Procedure., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a **failure of justice**. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice

or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

15. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court."

15. In *Gurpreet Singh v. State of Punjab* (2005) 12 SCC 615, this Court held that no prejudice could be claimed by the accused merely because charge was framed under Section 302 IPC simpliciter and not with the help of Section 34 IPC. The Court found that the eye witnesses had been cross-examined at length from all possible angles and from suggestions that were put to them to the eye witnesses, the Court was fully satisfied that there was no manner of prejudice caused. What, therefore, needs to be examined is whether any

prejudice was caused to the accused persons on account of absence of charge under Section 34 of the IPC. Mere omission of Section 34 from the charge sheet does not *ipso facto* or *ipso jure* lead to any inference or presumption of prejudice having been caused to the accused in cases where the conviction is recorded with the help of that provision. It is only if the accused persons plead and satisfactorily demonstrate that prejudice had indeed resulted from the omission of a charge under Section 34 of the IPC that any such omission may assume importance. We do not see any such prejudice having been caused in the present case. In fairness to Mr. Ganesh we must mention that although he had strenuously argued the legal proposition dealt with by us above when it came to demonstrating a prejudice on account of absence of charge under Section 34 he was unable to do so. The absence of charge under Section 34 of the IPC did not, therefore, affect the legality of the conviction recorded by the High Court.

16. That brings us to third and the only other submission urged by Mr. Ganesh to the effect that there was no evidence to show common intention on the part of the appellants to commit the murder of the deceased. We regret our inability to accept that submission. The evidence on record sufficiently proves that the appellants had confronted the deceased and PW-1 Alapati Seshadri on the previous date which was defused with the interference of PW-3 Sonti Koteswara Rao, a shopkeeper in the vicinity who was, however, witness to the threat extended by the appellants to the deceased of dire consequences. There is evidence to show that on the date of occurrence the appellants were lying in wait near the Reading Room for the deceased. No sooner they saw him approaching the place where they were waiting that they went behind the Reading Room to fetch the stout sticks that they appear to have hidden from public view only to mount a surprise attack on the deceased. This implies that the appellants had made preparations for the commission of the offence and the incident was premeditated as a sequel to the confrontation that the two parties had on the previous date. The last and by no means

the least important circumstance is the nature of the injuries inflicted upon the deceased on the vital part of the body resulting in fracture of the skull, sufficient in the ordinary course to cause death. The evidence on record suggests that all the three accused persons belaboured the deceased and continued their assault and aggression even when the deceased had fallen to the ground on account of the head injuries sustained by him. The appellants fled from the place of occurrence only when they felt that the deceased was dead. All these circumstances leave no manner of doubt that the appellants shared the common intention to kill the deceased and that they had acted under a premeditated plan. It is well settled that the common intention may develop during the course of the commission of the offence but the fact that the incident in instant case had a history behind it and that the appellants had not only threatened the deceased previously but were lying in wait for his arrival at the place of occurrence clearly showed that the commission of the offence was preconcerted.

17. The High Court, therefore, committed no error in holding the appellants guilty especially when the statement of PW-1 Alapati Seshadri who was also injured in the incident was found to be credible. The depositions of PW-1 Alapati Seshadri, PW-2 Sonti Srinivasa Rao S/o Nageswara Rao, PW-3 Sonti Koteswara Rao, PW-4 Sonti Srinivasa Rao S/o Veeraiah, PW-6 M.V. Gopala Krishna Murthy all supported the prosecution version that the deceased was assaulted by the appellants resulting in grievous injuries to him that culminated in his death. The trial Court had obviously fallen in error in rejecting the testimony of these witnesses on minor contradictions which was not sufficient to shatter their credibility. The acquittal recorded by the trial Court was not thus a reasonably possible view in the matter which the High Court was entitled to reverse while hearing the appeal.

18. In the result this appeal fails and is hereby dismissed.

K.K.T. Appeal dismissed.

STATE OF J & K AND ORS.
v.
SAT PAL
(Civil Appeal Nos.938-939 of 2013)

FEBRUARY 5, 2013

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

Service Law:

Appointment – Recruitment – Candidate in wait-list – Claiming appointment, in view that candidate above him in the merit list did not join – His writ petition disposed of directing the appellant-State to examine the claim – State rejected the claim – Contempt petition – Disposed of holding that the candidate deserved to be appointed and directing the State to consider the case and pass orders in accordance with the order of the Court – LPA by State – Dismissed as not maintainable – On appeal, held: In the facts of the case, the candidate deserved to be appointed to the post – The offer of appointment would relate back to the permissible date contemplated under rules laying down conditions of service of the cadre – The candidate entitled to seniority immediately below those who were appointed from the same process of selection – He would be entitled to wages from the date of the order.

The respondent participated in the selection process for the post of Junior Engineer (Civil) Grade-II, and figured in the final merit/select list of Scheduled Caste candidates. On coming to know that some scheduled Caste candidates above him in the merit list had not joined inspite of having been offered appointment, he addressed a representation seeking appointment against an available vacancy. He specifically named a candidate 'T', in the merit list, who did not join despite being offered

appointment. As the representation remained undecided, the respondent filed writ petition before High Court. The appellant-State did not appear before the Court. High Court disposed of the petition and directed the appointing authority to examine the claim of the respondent. The appellants dismissed the claim of the respondent taking the view that the vacancies cannot be filled at the belated stage; and that the appointment could not have been granted in accordance with the waiting list, as the same had outlived its validity. The respondent filed contempt petition against the order. High Court disposed of the petition holding that the respondent deserved to be appointed and directed the appellant-State to consider the issue and pass orders in accordance with the judgment of the Court. Appellants filed LPA taking the plea that the directions in the nature recorded by High Court was not permissible in exercise of contempt jurisdiction. Division Bench of High Court dismissed the appeal as not maintainable. Hence the present appeal.

Disposing of the appeals, the Court

HELD: 1. In the facts and circumstances of the case, it would be just and appropriate to direct the appellants to appoint the respondent against the post of Junior Engineer (Civil) Grade-II. Even though candidates who were higher in merit, were offered appointment to the post of Junior Engineer (Civil) Grade-II, for which recruitment was held, some of such posts remained vacant on account of the fact that persons higher in merit to the respondent had declined to join, despite having been offered appointment. Atleast one such vacancy never came to be filled up. In such a situation, the claim of the respondent whose name figured in the merit/select list, ought to have been offered appointment against the said post. The claim of the respondent could not have been repudiated. The offer of appointment would relate back

to the permissible date contemplated under the rules laying down conditions of service of the cadre to which the respondent would be appointed. The respondent would be entitled to seniority immediately below those who were appointed from the same process of selection. Since the respondent has not discharged his duties, he would be entitled to wages only with effect from the date of the instant order. [Paras 10 and 18] [656-G-H; 657-A-C; 663-F-G]

1.2. The reason for declining the claim of the respondent for appointment out of the waiting list is unjustified. A waiting list would start to operate only after the posts for which the recruitment is conducted, have been completed. A waiting list would commence to operate, when offers of appointment have been issued to those emerging on the top of the merit list and after the vacancies for which the recruitment process has been conducted have been filled up. In the instant case, the situation for operating the waiting list had not arisen, because one of the posts of Junior Engineer (Civil) Grade-II for which the recruitment process was conducted was actually never filled up. [Para 11] [657-E-G]

1.3. Even if it is assumed, for arguments sake, that all the posts for which selection was held were duly filled up, the validity of the waiting list, in the facts of the present case, has to be determined with reference to 22.4.2008, because the offer of appointment to 'T' (the candidate, who did not join) was made on 22.4.2008. It is the said vacancy, for which the respondent had approached the High Court. As against the aforesaid, it is the acknowledged position recorded by the appellants in the impugned order that the waiting list was valid till May, 2008. If 'T' was found eligible for appointment against the vacancy in question, out of the waiting list, the respondent herein would be equally eligible for appointment against

the said vacancy. [Para 11] [658-A-D]

Virender S. Hooda v. State of Haryana **(1999) 3 SCC 696;** *Mukul Saikia v. State of Assam* **(2009) 1 SCC 386: 2008 (16) SCR 236 – relied on.**

2.1. The observations made by the High Court in the contempt cases were advisory in nature. Rather than initiating action against the appellants for having missed the point, while considering the claim of the respondent in contempt jurisdiction, the High Court in its wisdom, required the appellants to correct the mistake committed by the appellants. The High Court did not, in the first instance, initiate any coercive action against the appellants. In the aforesaid view of the matter, it is apparent that the appellants unnecessarily preferred a letters patent appeal to assail the order of the High Court on a technical plea that the High Court in exercise of its contempt jurisdiction could not have dealt with the merits of the claim of the respondent. [Para 14] [661-D-G]

Prithawi Nath Ram v. State of Jharkhand and Ors. **(2004) 7 SCC 261: 2004 (3) Suppl. SCR 740;** *V.M. Manohar Prasad v. N. Ratnam Raju and Anr.* **(2004) 13 SCC 610;** *Midnapore Peoples' Coop. Bank Ltd. and Ors. v. Chunilal Nanda and Ors.* **(2006) 5 SCC 399: 2006 (2) Suppl. SCR 986 – referred to.**

2.2. Though the technical pleas raised by the appellants are fully legitimate but in the facts and circumstances of the present case, the Court would not invoke the jurisdiction under Article 136 of the Constitution of India, for debating and deciding the technical pleas advanced by the appellants. The court would rather invoke its jurisdiction under Article 142 of the Constitution of India for doing complete justice in the instant case. Entertaining the instant appeals would defeat the ends of justice for which the respondent had approached the High Court. Entertaining the objections

filed by the appellants would result in deviating from the merits of the claim raised by the respondent before the High Court. [Para 16] [662-E-G]

2.3. The State is not an adversary, and ought not have behaved in the manner, it has chosen, in the facts and circumstances of the instant case. In the first instance, it failed to even file a response before the High Court, to the writ petition preferred by the respondent. In order to ensure that justice to the respondent was not delayed, the High Court, instead of adjudicating the matter on merits, considered it just and appropriate to direct the appointing authority to consider the claim of the respondent, consequent upon 'T' having declined to join the post of Junior Engineer (Civil) Grade-II. Mainly because, the respondent had approached the High Court for relief, the appellants rejected his claim for wholly unreasonable grounds. Rather than focusing on the merits of the claim raised by the respondent, the appellants chose to initiate proceedings which would deviate the legal process from the merits of the claim of the respondent. [Para 17] [662-G-H; 663-A-C]

Case Law Reference:

(1999) 3 SCC 696	**relied on**	**Para 13**
2008 (16) SCR 236	**relied on**	**Para 13**
2004 (3) Suppl. SCR 740	**referred to**	**Para 15**
(2004) 13 SCC 610	**referred to**	**Para 15**
2006 (2) Suppl. SCR 986	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 938-939 of 2013.

From the Judgment & Order dated 03.04.2012 of the High Court of Jammu and Kashmir at Jammu in LPAC No. 2 of 2012 & CMP No. 3 of 2012.

Gaurav Pachnanda, Sunil Fernandes, Vernika Tomar, Astha Sharma, Rahul Sharma, Insha Mir for the Appellants.

Sakal Bhushan, P.D. Sharma for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. The Public Works Department of the State of Jammu & Kashmir conducted a process of selection, for recruitment against the posts of Junior Engineer (Civil) Grade-II. Sat Pal, the respondent herein participated in the aforesaid process of selection. He was successful, inasmuch as, he figured in the final merit/select list of scheduled caste candidates, prepared at the culmination of the selection process. Having learnt that some scheduled cast candidates above him in the merit/select list had not joined inspite of having been offered appointment, Sat Pal addressed a representation to the appellants seeking appointment against an available vacancy. In his representation, he mentioned the name of Trilok Nath as one of the selected candidates, who had been offered appointment, but had not joined. In his representation, he also pointed out, that in the merit/select list pertaining for scheduled caste candidates, his name figured immediately after the name of the said Trilok Nath.

3. Since the representation filed by the respondent remained undecided, he approached the High Court of Jammu & Kashmir at Jammu (hereinafter referred to as, the High Court) by filing SWP no. 1156 of 2009. Before the High Court, the respondent Sat Pal reiterated the factual position asserted by him in his representation. To substantiate his assertion pertaining to Trilok Nath, that although the aforesaid Trilok Nath had been offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008, Trilok Nath had not joined against the same, he placed before the High Court a communication dated 5.5.2008 issued by the Chief Engineer

(R&B) Department, Jammu, narrating that Trilok Nath was not interested to join against the post of Junior Engineer (Civil) Grade-II.

4. Before the High Court, the respondent relied upon the prevalent rule, whereunder, a waiting list was valid for one year. The fact that the prevalent rules envisaged, that the merit list of candidates in continuation of those offered appointment, would constitute the waiting list, and would be valid for a period of one year, was not disputed even before us.

5. Despite the High Court having issued notice to the State Government in SWP no.1156 of 2009, and had required it to file pleadings, the State Government i.e., the appellants before this Court, did not file any objections. The right of the appellants to file objections was closed by an order dated 5.4.2010. In the aforesaid view of the matter, it was natural for the High Court to infer, that the assertions made by the respondent before it, were truthful and acceptable for a final determination of the controversy. Despite the aforesaid, the High Court disposed of the aforesaid writ petition at the admission stage, by directing the appointing authority to examine the claim of the respondent, for appointment against the post of Junior Engineer (Civil) Grade-II, by keeping in mind the communication dated 5.5.2008 issued by the Chief Engineer (R&B) Department, Jammu, affirming that Trilok Nath, who was offered appointment against the post under reference, had declined to join. The High Court required the appellants herein to take a final decision in respect of the appointment of the respondent, within a period of two months, from the date a copy of the order of the High Court was made available.

6. In compliance of the directions issued by the High Court vide order dated 9.8.2010 in SWP no. 1156 of 2009, the appellants passed an order on 23.8.2011. By the said order dated 23.8.2011, the claim of the respondent for appointment against the post of Junior Engineer (Civil) Grade-II was rejected for the following reasons:-

"(i) In view of the fact that the waiting list issued in respect of the recruitment has outlived its validity way back in May, 2008 itself, he cannot be granted appointment in accordance with the same.

(ii) And that for the abovesaid reason, vacancies cannot be filled at a belated stage."

7. Aggrieved by the rejection order dated 23.8.2011, rather than assailing the same by way of a fresh writ petition, the respondent filed Contempt (SWP) no. 157 of 2011. The aforesaid contempt petition was disposed of by the High Court vide order dated 29.10.2011, with the following observations:-

"The claim of the petitioner for his appointment as Junior Engineer (Civil) Grade-II arose during the validity of select list/wait list. The duty was cast on the competent authority, who was seized of the select list/wait list to fill up the vacancies from the wait list, but it failed to perform its duty. It is not the fault of the petitioner that his claim for appointment was not considered during the validity of select list/wait list. The fault is committed by the authority and the petitioner cannot penalized for the same. The claim of the petitioner on merits deserved to be allowed for being appointed on the post of Junior Engineer (Civil) Grade-II when select list/wait list was in operation. Same having not been done despite request having been made, his right of consideration for being appointed would thus survive though such claim was considered by the Government after the expiry of the validity period of select list/wait list.

Consideration order issued by the Government does not comply with the court directions. Before initiating action for framing rule in this contempt petition, it will be appropriate to afford an opportunity to the respondents to consider the whole issue and pass orders in accordance with judgment of the Court. Four week's time is granted to

the respondents to reconsider the whole issue in the light of the observations made hereinabove and file compliance report by or before next date."

8. The appellants herein were aggrieved by the order passed by the High Court in Contempt (SWP) no. 157 of 2011 filed by the respondent, since the appellants felt, that the directions in the nature recorded by the High Court (in the order extracted hereinabove), were not permissible in exercise of contempt jurisdiction. It is, therefore, that the appellants preferred a letters patent appeal (LPAC no.2 of 2012) to assail the order dated 29.10.2011 passed by the High Court in Contempt (SWP) no. 157 of 2011. The letters patent bench, by its order dated 3.4.2012, held the said letters patent appeal as not maintainable. The orders passed by the High Court dated 29.10.2011 and 3.4.2012 have been assailed by the appellants before this Court, by way of present appeals.

9. The controversy in hand is yet another illustration of the denial of a legitimate claim, of an innocent citizen. Rather than appreciating the claim raised by the respondent before the High Court through SWP no.1156 of 2009, to which the appellants failed to even file their response, the same was ordered to be closed by an order dated 5.4.2010. Thereupon appellants have chosen to pursue a course, which would sideline the main controversy. The course adopted would neither serve their own purpose, nor the purpose of the respondent Sat Pal.

10. It is not a matter of dispute, that the respondent Sat Pal participated in a process of selection for recruitment against the post of Junior Engineer (Civil) Grade-II. It is also not in dispute, that his name figured in the merit/select list of scheduled caste candidates. Trilok Nath, who had been offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008, did not join, despite the said offer of appointment. The instant fact is fully substantiated from the order dated 5.5.2008 issued by the Chief Engineer (R&B)

Department, Jammu. Even though candidates who were higher in merit, were offered appointment to the post of Junior Engineer (Civil) Grade-II, for which recruitment was held, some of such posts remained vacant on account of the fact that persons higher in merit to the respondent Sat Pal had declined to join, despite having been offered appointment. Atleast one such vacancy offered to Trilok Nath never came to be filled up. In such a situation, the claim of the respondent Sat Pal whose name figured in the merit/select list, ought to have been offered appointment against the said post. The claim of respondent Sat Pal could not have been repudiated, specially on account of his assertion, that his name in the merit/select list amongst Scheduled Caste candidates immediately below the name of Trilok Nath, was not disputed even in the pleadings before this Court. It is not the case of the appellants before this Court, that any other candidate higher than Sat Pal in the merit/select list is available out of Scheduled Caste candidates, and can be offered the post against which Trilok Nath had not joined.

11. In view of the factual position noticed hereinabove, the reason indicated by the appellants in declining the claim of the respondent Sat Pal for appointment out of the waiting list is clearly unjustified. A waiting list would start to operate only after the posts for which the recruitment is conducted, have been completed. A waiting list would commence to operate, when offers of appointment have been issued to those emerging on the top of the merit list. The existence of a waiting list, allows room to the appointing authority to fill up vacancies which arise during the subsistence of the waiting list. A waiting list commences to operate, after the vacancies for which the recruitment process has been conducted have been filled up. In the instant controversy the aforesaid situation for operating the waiting list had not arisen, because one of the posts of Junior Engineer (Civil) Grade-II for which the recruitment process was conducted was actually never filled up. For the reason that Trilok Nath had not assumed charge, one of the posts for which the process of recruitment was conducted, had

remained vacant. That apart, even if it is assumed for arguments sake, that all the posts for which the process of selection was conducted were duly filled up, it cannot be disputed that Trilok Nath who had participated in the same selection process as the respondent herein, was offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008. The aforesaid offer was made, consequent upon his selection in the said process of recruitment. The validity of the waiting list, in the facts of this case, has to be determined with reference to 22.4.2008, because the vacancy was offered to Trilok Nath on 22.4.2008. It is the said vacancy, for which the respondent had approached the High Court. As against the aforesaid, it is the acknowledged position recorded by the appellants in the impugned order dated 23.8.2011 (extracted above), that the waiting list was valid till May, 2008. If Trilok Nath was found eligible for appointment against the vacancy in question out of the same waiting list, the respondent herein would be equally eligible for appointment against the said vacancy. This would be the unquestionable legal position, in so far as the present controversy is concerned.

12. The date of filing of the representation by the parties concerned and/or the date on which the competent authority chooses to fill up the vacancy in question, is of no consequence whatsoever. The only relevant date is the date of arising of the vacancy. It would be a different legal proposition, if the appointing authority decides not to fill up an available vacancy, despite the availability of candidates on the waiting list. The offer made to Trilok Nath on 22.4.2008 by itself, leads to the inference that the vacancy under reference arose within the period of one year, i.e., during the period of validity of the waiting list postulated by the rules. The offer of the vacancy to Trilok Nath, negates the proposition posed above, i.e., the desire of the employer not to fill up the vacancy. Herein, the appellants wished to fill up the vacancy under reference. Moreover, this is not a case where the respondent was seeking appointment against a vacancy, over and above the posts for

which the process of selection/ recruitment was conducted. Based on the aforesaid inference, we have no hesitation in concluding that the appellants ought to have appointed the respondent Sat Pal, against the vacancy which was offered to Trilok Nath.

13. The issue arising for consideration herein, has already been adjudicated upon by this Court. In the first instance reference may be made to the decision rendered by this Court in *Virender S. Hooda v. State of Haryana* (1999) 3 SCC 696. In the instant case administrative instructions envisaged, that vacancies which came into existence within six months of the date of recommendation by the Public Service Commission, could be filled up from the earlier process of selection. The observations made by this Court on the instant issue, in the aforesaid background, are being extracted below:

> "…..The fact that there were further vacancies available and when 9 vacancies were advertised to be filled up within a period of six months after announcement of the previous selection cannot be disputed at all. In terms of the circulars issued by the Government on 22.3.1957 and 26.5.1972 when such vacancies arise within six months from the receipt of the recommendation of the Public Service Commission they have to be filled up out of the waiting list maintained by the Commission. In respect of the vacancies which arise after the expiry of six months it is necessary to send the requisition to the Commission. It is also made clear that if the Commission makes recommendations regarding a post to the Department and additional vacancies occur in the Department within a period of six months on the receipt of the recommendations, then the vacancies which occur later on can be filled in from amongst the additional candidates recommended by the Commission. It is urged on behalf of the appellants that letter dated 7.1.1992 indicated that the cadre strength in the Haryana Civil Service (Executive

> Branch) was 440 and the officers filling these posts were around 129 and there was a shortfall of 111 and 23 posts had to be filled up by direct recruitment. Thus 12 posts for direct recruitment were vacant when the advertisement for recruitment was made which was held in 1991. Therefore, the appellants' case ought to have been considered when some of the vacancies arose by reason of non-appointment of some of the candidates. Therefore, the Government ought to have considered the case of the appellants as per the rank obtained by them and the appellants had to be appointed if they came within the range of selection. Thus when these vacancies arise within the period of six months from the date of previous selection the circulars are attracted and hence the view of the High Court that vacancies arose after selection process commenced has no relevance and is contrary to the declared policy of the Government in the matter to fill up such posts from the waiting list."

This Court has also considered the same issue wherein there were no rules/administrative instructions for filling up vacancies from the waiting list. While examining the aforesaid issue this Court in *Mukul Saikia v. State of Assam,* (2009) 1 SCC 386, held as under:

> "At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The select list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17.7.2000 below the

persons who have been appointed on merit against the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointment beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularisation of the private respondents."

The determination rendered by this Court in the aforesaid judgments, substantiates the view expressed by us in the foregoing paragraphs.

14. It is in the background of the aforesaid factual and legal position, that the High Court recorded some observations in its order dated 29.10.2011 passed in Contempt (SWP no.157 of 2011). The aforesaid observations were advisory in nature. Rather than initiating action against the appellants for having missed the point, while considering the claim of the respondent in contempt jurisdiction, the High Court in its wisdom required the appellants to correct the mistake committed by the appellants. The High Court did not, in the first instance, initiate any coercive action against the appellants. In the aforesaid view of the matter it is apparent, that the appellants unnecessarily preferred a letters patent appeal to assail the order of the High Court dated 29.10.2011, on a technical plea, that the High Court in exercise of its contempt jurisdiction could not have dealt with the merits of the claim of the respondent. The same issue is being pursued now before us on technical grounds of maintainability of the letters patent appeal preferred by the appellants before the High Court (out of which the instant appeals have arisen).

15. In so far as the technical objections raised by the

appellants is concerned, reliance, in the first instance was placed by the learned counsel on *Prithawi Nath Ram v. State of Jharkhand & Others,* (2004) 7 SCC 261, wherein this Court opined, that a court in exercise of its contempt jurisdiction, dealing with an application alleging non compliance of its earlier order, could not examine the rightness or wrongness of that order, nor could it issue further directions. Reliance was also placed on *V.M. Manohar Prasad v. N. Ratnam Raju & Anr.,* (2004) 13 SCC 610, wherein this Court held, that a contempt court was precluded from adjudicating on the merits of a controversy by passing any supplemental order, in addition to the order non compliance of which, was the basis of initiating contempt proceedings. Finally, reliance was placed on *Midnapore Peoples' Coop. Bank Ltd. & Others v. Chunilal Nanda & Others* (2006) 5 SCC 399, dealing with the maintainability of an intra-court appeal against an order passed by the High Court in exercise of its contempt jurisdiction.

16. It is not as if the pleas raised at the hands of the appellants are not fully legitimate. In the facts and circumstances of this case, for reasons which would emerge from our instant order, we would decline to invoke the jurisdiction vested in us under Article 136 of the Constitution of India, for debating and deciding the technical pleas advanced by the appellants. We would rather invoke our jurisdiction under Article 142 of the Constitution of India for doing complete justice in the cause in hand. Entertaining the instant appeals would defeat the ends of justice for which the respondent Sat Pal had approached the High Court. Entertaining the objections filed by the appellants would result in deviating from the merits of the claim raised by the respondent Sat Pal, before the High Court.

17. It gives us no pleasure to record that the State is not an adversary, and ought not have behaved in the manner it has chosen in the facts and circumstances of this case. In the first instance, it failed to even file a response before the High Court, to the writ petition preferred by the respondent Sat Pal. The

matter could have been adjudicated on merits, had the High Court chosen to do so. In order to ensure that justice to the respondent was not delayed, the High Court considered it just and appropriate to direct the appointing authority to consider the claim of the respondent, consequent upon Trilok Nath having declined to join the post of Junior Engineer (Civil) Grade-II. Mainly because, the respondent Sat Pal had approached the High Court for relief, the appellants rejected his claim for wholly unreasonable grounds. Rather than focusing on the merits of the claim raised by respondent Sat Pal, the appellants chose to initiate proceedings which would deviate the legal process from the merits of the claim of respondent. Had we issued notice to respondent Sat Pal based on the technical pleas raised by the appellants, the respondent Sat Pal may not even have been in a position to defend himself before this Court. Litigation before this Court, is an expensive proposition. A poor scheduled caste candidate cannot be subjected to unnecessary harassment at the hands of the mighty State. It is for the aforesaid reasons, that the instant order is being passed, for doing complete justice in the instant cause.

18. In view of the factual and legal position discussed by us hereinabove, we are of the view, that in the facts and circumstances of this case, it would be just and appropriate to direct the appellants to appoint the respondent Sat Pal against the post of Junior Engineer (Civil) Grade-II. The aforesaid offer of appointment will relate back to the permissible date contemplated under the rules laying down conditions of service of the cadre to which the respondent Sat Pal will be appointed. Naturally, the respondent will be entitled to seniority immediately below those who were appointed from the same process of selection. Since Sat Pal has not discharged his duties, he would be entitled to wages only with effect from the date of the instant order.

19. Disposed of in the aforesaid terms.

K.K.T. Appeals disposed of.

SHRIRAMPUR MUNICIPAL COUNCIL, SHRIRAMPUR
v.
SATYABHAMABAI BHIMAJI DAWKHER AND OTHERS
(Civil Appeal No. 2733 of 2013 etc.)

APRIL 1, 2013.

[G.S. SINGHVI, H.L. GOKHALE AND RANJANA PRAKASH DESAI, JJ.]

Maharashtra Regional and Town Planning Act, 1966:

s.127 r/w s.126 – Land reserved not acquired/no steps commenced towards acquisition within six months of service of notice u/s 127 – Held: The reservation shall be deemed to have lapsed and the land shall be deemed to have been released from such reservation so as to enable the owner to develop the same – Steps towards acquisition would really commence when State Government takes active steps for acquisition of particular piece of land which leads to publication of declaration u/s 6 of 1894 Act – Expression "no steps as aforesaid" used in s. 127 of 1966 Act has to be read in the context of provisions of 1894 Act and mere passing of a resolution by Planning Authority or sending of a letter to Collector or even to State Government cannot be treated as commencement of proceedings for acquisition of land under 1966 Act or 1894 Act – Land Acquisition Act, 1894 – s.6.

In the instant appeals filed by the Municipal Council, the question for consideration before the Court was: whether reservation of the parcels of land owned by the respondents in the Regional plans/Development plans prepared under the Maharashtra Regional and Town Planning Act, 1966 would be deemed to have lapsed because the same were not acquired or no steps were commenced in that respect within six months of the service of notice u/s 127 of that Act.

Dismissing the appeals, the Court

HELD: 1.1 Section 126(1) of the Maharashtra Regional and Town Planning Act, 1966 lays down that when any land is required or reserved for any of the public purposes specified in any plan or scheme, the Planning Authority, Development Authority, or any Appropriate Authority can acquire the same as mentioned therein. Section 126(2) empowers the State Government to make a declaration u/s 6 of the Land Acquisition Act, 1894. Proviso to this sub-section fixes the time limit of one year for making such declaration. Section 126(3) lays down that on publication of a declaration u/s 6 of the 1894 Act, the Collector shall proceed to take order for the acquisition of the land under the 1894 Act and the provisions of that Act shall apply to such acquisition with the modification regarding market value as specified in Clauses (i) to (iii) of that sub-section. Section 126(4) contains a *non obstante* clause and provides that if a declaration is not made within the period referred to in sub-s. (2), or having been made, such period expired at the commencement of the Maharashtra Regional Town Planning (Amendment) Act, 1993, the State Government can make fresh declaration under the 1894 Act. [para 17] [686-A-B, E-H]

1.2 Section 127 of the 1966 Act lays down that if any land reserved, allotted or designated for any purpose specified in any plan prepared and sanctioned under the 1966 Act is not acquired by agreement within ten years from the date on which a final Regional plan or final Development plan comes into force or if proceedings for the acquisition of such land under the 1966 Act read with the 1894 Act are not commenced within that period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or Appropriate Authority to that effect. That section

further lays down that if the land is not acquired or no steps are commenced for its acquisition within six months from the date of service of notice, the reservation etc. shall be deemed to have lapsed and the land shall be deemed to have been released from such reservation etc. so as to enable the owner to develop the same. [para 17] [686-H; 687-A-D]

Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association **1988 SCR 21 =1988 (Supp) SCC 55;** *Girnar Traders v. State of Maharashtra* **(Girnar Traders II) 2007 (9) SCR 383 = 2007 (73) SCC 555; and** *Girnar Traders v. State of Maharashtra* **(Girnar Traders III) 2011 (3) SCR 1 = (2011) 3 SCC 1 – relied on.**

1.3 This Court is further of the view that the majority in *Girnar Traders (II)* had rightly observed that steps towards the acquisition would really commence when the State Government takes active steps for the acquisition of the particular piece of land which leads to publication of the declaration u/s 6 of the 1894 Act. Any other interpretation of the scheme of ss. 126 and 127 of the 1966 Act will make the provisions wholly unworkable and leave the landowner at the mercy of the Planning Authority and the State Government. [para 21] [698-F-G]

1.4 The expression "no steps as aforesaid" used in s. 127 of the 1966 Act has to be read in the context of the provisions of the 1894 Act and mere passing of a resolution by the Planning Authority or sending of a letter to the Collector or even the State Government cannot be treated as commencement of the proceedings for the acquisition of land under the 1966 Act or the 1894 Act. By enacting ss. 125 to 127 of the 1966 Act, the State Legislature has made a definite departure from the scheme of acquisition enshrined in the 1894 Act. But a holistic reading of these provisions makes it clear that while engrafting the substance of some of the provisions

of the 1894 Act in the 1966 Act and leaving out other provisions, the State Legislature has ensured that the landowners/other interested persons, whose land is utilized for execution of the Development plan/Town Planning Scheme, etc. are not left high and dry. This is the reason why time limit of ten years has been prescribed in s. 31(5) and also u/ss 126 and 127 of the 1966 Act for acquisition of land, with a stipulation that if the land is not acquired within six months of the service of notice u/s 127 or steps are not commenced for acquisition, reservation of the land will be deemed to have lapsed. [para 22] [698-H; 699-A-E]

1.5 There is no conflict between the judgments of the two-Judge Bench in *Dr. Hakimwadi Tenants' Association* **and the majority judgment in** *Girnar Traders (II).* **In both the cases, this Court emphasized that if any private land is shown as reserved, allotted or designated for any purpose specified in any Development plan, the same may be acquired within ten years either by agreement or by following the procedure prescribed under the 1894 Act, and if proceedings for the acquisition of land are not commenced within that period and a further period of six months from the date of service of notice u/s 127 of the 1966 Act, then the land shall be deemed to have been released from such reservation, allotment, etc. Further, the observations contained in paragraph 133 of** *Girnar Traders (III) unequivocally* **support the majority judgment in *Girnar Traders (II).* [para 20 and 24] [697-H; 698-A-B; 705-D-E]**

1.6 This Court, therefore, holds that the majority judgment in *Girnar Traders (II)* **lays down correct law and does not require reconsideration by a larger Bench. It is further held that the orders impugned in the instant appeals are legally correct and do not call for interference by this Court. [para 25] [705-E]**

Case Law Reference:

2007 (9) SCR	**relied on**	**para 3.6**
1988 SCR 21	**relied on**	**para 13**
2011 (3) SCR 1	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2733 of 2013.

From the Judgment and Order dated 30.03.2009 of the High Court of Judicature at Bombay, bench at Aurangabad in Writ Petition No. 4774 of 2006.

WITH

C.A. Nos. 2735, 2736, 2739, 2741, 2742, 2747, 2748, 2749 & 2750 of 2013.

Shekhar Naphade, Vibhu Bhakru, Atul Y. Chitale, V.V. Giri, R. Balasubramanian, Ravindra K. Adsure, Jayashree Wad, Ashish Wad, Mayank K. Sagar, Vinay Navare, Satyajeet Kumar, Abha R. Sharma, Manish Pitale, C.S. Ashri, M.P. Jha, Ram Eqbal Roy, Harshvardhan Jha, Karan Kanwal, Suchitra A. Chitale, Sudhanshu S. Choudhari, Rajshri Duvey, Narendra Kumar, Pravesh Thakur, Viraj Kadam, Sidaarth Shinde, D.M. Nargolkar, M.Y. Deshmukh, Abhijeet B. Kale, Yatin M. Jagtap. Shrikant R. Deshmukh, Shivaji M. Jadhav, Shankar Chillarge, Asha Gopalan Nair for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. The question which arises for consideration in these appeals is whether reservation of the parcels of land owned by the respondents in the Regional plans/Development plans prepared under the Maharashtra Regional and Town Planning Act, 1966 (for short, 'the 1966 Act') will be deemed to have lapsed because the same were not acquired or no steps were commenced in that respect within six months of the service of

notice under Section 127 of that Act.

3. For the sake of convenience, we shall first notice the facts from the record of the appeal arising out of SLP(C) No. 9934/2009.

3.1 Respondent Nos. 1 to 5 are the owners in possession of the land comprised in Gat Nos. 44/1/2 and 44/1/4, CTS No. 2141 measuring about 2 hectares and 40 ares situated at Shrirampur Taluka, Shrirampur (Maharashtra).

3.2 In the Development plan prepared for Shrirampur under the 1966 Act, which was sanctioned by Director of Town Planning, Maharashtra vide order dated 9.8.1991 and enforced with effect from 31.10.1991, the land of respondent Nos. 1 to 5 was shown as reserved for primary school and playground. However, the same was not acquired in accordance with the provisions of Section 126 of the 1966 Act read with the Land Acquisition Act, 1894 (for short, 'the 1894 Act').

3.3 After eleven and a half years of the reservation of their land, respondent Nos. 1 to 5 issued purchase notice dated 29.5.2003 under Section 127 of the 1966 Act, which was duly served upon the Chief Officer of the appellant – Shrirampur Municipal Council, Shrirampur. The relevant portions of the notice are extracted below:

"PURCHASE NOTICE
UNDER SECTION 127

Date:- 29.5.2003

To,

Hon. Chief Officer,
Nagar Parishad, Shrirampur,
Dist. Ahmednagar

Reference:-Development Plan (R) Shrirampur approved

Subject:- Purchase Notice Under Section 127 of

Maharashtra Regional and Town Planning Act, 1966.

We, the undersigned

1] Shrimati Satyabhamabai Bhimaji Dawkhar, Age - 70, Occupation - Farming, House work,

2) Alka Shivaji Dawkher, age 47 years, Occupation - household 86 Agril

3) Sudhil Shivaji Dawkher, age 28 years, Occupation : Agril

4) Vijay Shivaji Dawkher, age 26 years, Occupation : Agril

5) Rushikesh Shivaji Dawkher, age 24 years, Occupation: Agril

All R/o Mahadeo Mala, Shrirampur, Ward No. 7, Dist. Ahmednagar.

Hereby give notice under Section 127 of the above stated Act that, the land located within the city limits of Shrirampur out of Gat No.44 admeasuring approx. 2.5 Hectare is owned by me and it has been reserved as Reservation No.40 in Town Planning Scheme No.4. This reservation has been reserved approx. 1 Acre for play ground. The sanctioned Development Plan (R) Shrirampur of Shrirampur City has been granted final sanction by the Director, Town Planning (State) Pune vide their notification no. D. P. Shrirampur (Part) R/TPV 4-2837 Dated 31/12/91 and although more than 10 years duration has passed after getting the final sanction to the Development Plan the Nagar Parishad has taken no action to acquire the said land.

Through this notice you are being notified that, in case of your failure to take suitable action to acquire the said land within 6 months of the receipt of the said notice the land

under reservation in Gat no. 44 shall become free from reservation. Please take note. The said notice is being issued in this behalf."

3.4 The notice issued by respondent Nos.1 to 5 was considered in the meeting of the General Body of the appellant held on 30.8.2003 and the following resolution was passed:

"It is seen from the note submitted on the above subject that the land bearing Gat No. 44, CTS No.2141 (part) within the Municipal Limit is owned by Smt. Satyabhamabai Davkhar, out of which 4815 sq.mtr. of area is reserved for Play Ground, vide reservation No.40 and for Primary School & Play Ground, vide reservation No.41. Since the Municipal Council has not acquired the land under said reservations after 10 years of sanction of Development Plan, the land owner Smt. Davkhar has served the purchase notice under section 127 of Maharastra Regional and Town Planning Act, 1966.

The above referred lands are included in Town Planning Scheme No.IV. But the above reservations are not included in Draft sanctioned Town Planning Scheme No. IV. And hence the notice served by the owner is tenable and also if the land acquisition proposal is not submitted to the Collector within the period of Six months from the date of issue of notice the land will be released from reservations.

Therefore, by passing this Resolution the sanction is given to initiate the land acquisition process for the above two reserved sites. And accordingly the proposal should be submitted immediately to the Collector, Ahmednagar. The expenses that would be required for the land acquisition and to take possession and the allied expenses are also hereby allowed."

3.5 In furtherance of the aforesaid resolution, the President of the appellant sent communication dated 24.12.2003 to

Collector, Ahmednagar and requested him to take action for the acquisition of land comprised in Gat No. 44, CTS No. 2141 (part). The Collector sought clarification on some issues. The appellant did the needful vide letter dated 9.2.2004. Thereafter, land was got measured through City Survey Officer and proposal dated 25.1.2007 was submitted to the Collector for its acquisition. The Collector passed order dated 17.4.2007 under Section 52-A of the 1894 Act and authorized Sub-Divisional Officer, Shrirampur to take the necessary steps.

3.6 In the meanwhile, respondent Nos. 1 to 5 filed Writ Petition No. 4774/2006 for grant of a declaration that the reservation of their land stood lapsed in November, 2003 because the same had not been acquired within six months of the service of notice under Section 127 of the 1966 Act. In support of their plea, respondent Nos. 1 to 5 relied upon the judgment of this Court in *Girnar Traders v. State of Maharashtra and Others* (2007) 7 SCC 555 (hereinafter referred to as 'Girnar Traders II') and of the Division Bench of the Bombay High Court in *Shivram Kondaji Sathe and Others v. State of Maharashtra and Others* 2009 (2) ALL MR 347.

3.7 The appellant contested the writ petition and pleaded that in terms of resolution dated 30.8.2003, a proposal had been sent to the Collector for the acquisition of land belonging to respondent Nos. 1 to 5 and vide order dated 17.4.2007, the latter authorised the Sub-Divisional Officer to do the needful.

3.8 The Division Bench of the High Court relied upon the judgments in *Shivram Kondaji Sathe and Others v. State of Maharashtra and Others* (supra) and *Satyabhamabai v. State of Maharashtra and Others* (2008) 1 ALL MR 399 as also the judgment of this Court in Girnar Traders (II) and held that reservation of the land in question will be deemed to have lapsed because no steps were taken for acquisition thereof within six months of the receipt of purchase notice. The High Court also directed the appellant to de-reserve the land so as to enable the respondents to develop the same.

4. We may now briefly notice the facts from the other appeals.

Appeal arising out of SLP(C)No.8756/2009

4.1 Respondent Nos. 1 to 4 are the owners in possession of land comprised in Gat No.92 (part) admeasuring 45,983 square meters situated at Shirasgaon within the municipal boundary of the appellant. In the Development plan, 6,360 square meters land belonging to respondent Nos.1 to 4 was shown as reserved for playground. They issued purchase notice dated 20.6.2002 under Section 127 of the 1966 Act. Thereafter, the General Body of the appellant passed resolution dated 3.8.2002 for sending a proposal to the District Collector for initiation of the acquisition proceedings. After six months, the appellant sent detailed proposal dated 6.12.2002 to the District Collector for acquiring the land, but no concrete step was taken in that regard.

4.2 Writ Petition No. 3626/2006 was filed by respondent Nos. 1 to 4 for de-reservation of their land on the ground that the same had not been acquired within ten years of enforcement of the Development plan and expiry of six months counted from the date of receipt of purchase notice. The Division Bench of the High Court referred to the judgment of this Court in Girnar Traders (II) and allowed the writ petition by making the following observations:

> "In face of clear dictum of the Supreme Court we have no hesitation in rejecting the contention raised on behalf of Respondents that they started acquisition proceedings after receipt of purchase notice under Section 127 of the said Act within time. In fact when the present Writ Petition came up for admission after long period from the date of filing, counsel appearing on behalf of Respondents informed that till this date acquisition proposal is pending with the Collector. To that effect we can safely rely on letter dated 21/7/2006 from -Respondent No.5 to Respondent

> No.2 forwarding some documents for the purpose of starting acquisition proceedings in respect of Petitioners' plot of land. Said letter is at page 36 in the present Petition. Even though Respondent No.5 filed their affidavit in reply dated 21/11 /2006 nowhere they stated that they complied the notice under Section 127 of the said Act issued by the Petitioners. Therefore, it is crystal clear that the Respondents failed to acquire the Petitioners' property in question within particular time as per MRTP Act."

Appeal arising out of SLP(C)No.9617/2009

5. The facts of this appeal are identical to the appeal arising out of SLP(C) No.9934/2009. The only difference is that this appeal pertains to the land comprised in Gat No.44/2 admeasuring 5,536 square meters.

Appeal arising out of SLP(C)No.13280/2009

6. Delay condoned.

6.1 In the Development plan for Greater Mumbai, which was sanctioned on 23.12.1991, land comprised in CS 231 and 1/231, Byculla Division, Maulana Azad Road, E-Ward, Mumbai admeasuring 2,526.78 square meters was shown as reserved for recreation ground.

6.2 Respondent No.1 Prabhat (Stove and Lamp) Products Company Pvt. Ltd., which owns the land, issued purchase notice dated 7.12.2005 to the Planning Authority, i.e., Municipal Corporation of Greater Mumbai (MCGM) under Section 127 of the 1966 Act. There is some dispute about receipt of the notice by the competent authority but it is an admitted position that vide letter dated 15.12.2005, the Municipal Commissioner of MCGM asked the Improvement Committee to initiate the acquisition proceedings. On 3.6.2006, the Planning Authority submitted a proposal to the State Government for taking action in accordance with Section 126(1)(c) of the 1966 Act. The State Government issued notification dated 19.1.2007 under Section

126(2) and (4) of the 1966 Act read with Section 6 of the 1894 Act.

6.3 Writ Petition No. 2303/2007 filed by respondent Nos. 1 and 2 for quashing Notification dated 19.1.2007 was allowed by the High Court by relying upon the judgment of this Court in Girnar Traders (II).

Appeal arising out of SLP(C)No.34943/2012

7.1 In the Development plan sanctioned for Pune Municipal Corporation, which was notified on 5.1.1997, Plot No. 59, Gat No.17 situated at Kondhwa Khurd, Pune admeasuring 4,400 square meters was shown as reserved for construction of children's park.

7.2 Respondent – Sahyadri Land Development Corporation, which owned the land, issued purchase notice dated 17.6.2010 under Section 127 of the 1966 Act, but the Planning Authority did not take steps for the acquisition of land. Writ Petition No. 4457/2011 filed by the respondent was allowed by the High Court by relying upon the judgment of this Court in Girnar Traders (II) and the respondent was allowed to develop the land.

Appeal arising out of SLP(C)No.36117/2012

8.1 In the Development plan sanctioned for Pune Municipal Corporation, plot bearing CTS No.1135 (old 54) owned by respondent Nos.1 and 2 situated at Sadashiv Peth was shown as reserved for children's playground. After three years, the Commissioner inspected the site and opined that the same was not suitable for the purpose for which it was shown as reserved. Thereupon, the Corporation passed resolution dated 19.4.1990 for de-reservation of the plot. The State Government sanctioned the de-reservation in September, 1992 and directed the Commissioner of the Corporation to take necessary action under Section 37 of the 1966 Act. The latter issued notice dated

18.5.1995 and invited objections against the proposed de-reservation of the plot and its inclusion in the residential zone. However, no final decision was taken in the matter in view of circular dated 21.12.1995 issued by the State Government.

8.2 After 14 years, the Standing Committee of the Corporation, in its meeting held on 2.6.2009, decided to take steps for the acquisition of land belonging to respondent Nos. 1 and 2. This decision was approved by the General Body of the Corporation vide resolution dated 23.7.2009. In compliance of that resolution, Deputy Chief Engineer of the Corporation sent letter dated 10.8.2009 to the Special Land Acquisition Officer to sanction initiation of the acquisition proceedings. On 20.5.2010, respondent Nos. 1 and 2 issued purchase notice under Section 127 of the 1966 Act. Thereafter, they filed Writ Petition No.9895/2011 for grant of a declaration that reservation of their plot has lapsed because the same was not acquired within six months of the receipt of purchase notice. The Division Bench of the High Court allowed the writ petition and declared that reservation of land belonging to respondent Nos. 1 and 2 will be deemed to have lapsed because steps were not taken for acquisition thereof.

Appeal arising out of SLP(C)No.36213/2012

9. The facts of this appeal are substantially similar to that of the appeal arising out of SLP (C) No. 36117/2012 except that the plot owned by respondent Nos.1 to 5 is CST No.1134, Sadashiv Peth, Pune admeasuring 567.72 square meters whereas the plot which is subject matter of the other SLP is CST No.1135, Sadashiv Peth, Pune. The reservation of CST No.1134 was for children's playground. The High Court allowed Writ Petition No.9895/2011 filed by respondent Nos.1 to 5 on the ground that the land had not been acquired within six months of the receipt of purchase notice issued under Section 127 of the 1966 Act.

Appeal arising out of SLP(C)No.25742/2012

10. In the Development plan of Shrirampur (part) (revised), land bearing Gat No.108 (74 Are) belonging to respondent No.1 was shown as reserved for garden and he was given alternative plot in Gat No.92 (part). However, that Gat was also reserved for playground/stadium. After nine years, the State Government in exercise of the power vested in it under Section 86 (1) of the 1966 Act sanctioned the Town Planning Scheme. Respondent No.1 issued notice dated 5.1.2002 under Section 127 of the 1966 Act. The same was received in the office of the appellant on 8.1.2002. The General Body of the appellant passed resolution dated 2.5.2002 whereby approval was accorded to the acquisition of land comprised in Gat No.92 (part). Accordingly, letter dated 28.6.2002 was sent to District Collector, Ahmednagar for initiation of the acquisition proceedings. Writ Petition No.3399/2007 filed by respondent No.1 for grant of a declaration that reservation of his plot had lapsed on account of the Planning Authority's failure to take steps for the acquisition of land within six months of the receipt of purchase notice was allowed by the Division Bench of the High Court vide order dated 27.7.2012.

Appeal arising out of SLP(C)No.26103/2012

11. In the Development plan of Shrirampur, Gat Nos. 91 and 92 (part) belonging to respondent Nos.1 to 4 were shown as reserved for vegetable market and shopping centre and also for library and cultural centre. The Town Planning Scheme was sanctioned by the State Government on 22.9.1999. Some of the owners issued purchase notice dated 2.8.2002. Thereupon, the General Body of the appellant passed resolution dated 14.10.2002 for commencement of the acquisition proceedings. On 27.1.2003, the appellant sent requisition to the District Collector for the acquisition of land owned by respondent Nos.1 to 4. Writ Petition No.1314/2012 filed by them was allowed by the Division Bench of the High Court on 26.7.2012 and it was declared that the reservation of their land had lapsed because of the Planning Authority's failure to acquire the land within six months of the receipt of purchase notice.

Appeal arising out of SLP(C).....CC No.17030/2012

12. Delay condoned.

12.1 The factual matrix of the case is similar to the appeal arising out of SLP (C) No.26103/2012. Respondent Nos.1 and 2 issued purchase notice, which was received by the competent authority sometime in December, 2007. In the next six months no steps were taken for the acquisition of land. Therefore, by applying the ratio of Girnar Traders (II), the High Court declared that the reservation of the land belonging to respondent Nos.1 and 2 has lapsed.

Arguments

13. Shri Shekhar Naphade, learned senior counsel appearing for some of the appellants, argued that the majority judgment in Girnar Traders (II) deserves to be considered by a larger Bench because the same is contrary to the plain language of Section 127 of the 1966 Act and the earlier judgment in *Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association* 1988 (Supp) SCC 55. Learned senior counsel then referred to the order reported as *Poona Timber Merchants and Saw Mill Owners Association v. State of Maharashtra and Others* 2008 (4) SCALE 737 and other orders by which directions were given for hearing of some of the special leave petitions along with Civil Appeal No.3703/2003 and Civil Appeal No. 3922/2007 and argued that in view of the judgment of the Constitution Bench in *Girnar Traders v. State of Maharashtra* (2011) 3 SCC 1 (hereinafter referred to as 'Girnar Traders (III)'), the question arising in these appeals should be referred to a Constitution Bench. Shri Naphade further argued that the reservation of the respondents' land cannot be treated to have lapsed on the expiry of six months from the date of receipt of purchase notices because in the meanwhile, the

appellants had passed resolutions and sent communications to the District Collector to commence the acquisition proceedings and this amounted to taking of steps within the meaning of Section 127 read with Section 126(1)(c) of the 1966 Act. Learned senior counsel submitted that the expression "no steps as aforesaid are commenced" appearing in Section 127 must take their colour from Clause (c) of Section 126(1) and, therefore, making of an application by the Planning Authority or sending of a communication to the District Magistrate to start the acquisition proceedings must be treated as sufficient to avert the consequence envisaged under Section 127 of the 1966 Act. Shri Naphade relied upon the Constitution Bench judgment in Girnar Traders (III) and argued that in view of the proposition laid down therein that Section 11A of the 1894 Act, which provides that the acquisition proceedings will lapse if the award is not passed within two years from the date of publication of the declaration made under Section 6(1) of that Act, is not applicable to the scheme of the 1966 Act, the period of six months specified in Section 127 of that Act cannot be treated as sacrosanct and there cannot be deemed lapsing of the reservation merely because the State Government and/or its delegate fails to initiate proceedings for the acquisition of land covered by the Regional plan/Development plan. Other learned counsel adopted the arguments of Shri Naphade.

14. Learned counsel for the private respondents supported the impugned orders and argued that the majority view in Girnar Traders (II) cannot be ignored on the ground that it is inconsistent with the earlier judgment in *Dr. Hakimwadi Tenants' Association* (supra) because that judgment had been considered and explained in the subsequent judgment.

Relevant Provisions

15. Section 2 of the 1966 Act contains definitions of various terms including 'Development Authority', 'Development plan', 'local authority', and 'Planning Authority'. Section 21(1) imposes a duty on every Planning Authority to carry out a survey, prepare

an existing land-use map and a draft Development plan for the area within its jurisdiction in accordance with the provisions of a Regional plan, where there is such a plan and submit the same to the State Government for sanction. Section 21(2) lays down that every Planning Authority constituted after the commencement of the Act shall prepare a draft Development plan within a maximum period of three years. Section 21(4) provides that if the Planning Authority fails to perform its duty in accordance with Section 21(1) or (2), an officer appointed by the State Government shall do the needful and recover the cost thereof from the funds of the Planning Authority. Section 22 enumerates the contents of a Development plan. Clauses (b) and (c) of that section read as under:

> "**22. Contents of Development Plan.-** A Development plan shall generally indicate the manner in which the use of land in the area of the Planning Authority shall be regulated, and also indicate the manner in which the development of land therein shall be carried out. In particular, it shall provide so far as may be necessary for all or any of the following matters, that is to say,-
>
> (b) proposals for designation of land for public purpose, such as schools, colleges and other educational institutions, medical and public health institutions, markets, social welfare and cultural institutions, theatres and places for public entertainment, or public assembly, museums, art galleries, religious buildings and government and other public buildings as may from time to time be approved by the State Government;
>
> (c) proposals for designation of areas for open spaces, playgrounds, stadia, zoological gardens, green belts, nature reserves, sanctuaries and dairies;"

Sections 23 to 31 lay down the procedure to be followed in the preparation and sanction of Development plans. Section 25 prescribes the outer limit of six months, counted from the date

of the declaration of intention of a Planning Authority to prepare a Development plan for the purpose of carrying out a survey of the lands within its jurisdiction and preparation of an existing land-use map. Section 26 prescribes an outer limit of two years from the date of publication of notice under Section 23 for preparation of a draft Development plan and publication of notice in the Official Gazette. In either case, the State Government can extend the time prescribed by the statute subject to the condition that the time specified in Section 26 cannot be extended for more than six months in aggregate. Section 28(4) (un-amended) contained a limitation of three months within which the Planning Committee was required to consider the report of the Planning Authority or the concerned officer including the objections and suggestions received by it or him. In terms of Section 30, the Planning Authority is required to submit the draft Development plan to the State Government within a period of twelve months. Section 31 (un-amended) laid down an outer limit of one year for sanction or return of the draft Development plan. Proviso to Section 31(1) empowered the State Government to extend the period for sanction of the draft Development plan or refusal thereof. Section 31(5) lays down that if a Development plan contains any proposal for the designation of any land for a purpose specified in Clauses (b) and (c) of Section 22 and if such land does not vest in the Planning Authority, the State Government shall not include that land in the Development plan, unless it is satisfied that the Planning Authority will be able to acquire the same by private agreement or compulsory acquisition within a period of 10 years from the date on which the Development plan comes into operation. Section 32 postulates preparation of interim Development plan and Section 33 provides for plan or plans showing proposals for development of any area or areas. Section 34 postulates preparation of a Development plan for additional area. Section 35 contains a fiction and provides that a Development plan duly sanctioned by the State Government before the commencement of the 1966 Act shall be deemed to be a final Development plan. Section 37 contains the

procedure for modification of the final Development plan. Section 38 lays down that the Development plan should be revised at least once in 20 years. If the State Government so directs, the Development plan can be revised even before the expiry of 20 years. Chapter IV of the 1966 Act (Sections 43 to 58) contains provisions relating to control of development and use of land included in the Development plans. Chapter V (Sections 59 to 112) deals with Town Planning Schemes and Chapter VII (Sections 125 to 129) contains provisions for compulsory acquisition of land needed for a Regional plan, Development plan or Town Planning Scheme.

16. Section 126, which provides for the acquisition of land required or reserved for any of the public purposes specified in any plan or scheme prepared under the 1966 Act and Section 127, which envisages lapsing of reservation in certain contingencies read as under:

"**Section 126. Acquisition of land required for public purposes specified in plans**. - (1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority may, except as otherwise provided in section 113A acquire the land,-

(a) by an agreement by paying an amount agreed to, or

(b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in the Land

Acquisition Act, 1894, Floor Space Index (FSI) or Transferable Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost, as the Final Development Control Regulations prepared in this behalf provide, or

(c) by making an application to the State Government for acquiring such land under the Land Acquisition Act, 1894,

and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this section or under the Land Acquisition Act, 1894, as the case may be, shall vest in the Planning Authority. Development Authority, or as the case may be, any Appropriate Authority.

(2) On receipt of such application, if the State Government is satisfied that the land specified in the application is needed for the public purpose therein specified, or if the State Government (except in cases falling under section 49 and except as provided in section 113A) itself is of opinion that any land in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in section 6 of the Land Acquisition Act, 1894 (1 of 1894), in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:

Provided that, subject to the provisions of sub-section (4), no such declaration shall be made after the expiry of one year from the date of publication of the draft Regional Plan,

Development Plan or any other Plan, or Scheme, as the case may be.

(3) On publication of a declaration under the said section 6, the Collector shall proceed to take order for the acquisition of the land under the said Act; and the provisions of that Act shall apply to the acquisition of the said land, with the modification that the market value of the land shall be,-

(i) where the land is to be acquired for the purposes of a new town, the market value prevailing on the date of publication of the notification constituting or declaring the Development Authority for such town;

(ii) where the land is acquired for the purposes of a Special Planning Authority, the market value prevailing on the date of publication of the notification of the area as an undeveloped area; and

(iii) in any other case the market value on the date of publication of the interim development plan, the draft development plan, or the plan for area or areas for comprehensive development, whichever is earlier, or as the case may be, the date or publication of the draft town planning scheme:

Provided that, nothing in this sub-section shall affect the date for the purposes of determining the market value of land in respect of which proceedings for acquisition commenced before the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972 (Mah. XI of 1973):

Provided further that, for the purpose of clause (ii) of this sub-section, the market value in respect of land included in any undeveloped area notified under subsection (1) of section 40 prior to the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act,

1972 (Mah. XI of 1973), shall be the market value prevailing on the date of such commencement.

(4) Notwithstanding anything contained in the proviso to sub-section (2) and in subsection (3), if a declaration is not made within the period referred to in subsection (2) or having been made, the aforesaid period expired at the commencement of the Maharashtra Regional Town Planning (Amendment) Act, 1993, the State Government may make a fresh declaration for acquiring the land under the Land Acquisition Act, 1894 (I of 1894), in the manner provided by sub-sections (2) and (3) of this section, subject to the modification that the market value of the land shall be the market value at the date of declaration in the Official Gazette made for acquiring the land afresh.

Section 127. Lapsing of reservation –

If any land reserved, allotted or designated for any purpose specified in any plan under this Act is not acquired by agreement within ten years from the date on which a final Regional plan, or final Development plan comes into force or if proceedings for the acquisition of such land under this Act or under the Land Acquisition Act, 1894 (1 of 1894), are not commenced within such period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or as the case may be, Appropriate Authority to that effect, and if within six months from the date of service of such notice, the land is not acquired or no steps as aforesaid are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed, and thereupon, the land shall be deemed to be released from such reservation, allotment or designation and shall become available to the owner for the purpose of development as otherwise, permissible in the case of adjacent land under the relevant plan."

Analysis of Sections 126 and 127 of the 1966 Act

17. Section 126(1) lays down that when any land is required or reserved for any of the public purposes specified in any plan or scheme, the Planning Authority, Development Authority, or any Appropriate Authority can acquire the same by an agreement by paying an agreed amount, or by granting the landowner or the lessee Floor Space Index or Transferable Development Rights in lieu of the area of land surrendered free of cost and free from all encumbrances and further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenities on the surrendered land at his cost, or by making an application to the State Government for acquiring such land under the 1894 Act. Once the land is acquired by an agreement under Section 126(1)(a) or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under Section 126(1)(b) or under the 1894 Act, the same vests in the Planning Authority, Development Authority or Appropriate Authority, as the case may be. Section 126(2) empowers the State Government to make a declaration under Section 6 of the 1894 Act. Proviso to this sub-section fixes the time limit of one year for making such declaration. Section 126(3) lays down that on publication of a declaration under Section 6 of the 1894 Act, the Collector shall proceed to take order for the acquisition of the land under the 1894 Act and the provisions of that Act shall apply to such acquisition with the modification regarding market value as specified in Clauses (i) to (iii) of that sub-section. Section 126(4) contains a *non obstante* clause and provides that if a declaration is not made within the period referred to in sub-section (2), or having been made, such period expired at the commencement of the Maharashtra Regional Town Planning (Amendment) Act, 1993, the State Government can make fresh declaration under the 1894 Act. This is subject to the rider that in such an event, market value of the acquired land shall be determined with reference to the date of fresh declaration. Section 127 speaks of lapsing of reservation. It

lays down that if any land reserved, allotted or designated for any purpose specified in any plan prepared and sanctioned under the 1966 Act is not acquired by agreement within ten years from the date on which a final Regional plan or final Development plan comes into force or if proceedings for the acquisition of such land under the 1966 Act read with the 1894 Act are not commenced within that period, the owner or any person interested in the land may serve notice on the Planning Authority, Development Authority or Appropriate Authority to that effect. That section further lays down that if the land is not acquired or no steps are commenced for its acquisition within six months from the date of service of notice, the reservation etc. shall be deemed to have lapsed and the land shall be deemed to have been released from such reservation etc. so as to enable the owner to develop the same.

18. The scope of Sections 126 and 127 of the 1966 Act was considered by a two-Judge Bench in *Dr. Hakimwadi Tenants' Association* (supra). The facts of that case were that the Planning Authority had published a draft Development plan in respect of 'D' ward showing the property belonging to late Dr. Eruchshaw Jamshedji Hakim as reserved for recreation ground. The final Development plan was made effective from 7.2.1967. However, no action was taken for the acquisition of land. The owner served purchase notice dated 1.7.1977 on the Commissioner of the Corporation. After about six months, the Corporation passed resolution dated 10.1.1978 for the acquisition of land and sent an application to the State Government for taking necessary steps. Thereupon the State Government issued Notification dated 7.4.1978 under Section 6 of the 1894 Act. The writ petition filed by Dr. Hakimwadi Tenants' Association for quashing the notification was allowed by the learned Single Judge of the Bombay High Court, who held that the acquisition proceedings commenced by the State Government under Section 126(2) at the instance of the Planning Authority were not valid because steps were not taken for the acquisition of land under Section 126(1) of the 1966 Act

read with Section 6 of the 1894 Act within the prescribed time. The learned Single Judge observed that the period of six months prescribed under Section 127 began to run from the date of service of purchase notice and the Corporation had to take steps to acquire the property before 4.1.1978, which was not done. The Division Bench of the High Court approved the view taken by the learned Single Judge and held that the most crucial step was the application to be made by the Corporation to the State Government under Section 126(1) of the 1966 Act for the acquisition of land and such step ought to have been taken within the period of six months commencing from 4.7.1977. This Court expressed agreement with the counsel for the Corporation that the words 'six months from the date of service of such notice' used in Section 127 of the 1966 Act were not susceptible to a literal construction, but observed:

> "8. ……it must be borne in mind that the period of six months provided by Section 127 upon the expiry of which the reservation of the land under a Development Plan lapses, is a valuable safeguard to the citizen against arbitrary and irrational executive action. Section 127 of the Act is a fetter upon the power of eminent domain. By enacting Section 127 the legislature has struck a balance between the competing claims of the interests of the general public as regards the rights of an individual."
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> (emphasis supplied)

The Court then made detailed analysis of Section 127 of the 1966 Act and held:

> "10. Another safeguard provided is the one under Section 127 of the Act. It cannot be laid down as an abstract proposition that the period of six months would always begin to run from the date of service of notice. The Corporation is entitled to be satisfied that the purchase notice under Section 127 of the Act has been served by

the owner or any person interested in the land. If there is no such notice by the owner or any person, there is no question of the reservation, allotment or designation of the land under a development plan of having lapsed. It a fortiori follows that in the absence of a valid notice under Section 127, there is no question of the land becoming available to the owner for the purpose of development or otherwise. In the present case, these considerations do not arise. We must hold in agreement with the High Court that the purchase notice dated July 1, 1977 served by Respondents 4-7 was a valid notice and therefore with the failure of the appellant to take any steps for the acquisition of the land within the period of six months therefrom, the reservation of the land in the Development Plan for a recreation ground lapsed and consequently, the impugned notification dated April 7, 1978 under Section 6 of the Land Acquisition Act issued by the State Government must be struck down as a nullity.

11. Section 127 of the Act is a part of the law for acquisition of lands required for public purposes, namely, for implementation of schemes of town planning. The statutory bar created by Section 127 providing that reservation of land under a development scheme shall lapse if no steps are taken for acquisition of land within a period of six months from the date of service of the purchase notice, is an integral part of the machinery created by which acquisition of land takes place. The word "aforesaid" in the collocation of the words "no steps as aforesaid are commenced for its acquisition" obviously refer to the steps contemplated by Section 126(1). The effect of a declaration by the State Government under sub-section (2) thereof, if it is satisfied that the land is required for the implementation of a regional plan, development plan or any other town planning scheme, followed by the requisite declaration to that effect in the official Gazette, in the manner provided by Section 6 of the Land

Acquisition Act, is to freeze the prices of the lands affected. The Act lays down the principles of fixation by providing firstly, by the proviso to Section 126(2) that no such declaration under sub-section (2) shall be made after the expiry of three years from the date of publication of the draft regional plan, development plan or any other plan, secondly, by enacting sub-section (4) of Section 126 that if a declaration is not made within the period referred to in sub-section (2), the State Government may make a fresh declaration but, in that event, the market value of the land shall be the market value at the date of the declaration under Section 6 and not the market value at the date of the notification under Section 4, and thirdly, by Section 127 that if any land reserved, allotted or designated for any purpose in any development plan is not acquired by agreement within 10 years from the date on which a final regional plan or development plan comes into force or if proceedings for the acquisition of such land under the Land Acquisition Act are not commenced within such period, such land shall be deemed to be released from such reservation, allotment or designation and become available to the owner for the purpose of development on the failure of the Appropriate Authority to initiate any steps for its acquisition within a period of six months from the date of service of a notice by the owner or any person interested in the land. It cannot be doubted that a period of 10 years is long enough. The Development or the Planning Authority must take recourse to acquisition with some amount of promptitude in order that the compensation paid to the expropriated owner bears a just relation to the real value of the land as otherwise, the compensation paid for the acquisition would be wholly illusory. Such fetter on statutory powers is in the interest of the general public and the conditions subject to which they can be exercised must be strictly followed."

(emphasis supplied)

19. The same issue was again considered in Girnar Traders (II). S.P. Building Corporation was the owner of a piece of land bearing City Sy. No. 18/738 admeasuring about 5387.35 square yards situated at Carmichael Road, Malabar Hill Division, Mumbai. The Development plan prepared by Bomba Municipal Corporation was sanctioned by the State Government on 6.1.1967 and was enforced on 7.2.1967. The belonging to S.P. Building Corporation was notified as "open space and children's park". After coming into force of the 1966 Act, the landowners served notice under Section 127 of that Act for de-reservation of the land. Two similar notices were issued by S.P. Building Corporation on 18.10.2000 and 15.3.2002. after about eight months the State Government issued notification dated 20.11.2002 under Section 126(2) and (4) of the 1966 Act read with Section 6 of the 1894 Act. Writ Petition No.353/2005 filed by S.P. Building Corporation questioning the notification issued by the State Government was dismissed by the Division Bench of the High Court by observing that Resolution dated 9.9.2002 passed by the Improvement Committee of the Municipal Corporation would constitute a step as contemplated by Section 127 of the 1966 Act. The Division Bench further held that Section 11A of the 1894 Act, as amended, is not applicable to the proceedings initiated for the acquisition of land under the 1966 Act. Civil Appeal No.3922/2007 filed by S.P. Building Corporation was decided by the three Judge Bench along with Civil Appeal No.3703/2003 - *Girnar Traders v. State of Maharashtra.* Speaking for the majority, P.P. Naolekar, J., referred to the relevant provisions of the 1966 Act including Sections 126 and 127, and observed:

> "31. Section 127 prescribes two time periods. First, a period of 10 years within which the acquisition of the land reserved, allotted or designated has to be completed by agreement from the date on which a regional plan or development plan comes into force, or the proceedings for acquisition of such land under the MRTP Act or under the LA Act are commenced. Secondly, if the first part of Section 127 is not complied with or no steps are taken, then the second part of Section 127 will come into operation, under which a period of six months is provided from the date on which the notice has been served by the owner within which the land has to be acquired or the steps as aforesaid are to be commenced for its acquisition. The six-month period shall commence from the date the owner or any person interested in the land serves a notice on the planning authority, development authority or appropriate authority expressing his intent claiming dereservation of the land. If neither of the things is done, the reservation shall lapse. If there is no notice by the owner or any person interested, there is no question of lapsing reservation, allotment or designation of the land under the development plan. Second part of Section 127 stipulates that the reservation of the land under a development scheme shall lapse if the land is not acquired or no steps are taken for acquisition of the land within the period of six months from the date of service of the purchase notice. The word "aforesaid" in the collocation of the words "no steps as aforesaid are commenced for its acquisition" obviously refers to the steps contemplated by Section 126 of the MRTP Act.
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> If no proceedings as provided under Section 127 are taken and as a result thereof the reservation of the land lapses, the land shall be released from reservation, allotment or designation and shall be available to the owner for the purpose of development. The availability of the land to the owner for the development would only be for the purpose which is permissible in the case of adjacent land under the relevant plan. Thus, even after the release, the owner cannot utilise the land in whatever manner he deems fit and proper, but its utilisation has to be in conformity with the relevant plan for which the adjacent lands are permitted to be utilised."
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> (emphasis supplied)

Naolekar, J. then referred to the judgment in *Dr. Hakimwadi Tenants' Association* (supra) and proceeded to observed:

> "52. ……..Thus, after perusing the judgment in Municipal Corpn. of Greater Bombay case we have found that the question for consideration before the Court in Municipal Corpn. of Greater Bombay case has reference to first step required to be taken by the owner after lapse of 10 years' period without any step taken by the authority for acquisition of land, whereby the owners of the land served the notice for dereservation of the land. The Court was not called upon to decide the case on the substantial step, namely, the step taken by the authority within six months of service of notice by the owners for dereservation of their land which is second step required to be taken by the authority after service of notice.
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> 53. The observations of this Court regarding the linking of word *"aforesaid"* from the wordings "no steps as aforesaid are commenced for its acquisition" of Section 127 with the steps taken by the competent authority for acquisition of land as provided under Section 126(1) of the MRTP Act, had no direct or substantial nexus either with the factual matrix or any of the legal issues raised before it. It is apparent that no legal issues, either with respect to interpretation of words *"no steps as aforesaid are commenced for its acquisition"* as stipulated under the provisions of Section 127 or any link of these words with steps to be taken on service of notice, were contended before the Court. Thus, observations of the Court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the Court, is not of much avail to the respondents.

> 54. When we conjointly read Sections 126 and 127 of the MRTP Act, it is apparent that the legislative intent is to expeditiously acquire the land reserved under the Town Planning Scheme and, therefore, various periods have been prescribed for acquisition of the owner's property. The intent and purpose of the provisions of Sections 126 and 127 has been well explained in Municipal Corpn. of Greater Bombay case. If the acquisition is left for time immemorial in the hands of the authority concerned by simply making an application to the State Government for acquiring such land under the LA Act, 1894, then the authority will simply move such an application and if no such notification is issued by the State Government for one year of the publication of the draft regional plan under Section 126(2) read with Section 6 of the LA Act, wait for the notification to be issued by the State Government by exercising suo motu power under sub-section (4) of Section 126; and till then no declaration could be made under Section 127 as regards lapsing of reservation and contemplated declaration of land being released and available for the landowner for his utilisation as permitted under Section 127. Section 127 permitted inaction on the part of the acquisition authorities for a period of 10 years for dereservation of the land. Not only that, it gives a further time for either to acquire the land or to take steps for acquisition of the land within a period of six months from the date of service of notice by the landowner for dereservation. The steps towards commencement of the acquisition in such a situation would necessarily be the steps for acquisition and not a step which may not result into acquisition and merely for the purpose of seeking time so that Section 127 does not come into operation.
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> 56. The underlying principle envisaged in Section 127 of the MRTP Act is either to utilise the land for the purpose it is reserved in the plan in a given time or let the owner utilise the land for the purpose it is permissible under the

town planning scheme. The step taken under the section within the time stipulated should be towards acquisition of land. It is a step of acquisition of land and not step for acquisition of land. It is trite that failure of authorities to take steps which result in actual commencement of acquisition of land cannot be permitted to defeat the purpose and object of the scheme of acquisition under the MRTP Act by merely moving an application requesting the Government to acquire the land, which Government may or may not accept. Any step which may or may not culminate in the step for acquisition cannot be said to be a step towards acquisition.

57. It may also be noted that the legislature while enacting Section 127 has deliberately used the word "steps" (in plural and not in singular) which are required to be taken for acquisition of the land. On construction of Section 126 which provides for acquisition of the land under the MRTP Act, it is apparent that the steps for acquisition of the land would be issuance of the declaration under Section 6 of the LA Act. Clause (*c*) of Section 126(1) merely provides for a mode by which the State Government can be requested for the acquisition of the land under Section 6 of the LA Act. The making of an application to the State Government for acquisition of the land would not be a step for acquisition of the land under reservation. Sub-section (2) of Section 126 leaves it open to the State Government either to permit the acquisition or not to permit, considering the public purpose for which the acquisition is sought for by the authorities. Thus, the steps towards acquisition would really commence when the State Government permits the acquisition and as a result thereof publishes the declaration under Section 6 of the LA Act.

58. The MRTP Act does not contain any reference to Section 4 or Section 5-A of the LA Act. The MRTP Act contains the provisions relating to preparation of regional

plan, the development plan, plans for comprehensive developments, town planning schemes and in such plans and in the schemes, the land is reserved for public purpose. The reservation of land for a particular purpose under the MRTP Act is done through a complex exercise which begins with land use map, survey, population studies and several other complex factors. This process replaces the provisions of Section 4 of the LA Act and the inquiry contemplated under Section 5-A of the LA Act. These provisions are purposely excluded for the purposes of acquisition under the MRTP Act. The acquisition commences with the publication of declaration under Section 6 of the LA Act. The publication of the declaration under sub-sections (2) and (4) of Section 126 read with Section 6 of the LA Act is a sine qua non for the commencement of any proceedings for acquisition under the MRTP Act. It is Section 6 declaration which would commence the acquisition proceedings under the MRTP Act and would culminate into passing of an award as provided in sub-section (3) of Section 126 of the MRTP Act. Thus, unless and until Section 6 declaration is issued, it cannot be said that the steps for acquisition are commenced.

59. There is another aspect of the matter. If we read Section 126 of the MRTP Act and the words used therein are given the verbatim meaning, then the steps commenced for acquisition of the land would not include making of an application under Section 126(1)(*c*) or the declaration which is to be made by the State Government under sub-section (2) of Section 126 of the MRTP Act.

60. On a conjoint reading of sub-sections (1), (2) and (4) of Section 126, we notice that Section 126 provides for different steps which are to be taken by the authorities for acquisition of the land in different eventualities and within a particular time span. Steps taken for acquisition of the

land by the authorities under Clause (*c*) of Section 126(1) have to be culminated into Section 6 declaration under the LA Act for acquisition of the land in the Official Gazette, within a period of one year under the proviso to sub-section (2) of Section 126. If no such declaration is made within the time prescribed, no declaration under Section 6 of the LA Act could be issued under the proviso to sub-section (2) and no further steps for acquisition of the land could be taken in pursuance of the application moved to the State Government by the planning authority or other authority.

61. Proviso to sub-section (2) of Section 126 prohibits publication of the declaration after the expiry of one year from the date of publication of draft regional plan, development plan or any other plan or scheme. Thus, from the date of publication of the draft regional plan, within one year an application has to be moved under Clause (*c*) of Section 126(1) which should culminate into a declaration under Section 6 of the LA Act. As per the proviso to sub-section (2) of Section 126, the maximum period permitted between the publication of a draft regional plan and declaration by the Government in the Official Gazette under Section 126(2) is one year. In other words, during one year of the publication of the draft regional plan, two steps need to be completed, namely, (*i*) application by the appropriate authority to the State Government under Section 126(1)(*c*); and (*ii*) declaration by the State Government on receipt of the application mentioned in Clause (*c*) of Section 126(1) on satisfaction of the conditions specified under Section 126(2). The only exception to this provision has been given under Section 126(4)."

(emphasis supplied)

20. In our view, there is no conflict between the judgments of the two-Judge Bench in *Dr. Hakimwadi Tenants' Association* (supra) and the majority judgment in Girnar Traders (II). In both the cases, this Court emphasized that if any private land is

shown as reserved, allotted or designated for any purpose specified in any Development plan, the same may be acquired within ten years either by agreement or by following the procedure prescribed under the 1894 Act, and if proceedings for the acquisition of land are not commenced within that period and a further period of six months from the date of service of notice under Section 127 of the 1966 Act, then the land shall be deemed to have been released from such reservation, allotment, etc. In *Dr. Hakimwadi Tenants' Association* (supra), notice under Section 127 was issued on 1.7.1977. The State Government did not take any steps for the acquisition of land within next six months. The learned Single Judge and the Division Bench of the High Court held that in terms of second part of Section 127, the reservation of land for recreation ground will be deemed to have lapsed. This Court unequivocally approved the view expressed by the High Court (paragraphs 10 and 11). The majority judgment in Girnar Traders (II) appears to suggest that the question considered and decided in *Dr. Hakimwadi Tenants' Association* (supra) was slightly different, but having carefully gone through paragraphs 10 and 11 of the first judgment, we are convinced that the question involving interpretation of Section 127 was very much considered and decided by the two-Judge Bench in favour of the landowner and there is no conflict in the opinion expressed in the two judgments.

21. We are further of the view that the majority in Girnar Traders (II) had rightly observed that steps towards the acquisition would really commence when the State Government takes active steps for the acquisition of the particular piece of land which leads to publication of the declaration under Section 6 of the 1894 Act. Any other interpretation of the scheme of Sections 126 and 127 of the 1966 Act will make the provisions wholly unworkable and leave the landowner at the mercy of the Planning Authority and the State Government.

22. The expression "no steps as aforesaid" used in

Section 127 of the 1966 Act has to be read in the context of the provisions of the 1894 Act and mere passing of a resolution by the Planning Authority or sending of a letter to the Collector or even the State Government cannot be treated as commencement of the proceedings for the acquisition of land under the 1966 Act or the 1894 Act. By enacting Sections 125 to 127 of the 1966 Act, the State Legislature has made a definite departure from the scheme of acquisition enshrined in the 1894 Act. But a holistic reading of these provisions makes it clear that while engrafting the substance of some of the provisions of the 1894 Act in the 1966 Act and leaving out other provisions, the State Legislature has ensured that the landowners/other interested persons, whose land is utilized for execution of the Development plan/Town Planning Scheme, etc., are not left high and dry. This is the reason why time limit of ten years has been prescribed in Section 31(5) and also under Sections 126 and 127 of the 1966 Act for the acquisition of land, with a stipulation that if the land is not acquired within six months of the service of notice under Section 127 or steps are not commenced for acquisition, reservation of the land will be deemed to have lapsed. Shri Naphade's interpretation of the scheme of Sections 126 and 127, if accepted, will lead to absurd results and the landowners will be deprived of their right to use the property for an indefinite period without being paid compensation. That would tantamount to depriving the citizens of their property without the sanction of law and would result in violation of Article 300A of the Constitution.

23. Before concluding, we may notice the judgment of the Constitution Bench in Girnar Traders (III) on which reliance was placed by Shri Shekhar Naphade. The main question decided in that case was whether Section 11A of the 1894 Act is applicable to the acquisition of land made under the 1966 Act. The Constitution Bench referred to the provisions of the 1966 Act (as amended) including Chapter VII thereof and held that Section 11A of the 1894 Act cannot be bodily lifted and read into the scheme of the 1966 Act. At the same time, it held that

if any land is reserved, allotted or designated for any purpose specified in the Regional plan or Development plan and the same is not acquired by agreement within 10 years from the date of enforcement of such plan or the declaration under sub-section (2) or (4) of Section 126 of the 1966 Act is not published in the Official Gazette within that period, the owner or any person interested in the land may serve notice upon the Planning Authority etc. and if within 12 months of the service of notice the land is not acquired or no steps, as aforesaid are commenced for its acquisition, the reservation etc. will automatically lapse. All this is evinced from paragraphs 125-129, 132-134, 136 and 138 of the Constitution Bench judgment, which are extracted below:

> "125. In terms of Section 126(1)(c) of the MRTP Act, the application to the State Government has to be made for acquiring such land under the Land Acquisition Act. Such land refers to the lands which are required only under the provisions of the MRTP Act. Section 126(2) refers to Section 6 of the Land Acquisition Act only for the purpose of format in which the declaration has to be made. In terms of Section 126(3), on publication of the declaration, the Collector shall proceed to take order for acquisition of the land under the State Act i.e. for the purpose of acquisition of land; the procedure adopted under the Land Acquisition Act shall be adopted by the Collector and nothing more. The aforereferred provisions of the State Act clearly frame a scheme for planned development with limited incorporation of some of the provisions of the Land Acquisition Act.
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> 126. The provisions of the State Act were amended last in point of time and, therefore, the State Legislature was aware of the relevant existing laws including Section 11-A of the Land Acquisition Act. The intent of the legislature to exclude the application of Section 11-A clearly emerges from the fact that while amending Section 127 of the MRTP

Act, it made no reference, generally or specifically, to the said provision rather it deleted reference to the provisions of the Land Acquisition Act from the unamended provisions of Section 127. Reference to Section 16 of the Land Acquisition Act in the State Act, under Section 128(3) of the State Act, is again relatable to the acquisition proceedings under the Land Acquisition Act, as under Section 83 of the State Act, the land could vest in the Planning Authority even at the threshold and it is vesting of a different kind than contemplated under Section 16 of the Land Acquisition Act. The purpose and intent of Section 129 of the MRTP Act is akin to the provisions of Section 17 of the Land Acquisition Act and from linguistic point of view, there is similarity in the two sections but still the State Act has provided for a complete scheme with regard to possession and compensation payable to the owner of the land in cases of urgency. Thus, it is clear that there is no general reference to the provisions of the Land Acquisition Act and they shall not apply as such or even mutatis mutandis to the MRTP Act. On the contrary, reference to the Central Act, wherever is made in the State Act, is specific and for a definite purpose.

127. Another argument which had been vehemently advanced on behalf of the appellant is that the reference to the provisions of the Land Acquisition Act in different provisions of the MRTP Act would require that the proceedings commence from Section 6 of the Central Act onwards and award is made in terms of Section 11 of that Act and as those provisions apply to these proceedings, Section 11-A would automatically come into play so would the other provisions of the Land Acquisition Act. The expression "under the said Act" in Section 126(3) of the MRTP Act is sufficient indication that it is a legislation by reference and, thus, all subsequent amendments would apply. It was also contended that on a bare reading of Sections 126 and 127 of the MRTP Act, it is clear that it

does not exclude the application of Section 11-A of the Land Acquisition Act.

128. We certainly are not impressed by this argument advanced on behalf of the appellants. Firstly, if we examine the acquisition proceedings under the Land Acquisition Act, they commence only when a notification under Section 4 of the Land Acquisition Act is issued. Section 5-A of the Central Act makes it incumbent upon the authorities to invite objections and decide the same before issuing declaration under Section 6 of the Land Acquisition Act. All these proceedings have specifically been given a go-by under the MRTP Act, where notification is to be issued under Section 126(2) in the manner provided under Section 6 of the Land Acquisition Act. Secondly, specific reference to various sections of the Land Acquisition Act in the MRTP Act necessarily implies exclusion of the provisions not specifically mentioned therein. Lastly, acquisition proceedings under the MRTP Act are commenced by issuance of a declaration under Section 126(2) and then the procedure prescribed under the Land Acquisition Act is followed up to the passing of award under Section 11 of that Act.

129. Further, determination of compensation will again depend upon the principles stated in Sections 23 and 24 of the Land Acquisition Act but subject to Sections 128(2) and 129(1) of the MRTP Act. Statutory benefits accrued under Sections 23(1-A), 23(2) and 28 of the Land Acquisition Act would be applicable as held by this Court in U.P. Avas Evam Vikas Parishad. Vesting, unlike Section 16 of the Land Acquisition Act which operates only after the award is made and compensation is given, whereas under the MRTP Act it may operate even at the initial stages before making of an award, for example, under Sections 126(1)(c) and 83.

132. Besides this, another very important aspect of the

present case is that if the provisions of Section 11-A of the Land Acquisition Act are applied or deemed to be incorporated by application of any doctrine of law into the provisions of the MRTP Act, it will have the effect of destroying the statutory rights available to the State Government and/or the Planning Authority. For instance, proviso to Section 126(2) of the State Act provides that where a declaration in the manner provided in Section 6 of the Land Acquisition Act in respect of the said land is not made within one year from the date of publication of draft regional plan, thereafter no such declaration shall be made. Section 126(4) makes an exception to the consequences stated in the proviso to Section 126(2) that the State Government, notwithstanding those provisions, can make a fresh declaration for acquiring the land under the Land Acquisition Act. However, the market value of the land shall be the market value at the date of declaration in the Official Gazette made for acquiring such land afresh. In other words, the rest of the machinery provided under the Act would not operate after the prescribed period.

133. However, in terms of Section 127 of the MRTP Act, if any land reserved, allotted or designated for any purpose specified is not acquired by agreement within 10 years from the date on which final regional plan or final development plan comes into force or if a declaration under sub-section (2) or (4) of Section 126 of the MRTP Act is not published in the Official Gazette within such period, the owner or any person interested in the land may serve notice upon such authority to that effect and if within 12 months from the date of service of such notice, the land is not acquired or no steps, as aforesaid, are commenced for its acquisition, the reservation, allotment or designation shall be deemed to have lapsed and the land would become available to the owner for the purposes of development. The defaults, their consequences and even exceptions thereto have been specifically stated in the

State Act. For a period of 11 years, the land would remain under reservation or designation, as the case may be, in terms of Section 127 of the MRTP Act (10 years + notice period).

134. However, if the provisions of Section 11-A of the Central Act were permitted to punctuate a scheme of the State Act and the award is not made within two years from the date of declaration under Section 6 of the Central Act, the acquisition proceedings will lapse which will frustrate the rights of the State as well as the scheme contemplated under Section 126 as well as Section 127 of the State Act and that would not be permissible in law. This being legislation by incorporation, the general reference to the provisions of the Land Acquisition Act shall stand excluded.

136. Section 126(2) of the State Act refers to the manner of declaration as contemplated under Section 6 of the Land Acquisition Act but the legislature intentionally avoided making any reference to other features contained in Section 6 of the Central Act as well as the time-frame prescribed under that Act. On the contrary, proviso to Section 126(2) of the MRTP Act spells out its own time-frame whereafter such declaration cannot be made subject to the provisions of Section 126(4). The unamended provisions of Section 127 of the State Act though refer to the acquisition under the Land Acquisition Act but without making any reference to the time-frame prescribed under the said Act. In this section also, the specific time-frame and the consequences of default thereof have been stated. Sections 128 and 129 of the MRTP Act relate to acquiring land for the purpose other than for which it is designated in any plan or scheme and taking of possession of land in cases of urgency respectively.

138. The provisions relating to planned development of the State or any part thereof, read in conjunction with the object

of the Act, show that different time-frames are required for initiation, finalisation and complete execution of such development plans. The period of 10 years stated in Section 127 of the MRTP Act, therefore, cannot be said to be arbitrary or unreasonable ex facie. If the provisions of Section 11-A of the Land Acquisition Act, with its serious consequence of lapsing of entire acquisition proceedings, are bodily lifted and read into the provisions of the MRTP Act, it is bound to frustrate the entire scheme and render it ineffective and uncertain. Keeping in view the consequence of Section 11-A of the Central Act, every development plan could stand frustrated only for the reason that period of two years has lapsed and it will tantamount to putting an end to the entire development process."

(emphasis supplied)

24. In our view, the observations contained in paragraph 133 of Girnar Traders (III) unequivocally support the majority judgment in Girnar Traders (II).

25. As a sequel to the above discussion, we hold that the majority judgment in Girnar Traders (II) lays down correct law and does not require reconsideration by a larger Bench. We further hold that the orders impugned in these appeals are legally correct and do not call for interference by this Court. The appeals are accordingly dismissed.

R.P. Appeals dismissed.

RESHMA KUMARI AND ORS.
v.
MADAN MOHAN AND ANR.
(Civil Appeal No. 4646 of 2009)

APRIL 2, 2013.

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

Motor Vehicles Act, 1988:

s. 166 – Motor accident – Compensation – Computation of – Multiplier – Additional income for future prospects – Deduction towards income tax as also personal expenses – Held: It is high time that the courts move to a standard method of selection of multiplier, income for future prospects and deduction for personal and living expenses – In the applications for compensation made u/s 166 in death cases where the age of deceased is 15 years and above, Claims Tribunals shall select the multiplier as indicated in Column (4) of the table prepared in Sarla Verma read with the relevant para of that judgment – As a result, there is no necessity for Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act – In cases where the age of the deceased is upto 15 years, irrespective of s.166 or s.163A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in Sarla Verma should be followed – For determination of compensation in death cases, and for making addition to income for future prospects and deduction in case of taxable salary, guidelines laid down in Sarla Verma's case shall be followed – Further, with regard to deduction for personal expenses ordinarily the judgment in Sarla Verma's case, subject to the observations made in the instant judgment, shall be followed.

s.168 – 'Just compensation' – Held: The expression, 'just' means that the amount so determined is fair, reasonable and equitable by accepted legal standards.

In the instant appeals referred by a two-Judge Bench for decision of a larger Bench, the question for consideration before the Court was: "whether while considering an application for compensation made u/s 166, the multiplier specified in the Second Schedule can be taken to be guide for determination of amount of the compensation."

Answering the reference, the Court

HELD: 1.1 The Motor Vehicles Act, 1988 gives choice to the claimants to seek compensation on structured formula basis as provided in s.163A or make an application for compensation arising out of an accident of the nature specified in sub-s. (1) of s. 165, u/s 166. The claimants have to elect one of the two remedies provided in ss.163A and 166. The remedy provided in s.163A is not a remedy in addition to the remedy provided in s.166 but it provides for an alternative course to s.166. The peculiar feature of s.163A is that for a claim made thereunder, the claimants are not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner or owners of the vehicle concerned. On the other hand, by making an application for compensation arising out of an accident u/s 166 it is necessary for a claimant to prove negligence on the part of the driver or owner of the vehicle. The burden is on the claimant to establish the negligence on the part of the driver or owner of the vehicle and on proof thereof, the claimant is entitled to compensation. [para 10-11] [722-E-G; 723-A-B, E-F]

Minu B. Mehta and Anr. v. Balkrishna Ramchandra

Nayan and Anr. **1977 (2) SCR 886 = 1977 (2) SCC 441;** *Gujarat State Road Transport Corporation, Ahmedabad* v. *Ramanbhai Prabhatbhai and Another* **1987(3) SCR 404 = 1987 (3) SCC 234 – referred to.**

Davies & Anr. v. Powell Duffryn Associated Collieries Ltd. **1942 (1) All ER 657 and (2)** *Nance v. British Columbia Electric Railway Co. Ltd.* **1951 (2) All ER 448** *Mallett v. Mc Monagle* **1969 (2) All ER 178 – referred to.**

1.2 The determination of compensation based on multiplier method is the best available means and the most satisfactory method and must be followed invariably by the tribunals and courts. This statement in *Susamma Thomas* is equally applicable to the fatal accident claims made u/s 166 of the 1988 Act. In *Trilok Chandra*, the Court considered s. 163A and the Second Schedule which was not under consideration in *Susamma Thomas* as s.163A was not on the statute when the judgment in *Susamma Thomas* was delivered. It was observed that by incorporation of ss. 163A and 163B in the 1988 Act the situation had undergone a change. Under the Second Schedule, the maximum multiplier could be upto 18 and not 16 as was held in *Susamma Thomas.* In *Trilok Chandra*, the maximum multiplier was fixed at 18 but the Court did find several defects in the calculation of compensation and the amount worked out in the Second Schedule. Importantly, this Court stated in *Trilok Chandra* that tribunals and the courts cannot go by the ready reckoner; the Schedule can only be used as a guide. [para 13 and 32] [724-G-H; 725-A-B; 737-F-G]

General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors. **1994 (2) SCC 176,** *U.P. State Road Transport Corporation and Ors. v. Trilok Chandra and* Ors. **1996 (2) Suppl. SCR 443 = 1996 (4) SCC 362,** *Kaushnuma Begum (Smt.) and Ors. v. New India Assurance Co. Ltd. and Ors.*

2001 (1) SCR 8 = 2001 (2) SCC 9; *Supe Dei (Smt) and others* v. *National Insurance Company Limited and Another* **2009 (4) SCC 513;** *Deepal Girishbhai Soni and others v. United India Insurance Co. Ltd., Baroda* **(2004) 5 SCC 385;** *Oriental Insurance Company Ltd. v. Jashuben and Ors*. **2008 (2) SCR 930 = 2008 (4) SCC 162 – referred to.**

1.3 In *Sarla Verma,* this Court undertook the exercise of comparing the multiplier indicated in *Susamma Thomas, Trilok Chandra and Charlie,* for claims u/s 166 of the 1988 Act with the multiplier mentioned in the Second Schedule for claims u/s 163A (with appropriate deceleration after 50 years). The exercise was undertaken to ensure uniformity and consistency in the selection of multiplier while awarding compensation in motor accident claims made u/s 166. [para 26 and 28] [735-A-B; 736-D]

Sarla Verma (Smt.) and Ors. v. Delhi Transport Corporation and Anr. **2009 (5) SCR 1098 = 2009 (6) SCC 121 – affirmed.**

New India Assurance Company Ltd. v. Charlie and Anr. **2005 (2) SCR 1173 = 2005 (10) SCC 720,** *T.N. State Road Transport Corporation v. S. Rajapriya and Ors.* **2005 (3) SCR 737 = 2005 (6) SCC 236 and** *U.P. State Road Transport Corporation v. Krishna Bala and Ors.* **2006 (3) Suppl. SCR 506 = 2006 (6) SCC 249 – referred to.**

1.4 Section 168 of the 1988 Act provides the guideline that the amount of compensation shall be awarded by the claims tribunal which appears to it to be just. The expression, 'just' means that the amount so determined is fair, reasonable and equitable by accepted legal standards and not a forensic lottery. Obviously 'just compensation' does not mean 'perfect' or 'absolute' compensation. The just compensation principle requires examination of the particular situation obtaining uniquely in an individual case. [para 29] [736-E-F]

C.K. Subramania Iyer and Ors. v. T.Kunhikuttan Nair and Ors. **1970 (2) SCR 688– referred to.**

Taff Vale Railway Co. v. Jenkins **(1913) AC 1 – referred to.**

1.5 In *Sarla Verma*, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made u/s 166. It has been rightly stated that claimants in case of death claim for the purposes of compensation must establish: (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/ deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. In view of the decision in *Sarla Verma, i*t is not necessary to revisit the law on the point. The table has been prepared in Sarla *Verma* for the selection of multiplier having regard to the three decisions of this Court, namely, *Susamma Thomas*, *Trilok Chandra* and *Charlie* for the claims made u/s 166 of the 1988 Act. The Court said that multiplier shown in Column (4) of the table must be used having regard to the age of the deceased. Perhaps the biggest advantage by employing the table prepared in *Sarla Verma* is that uniformity and consistency in selection of the multiplier can be achieved. The assessment of extent of dependency depends on examination of the unique situation of the individual case. Valuing the dependency or the multiplicand is to some extent an arithmetical exercise. The multiplicand is normally based on the net annual value of the dependency on the date of the deceased's death. Once the net annual loss (multiplicand) is assessed, taking into account the age of

the deceased, such amount is to be multiplied by a 'multiplier' to arrive at the loss of dependency. [para 33] [737-G-H; 738-A-F]

1.6 It is high time that the courts move to a standard method of selection of multiplier, income for future prospects and deduction for personal and living expenses. The courts in some of the overseas jurisdictions have made this advance. It is for these reasons, this Court must approve the table in *Sarla Verma* for the selection of multiplier in claim applications made u/s 166 in the cases of death. [para 34] [738-H; 739-A]

1.7 If for the selection of multiplier, Column (4) of the table in *Sarla Verma* is followed, there is no likelihood of the claimants who have chosen to apply u/s 166 being awarded lesser amount on proof of negligence on the part of the driver of the motor vehicle than those who prefer to apply u/s 163A. [para 34] [739-A-B]

1.8 As regards the cases where the age of the victim happens to be upto 15 years, this Court is of the considered opinion that in such cases irrespective of s.163A or s.166 under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in *Sarla Verma* should be followed. This is to ensure that claimants in such cases are not awarded lesser amount when the application is made u/s 166 of the 1988 Act. In all other cases of death where the application has been made u/s 166, the multiplier as indicated in Column (4) of the table in *Sarla Verma* should be followed. As a result, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act. The Claims Tribunals shall follow the steps and guidelines stated in para 19 of *Sarla Verma* for determination of compensation in cases of death. [para

34 and 40(i), (ii) and (iii)] [739-C-E; 742-F-H; 743-A]

1.9 The standardization of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. While making addition to income for future prospects, the Tribunals shall follow paragraph 24 of the Judgment in *Sarla Verma.* This Court approves the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases. [para 36 and 40(v)] [740-C-F]

1.10 One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependant members in the family, and the personal living expenses of the deceased need not exactly correspond to the number of dependants. The standards fixed by this Court in *Sarla Verma* on the aspect of deduction for personal living expenses in paragraphs 30, 31 and 32 must ordinarily be followed unless a case for departure is made out. [para 38-39] [741-H; 742-A-C]

Sarla Verma (Smt.) and Ors. v. Delhi Transport Corporation and Anr. **2009 (5) SCR 1098 = 2009 (6) SCC 121; and** *Fakeerappa and Anr. v. Karnataka Cement Pipe Factory and Others* **2004 (2) SCR 369 = (2004) 2 SCC 473 - referred to.**

United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors. **2002 (3) SCR 1176 = 2002 (6) SCC 281,** *Jyoti Kaul & Ors. v. State of M.P. & Anr.* **2002 (6) SCC 306,** *Abati Bezbaruah v. Dy. Director General, Geological Survey of India & Anr.* **2003 (1) SCR 1229 = 2003 (3) SCC 148,** *New India Assurance Co. Ltd. v. Shanti Pathak (Smt.) & Ors.* **2007 (8) SCR 237 = 2007 (10) SCC 1 - cited.**

Case Law Reference:

1994 (2) SCC 176	**referred to**	**Para 1**
1996 (3) SCR 30	**affirmed**	**Para 1**
1996 (2) Suppl. SCR 443	**referred to**	**Para 1**
2001 (1) SCR 8	**referred to**	**Para 1**
2002 (3) SCR 1176	**cited**	**Para 1**
2002 (6) SCC 306	**cited**	**Para 1**
2003 (1) SCR 1229	**cited**	**Para 1**
2007 (8) SCR 237	**cited**	**Para 1**
1977 (2) SCR 886	**referred to**	**para 2**
1987 (3) SCR 404	**referred to**	**para 4**
1942 (1) All ER 657	**referred to**	**para 12**
1951 (2) All ER 44 8	**referred to**	**para 12**
1969 (2) All ER 178	**referred to**	**para 12**
2009 (4) SCC 513	**referred to**	**para 14**
(2004) 5 SCC 385	**referred to**	**para 18**
2008 (2) SCR 930	**referred to**	**para 22**
2009 (5) SCR 1098	**referred to**	**para 23**
2005 (2) SCR 1173	**referred to**	**para 25**
2005 (3) SCR 737	**referred to**	**para 25**
2006 (3) Suppl. SCR 506	**referred to**	**para 25**
(1913) AC 1	**referred to**	**para 30**
1970 (2) SCR 688	**referred to**	**para 31**
2004 (2) SCR 369	**referred to**	**para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4646 of 2009.

WITH

C.A. No. 4647 of 2009.

Ashok K. Mahajan, Gajendra Maheshwari, Rajat Bose for the Appellants.

Shalu Sharma, Dr. Sushil Balwada, Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. A two-Judge Bench (S.B. Sinha and Cyriac Joseph, JJ.) proceeded to hear these appeals on two common questions, namely, (1) Whether multiplier specified in the Second Schedule appended to the Motor Vehicles Act, 1988 (for short "the 1988 Act") should be scrupulously applied in all cases? and (2) Whether for determination of the multiplicand, the 1988 Act provides for any criterion, particularly as regards determination of future prospect. In the course of hearing few decisions of this Court, *General Manager, Kerala*

State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.[1], *Sarla Dixit (Smt.) and Anr. v. Balwant Yadav and Ors.*[2], *U.P. State Road Transport Corporation and Ors. V. Trilok Chandra and* Ors.[3], *Kaushnuma Begum (Smt.) and Ors. V. New India Assurance Co. Ltd. and Ors.*[4], *United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors.*[5], *Jyoti Kaul & Ors. v. State of M.P. & Anr.*[6], *Abati Bezbaruah v. Dy. Director General, Geological Survey of India & Anr.*[7], *New India Assurance Co. Ltd. v. Shanti Pathak (Smt.) & Ors.*[8], were cited. The attention of the Bench was also invited to Sections 163A and 166 of the 1988 Act. The Bench was of the opinion that the question, whether the multiplier specified in the Second Schedule should be taken to be guide for calculation of amount of compensation payable in a case falling under Section 166 of the 1988 Act needed to be decided by a larger Bench. The reasons for referring the above issue to the larger Bench indicated in the referral order dated 23.07.2009 read as under:

> "39. We have noticed hereinbefore that in *Patricia Jean Mahajan*[5] and *Abati Bezbaruah*[7] and the other cases following them multiplier specified in the Second Schedule has been taken to be guiding factor for calculation of the amount of compensation even in a case under Section 166 of the Act. However, in *Shanti Pathak*[8] this Court advocated application of lesser multiplier, although no legal principle has been laid therein.
>
> 40. In *Trilok Chandra*[3] this Court has pointed out certain

1. 1994 (2) SCC 176.
2. 1996 (3) SCC 179.
3. 1996 (4) SCC 362.
4. 2001 (2) SCC 9.
5. 2002 (6) SCC 281.
6. 2002 (6) SCC 306.
7. 2003 (3) SCC 148.
8. 2007 (10) SCC 1.

> purported calculation mistakes in the Second Schedule. It, however, appears to us that there is no mistake therein. Amount of compensation specified in the Second Schedule only is required to be paid even if a higher or lower amount can be said to be the quantum of compensation upon applying the multiplier system.
>
> 41. Section 163-A of the 1988 Act does not speak of application of any multiplier. Even the Second Schedule, so far as the same applies to fatal accident, does not say so. The multiplier, in terms of the Second Schedule, is required to be applied in a case of disability in nonfatal accident. Consideration for payment of compensation in the case of death in a "no fault liability" case vis-à-vis the amount of compensation payable in a case of permanent total disability and permanent partial disability in terms of the Second Schedule is to be applied by different norms. Whereas in the case of fatal accident the amount specified in the Second Schedule depending upon the age and income of the deceased is required to be paid where for the multiplier is not to be applied at all but in a case involving permanent total disability or permanent partial disability the amount of compensation payable is required to be arrived at by multiplying the annual loss of income by the multiplier applicable to the age of the injured as on the date of determining the compensation and in the case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) of the Second Schedule.
>
> 42. The Parliament in its wisdom thought to provide for a higher amount of compensation in case of permanent total disablement and proportionate amount of compensation in case of permanent partial disablement depending upon the percentage of disability.
>
> 43. Thus, prima facie, it appears that the multiplier

mentioned in the Second Schedule, although in a given case, may be taken to be a guide but the same is not decisive. To our mind, although a probable amount of compensation as specified in the Second Schedule in the event the age of victim is 17 or 20 years and his annual income is Rs. 40,000/-, his heirs/legal representatives is to receive a sum of Rs.7,60,000/-, however, if an application for grant of compensation is filed in terms of Section 166 of the 1988 Act that much amount may not be paid, although in the former case the amount of compensation is to be determined on the basis of 'no fault liability' and in the later on 'fault liability'. In the aforementioned situation the Courts, we opine, are required to lay down certain principles.

44. We are not unmindful of the Statement of Objects and Reasons to Act 54 of 1994 for introducing Section 163-A so as to provide for a new predetermined formula for payment of compensation to road accident victims on the basis of age/income; which is more liberal and rational. That may be so, but it defies logic as to why in a similar situation, the injured claimant or his heirs/legal representatives, in the case of death, on proof of negligence on the part of the driver of a motor vehicle would get a lesser amount than the one specified in the Second Schedule. The Courts, in our opinion, should also bear that factor in mind.

45. Having regard to divergence of opinion and this aspect of the matter having not been considered in the earlier decisions, particularly in the absence of any clarification from the Parliament despite the recommendations made by this Court in *Trilok Chandra*[3], the issue, in our opinion, shall be decided by a Larger Bench. It is directed accordingly."

2. We are concerned with the above reference. Before we refer to the provisions contained in Sections 163A and 166 of

the 1988 Act, it is of some relevance to notice the background in which the Parliament considered it necessary to bring in the provisions of no fault liability on the statute. It so happened that in *Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.*[9], a three-Judge Bench of this Court while considering the question whether the fact of injury resulting from the accident involving the use of a vehicle on the public road is the basis of a liability and that it is not necessary to prove any negligence on the part of the driver, held that the liability of the owner of the car to compensate the victim in a car accident due to the negligent driving of his servant is based on the law of tort and before the master could be made liable it is necessary to prove that the servant was acting during the course of his employment and that he was negligent. This Court held that the concept of owner's liability without any negligence is opposed to the basic principles of law. The mere fact that a person died or a party received an injury arising out of the use of a vehicle in a public place cannot justify fastening liability on the owner. This Court noticed a judgment of Madras High Court in *M/s Ruby Insurance Co. v. Govindaraj,* (A.A.O. Nos. 607 of 1973 and 296 of 1974) decided on December 13, 1976 wherein the necessity of having social insurance to provide cover for the claimants irrespective of proof of negligence to a limited extent was suggested. This Court said "unless these ideas are accepted by the legislature and embodied in appropriate enactments Courts are bound to administer and give effect to the law as it exists today. We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case".

3. The Parliament having regard to the above view of this Court and the recommendation of the Law Commission of India, amended the Motor Vehicles Act, 1939 (for short, "1939 Act") and inserted Section 92A therein which provided that in any

9. 1977 (2) SCC 441.

claim for compensation under sub-section (1) of Section 92-A, the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicles concerned or of any other person.

4. In *Gujarat State Road Transport Corporation, Ahmedabad v. Ramanbhai Prabhatbhai and Another*[10], a two-Judge Bench held that the compensation awardable under Section 92-A was without proof of any negligence on the part of the owner of the vehicle or any other person which was clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident. Certain observations made in *Minu B. Mehta9* were held to be obiter in *Ramanbhai Prabhatbhai*[10].

5. The 1988 Act replaced the 1939 Act. Chapter X of the 1988 Act deals with liability without fault in certain cases. Sub-section (3) of Section 140 provides that in any claim for compensation under sub-section (1) the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. Chapter XI of the 1988 Act deals with insurance of motor vehicles against third party risks. Chapter XII deals with the claims tribunals. Section 166 makes a provision for application for compensation arising out of an accident which after few amendments reads as under:

"Section 166 - Application for compensation

10. 1987 (3) SCC 234.

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an

application for compensation under this Act."

6. By Act 54 of 1994, Section 163A was brought in the 1988 Act w.e.f. 14.11.1994. Section 163A may be reproduced which reads as under:-

"163-A. *Special provisions as to payment of compensation on structured formula basis*.—(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.—For the purposes of this sub-section, 'permanent disability' shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

7. Along with Section 163A Second Schedule was inserted in the 1988 Act. Sub- section (3) of Section 163A empowers the central government to amend the Second Schedule from time to time keeping in view the cost of living.

8. Consequent upon the insertion of Section 163A in the

1988 Act, certain amendments were brought in the 1988 Act. Sub-section (5) which was inserted in Section 140 reads as follows:

"Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force.

Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."

9. Section 163B was also brought in the 1988 Act along with Section 163A. Section 163B reads as follows:

"163B. Option to file claim in certain cases. – Where a person is entitled to claim compensation under section 140 and section 163A, he shall file the claim under either of the said sections and not under both."

10. The 1988 Act gives choice to the claimants to seek compensation on structured formula basis as provided in Section 163A or make an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 under Section 166. The claimants have to elect one of the two remedies provided in Section 163A and Section 166. The remedy provided in Section 163A is not a remedy in addition to the remedy provided in Section 166 but it provides for an alternative course to Section 166. By incorporating Section 163A in the 1988 Act, the Parliament has provided the remedy for payment of compensation notwithstanding anything contained in the 1988 Act or in any other law for the time being in force or instrument having the force of law, that the owner of a motor vehicle or authorised insurer shall be liable to pay compensation on structured formula basis as indicated in the

Second Schedule in the case of death or permanent disablement due to accident arising out of the use of motor vehicle. The peculiar feature of Section 163A is that for a claim made thereunder, the claimants are not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner or owners of the vehicle concerned. The scheme of Section 163A is a departure from the general principle of law of tort that the liability of the owner of the vehicle to compensate the victim or his heirs in a motor accident arises only on the proof of negligence on the part of the driver. Section 163A has done away with the requirement of the proof of negligence on the part of the driver of the vehicle where the victim of an accident or his dependants elect to apply for compensation under Section 163A. When an application for compensation is made under Section 163A the compensation is paid as indicated in the Second Schedule. The table in the Second Schedule has been found by this Court to be defective to which we shall refer at a little later stage.

11. On the other hand, by making an application for compensation arising out of an accident under Section 166 it is necessary for a claimant to prove negligence on the part of the driver or owner of the vehicle. The burden is on the claimant to establish the negligence on the part of the driver or owner of the vehicle and on proof thereof, the claimant is entitled to compensation. We are confronted with the question, whether while considering an application for compensation made under Section 166, the multiplier specified in the Second Schedule can be taken to be guide for determination of amount of the compensation.

12. In *Susamma Thomas*[1], this Court noticed the two decisions of House of Lords, (1) *Davies & Anr. v. Powell Duffryn Associated Collieries Ltd.*[11] and (2) *Nance v. British*

11. 1942 (1) All ER 657.

12. 1951 (2) All ER 448.

Columbia Electric Railway Co. Ltd.[12] wherein two different methods – lump sum method and multiplier method - were adopted for determination and for calculation of compensation in fatal accident actions. This Court has preferred the multiplier method adopted in *Davies case*[11]. While holding so, this Court also referred to another decision of House of Lords in *Mallett v. Mc Monagle*[13]. It has been laid down in *Susamma Thomas*[1] that multiplier method was logically sound and legally well established. The multiplier represented the number of year's purchase on which the loss of dependency is capitalized. The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, the Court said that regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last. In *Susamma Thomas*[1] this Court noticed that English Courts have rarely applied operative multiplier exceeding 16.

13. The award of compensation in a motor accident case based on the multiplier method is an established norm in India now. A three-Judge Bench in *Trilok Chandra*[3] reiterated what was stated in *Susamma Thomas*[1] as regards determination of compensation in accident cases on the basis of multiplier method. In *Trilok Chandra*[3], the Court considered Section 163A and the Second Schedule which was not under consideration in *Susamma Thomas*[1] as Section 163A was not on the statute when the judgment in *Susamma Thomas*[1] was delivered. It was observed that by incorporation of Sections 163A and 163B in the 1988 Act the situation had undergone a

13. 1969 (2) All ER 178.

change. Under the Second Schedule, the maximum multiplier could be upto 18 and not 16 as was held in *Susamma Thomas*[1]. In *Trilok Chandra*[3], the maximum multiplier was fixed at 18 but the Court did find several defects in the calculation of compensation and the amount worked out in the Second Schedule. Importantly this Court stated in *Trilok Chandra*[3] that Tribunals and the Courts cannot go by the ready reckoner; the Schedule can only be used as a guide. This is what this Court said in paras 17 and 18 of the Report:

> "17. The situation has now undergone a change with the enactment of the Motor Vehicles Act, 1988, as amended by Amendment Act 54 of 1994. The most important change introduced by the amendment insofar as it relates to determination of compensation is the insertion of Sections 163-A and 163-B in Chapter XI entitled "Insurance of Motor Vehicles against Third Party Risks". Section 165-A begins with a non obstante clause and provides for payment of compensation, as indicated in the Second Schedule, to the legal representatives of the deceased or injured, as the case may be. Now if we turn to the Second Schedule, we find a table fixing the mode of calculation of compensation for third party accident injury claims arising out of fatal accidents. The first column gives the age group of the victims of accident, the second column indicates the multiplier and the subsequent horizontal figures indicate the quantum of compensation in thousand payable to the heirs of the deceased victim. According to this table the multiplier varies from 5 to 18 depending on the age group to which the victim belonged. Thus, under this Schedule the maximum multiplier can be up to 18 and not 16 as was held in *Susamma Thomas case [(1994) 2 SCC 176].*
>
> 18. We must at once point out that the calculation of compensation and the amount worked out in the Schedule suffer from several defects. For example, in Item 1 for a victim aged 15 years, the multiplier is shown to be 15 years

> and the multiplicand is shown to be Rs. 3000. The total should be 3000x15=45,000 but the same is worked out at Rs. 60,000. Similarly, in the second item the multiplier is 16 and the annual income is Rs. 9000; the total should have been Rs. 1,44,000 but is shown to be Rs. 1,71,000. To put it briefly, the table abounds in such mistakes. Neither the tribunals nor the courts can go by the ready reckoner. It can only be used as a guide. Besides, the selection of multiplier cannot in all cases be solely dependant on the age of the deceased. For example, if the deceased, a bachelor, dies at the age of 45 and his dependants are his parents, age of the parents would also be relevant in the choice of the multiplier. But these mistakes are limited to actual calculations only and not in respect of other items. What we propose to emphasise is that the multiplier cannot exceed 18 years' purchase factor. This is the improvement over the earlier position that ordinarily it should not exceed 16. We thought it necessary to state the correct legal position as courts and tribunals are using higher multiplier as in the present case where the Tribunal used the multiplier of 24 which the High Court raised to 34, thereby showing lack of awareness of the background of the multiplier system in *Davies case".*
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> *(Emphasis supplied by us)*

14. A three-Judge Bench in *Supe Dei (Smt) and Others v. National Insurance Company Limited and Another*[14] *[Civil Appeal No. 2753 of 2002; decided on April 16, 2002]* considered the question, whether Second Schedule to the 1988 Act can be made applicable in deciding the application for compensation made under Section 166 or not? This Court held that the Second Schedule under Section 163A of the 1988 Act which gives the amount of compensation to be determined for the purpose of claim under that Section can be taken as a guideline while determining the compensation under Section

14. (2009) 4 SCC 513.

166 of the 1988 Act. The Second Schedule in terms does not apply to a claim made under Section 166 of the 1988 Act.

15. In *Patricia Jean Mahajan*[5], this Court had an occasion to consider Sections 163A and 166 of the 1988 Act. With regard to Section 163A, the Court stated, "the noticeable features of this provision are that it provides for compensation in the case of death or permanent disablement due to accident arising out of use of motor vehicle. The amount of compensation would be as indicated in the Second Schedule. The claimant is not required to plead or establish that the death or permanent disablement was due to any wrongful act or negligence or default of the owner of the vehicle or any other person."

16. Then the Court referred to Sections 165 and 166 of the 1988 Act and observed that a claim under Section 166 did not provide for the amount of compensation according to the Second Schedule; rather Section 168 makes it clear that it is for the tribunal to arrive at an amount of compensation which it may consider to be just in the facts and circumstances of the case. However, the Court did observe that structured formula as provided under Second Schedule would be a safe guide to calculate the compensation while dealing with a claim made under Section 166.

17. In *Patricia Jean Mahajan*[5], in light of the facts which were obtaining in that case, this Court held in paragraphs 19 and 20 of the Report (pgs. 294 and 295) as under:

> "19. In the present case we find that the parents of the deceased were 69/73 years. Two daughters were aged 17 and 19 years. The main question, which strikes us in this case is that in the given circumstances the amount of multiplicand also assumes relevance. The total amount of dependency as found by the learned Single Judge and also rightly upheld by the Division Bench comes to

2,26,297 dollars. Applying multiplier of 10, the amount with interest and the conversion rate of Rs 47, comes to Rs 10.38 crores and with multiplier of 13 at the conversion rate of Rs 30 the amount comes to Rs 16.12 crores with interest. These amounts are huge indeed. Looking to the Indian economy, fiscal and financial situation, the amount is certainly a fabulous amount though in the background of American conditions it may not be so. Therefore, where there is so much of disparity in the economic conditions and affluence of the two places viz. the place to which the victim belongs and the place where the compensation is to be paid, a golden balance must be struck somewhere, to arrive at a reasonable and fair mesne. Looking by the Indian standards they may not be much too overcompensated and similarly not very much undercompensated as well, in the background of the country where most of the dependent beneficiaries reside. Two of the dependants, namely, parents aged 69/73 years live in India, but four of them are in the United States. Shri Soli J. Sorabjee submitted that the amount of multiplicand shall surely be relevant and in case it is a high amount, a lower multiplier can appropriately be applied. We find force in this submission. Considering all the facts and factors as indicated above, to us it appears that application of multiplier of 7 is definitely on the lower side. Some deviation in the figure of multiplier would not mean that there may be a wide difference between the multiplier applied and the scheduled multiplier which in this case is 13. The difference between 7 and 13 is too wide. As observed earlier, looking to the high amount of multiplicand and the ages of the dependants and the fact that the parents are residing in India, in our view application of multiplier of 10 would be reasonable and would provide a fair compensation i.e. a purchase factor of 10 years. We accordingly hold that multiplier of 10 as applied by the learned Single Judge should be restored instead of

multiplier of 13 as applied by the Division Bench. We find no force in the submission made on behalf of the claimants that in no circumstances the amount of multiplicand would be a relevant consideration for application of appropriate multiplier. We have already given our reasons in the discussion held above.

20. The court cannot be totally oblivious to the realities. The Second Schedule while prescribing the multiplier, had maximum income of Rs 40,000 p.a. in mind, but it is considered to be a safe guide for applying the prescribed multiplier in cases of higher income also but in cases where the gap in income is so wide as in the present case income is 2,26,297 dollars, in such a situation, it cannot be said that some deviation in the multiplier would be impermissible. Therefore, a deviation from applying the multiplier as provided in the Second Schedule may have to be made in this case. Apart from factors indicated earlier the amount of multiplicand also becomes a factor to be taken into account which in this case comes to 2,26,297 dollars, that is to say an amount of around Rs 68 lakhs per annum by converting it at the rate of Rs 30. By Indian standards it is certainly a high amount. Therefore, for the purposes of fair compensation, a lesser multiplier can be applied to a heavy amount of multiplicand. A deviation would be reasonably permissible in the figure of multiplier even according to the observations made in the case of *Susamma Thomas*[1] where a specific example was given about a person dying at the age of 45 leaving no heirs being a bachelor except his parents."

18. The noticeable observations in *Patricia Jean Mahajan*[5] are that, (i) for the purposes of fair compensation, a lesser multiplier can be applied to a heavy amount of multiplicand and (2) a deviation would be reasonably permissible in the figure of multiplier in appropriate cases.

19. In *Deepal Girishbhai Soni and Others v. United India*

Insurance Co. Ltd.[15]*, Baroda,* the question that arose for consideration before a three-Judge Bench was, whether a proceeding under Section 163A of the 1988 Act was a final proceeding and the claimant, who has been granted compensation under Section 163A, was debarred from proceeding with any further claims on the basis of the fault liability in terms of Section 166. This Court considered the statutory provisions contained in the 1988 Act, including Sections 163A and 166. With regard to Section 163A, the Court stated as follows:

> "42. Section 163-A was, thus, enacted for grant of immediate relief to a section of the people whose annual income is not more than Rs 40,000 having regard to the fact that in terms of Section 163-A of the Act read with the Second Schedule appended thereto, compensation is to be paid on a structured formula not only having regard to the age of the victim and his income but also the other factors relevant therefor. An award made thereunder, therefore, shall be in full and final settlement of the claim as would appear from the different columns contained in the Second Schedule appended to the Act. The same is not interim in nature. . . . This together with the other heads of compensation as contained in columns 2 to 6 thereof leaves no manner of doubt that Parliament intended to lay a comprehensive scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation for proving that the accident occurred owing to negligence on the part of the driver of the motor vehicle or any other fault arising out of use of a motor vehicle.
>
> xxx xxx xxx
>
> 46. Section 163-A which has an overriding effect provides

15. (2004) 5 SCC 385.

for special provisions as to payment of compensation on structured-formula basis. Sub-section (1) of Section 163-A contains non obstante clause in terms whereof the owner of the motor vehicle or the authorised insurer is liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. …….. .

xxx xxx xxx

51. The scheme envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set-off against a higher compensation unlike Section 140. In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs 40,000 or less is covered thereunder whereas Sections 140 and 166 cater to all sections of society.

52. It may be true that Section 163-B provides for an option to a claimant to either go for a claim under Section 140 or Section 163-A of the Act, as the case may be, but the same was inserted *ex abundanti cautela* so as to remove any misconception in the minds of the parties to the lis having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that Section 166 of the Act provides for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims both under Section 163-A and Section 166 does not arise. If the submission of the learned counsel is accepted the same would lead to an incongruity.

xxx xxx xxx".

20. A two-Judge Bench in *Abati Bezbaruah*[7] with reference to the structured formula set out in the Second Schedule in 1988 Act observed as follows:-

> It is now a well-settled principle of law that the payment of compensation on the basis of structured formula as provided for under the Second Schedule should not ordinarily be deviated from. Section 168 of the Motor Vehicles Act lays down the guidelines for determination of the amount of compensation in terms of Section 166 thereof. Deviation from the structured formula, however, as has been held by this Court, may be resorted to in exceptional cases. Furthermore, the amount of compensation should be just and fair in the facts and circumstances of each case.

21. In *Shanti Pathak*[8] a three-Judge Bench of this Court in a very brief order applied multiplier of 8 for a claim of compensation in respect of the deceased who was 25 years at the time of his death.

22. In *Oriental Insurance Company Ltd. v. Jashuben and Ors*.[16], two-Judge Bench of this Court applied the multiplier of 13 in a case where the age of the deceased was 35 years at the time of accident.

23. In *Sarla Verma (Smt.) and Ors. v. Delhi Transport Corporation and Anr.*[17], this Court had an occasion to consider the peculiarities of Section 163A of the 1988 Act vis-à-vis Section 166. The Court reiterated what was stated in earlier decisions that the principles relating to determination of liability and quantum of compensation were different for claims made under Section 163A and claims made under Section 166. It was stated that Section 163A and the Second Schedule in terms

16. 2008 (4) SCC 162.

17. 2009 (6) SCC 121.

did not apply to determination of compensation in applications under Section 166. While stating that Section 163A contains a special provision, this Court said:

> "34. . . . . Section 163-A of the MV Act contains a special provision as to payment of compensation on structured formula basis, as indicated in the Second Schedule to the Act. The Second Schedule contains a table prescribing the compensation to be awarded with reference to the age and income of the deceased. It specifies the amount of compensation to be awarded with reference to the annual income range of Rs 3000 to Rs 40,000. It does not specify the quantum of compensation in case the annual income of the deceased is more than Rs 40,000. But it provides the multiplier to be applied with reference to the age of the deceased. The table starts with a multiplier of 15, goes up to 18, and then steadily comes down to 5. It also provides the standard deduction as one-third on account of personal living expenses of the deceased. Therefore, where the application is under Section 163-A of the Act, it is possible to calculate the compensation on the structured formula basis, even where the compensation is not specified with reference to the annual income of the deceased, or is more than Rs 40,000, by applying the formula: (2/3 × AI × M), that is two-thirds of the annual income multiplied by the multiplier applicable to the age of the deceased would be the compensation. Several principles of tortuous liability are excluded when the claim is under Section 163-A of the MV Act."

24. This Court, however, noticed discrepancies/errors in the multiplier scale given in the Second Schedule table and also observed that application of table may result in incongruities. Paras 35 and 36 (pp. 137) of the Report are as follows:

> **"**35**.** There are however discrepancies/errors in the multiplier scale given in the Second Schedule table. It prescribes a lesser compensation for cases where a higher multiplier of 18 is applicable and a larger compensation with reference to cases where a lesser multiplier of 15, 16, or 17 is applicable. From the quantum of compensation specified in the table, it is possible to infer that a clerical error has crept in the Schedule and the "multiplier" figures got wrongly typed as 15, 16, 17, 18, 17, 16, 15, 13, 11, 8, 5 and 5 instead of 20, 19, 18, 17, 16, 15, 14, 12, 10, 8, 6 and 5.
>
> 36. Another noticeable incongruity is, having prescribed the notional minimum income of non-earning persons as Rs 15,000 per annum, the table prescribes the compensation payable even in cases where the annual income ranges between Rs 3000 and Rs 12,000. This leads to an anomalous position in regard to applications under Section 163-A of the MV Act, as the compensation will be higher in cases where the deceased was idle and not having any income, than in cases where the deceased was honestly earning an income ranging between Rs 3000 and Rs 12,000 per annum. Be that as it may."

25. While referring to the decisions of this Court in *New India Assurance Company Ltd. v. Charlie and Anr*.[18], *T.N. State Road Transport Corporation v. S. Rajapriya and Ors.*[19] and *U.P. State Road Transport Corporation v. Krishna Bala and Ors.*[20], this Court in *Sarla Verma*[17] in paragraph 39 (pg. 138) of the Report observed as follows:

> **"**39. In *New India Assurance Co. Ltd. v. Charlie* this Court noticed that in respect of claims under Section 166 of the MV Act, the highest multiplier applicable was 18 and that the said multiplier should be applied to the age group of 21 to 25 years (commencement of normal productive years) and the lowest multiplier would be in respect of

18. 2005 (10) SCC 720.

19. 2005 (6) SCC 236.

20. 2006 (6) SCC 249.

persons in the age group of 60 to 70 years (normal retiring age). This was reiterated in *T.N. State Transport Corpn. Ltd. v. S. Rajapriya* and *U.P. SRTC v. Krishna Bala*."

26. In *Sarla Verma*[17], this Court undertook the exercise of comparing the multiplier indicated in *Susamma Thomas*[1], *Trilok Chandra*[3] and *Charlie*[18], for claims under Section 166 of the 1988 Act with the multiplier mentioned in the Second Schedule for claims under Section 163A (with appropriate deceleration after 50 years) as follows:

Age of Deceased	Multiplier Scale as envisaged in *Susamma Thomas*[1]	Multiplier Scale as adopted by *Trilok Chandra*[3]	**Multiplier Scale in *Trilok Chandra*[3] as clarified in *Charlie*[18]**	Multiplier Specified in Second Column in the Table in Second Schedule to the MV Act	Multiplier actually used in Second Schedu--le to the MV Act (as seen from the quantum of compe--nsation)
(1)	(2)	(3)	***(4)***	(5)	(6)
Upto 15 years	-	-	**-**	15	20
15 to 20 years	16	18	***18***	16	19
21 to 25 years	15	17	***18***	17	18
26 to 30 years	14	16	***17***	18	17
31 to 35 years	13	15	***16***	17	16
36 to 40 years	12	14	***15***	16	15
41 to 45 years	11	13	***14***	15	14
46 to 50 years	10	12	***13***	13	12
51 to 55 years	9	11	***11***	11	10
56 to 60 years	8	10	***09***	8	8
61 to 65 years	6	08	***07***	5	6
Above 65 years	5	05	***05***	5	5

27. In paragraph 42 (pg. 140) of the Report, this Court in *Sarla Verma*[17] laid down that the multiplier shall be used in a given case in the following manner:

> **"**42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas*, *Trilok Chandra* and *Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

28. The above exercise was undertaken in *Sarla Verma*[17] to ensure uniformity and consistency in the selection of multiplier while awarding compensation in motor accident claims made under Section 166.

29. Section 168 of the 1988 Act provides the guideline that the amount of compensation shall be awarded by the claims tribunal which appears to it to be just. The expression, 'just' means that the amount so determined is fair, reasonable and equitable by accepted legal standards and not a forensic lottery. Obviously 'just compensation' does not mean 'perfect' or 'absolute' compensation. The just compensation principle requires examination of the particular situation obtaining uniquely in an individual case.

30. Almost a century back in *Taff Vale Railway Co. v. Jenkins*[21], the House of Lords laid down the test that award of damages in fatal accident action is compensation for the reasonable expectation of pecuniary benefit by the deceased's

21. (1913) AC 1.

family. The purpose of award of compensation is to put the dependants of the deceased, who had been bread-winner of the family, in the same position financially as if he had lived his natural span of life; it is not designed to put the claimants in a better financial position in which they would otherwise have been if the accident had not occurred. At the same time, the determination of compensation is not an exact science and the exercise involves an assessment based on estimation and conjectures here and there as many imponderable factors and unpredictable contingencies have to be taken into consideration.

31. This Court in *C.K. Subramania Iyer and Ors. v. T.Kunhikuttan Nair and Ors.*[22], reiterated the legal philosophy highlighted in *Taff Vale Railway*[21] for award of compensation in claim cases and said that there is no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations. Obviously, award of damages in each case would depend on the particular facts and circumstances of the case but the element of fairness in the amount of compensation so determined is the ultimate guiding factor.

32. In *Susamma Thomas*[1], this Court – though with reference to Section 110B of the Motor Vehicles Act, 1939 – stated that the multiplier method was the accepted norm of ensuring the just compensation which will make for uniformity and certainty of the awards. We are of the opinion that this statement in *Susamma Thomas*[1] is equally applicable to the fatal accident claims made under Section 166 of the 1988 Act. In our view, the determination of compensation based on multiplier method is the best available means and the most satisfactory method and must be followed invariably by the tribunals and courts.

33. We have already noticed the table prepared in Sarla *Verma*[17] for the selection of multiplier. The table has been

22. 1970 (2) SCR 688.

prepared in *Sarla Verma*[17] having regard to the three decisions of this Court, namely, *Susamma Thomas*[1], *Trilok Chandra*[3] and *Charlie*[18] for the claims made under Section 166 of the 1988 Act. The Court said that multiplier shown in Column (4) of the table must be used having regard to the age of the deceased. Perhaps the biggest advantage by employing the table prepared in *Sarla Verma*[17] is that the uniformity and consistency in selection of the multiplier can be achieved. The assessment of extent of dependency depends on examination of the unique situation of the individual case. Valuing the dependency or the multiplicand is to some extent an arithmetical exercise. The multiplicand is normally based on the net annual value of the dependency on the date of the deceased's death. Once the net annual loss (multiplicand) is assessed, taking into account the age of the deceased, such amount is to be multiplied by a 'multiplier' to arrive at the loss of dependency. In *Sarla Verma*[17], this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in *Sarla Verma*[17] that claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in *Sarla Verma*[17].

34. If the multiplier as indicated in Column (4) of the table read with paragraph 42 of the Report in *Sarla Verma*[17] is followed, the wide variations in the selection of multiplier in the claims of compensation in fatal accident cases can be avoided. A standard method for selection of multiplier is surely better than a criss-cross of varying methods. It is high time that we move to a standard method of selection of multiplier, income

for future prospects and deduction for personal and living expenses. The courts in some of the overseas jurisdictions have made this advance. It is for these reasons, we think we must approve the table in *Sarla Verma*[17] for the selection of multiplier in claim applications made under Section 166 in the cases of death. We do accordingly. If for the selection of multiplier, Column (4) of the table in *Sarla Verma*[17] is followed, there is no likelihood of the claimants who have chosen to apply under Section 166 being awarded lesser amount on proof of negligence on the part of the driver of the motor vehicle than those who prefer to apply under Section 163A. As regards the cases where the age of the victim happens to be upto 15 years, we are of the considered opinion that in such cases irrespective of Section 163A or Section 166 under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in *Sarla Verma*[17] should be followed. This is to ensure that claimants in such cases are not awarded lesser amount when the application is made under Section 166 of the 1988 Act. In all other cases of death where the application has been made under Section 166, the multiplier as indicated in Column (4) of the table in *Sarla Verma*[17] should be followed.

35. With regard to the addition to income for future prospects, in *Sarla Verma*[17], this Court has noted earlier decisions in *Susamma Thomas*[1], *Sarla Dixit*[2] and *Abati Bezbaruah*[7] and in paragraph 24 of the Report held as under:

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

36. The standardization of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases.

37. As regards deduction for personal and living expenses, in *Sarla Verma*[17], this Court considered *Susamma Thomas*[1], *Trilok Chandra*[3] and *Fakeerappa*[23] and finally in paras 30, 31 and 32 of the Report held as under:

> "30.……Having considered several subsequent decisions

23. Fakeerappa and Anr. v. Karnatka Cement Pipe Factory and others: [(2004) 2 SCC 473.

of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

38. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in

mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependant members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

39. In our view, the standards fixed by this Court in *Sarla Verma*[17] on the aspect of deduction for personal living expenses in paragraphs 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding para is made out.

40. In what we have discussed above, we sum up our conclusions as follows:

(i) In the applications for compensation made under Section 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the table prepared in *Sarla Verma*[17] read with para 42 of that judgment.

(ii) In cases where the age of the deceased is upto 15 years, irrespective of the Section 166 or Section 163A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in *Sarla Verma*[17] should be followed.

(iii) As a result of the above, while considering the claim applications made under Section 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

(iv) The Claims Tribunals shall follow the steps and

guidelines stated in para 19 of *Sarla Verma*[17] for determination of compensation in cases of death.

(v) While making addition to income for future prospects, the Tribunals shall follow paragraph 24 of the Judgment in *Sarla Verma*[17].

(vi) Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paragraphs 30, 31 and 32 of the judgment in *Sarla Verma*[17] subject to the observations made by us in para 38 above.

(vii) The above propositions *mutatis mutandis* shall apply to all pending matters where above aspects are under consideration.

41. The reference is answered accordingly. Civil appeals shall now be posted for hearing and disposal before the regular Bench.

R.P. Reference answered.

ASSTT. GENERAL MANAGER, KARNATAKA STATE FINANCIAL CORPORATION

v.

GENERAL SECRETARY, MYSORE DIVISION INDUSTRIAL WORKERS GENERAL UNION AND ORS.

(Special Leave Petition (Civil) No. 8684 of 2010)

APRIL 03, 2013

[H.L. GOKHALE AND RANJAN GOGOI, JJ.]

STATE FINANCIAL CORPORATIONS ACT, 1951,

s. 46-B -Industrial concern closed down - Recovery of dues of workmen as also of State Financial Corporation - Held: Workmen had their rights adjudicated in the year 2005, and court had held that they were entitled to their dues u/s.33-C of the Industrial Disputes Act as well as under Payment of Gratuity Act -- Labour Commissioner did not proceed with the proceedings for realizing claims of workmen which he was expected to realize from sale proceeds of assets of company -- Merely because appellant Financial Corporation subsequently sold the properties, that by itself cannot destroy rights of workmen as held by competent courts -- Under s.46-B, provisions of 1951 Act shall be applicable in addition to, and not in derogation of any other law for the time being applicable to an industrial concern -- High Court compared claim of petitioner with claims of workmen where a company goes into liquidation and held that dues of workmen shall have preference -- Comparison has to be seen with proper perspective and that has to be seen on the backdrop of s. 46-B -- There is no error in the order of High Court - Industrial Disputes Act,1947 - ss.33-C- Payment of Gratuity Act, 1972.

Central Bank of India vs. Sriguppa Sugars & Chemicals Ltd. and Ors. **2007(8) SCR 898 = (2007) 8 SCC 353 and**

Union of India and Ors. vs. Sicom Limited and Another, **2008 (17)SCR 120 = (2009) 2 SCC 121 -distinguished.**

Case Law Reference:

2007 (8) SCR 898	**distinguished**	**para 7**
2008 (17) SCR 120	**distinguished**	**para 7**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 8684 of 2010.

From the Judgment and order dated 16.12.2009 of the High Court of Karnataka at Bangalore in WA No. 1382 of 2009.

Kiran Suri, S.J. Amith, Nakibur Rahman Barbuiya for the Petitioner.

V.N. Raghupathy, Shailesh Madiyal, Muthu Kumar K.V., Anitha Shenoy for the Respondents.

The following order of the Court was delivered

O R D E R

1. Heard Ms. Kiran Suri, learned counsel for the appellant in support of this petition and Mr. Raghupathy, learned counsel appearing for the respondent Trade Union.

2. This special leave petition seeks to challenge the judgement and order dated 16.12.2009 rendered by a Division Bench of the Karnataka High Court in Writ Appeal No.1382/ 2009 whereby the writ appeal filed by the respondents was allowed, and the order passed by the learned Single Judge of the High Court dismissing Writ Petition No.4529/2009 filed by the respondent was set aside.

3. The short facts leading to the present special leave petition are this wise: The respondent No.1 is a Trade Union registered under the Trade Unions Act, 1926 and was

representing the workmen of the industrial concern known as Mysore Panel and Boards Pvt. Ltd. This company closed down its manufacturing activities sometime in January, 2002, leaving some 83 workmen jobless. Consequent upon the closure of the said company, there were various statutory and legal dues of the workmen, and for that purpose they filed Applications under Section 33-C of the Industrial Disputes Act, 1947 as well as under the Payment of Gratuity Act. Those applications were allowed by the concerned authorities. Thus, one Application was allowed by order dated 4.3.2005 for a claim of Rs.4,71,781/-, another Application was allowed by the order dated 30.8.2005 for a claim of Rs.16,66,585/- and the third Application filed under the Payment of Gratuity Act was allowed by order dated 13.9.2005 for a sum of Rs.7,78,696/-, resulting into total dues of Rs.29,17,062/-. Having waited sufficiently, the respondent Trade Union wrote to the Deputy Commissioner of the Mysore District, Mysore by its letter dated 28.8.2008 seeking recovery of these amounts.

4. It so transpired that the Deputy Commissioner, Mysore District was not quick enough in taking the necessary steps, whereas the petitioner Corporation which had its claim against this company, proceeded to sell the leasehold rights of the company for realizing the amount of Rs.24,00,000/-. The claim of the workmen as aforesaid was for Rs.29,17,062/-. Fearing that the amount recovered by the sale of the leasehold rights of the company will seriously erode the dues of workmen, the respondents filed a writ petition before the High Court. The first prayer in the writ petition was for issue of a writ of mandamus or direction to the Deputy Commissioner, Mysore District to take immediate steps to proceed against the Company for recovery of statutory and legal dues of the workmen as arrears of land revenue by selling the assets of the Company. Prayer (b) of the writ petition was to seek writ of mandamus or direction or order to the Karnataka State Financial Corporation, which is the petitioner herein, not to appropriate the sale proceeds from the sale of machinery and other assets (realized pursuant

to the public auction) and to apportion the same to satisfy the claims of the workmen in accordance with law.

5. The learned Single Judge of the Karnataka High Court dismissed this writ petition, though the appeal therefrom was allowed by a Division Bench of the High Court. Being aggrieved by the judgment and order passed by the Division Bench of the High Court, the present special leave petition has been filed by the petitioner.

6. The submission of Ms. Kiran Suri, learned counsel for the appellant Corporation is that under Section 29 of the State Financial Corporations Act, 1951, the Financial Corporation has a right to take over the management or possession of the properties or both of the industrial concern, and this right has precedence over all other claims. She relies upon Section 31 of the said Act which gives special provisions for enforcement of the claims of the Financial Corporation. Ms. Suri criticises the judgment of the High Court which looked into the proviso to Section 529 of the Companies Act, 1956 under which the dues of the workmen are given a precedence. The submission of Ms. Suri was that unless the liquidation proceedings are taken, the rights of the workmen under Section 529 of the Companies Act cannot fructify, and until then those rights cannot have any precedence over the rights of the State Financial Corporation under Sections 29 & 31 of the State Financial Corporations Act, 1951.

7. The learned counsel relies upon a few decisions of this Court. Firstly, on *Central Bank of India vs. Sriguppa Sugars & Chemicals Ltd. and Ors.,* (2007) 8 SCC 353. In that case, this Court has held that the rights of the appellant Bank had precedence over the workmen's dues and the statutory rights, like that of the Cane Commissioner. She relies upon particularly paragraphs 16 and 17 of the said judgment where it has been held that the rights of the appellant Bank cannot be affected by the orders of the Cane Commissioner and both the Cane Commissioner, and the workmen, in the absence of a

liquidation, stand only as unsecured creditors and their rights cannot prevail over the rights of the workmen. She has also relied upon the decision of this Court in the case of *Union of India and Ors. vs. Sicom Limited and Another,* (2009) 2 SCC 121, and particularly paragraphs 16 and 23 thereof. In paragraph 23, Section 46-B which deals with the rights of the State Financial Corporation, has been referred to, and it is held that the non obstante clause in that Section will not only prevail over the contract but also other laws.

8. We may we refer to Section 46-B of the State Financial Corporations Act, 1951 which reads as follows:

> "46B. Effect of Act on other laws.- The provision of this Act and of any rule or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern." (emphasis supplied)

9. The two authorities relied upon by Ms. Suri will have to be looked at in a proper perspective. As far as the judgment of this Court in *Central Bank of India* (supra) is concerned, the Court has not discussed the provision of Section 46-B and particularly, the later part thereof, which specifically lays down that the provisions of the State Financial Corporations Act, 1951 shall be applicable in addition to, and not in derogation of any other laws for the time being applicable to an industrial concern. Similarly, the judgment in *Sicom Limited* (supra), though refers to the provision of Section 46-B of the State Financial Corporations Act, 1951, does not deal with the effect thereof.

10. In the present case, as we have noted above, the

workmen had their rights adjudicated way back in the year 2005, and the Court concerned had held that they were entitled to their dues under Section 33-C of the Industrial Disputes Act, 1947 as well as under the Payment of Gratuity Act. Unfortunately, the Labour Commissioner had not proceeded with the proceedings for realizing the claims of the workmen which he was expected to realize from the sale proceeds of the assets of the company. Merely because the appellant Financial Corporation subsequently sold the properties, that by itself cannot destroy the rights of the workmen which they had under the orders passed by the competent Courts. Under Section 46-B, the provisions of the State Financial Corporations Act shall be applicable in addition to, and not in derogation of any other law for the time being applicable to an industrial concern. The High Court compared the claim of the petitioner with the claims of the workmen where a company goes into liquidation and held that the dues of the workmen shall have preference. The comparison has to be seen with proper perspective and that has to be seen on the backdrop of Section 46-B of the Act. We do not find any error in the order passed by the High Court. This special leave petition is, therefore, dismissed.

R.P. SLP dismissed.

S. KESARI HANUMAN GOUD

v.

ANJUM JEHAN & ORS.

(Civil Appeal Nos. 2885-2887 of 2005 etc.)

APRIL 10, 2013

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

CODE OF CIVIL PROCEDURE, 1908:

s.96 read with O. 41, r.31 - First appeal before High Court challenging the judgment and decree passed in a suit for specific performance of agreement to sell - High Court holding that the plaintiff was not ready and willing to perform his part of contract - Held: Finding recorded by High Court on this issue is perverse being contrary to evidence on record - Further, High Court while deciding the first appeal u/s 96, did not consider all the issues as is required under O. 41, r.31 - Judgment and decree passed by High Court set aside and that passed by trial court restored - Appellant directed to refund the amount of compensation to first respondent along with 9% interest.

O. 3, rr. 1 and 2 - Recognized agent - Power of attorney holder - Held: It is a settled legal proposition that power of attorney holder cannot depose in place of the principal - Nor can he depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined.

The appellant in C.A Nos. 2885-2887 of 2005 filed Suit No. 30 of 1984 against respondent no. 1 (defendant no. 1) for specific performance of the agreement to sell entered into between the parties on 15.10.1977 and for

directing respondent no. 1 to execute a registered sale deed in his favour ignoring the agreement to sell in favour of respondents/defendants no. 3, 6 and 7 which were entered into despite the public notice issued by the plaintiff. It was the case of the plaintiff that he had always been ready and willing to perform his part and it was the first defendant who evaded to perform her part of the suit agreement. Respondent/defendant no. 1 denied the plaint allegation and stated that when the plaintiff failed to raise necessary money, he informed her that she was at liberty to sell the property to anyone. Respondent no. 3/ defendant no. 7 also filed Suit No. 135 of 1984 for perpetual injunction restraining the plaintiff from interfering with the construction of a theatre building including the compound wall which was in close proximity to his land. During the pendency of the suit respondent no. 1 executed and got registered a sale deed in favour of respondent no. 2/defendant no. 3 with respect to a part of the suit property. Further, the GPA holder also got registered another sale deed in favour of respondent no. 2/defendant no. 3 with respect to a part of the suit land. The trial court decreed the suit of the appellant except for a small area which had been purchased by defendant no. 6. The suit filed by respondent no. 3/defendant no. 7 was also dismissed. In the appeals preferred by both sides, the High Court held that the plaintiff-appellant was not ready and willing to perform his part of contract. However, it held the plaintiff entitled to get the sale deed executed in respect of the land excluding the land sold to defendants nos. 3, 6 and 7. Both the sides filed the appeals.

Disposing the appeals, the Court

HELD: 1.1 The plaint contained a specific averment that the plaintiff had always been ready and willing to perform his part. In the written statement the said

averment was simply denied. In the replication the plaintiff stated that he was capable of raising necessary finance. The appellant/plaintiff examined himself as PW.1, and in his cross-examination he has denied any suggestion made to him to the effect that he had ever informed the power of attorney holder of respondent No.1 that he would be unable to raise the balance of the sale consideration. With respect to the issue regarding financial capacity to pay, the appellant/plaintiff examined PW.2 and PW.3. They fully supported his case, deposing that he was a man of means, and that he had sufficient properties and the means to purchase the said suit property. The finding recorded by the High Court on this issue is perverse being contrary to the evidence on record. [para 8-12] [761-C-E; 762-B-D; 763-A-B]

1.2 It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of O. 3, rr. 1 and 2 CPC empower the holder of the power of attorney to "act" on behalf of the principal. The term "act", would not include deposing in place and instead of the principal. Similarly, the power-of-attorney holder cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. [para 13] [763-C-F]

Vidhyadhar v. Manikrao & Anr., **1999 (1) SCR 1168 = AIR 1999 SC 1441;** *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.,* **2004 (6) Suppl. SCR 681 = (2005) 2 SCC 217;** *M/S Shankar Finance and Investment v. State of A.P & Ors.,* **2008 (10) SCR 905 = AIR 2009 SC 422; and** *Man Kaur v. Hartar Singh Sangha* **2010 (12) SCR 515 = (2010) 10 SCC 512 - relied on.**

1.3 So far as the notice of the agreement between the appellant and respondent No. 1 is concerned, the trial

court after taking note of the recital of the said agreement in the agreement to sell and sale deed also, has held, that, so far as the land sold to the respondents other than respondent no.6 is concerned, the parties had been fully aware of the same. Only respondent no.6 had no such notice. It has been conceded on behalf of the appellant that the same being a very small area, the appellant is not willing to disturb the possession of respondent no.6. [para 14] [763-G-H; 764-A]

2.The judgment and decree passed by the High Court is set aside, and that passed by the trial court is restored. As a consequence, the appellant is entitled to get the sale deed executed and registered, with respect to all the suit land available (minus the land acquired and the land purchased by respondent no.6). The appellant is directed to refund the amount of compensation to respondent no. 1 along with 9% interest. [para 16-17] [764-D-E]

Case Law Reference:

1999 (1) SCR 1168	**relied on**	**para 13**
2004 (6) Suppl. SCR 681	**relied on**	**para 13**
2008 (10) SCR 905	**relied on**	**para 13**
2010 (12) SCR 515	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2885-2887 of 2005.

From the Judgment and Order dated 10.06.2003 of the High Court of Judicature Andhra Pradesh in C.C.C. Appeal Nos. 34, 33 of 1991 and 92 of 1993.

WITH

C.A. Nos. 2888 and 4459 of 2005.

Anoop G. Chaudhari, A.T.M. Rangaramanujam, P. Vinay Kumar, Vijay Prakash, Sohan Singh Rana, Bindra Rana, Vikrant Rana, Piyush Kumar (For S.S. Rana & Co.), Vishal Yadav, R. Santhan Krishnan, Praveen Kumar Pandey, Aditya A., D. Mahesh Babu, A.V. Rangam, Richa Bharadwaja, Abhijit Sengupta for the Appearing Parties.

The Judgment of the Court was delivered by

DR. B.S.CHAUHAN, J.

Civil Appeal Nos. 2885-2887 of 2005

1. These appeals have been preferred against the judgment and order dated 10.6.2003 by the High Court of Judicature, Andhra Pradesh at Hyderabad in C.C.C.A. Nos.34 and 33 of 1991 and C.C.C.A.No. 92 of 1993, by way of which the appeals filed by the respondents against the common judgment and decree dated 22.3.1991, in O.S. No.30 of 1984 and O.S. No.135 of 1984, passed by the court of the Additional Chief Judge, City Civil Court, Hyderabad, have been partly allowed, by modifying the said judgment and order of the trial court.

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

A. The appellant/plaintiff was carrying on business prior to 1.1.1978 in the appurtenant land as a tenant, and had made an offer to purchase the said premises, alongwith two other premises belonging to the landlady Ms. Anjum Jehan - respondent No.1/defendant No.1 (hereinafter referred to as `Res.No.1').

B. The parties entered into an agreement dated 15.10.1977, for the sale of land admeasuring 1200 square yards situated at Musheerabad, Hyderabad, Andhra Pradesh, for a total consideration of Rs.1,70,070/-. Out of which a sum of Rs.25,000/- was paid as earnest money. The said agreement to sell, provided that the sale deed was to be executed within

a period of six months from the date of agreement, or upon intimation by the vendor, as she had to obtain permission from the competent authority under Section 27 of the Urban Land Ceiling Act, 1976 (hereinafter referred to as `the Act 1976), the necessary income tax clearances and the sub division permission from the municipal corporation. The aforesaid suit land was also in the possession of the landlady, and had partly been occupied by defendant no. 2/respondent (Narsoji).

C. After the execution of the said agreement to sell, the appellant/plaintiff paid non-agricultural assessment tax. A legal notice dated 18.6.1979 was received by the appellant from Res. No.1 Ms. Anjum Jehan, stating that she had obtained requisite permission from the statutory authorities under the Act 1976, from the income tax authorities, and also from the sub-divisional authorities.

D. The appellant/plaintiff asked Res. No.1 vide letter dated 2.7.1979, to send the copies of the aforesaid permissions, as well as a copy of the General Power of Attorney (hereinafter referred to as the `GPA'), that had been executed by her.

E. Instead of executing the sale-deed in favour of the appellant/plaintiff, Res. No.1 tried to sell the suit property to other persons. Therefore, the appellant/plaintiff got a public notice published in local newspapers on 29.4.1980 and 30.4.1980, in respect of the suit property, stating that an agreement to sell had been executed between the parties as regards the said land, and that therefore, no other person must purchase the same.

F. Despite the said notice, the GPA holder of Res. No.1 entered into two different agreements to sell with respondent no. 2/defendant no.3 (K.S.R.Murthy) on 29/30.4.1980, for open land admeasuring 510 square yards.

G. The appellant/plaintiff filed a suit bearing O.S. No. 30 of 1984 on 23.6.1983 for specific performance of the

agreement to sell dated 15.10.1977, directing the Res. No.1 to execute a registered sale deed in favour of the appellant/plaintiff, and ignoring the agreement to sell in favour of respondent/defendant nos.3, 6 and 7.

H. Respondent no.3/Defendant No. 7 (K.Y. Rajaiah) filed Original Suit No. 135 of 1984 on 27.12.1983, for perpetual injunction, restraining the appellant/plaintiff from interfering with the construction of a theatre building, including the compound wall of the same, which was in close proximity to his land.

I. During the pendency of these two suits, Res.No.1 executed a sale deed, and she got the same registered on 29.4.1985, in favour of respondent no.2/defendant no.3 with respect to the part of the suit property admeasuring 260 square yards, and the recital of the sale deed acknowledged the agreement between the appellant/plaintiff and Res. No.1.

J. The GPA holder registered another sale deed in favour of respondent no.2/defendant no. 3 on 30.4.1985, with respect to the suit property admeasuring 260 square yards.

K. The trial court, vide judgment and decree dated 22.3.1991 decreed the suit of the appellant/plaintiff except for a small area admeasuring 65 square yards, which had been purchased by defendant no.6 (represented by Lrs. defendant nos.6 to 10), observing that the said defendant had no knowledge of any agreement to sell between the appellant/plaintiff and Res. No.1. The trial court also dismissed Suit No.135 of 1984 that had been filed by respondent no.3/defendant No.7 (K.Y. Rajaiah).

L. The appellant/plaintiff was directed to deposit the balance consideration amount in the trial court within a period of four weeks, and the same was duly deposited by the appellant/plaintiff on 6.4.1991.

M. Both sides preferred appeals before the High Court,

and all the appeals were disposed of by a common judgment dated 10.6.2003, as referred to hereinabove.

N. The High Court held, that the appellant/plaintiff was not ready and willing to perform his part of the contract, thus, in view of the same, there was no occasion to decide issues regarding whether the subsequent purchasers were in fact, bonafide purchasers for consideration without notice of the agreement to sell between the appellant/plaintiff and Res. No.1. However, the court further held, that the appellant/plaintiff would be entitled to get the sale deed executed in respect of the said land, excluding the land sold to defendant nos.3, 6 and 7 at the rate of Rs.750/- per square yard, adjusting the amount that had already been paid.

O. Res.No.1 filed a Review Petition before the High Court. During the pendency of the said review petition, both the sides have preferred these appeals. The Review Petition filed by Res. No.1 stood dismissed vide order dated 20.2.2004. The said order is also under challenge before us in connected appeal Nos. 2888 and 4459 of 2005.

Hence, these appeals.

3. Shri Anoop G. Chaudhari, learned senior counsel appearing on behalf of the appellant/plaintiff, has submitted that the High Court, while dealing with the first appeal, has decided the same under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as `the CPC'), giving strict adherence to Order XLI Rule 31 CPC, and thus that it ought to have dealt with each and every issue, and appreciate all the evidence on record. It was under an obligation to record findings on each issue separately. The High Court has committed an error in appreciating the evidence on record, and coming to the conclusion that the appellant/plaintiff was not ready and willing to perform his part of the contract, as the appellant/plaintiff had in fact been issuing public notices, with the intention of making other people aware of the fact that they

must not indulge in any kind of transaction in respect of the suit property, as the same belonged to him. He also had the financial capacity to pay, which stood proved by the fact that within a period of three weeks from the date of judgment and decree of the High Court, he deposited the entire amount. Furthermore, the High Court ought to have appreciated the evidence on record, with respect to whether the other defendants/subsequent bonafide purchasers had purchased the land without notice. Merely saying that the same was not necessary, would mean that the court itself has violated the mandate of Order XLI Rule 31 CPC. Res.No.1 (Ms. Anjum Jehan) never appeared in the witness box and never filed a written statement. The same was filed by her GPA holder. The said GPA was in respect of various other properties, and the GPA holder was not authorised to pursue suits in respect of the suit property. Under no circumstance is the GPA holder competent to enter the witness box and to give evidence as a substitute for the original party. Thus, the appeals deserve to be allowed, and the judgment and decree of the High Court, is liable to be set aside.

4. Per contra Shri A.T.M. Rangaramanujam, Senior Advocate, Shri R. Anand Padmanabhan, Shri Sohan Singh Rana and Shri A.V. Rangam, learned counsel appearing on behalf of the respondents, have opposed the appeals contending that the High Court has appreciated the evidence on record and has reached the correct conclusion. The findings of the fact recorded by the High Court are based on evidence, and do not warrant any interference by this Court. The appellant/plaintiff, has not furnished any explanation for the delay, as he was duly informed by Res. No.1 of the fact that she had obtained the required sanctions/permissions. Had the appellant/plantiff been in a position to perform his part of the contract, he could not have waited for a period of more than 4 years to file the suit. During the pendency of the cases, a part of the suit land stood acquired for widening the road. The appellant without having any title over the land, has claimed and

withdrawn a huge amount of compensation unauthorisedly/ fraudulently. Thus, the appeals are liable to be dismissed.

5. We have considered the rival submissions made by the parties, and perused the record.

6. The trial court, after appreciating the evidence on record came to the following conclusions:

I) The evidence adduced on behalf of the defendants does not conclusively establish their plea to the effect that the plaintiff himself had cancelled the agreement to sell (Ex.A-1), in view of his inability to pay the balance of the sale consideration.

II) The plaintiff had the capacity to raise and pay the balance of the sale consideration under Ex.A-1. Thus, the plaintiff was ready and willing to perform his part of the contract.

III) There were inconsistent versions with regard to the extent of the land alleged to have been sold to defendant nos.3 and 7.

IV) The plaintiff had paid the amount towards non-agricultural assessment tax and property tax for the suit property.

V) The plaintiff had not rescinded the suit contract, and had not informed the first defendant that he was not in a position to complete the sale transaction, and that therefore, defendant no.1 was at liberty to sell the suit land to any other person, as has been contended by defendant no.1

VI) Defendant nos.3 and 6 were subsequent purchasers for consideration without notice. Defendant no.6 is a bonafide purchaser for value, without notice of the agreement to sell (Ex.A-1).

7. The High Court while deciding the first appeal filed under Section 96 CPC, did not consider all the issues as is required under Order XLI Rule 31 CPC. On the other hand, it dealt with only one issue elaborately, without making any reference to the pleadings taken by the parties. The High Court held:

(i) No steps were taken by the appellant/plaintiff in establishing his readiness and willingness to perform his part of the contract.

(ii) Only a nominal sum was paid by the appellant/plaintiff in 1977 and till the date that the suit was filed, no effort was made by the appellant/plaintiff to pay the balance amount.

(iii) There has been inordinate delay on the part of the appellant/plaintiff in filing the suit. Had he been ready and willing, he ought to have approached the court at the earliest.

(iv) As per the evidence of defendant no. 7, the power of attorney holder (DW.1), did not call the appellant/plaintiff and ask him to get the sale deed executed, in pursuance of agreement dated 15.10.1977. The appellant/plaintiff expressed his inability to get the sale deed executed as he had no ready cash.

(v) There was no requirement in law to obtain permission for separate sub-division and thus, Res.No.1 was not required to obtain any such sanction. Furthermore, the said property had already been sub-divided, and bore different numbers.

(vi) Res. No.1 had obtained the requisite permission from the Urban Land Ceiling Authorities in December 1977, and the appellant/plaintiff had handed over the draft sale deed to Res. No.1.

(vii) It was because the appellant/plaintiff was not willing and ready to perform his part of the contract, and was resorting to dilatory tactics, that Res. No.1 had entered into two agreements to sell with respondent nos.3 and 7.

(viii) In view of the above, there was no occasion to examine the other issues, particularly those with respect to whether the other respondents were bonafide purchasers for consideration without notice, and the appeals were hence disposed of, as has been referred to hereinabove.

8. The plaint contained a specific averment in paragraph 7 as under:

"The plaintiff is and had always been ready and willing to perform his part of the suit agreement and it is the first defendant, who evaded to perform her part of the suit agreement and finally committed to refusal of the terms of the suit agreement amounting to refusal on her part to so perform her part of the suit agreement."

9. In the written statement, Res. No. 1 simply denied the said averment, and further averred that:

"The allegation in para 7 of the plaint that the plaintiff was always ready and willing to perform his part of the suit agreement being incorrect is denied. The allegation that the defendant committed breach of the agreement and failed to perform her part of the agreement being incorrect is denied. The Defendant submits on the contrary that the plaintiff failed to perform his part of the agreement thereby committed a breach of the agreement The Defendant, submits that the Defendant performed her part of the agreement and was ready to perform her part of the agreement, It is submitted that finally when the plaintiff failed to raise necessary money towards the sale price plaintiff

informed the Defendant that she/is at liberty to sell the property to anyone."

10. A replication was filed by the appellant/plaintiff under Order VIII Rule 9 CPC, wherein it has been submitted in paragraph 6 thereof as under:

"The plaintiff is a big businessman having a business turnover of more than 5 lakhs per year. He is always capable of providing and raising the necessary finances to complete the sale transaction"

11. These are the only pleadings taken by the parties so far as the issue of readiness and willingness to perform part of the contract by the appellant/plaintiff is concerned. The appellant/plaintiff examined himself as PW.1, and in his cross-examination he has denied any suggestion made to him to the effect that he had ever informed the power of attorney holder of Res. No.1, namely, Shri S.S. Noor Ali, that he would be unable to raise the balance of the sale consideration. Nor he had ever told defendant no. 7 that he wanted to sell the agricultural land to raise money to purchase the suit property. No question was put to him in the cross-examination, in response to which he could establish that he was a man of means, which he has thus stated in the replication, though he has admitted that he has certain outstanding dues towards the bank. He has denied the suggestion that he had neither a house, nor agricultural land, and that he had no capacity to pay the sale consideration, and further, that he had falsely deposed in respect of the same.

12. The allegation made in the written statement stating that the appellant/plaintiff had told Res. No. 1 that she was free to sell the land, was not established by leading any evidence. Additionally, Res. No. 1 lives in the USA. It is nobody's case that the appellant/plaintiff had any communication with her. It was not mentioned in the averments raised in the written statement, that she had been informed anyone of the same through the

power of attorney holder. Further, with respect to the issue regarding financial capacity to pay, the appellant/plaintiff examined K. Narayana Reddy (PW.2) and Laxman Gore (PW.3). They fully supported his case, deposing that he was a man of means, and that he had sufficient properties and the means to purchase the said suit property.

Thus, the finding recorded by the High Court on this issue is perverse being contrary to the evidence on record.

13. It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 CPC empower the holder of the power of attorney to "act" on behalf of the principal. The word "acts" employed therein is confined only to "acts" done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term "acts", would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. (See: *Vidhyadhar v. Manikrao & Anr.,* AIR 1999 SC 1441; *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.,* (2005) 2 SCC 217; *M/S Shankar Finance and Investment v. State of A.P & Ors.,* AIR 2009 SC 422; and *Man Kaur v. Hartar Singh Sangha,* (2010) 10 SCC 512).

14. So far as the notice of the agreement between the appellant and Res. No. 1 is concerned, the trial court after taking note of the recital of the said agreement in the agreement to sell and sale deed also, has held, that, so far as the land sold to respondents other than respondent no.6, the parties had been fully aware of the same. Only respondent no.6 had no such

notice. Shri A. G. Chaudhari, learned senior counsel appearing on behalf of the appellant, has submitted that the same being a very small area, the appellant is not willing to disturb the possession of defendant no.6.

15. In the facts and circumstances of the case, as the appellant has not yet acquired any title over the land, he has no right to receive compensation to the tune of Rs. 29,47,112/-. However, he withdrew the said amount by giving an undertaking to return the said amount to Res. No. 1 in case any such order was passed by the court in this regard.

16. In view of the above, the appeals are allowed. The judgment and decree passed by the High Court is set aside, and the same passed by the trial court is restored. As a consequence, the appellant is entitled to get the sale deed executed and registered, with respect to all the suit land available now (minus the land acquired and the land purchased by the respondent no.6).

17. The appellant is directed to refund the amount of compensation received by him to Res. No. 1 within a period of three months, alongwith 9% interest from the date of receipt till the date of payment.

Civil Appeal Nos. 2888 and 4459 of 2005

In view of the judgment and order in Civil Appeal Nos. 2885-2887 of 2005, these appeals are dismissed.

R.P. Appeals Disposed of.

SWAROOP SINGH
v.
STATE OF M.P.
(Criminal Appeal No. 376 of 2010)

APRIL 10, 2013

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

PENAL CODE, 1860:

s.376(1) - Rape - Statement of prosecutrix that accused committed forcible sexual intercourse against her wish at knife point - Held: Except simply denying the offence alleged in the statement u/s 313 Cr.P.C., accused did not let in any evidence to contradict the version of the prosecutrix -Trial court on a detailed consideration of the evidence concluded that the case of prosecutrix was cogent and convincing and was also supported by evidence of other witnesses and the recoveries made from the place of occurrence - Judgments of Courts below call for no interference.

State of Punjab Vs. Gurmit Singh **1996 (1) SCR 532 = 1996(2) SCC 384 - relied on**

Case Law Reference:

1996 (1) SCR 532	**relied on**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 376 of 2010.

From the Judgment and Order dated 16.07.2008 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 301 of 1994.

Ranvir Singh Kundu, Jetendra Singh, S.K. Sabharwal for the Appellant.

Vibha Datta Makhija for the Respondent.

The following order of the Court was delivered by

O R D E R

1. This appeal is directed against the judgment of High Court of Madhya Pradesh at Jabalpur dated 16.7.2008 in Criminal Appeal No.301/1994.

2. According to the prosecution on 28.9.19992 at 12.30 p.m., the prosecutrix P.W.2 was proceeding to the field for cutting grass. On the way, the appellant who was roasting Maize/Bhutta in the field of PyareLal, blocked P.W.2 and asked her to go alongwith him into the field of sugarcane. When P.W.2 refused, the appellant caught hold of her by hand and forcibly took her to the sugarcane field, throw her down, gagged her mouth with the saree of P.W.2 and forcibly had intercourse with her by threatening her life at knife point. According to her by virtue of the said act of the appellant, white liquid started oozing out from her private parts, that she went to the boundary wall (Mound) where a well is situated and where Ram Singh Dada (P.W.4) was cutting grass. P.W.2 informed Ram Singh Dada as to what happened, who in turn passed on the information to her Kakaji Hari Prasad. Thereafter, her Kakaji Hari Prasad took P.W. 2 to home, where she narrated the whole incident. She stated to have informed her sister Chain Bai as well as her Kaki and Shanta Bai. She thereafter reported the matter to the Vilkis Ganj Police Station and after registering the report reached back home. She identified the report as Exhibit P2.

3. Subsequent to the registration of the case, the Police inspected the spot, seized the broken bangles and prepared a rough sketch. She was examined by the doctor who seized her peticoat and X-ray was also taken. The appellant was

proceeded against in Criminal Case No.84/1992 for the offence punishable under Sections 376 and 506 Part II, IPC. The appellant having denied comission of the offence, witnesses were examined and in his statement under Section 313 Cr.P.C., the appellant pleaded total ignorance and that he was falsely implicated.

4. On the side of the prosecution P.W. 1 to 10 were examined. P.W.1 Dr. Manju Saxena, who examined the prosecutrix in her evidence stated that on internal examination of P.W.2, hymen was found to be torn in irregular manner and that two finger could easily be inserted in the vagina. She also stated that there was no flow of fresh blood. Two slides of vagina slabs prepared and sealed and were handed over to the police for forwarding the same for chemical examination alongwith the Peticoat of the prosecutrix on which spots were present.

5. In the course of cross examination, P.W.2 deposed that when the appellant threw her on the ground she did not sustain any injury; that she was not assaulted by way of fist blow, though the appellant threatened her not to raise any alarm by showing a knife. She further deposed that when white fluid was oozing out from her private parts, blood was also found and that she washed the stains with water when she reached the well from the place of occurrence and before she met Ram Singh. She also deposed that she had swelling in her private parts and was suffering from pain for 2-3 days. A suggestion put to her as to why she did not object when the appellant pulled her hand to go, she categorically denied the said suggestion.

6. The trial court after detailed analysis of the evidence placed before it held that there was no reason to disbelieve the version of the prosecutrix, that since the appellant had sexual intercourse with the prosecutrix against her consent, the same would fell within the offence of rape under Section 376 IPC and such a gruesome offence was committed under the threat of

knife point, the offence of criminal intimidation was also made out falling under Section 506 Part II, IPC.

7. The trial Court after convicting the appellant for the aforesaid offences imposed punishment for 7 years rigorous imprisonment alongwith fine of Rs.2000/, in default, sentence of 2 years rigorous imprisonment for the offence under Section 376(1) IPC and imprisonment of 2 years with fine of Rs.2,000/-, in default six months rigorous imprisonment for the offence under Section 506 Part II, IPC.

8. The trial court while reaching the above conclusion and while convicting the appellant has held that the version of the prosecutrix was fully supported by the other witnesses namely, Ram Singh (P.W.4), to whom she immediately informed, her Kakaji Hari Prasad (P.W.5), Bansi Lal (P.W.3) and Radhey Shyam (P.W.6). The trial court has found that those witnesses fully confirmed the version of the prosecutrix. The evidence of P.W.10 Dr. V.K. Chaudhary who examined the appellant on 17.9.1992 gave his opinion in Exhibit P6 that the appellant was capable of performing sexual intercourse.

9. The sole contention of the appellant before the trial court was that even as per the evidence of Dr. Manju Saxena (P.W.1), who examined the prosecutrix, it was clear that the prosecutrix was approximately 17 to 18 years of age, that since she was having frequent sexual intercourse no definite opinion of rape could be given and therefore, it cannot be held that the appellant had any forcible sexual intercourse against the wish of the prosecutrix in order to be convicted for the offence under Section 376 IPC read with Section 506 Part II, IPC.

10. The High Court having considered the judgment of the trial court in extenso found that there was no ground made out to interfere with the judgment and confirmed the conviction and sentence imposed on the appellant.

11. Heard Mr. Ranbir Singh Kundu, learned counsel

appearing for the appellant and Ms. Vibha Dutta Makhija, learned counsel appearing for the State. We also perused the judgment of the trial court as well as that of the High Court. In the course of submission, learned counsel for the appellant submitted except the version of P.W.2 prosecutrix there was nothing stated before the trial court to prove that the appellant committed the offence rape on her, that even going by the medical evidence as the prosecutrix was having frequent intercourse though not married, it cannot be a case of rape falling under Section 376 IPC. The learned counsel therefore, submitted that the conviction and sentence imposed on the appellant by the trial court as affirmed by the appellate court is liable to be interfered with.

12. As against the above submission, Ms. Makhija, learned counsel for the State contended that it is a case of offence of rape falling under Section 376 IPC, the question whether it was with the consent of the women alleged to have been raped has to be accepted based on her simple statement in the court and proceed on that basis. Learned counsel contended that when based on the evidence of P.W.2 prosecutrix, it was demonstrated before the court that the appellant had sexual intercourse with her against her consent, it was for the appellant to have proved beyond reasonable doubt that either there was no sexual intercourse or was there a consent existed in order to relieve the appellant of the offence alleged and found proved against him.

13. Therefore, the only question that remains for consideration in the case in hand is as to whether the sexual intercourse committed by the appellant on the prosecutrix P.W.2 was with her consent in order to hold that the appellant cannot be convicted under section 376 IPC. In that respect, when we examined the evidence let in, what is noted by us hereinbefore and as found by the trial court as well as by the High Court, the version of the prosecutrix P.W. 2 was unassailable. She was stated to be 17/18 years of age on the date of occurrence and

she categorically stated that the appellant who was a known person, performed the act of forcible sexual intercourse against her wish at knife point. Except the mere denial of the offence alleged, there was no evidence let in on behalf of the appellant to counter the allegation levelled against him by the prosecutrix. In such circumstances, the trial court on a detailed consideration of the evidence placed before it concluded that the case of the prosecutrix was cogent and convincing and also supported by the evidence of other witnesses in so far as the commission of offence of forcible sexual intercourse at knife point.

14. In this context it will be worthwhile to refer to the principles laid down by this Court as to the manner in which the evidence of a rape victim should be evaluated to ascertain the truth. The said decision is reported in *State of Punjab Vs. Gurmit Singh* 1996(2) SCC 384. Para 8 and 21 are relevant which reads as under:-

> "8..... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an

accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime

strikes the judicial mind as probable...."

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

15. Having heard learned counsel for the parties and having perused the judgment of the trial court as well as of the High Court, we are convinced that the judgment of the trial court

does not call for interference. From what has been let in by way of evidence by the court below, the prosecutrix P.W.2 has spoken that she knew the appellant, that she was forcibly taken to the sugarcane bush at knife point and was subjected to sexual intercourse against her consent. She revealed the gruesome act committed by the appellant immediately after the occurrence to Ram Singh PW 5. When she was examined by the doctor, nothing could be traced about the presence of sperm or blood since admittedly before going to the Police Station, she washed herself in the well which was nearby the place of occurrence to which place she immediately went where she also reported the incident to Mr.Ram Singh Dada who was examined as P.W.5.

16. The doctor who examined the prosecutrix stated clearly that the hymen of the prosecutrix was torn and ruptured.

17. Except simply denying the offence alleged in the statement under section 313 Cr.P.C., the appellant did not let in any evidence to contradict the version of the prosecutrix. No motive was either alleged or proved as against the prosecutrix or any of the witnesses to disbelieve the version of the prosecution witnesses or to hold that the Appellant was falsely implicated. Broken bangles were also recovered from the place of occurrence at the instance of the prosecutrix. No previous grudge of the prosecutrix as against him in order to falsely implicating the appellant was also suggested.

18. A careful reading of the judgment of the trial court discloses that the reasons adduced by it were cogent and convincing and there was no reason to disbelieve the same. The conclusion of the High Court is also equally well reasoned and we do not find any fault in the same in order to interfere with the same. We find no good ground to interfere with the well considered conclusion of the trial court as well as that of the High court. In the light of our above conclusion, we do not find any merit in this appeal and the same is dismissed.

R.P. Appeal dismissed.

LILLU @ RAJESH & ANR.
v.
STATE OF HARYANA
(Criminal Appeal No. 1226 of 2011)

APRIL 11, 2013

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

PENAL CODE, 1860:

ss. 376, 506, 366 and 363 - Kidnapping and rape of a girl of 13 years - Conviction of four accused by courts below - Appeal by two convicts - One died pending appeal - Held: On the date of incident, victim was of 13 years and 9 months and was a student of 6th standard - To refute the same, no evidence has been led by accused-appellant - The said finding stood affirmed by High Court and in view thereof, it remains totally immaterial whether the prosecutrix was a consenting party or not - The case does not present special features warranting any interference.

CRIMES AGAINST WOMEN:

Rape victim - Entitlement to legal recourse - Held: In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity - Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence - State is under an obligation to make such services available to survivors of sexual violence - Proper measures should be taken to ensure

their safety and there should be no arbitrary or unlawful interference with victim's privacy - There is a demand of sound standard of conducting and interpreting forensic examination of rape survivors - International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

Narayanamma (Kum) v. State of Karnataka & Ors., **1994 (2) Suppl. SCR 799 = (1994) 5 SCC 728;** *State of U.P. v. Pappu @ Yunus & Anr.,* **2004 (6) Suppl. SCR 585 = AIR 2005 SC 1248;** *State of Uttar Pradesh v. Munshi,* **2008 (12) SCR 897 = AIR 2009 SC 370;** *Narender Kumar v. State (NCT of Delhi),* **2012 (6) SCR 148 = AIR 2012 SC 2281 and** *State of Punjab v. Ramdev Singh,* **2003 (6) Suppl. SCR 995 = AIR 2004 SC 1290 - referred to.**

Case Law Reference:

1994 (2) Suppl. SCR 799	**referred to**	**para 8**
2004 (6) Suppl. SCR 585	**referred to**	**para 9**
2008 (12) SCR 897	**referred to**	**para 9**
2012 (6) SCR 148	**referred to**	**para 10**
2003 (6) Suppl. SCR 995	**referred to**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1226 of 2011.

From the Judgment & Order dated 20.09.2010 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 243-DB of 2002.

J.P. Singh, R.C. Kaushik for the Appellants.

Kamal Mohan Gupta for the Respondent.

The following Order of the Court was delivered

O R D E R

1. This criminal appeal has been preferred against the impugned judgment and order dated 20.9.2010 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 243-DB of 2002, by way of which the High Court has affirmed the judgment and order dated 4.3.2002 passed by the Additional Sessions Judge, Jind in Sessions Case No. 37 of 2001, by way of which the appellant no. 1 has been convicted under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as `IPC') and awarded the sentence of seven years rigorous imprisonment with a fine of Rs. 5,000/- and in default of making payment, to further undergo imprisonment for two years. Further he has been convicted under Section 506 IPC and awarded the sentence of two years rigorous imprisonment. Both the sentences have been directed to run concurrently. The other co-accused, namely, Manoj, Satish @ Sitta and Kuldeep have been convicted separately under sections 376, 506, 366 and 363 IPC. Kuldeep Singh alone has been found guilty under Section 376 (2) (g) IPC, and has been awarded sentence of life imprisonment. Out of these four convicts, Kuldeep Singh and Manoj did not prefer any appeal against the High Court's judgment, while appellant nos.1 and 2 preferred the present appeal. Appellant no.2 had died during the pendency of this appeal in jail, therefore, we are concerned only with the case of appellant no.1 i. e. Lillu @ Rajesh.

2. Mr. J.P. Singh, learned counsel for the appellant, submitted that the prosecution has failed to prove the date of birth of the prosecutrix and that she was about 17-18 years of age on the date of incident. Thus, it was a clear cut case of consent. The statement of Raj Bala, prosecutrix has not been corroborated by any of the witnesses and has not got corroborated by the medical evidence. Dr. Malti Gupta (PW-1), who had examined Raj Bala, prosecutrix medically had deposed that there was no external mark of injury on any part

of her body. The possibility of prosecutrix being habitual to sexual intercourse could not be ruled out. There was no bleeding. Thus, in such a fact-situation, the statement of the prosecutrix that she was unmarried and had never indulged in sexual activity with any person, or was below 16 years, could not be relied upon.

3. On the other hand, the State of Haryana, as usual, remained unrepresented as the government counsel duly appointed by the State considered it their privilege not to appear in court and become the burden on public exchequer. So, the court has to examine the case more consciously going through the record and examine the correctness of the findings recorded by the courts below.

4. The trial court has examined the issue on age and after examining the school certificate (Ext. P-N), which stood duly proved by Lakhi Ram (PW-11), Science teacher, Government High Court, Badhana and Gajraj Singh, teacher, Govt. Primary School, Badhana, came to the conclusion that her date of birth as per the school register was 4.6.1987. So on the date of incident i.e. 7.3.2001, she was 13 years 9 month and 2 days old. She was a student of 6th standard. To refute the same, no evidence worth the name has been led by the accused-appellant. The said finding stood affirmed by the High Court and in view thereof, it remains totally immaterial whether the prosecutrix was a consenting party or not.

5. So far as the medical evidence is concerned, Dr. Malti Gupta (PW-1), Medical Officer, Civil Hospital, Jind, has deposed that Raj Bala, prosecutrix was habitual in sexual activities and such a statement was made in view of the medical examination. Relevant part thereof reads as under:

> "Bilateral breast were moderately developed, There was no external mark of injury seen any where on the body. Axillary heir was not developed. Public hair were partially developed.

> On local examination labia majora and labia minora were moderately developed.
>
> There was no bleeding P/V. Whitish discharge was present. Hymen was completely torn.
>
> Vagina admitted two fingers cervix was normal, uterus was of null parous by lateral FF were normal.
>
> ….Two swabs were taken from cervix vagina. Public hair were taken and sent for examination. Salwar worn by Raj Bala was taken and sealed following were handed over to the police.
>
> ….It is correct that I have given my opinion that hymen was completely torn.
>
> ….It is also correct that the marginas were completely heeled. I cannot give the exact time.
>
> ….I cannot say whether it was torn one year back 2 years back or 10 days back.
>
> ….I cannot say whether there was any sign of semen on the swabs taken by me."

She further deposed:

> ".... Since there was no matting of hair so I did not opine whether there was any semen on the public hair.
>
> ….I do not remember whether I enquired from Raj Bala whether she came to me for medico legal examination after washing clothes and taking bath or not. However, the salwar worn by her was taken into custody. I cannot say from how many days Raj Bala was having sexual activities. The possibility of Raj Bala of habitual sexual intercourse cannot be ruled out."

6. In fact, much has been argued by Mr. J.P. Singh on two

fingers test. Admitting very fairly that in case she was a minor, the question as to whether she had been habitual to sexual activities or not, is immaterial to determine the issue of consent.

7. So far as the two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

8. In *Narayanamma (Kum) v. State of Karnataka & Ors.,* (1994) 5 SCC 728, this Court held that fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much earlier or carried an old tear. The factum of admission of two fingers could not be held adverse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen.

9. In *State of U.P. v. Pappu @ Yunus & Anr.,* AIR 2005 SC 1248, the Court held that a prosecutrix complaining of having been a victim of an offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness.

This Court while dealing with the issue in *State of Uttar Pradesh v. Munshi,* AIR 2009 SC 370, has expressed its anguish and held that even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. On the contrary, the question still remains as to whether the accused committed rape on the victim on the occasion complained of. Even if the victim had lost her virginity earlier, it can certainly not give a licence to any person to rape

her. It is the accused who was on trial and not the victim. So as to whether the victim is of a promiscuous character is totally an irrelevant issue altogether in a case of rape. Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. A prosecutrix stands on a higher pedestal than an injured witness for the reason that an injured witness gets the injury on the physical form, while the prosecutrix suffers psychologically and emotionally.

10. In *Narender Kumar v. State (NCT of Delhi),* AIR 2012 SC 2281, this Court dealt with a case where the allegation was that the victim of rape herself was an unchaste woman, and a woman of easy virtue. The court held that so far as the prosecutrix is concerned, mere statement of prosecutrix herself is enough to record a conviction, when her evidence is read in its totality and found to be worth reliance. The incident in itself causes a great distress and humiliation to the victim though, undoubtedly a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Court further held as under:

> *"Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: State of Maharashtra & Anr. v. Madhukar Narayan Mardikar, AIR 1991 SC 207; State of Punjab v. Gurmit Singh & Ors.,*

AIR 1996 SC 1393; and State of U.P. v. Pappu @ Yunus & Anr., AIR 2005 SC 1248).

In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all".

11. In *State of Punjab v. Ramdev Singh,* AIR 2004 SC 1290, this court dealt with the issue and held that rape is violative of victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.

12. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence.

Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

13. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.

14. In view of the above, the facts and circumstances of the case do not present special features warranting any interference by this Court. The appeal lacks merit and is accordingly dismissed.

R.P. Appeal dismissed.

RAJENDRA SINGH
v.
STATE OF UTTARANCHAL
(Criminal Appeal No. 1702 of 2008)

APRIL 11, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

PENAL CODE, 1860:

s. 302 - Murder - Acquittal by trial court - Conviction by High Court - Held: The medical evidence is quite consistent with the prosecution case that the deceased was killed by inflicting injuries by a pair of scissors - Both the eye-witnesses fully supported the prosecution case in regard to the assault by appellant on deceased with a pair of scissors - Discrepancies between statements of two eye-witnesses highlighted by trial court cannot be a ground for rejecting their deposition entirely - High Court has rightly rejected the view taken by trial court as wholly untenable and has rightly accepted the evidence of prosecution witnesses in order to bring home the guilt of the appellant - Maxim, falsus in uno, falsus in omnibus - Evidence.

An FIR for the offence punishable u/s 302 IPC was lodged against the accused-appellant, who was a tailor by profession. The prosecution case was that one 'KS', the brother of PW-1, had given some cloth to the appellant for stitching; that prior to the date of occurrence there was a quarrel between the two over the delay in getting the cloth stitched; that on the date of occurrence, when 'KS', while returning home, reached in front of the shop of the accused, the latter came with a pair of scissors in his hand and attacked 'KS' who ran for his life, but the accused chased and caught hold of him and gave him several blows by the scissors. The incident was

witnessed by many persons including PW-3 (the wife of victim) and PW-2, who took the victim to hospital where he was declared brought dead. The trial court acquitted the accused, but the High Court convicted him u/s 302 IPC and sentenced him to imprisonment for life.

Dismissing the appeal, the Court

HELD: 1.1 The medical evidence is quite consistent with the prosecution case that the deceased was killed by inflicting injuries by a pair of scissors. It is undeniable that both PW.2 and PW.3 fully supported the prosecution case in regard to the assault by the appellant on the deceased with a pair of scissors. PW.3, the wife of the deceased also deposed before the court regarding the genesis of the occurrence i.e., the quarrel between the deceased and the appellant that had taken place on the previous evening. Further, the deposition of PW.3 in regard to the assault by the appellant on the deceased is quite graphic. [para 10 and 15] [789-G-H; 790-E-F]

1.2 There is no reason for the trial court to come to the conclusion that PW.2 and PW.3 were speaking falsely and were trying to hide the relationship between PW.2 and the deceased or that he lived in the house of the deceased as a tenant. In the first place, no such inference is possible on the basis of the depositions of PW.2 and PW.3 and, secondly, and more importantly, even if it is assumed that the depositions of PW.2 and PW.3 in this regard were incorrect, that cannot be the ground to reject their deposition entirely even though it is perfectly sound in respect of the main prosecution case. In our system of law, the maxim *falsus in uno, falsus in omnibus* is not followed. The testimonies of PW.2 and PW.3 are wholly reliable and there is no reason not to accept the same. [para 27, 28 and 32] [794-E-H; 795-F-G]

1.3 Apart from the evidences of PW.2 and PW.3, there

are other circumstances that lend credence to the prosecution case. The Investigating Officer (PW.11) stated that in the course of interrogation the appellant volunteered to produce the scissors used for killing the deceased from his shop. He took the Investigating Officer to his shop, opened it with the keys kept in his pocket and recovered the blood stained scissors from under the shop counter and produced it before the Investigating Officer. The recovery is supported by PW.6 who signed the recovery memo. [para 33-35] [795-G-H; 796-A-C]

1.4 On a careful consideration of the materials on record, this Court is of the view that the High Court has rightly rejected the view taken by the trial court as wholly untenable and has rightly accepted the evidences of PW.2 and PW.3 in order to bring home the guilt of the appellant. [para 36] [796-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1702 of 2008.

From the Judgment and Order dated 30.04.2008 of the High Court of Uttarakhand at Nainital in Government Appeal No. 1174 of 2001 (Old No. 303 of 1991).

Sanjeev Bhatnagar, Sounak S. Das, Rupi Sagar (for Kusum Chaudhary) for the Appellant.

Dr. Abhishek Atrey, Amit Kumar Singh, Brijesh Panchal, Aishverya Shandilya for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal is directed against the judgment and order dated April 30, 2008 passed by the Uttarakhand High Court in Government Appeal No.1174 of 2001 (Old No.303 of 1991). By the impugned judgment, the High Court allowed the Government Appeal, set aside the judgment of acquittal rendered by the trial court, and finding the

appellant guilty of the offence of murder convicted him under section 302 of the Penal Code and gave him the sentence of rigorous imprisonment for life.

2. The case of the prosecution is based on a written report dated July 26, 1988 submitted at Police Station Dehradun by one Vijay Singh s/o Puran Singh Rana (hereinafter referred to as "the informant"). In the written report it was stated that the informant's elder brother, namely, Kishan Singh Rana (the deceased) was a peon in the Bank of India, Rajpur Road Branch, Dehradun. He had given a pair of pants and some cloth for stitching to Rajendra Singh tailor (the appellant), whose shop is on the road just near their house. The appellant did not return the stitched clothes even after several days and on the evening prior to the date of occurrence, there was a quarrel between the informant's brother and the appellant on that issue. On July 26, 1988 (the date of occurrence) the informant's brother had gone to the bank as usual on his motor cycle. He returned from the bank at about 1.00 p.m. and as he reached in front of the appellant's shop, he got down from the motor cycle as the road was broken at that point. At that instant, the appellant came out of his shop carrying a pair of scissors in his hands; hurling abuses, he came down to the road and attacked the informant's brother with the scissors with the intent to kill him. In order to save his life, Kishan Singh Rana ran down the road but the appellant chased him and caught him after some distance in front of Chintamani's house. At that spot he gave the informant's brother many blows by the scissors, one after the other. Kishan Singh Rana fell down bleeding on the road. It was further stated in the written report that besides the informant, Makhan Singh (PW.2), Laxman (Motor) Auto Mechanic (not examined) and his sister-in-law, Deepa (the wife of the deceased - PW.3) and many other persons and women of the area witnessed the occurrence. After assaulting the deceased, the appellant fled away from there. It was further stated in the written report that Makhan Singh took the informant's brother to Dun Hospital, where he was declared

brought dead. The written report concluded with the request to take legal action against the appellant.

3. The written report submitted by Vijay Singh was incorporated in the first information report (report No.230) giving rise to criminal case No.483/88/-under section 302 IPC, P.S. Dehradun.

4. The police after investigation submitted charge-sheet and the appellant was put on trial on the charge under section 302 of the Penal Code.

5. In support of the charge, the prosecution examined 11 witnesses. PW.1, PW.2 and PW.3 are the eye witnesses of the occurrence, of whom PW.1 is also the first informant. PW.4 is one of the witnesses of the recovery of blood stained and plain earth and a chappal from the place of occurrence. He also identified his signature on the site plan (Ex.Ka-3) of the place of occurrence. PW.5 is another witness of the recovery of blood stained and plain earth, two chappals and one sandle from the place of occurrence. He identified his signature on the seizure memo (Ex.La-3). PW.6 and PW.7 are witnesses of the recovery of the scissors from the appellant's shop. PW.8 is the doctor who had conducted post-mortem on the body of the deceased. PW.9 is a formal witness, the scribe of the chik FIR. PW.10 is a Sub-Inspector of Police who had examined the place of occurrence and had seized the articles from there. PW.11 is the Investigating Officer of the case.

6. The trial court found that there were a number of discrepancies in the depositions of the eye-witnesses and held that the prosecution was not able to establish the charge against the appellant. It, accordingly, acquitted the appellant by the judgment and order dated November 16, 1990.

7. The State Government filed an appeal against the judgment of the trial court and the High Court took the view that the reasons given by the trial court for not accepting the

statements of PW.2 and PW.3 were specious and quite untenable. The High Court found that both PW.2 and PW.3 are wholly reliable witnesses and there was no reason not to accept their evidences. It, accordingly, set aside the judgment passed by the trial court and convicted and sentenced the appellant, as noted above.

8. The appellant is now in appeal before this Court.

9. Before proceeding to examine the ocular evidence adduced by the prosecution in support of its case, we may first see the medical evidence. As noted above, PW.8 conducted the post mortem on the body of Kishan Singh Rana on July 27, 1987. He found as many as 16 injuries on the body of the deceased which are as under:-

"1. Stab wound 2.5 cm x 1 cm x cavity deep on left side of chest, 9 cm below left nipple midline direction backward and medially.

2. Stab wound 1.5 cm x .5 cm x muscle deep on left side of abdomen, 8 cm below injury No.1 and 11 cm away from the umbilicus.

3. Stab wound 4 cm x 1.5 cm x cavity deep on left side of abdomen direction medially backward and downward.

4. Contusion 6 cm x 4 cm on back of left elbow and arm.

5. Contusion 22 cm x 3 cm on right arm extending from right shoulder up to elbow (front aspect).

6. Lacerated wound 2 cm x 1 cm on right side of forehead x scalp deep, 6 cm above outer angle of right eye.

7. Stab wound 3 cm x 1 cm x cavity deep on right side of chest lower part on ant axillary line 12 cm below right nipple going upward medially and backward, 12 cm below right nipple.

8. Stab wound 2.5 cm x 1 cm x cavity deep on right side of chest in post axillary line 6 cm behind injury No.7.

9. Stab wound 3 cm x 1.5 cm on back of right side x cavity deep going downwards backwards 7 cm below injury No.8.

10. Stab wound 2 cm x 1 cm on right buttock x muscle deep 15 cm below injury No.9 and 5 cm away from vert. column.

11. Stab wound 1.5 cm x .5 cm x cavity deep on right side of back, 5 cm away from injury No.9 direction medially and forward.

12. Stab wound 2.5 cm x 1 cm on right side of back x cavity deep, 6 cm above injury No.11 direction medially and forward.

13. Stab wound 3 cm x 1.5 cm on right side of chest x cavity deep over right back, 10 cm away from injury No.12 over the inferior angle of scapula direction forward, medially and downwards, 10 cm above injury No.12.

14. Stab wound 2.5 cm x 1 cm on right side of back of chest 8 cm above injury No.13 and 15 cm away from midline over the upper part of scapula. Direction backward, medially and upward.

15. Stab wound 1.5 cm x .5 cm x cavity deep 5 cm away from vert. column and 8 cm away from injury No.14.

16. Stab wound 3 cm x 1.5 cm x chest cavity deep on left side of lower chest back going downward forward and medially 4 cms away from midline, at L2 level."

10. Here, it may be noted that apart from injuries 4 and 5 which are contusions that may have been caused due to fall, the rest 14 are stab injuries. The medical evidence is, thus, quite consistent with the prosecution case that the deceased was killed by inflicting injuries by a pair of scissors.

11. Let us now come to the ocular evidence.

12. The informant Vijay Singh who is the younger brother of the deceased was examined as PW.1. In his examination-in-chief he fully supported the prosecution case but in course of cross-examination in paragraph 12 of his deposition he stated as under:-

> "…….. On the day of occurrence I had gone to school. I had come back from school at 2.30 P.M. when I came back then I was informed that my brother was killed. People were weeping in the house. Then I had gone to hospital. Scissor blow was not given in my presence."

13. It is for the reason of this statement that the trial court discarded the evidence of PW.1.

14. It is difficult to fault the trial court for rejecting the evidence of PW.1 but let us now see the evidences of PW.2 and PW.3.

15. It is undeniable that both PW.2 and PW.3 fully supported the prosecution case in regard to the assault by the appellant on the deceased with a pair of scissors. PW.3, the wife of the deceased also deposed before the court regarding the genesis of the occurrence i.e., the quarrel between the deceased and the appellant that had taken place on the evening before the date of occurrence over the appellant's failure to return the clothes given by the deceased for stitching even after a number of days. Further, the deposition of PW.3 in regard to the assault by the appellant on the deceased is quite graphic.

16. The trial court, however, highlighted certain discrepancies between the statements of PW.2 and PW.3 and for that reason found them to be unreliable. Those very discrepancies were emphasized by the counsel for the appellant to urge before this Court that the judgment of the trial court was quite sound and the High Court was in error in

reversing that judgment and holding the appellant guilty of the charge.

17. In order to appreciate the view taken by the trial court and the submissions made on behalf of the appellant in its support we may advert to the depositions of PW.2 and PW.3.

18. PW.2 Makhan Singh stated before the court that at the time of the occurrence he was not a tenant of the deceased. He further said that he had not said to Darogaji that he was a tenant in the house of Kishan Singh and he did not know how he (Darogaji) had so written in his statement. He further stated that in those days he was not working in any factory and he had not said that he was working in a factory. He had given (the No.) 119/3 as his address. That house belonged to the deceased. He was a resident of Tehri Garhwal and the deceased too was a resident of Tehri Garhwal. They thus, belonged to the same place. They also belonged to the same caste. He knew Kishan Singh and Rajendra Singh from before. He also said that he had no relationship with Kishan Singh.

19. PW.2 was recalled for further evidence. On recall he reiterated that he had no relationship with the deceased Kishan Singh. He was then shown an application that was marked as Exhibit Ka-10 and he admitted that it was written in his hand and it was given at the Drona Hotel. In that application it was stated that his *"Chachera Bhai"* (paternal cousin), Kishan Singh had met with a tragic accident and for that reason he was unable to report for duty from July 26 to July 30, 1988. He further stated that he had given the number of the house of Kishan Singh because the place where he stayed had no number.

20. PW.3, the wife of the deceased denied before the court that Makhan Singh lived in their house as a tenant. She further said that Makhan Singh lived in Indra Colony and she did not know Makhan Singh before the occurrence. She further said that she had seen him first when the occurrence took place and she came to know his name when it was said to her by the

police. The police had come to her house at 5.00 to 6.00 P.M. She did not remember whether or not Makhan Singh was with them at that time.

21. The Investigating Officer was examined as PW.11. No question was asked to him with reference to any statement of Makhan Singh recorded under section 161 of the Code of Criminal Procedure. He, too, was recalled for further evidence and on recall he said that Makhan Singh addressed Deepa-PW.3 as "Bhabhi".

22. In the statement of the appellant recorded under section 313 of the Code of Criminal procedure, the court put to him the following question:-

> "It has come in the statement of Shri Naresh Pal Yadav, SI PW.11 that Makhan Singh had called Deepa as "Bhabhi". What do you have to say in this regard?
>
> Ans.: She is real Bhabhi (sister-in-law). Witness Makhan Singh lives with his Bhabhi."

23. The depositions of PW.2 and PW.3 are discussed by the trial court in paragraph 13 of its judgment where it made the following observations:

> "Now, there remains the testimony of Makhan Singh Rana (PW.2) and Smt. Deepa PW.3. Makhan Singh Rana (PW.2) tried to conceal the relationship between him and the deceased. Makhan Singh PW.2 stated that he had no relationship with Kishan Singh, deceased. He further stated that he was not the tenant of Kishan Singh. He further stated that he had not told the Investigating Officer that he was the tenant of Kishan Singh in that house, but the Investigation Officer stated in his statement that Makhan Singh told that he was the tenant and he gave the address of his house 119/3 Nai Basti. Naresh Pal Yadav, SHO PW.11 stated that Makhan Singh told Deepa as his Bhabhi. Makhan PW.2 stated in his re-examination that

he had written in the application Ex. KA-10 Kishan Singh as cousin brother. He stated that this fact was written in the application wrongly, but he has not stated the reasons why this fact was written in the application wrongly. Moreover, Ghanshyam Das DW.2 stated that the application for Ration-Card of Makhan Singh was on the address of 119/3 Nai Basti, Chukhuwala. Smt. Deepa PW3 also stated in his (sic. her) cross-examination that Makhan Singh was not the cousin of her husband. She stated in her cross-examination that she did not know Makhan Singh before the incident. When this accident took place she knew the name of Makhan Singh. The police personnel told the name of Makhan Singh, then she knew the name of Makhan Singh. Thus both the witnesses Makhan Singh PW2 and Smt. Deepa PW3 are intentionally concealing their relationship. It is highly strange that Smt. Deepa does not know the name of her husband's cousin."

24. The above quoted passage from the trial court judgment suffers from some errors of fact. We have perused the evidence of PW.11 more than once but we failed to notice any statement in his deposition that Makhan Singh had given his address as house No.119/3, Nai Basti and had told him that he was a tenant of the deceased. As a matter of fact, it was PW.2, Makhan Singh himself who truthfully accepted that in his statement before the Investigating Officer he had given his address as No. 119/3 which was the house of Kishan Singh, the deceased. In his statement on recall he had also explained that he had given the address of the house of the deceased because the place where he lived had no clearly ascertainable address. Moreover, both he and the deceased came from the same place and belonged to the same caste and he knew the deceased from before. He repeatedly denied that he lived in the house of the deceased as a tenant and there is no reason not to accept his statement.

25. Further, calling Deepa as "Bhabhi" does not at all mean that Makhan Singh was a blood relation of Kishan Singh Rana. "Bhabhi" is a common form of address for the wife of someone who is known from before. Moreover, Makhan Singh had clearly said that both he and Kishan Singh Rana belonged to Tehri Garhwal and they were also of the same caste and further that he knew Kishan Singh Rana from before. In those circumstances, to call the wife of the deceased as "Bhabhi" was quite natural for him but at the same time it did not, by any means, show that he had any blood relationship with the deceased.

26. Coming now to Ex.Ka-10, it needs to be noted that that was an application for leave of absence given where he was working. It is a common failing to try to justify the unsanctioned absence from work by making out excuses and by taking some liberty with actual facts. Therefore, in his application for condoning the absence for four days, if he said that his cousin had met with a tragic accident, it cannot be inferred that the deceased was actually his cousin and in court he was trying to conceal the relationship.

27. We see no reason for the trial court to come to the conclusion that PW.2 and PW.3 were speaking falsely and were trying to hide the relationship between PW.2 and the deceased or that he lived in the house of the deceased as a tenant.

28. In the first place no such inference is possible on the basis of the depositions of PW.2 and PW.3 and secondly and more importantly even if it is assumed for the sake of argument that the depositions of PW.2 and PW.3 were incorrect in regard to the relationship between PW.2 and the deceased and in regard to PW.2 living in the house of the deceased as a tenant at the time of occurrence, we fail to see how that can be the ground to reject their deposition entirely even though it is perfectly sound in respect of the main prosecution case. In our system of law, the maxim falsus in uno, falsus in *omnibus* is not followed.

29. Here, it is to be stated that the learned counsel appearing for the appellant submitted that the deposition of PW.3 was quite unreliable as it contained certain statements that were either incorrect or quite inconceivable. He referred to paragraph 20 of the deposition of PW.3 where she said that the first fight (between her husband and the appellant) took place on the verandah of the shop; that blood also spilled on the verandah of the shop and further that the first fight on the verandah of the shop went on for about 10-15 minutes. He also referred to paragraph 21 of the deposition of PW.3 where she said that the accused held the scissors with both hands and opened both the handles of the scissors and then attacked with one hand at her husband.

30. Learned counsel submitted that there was no verandah in front of the shop of the appellant and the manner of assault as described by PW.3 was quite inconceivable.

31. We are unable to accept the submission that on the basis of the statements pointed out by the counsel the deposition of PW.3 is liable to be rejected. The statements relied upon by the counsel were made by PW.3 under the stress of cross-examination. She is a housewife and apparently not highly educated. She has a limited vocabulary and an imperfect capacity to describe the manner of assault on her husband. Her statement especially in paragraph 21 is obviously in answer to some convoluted question by the cross-examiner, to which she replied as best as she could.

32. We find the testimonies of PW.2 and PW.3 wholly reliable and see no reason not to accept the same.

33. Apart from the evidences of PW.2 and PW.3, there are other circumstances that lend credence to the prosecution case.

34. The Investigating Officer (PW.11) stated that he arrested the appellant at 8.00 p.m. on July 28, 1988. In course of interrogation he volunteered to produce the scissors used

for killing the deceased from his shop. He took the Investigating Officer to his shop, opened it with the keys kept in his pocket and recovered the blood stained scissors from under the shop counter and produced it before the Investigating Officer.

35. PW.6 stated that on July 28, 1988, while he was going to the house of the deceased, he met the police people in Indira colony (the place where the occurrence took place). The appellant was also with them. The police people brought the appellant to his shop and got it opened and on the asking of the Daroga, the appellant picked up a pair of scissors from the counter of his shop and handed it to the police. A recovery memo was prepared and the signatures of the witness and one Bhim Singh were taken on the recovery memo.

36. On a careful consideration of the materials on record and the submissions made on behalf of the appellant and the State, we are of the view that the High Court has rightly rejected the view taken by the trial court as wholly untenable and has rightly accepted the evidences of PW.2 and PW.3 in order to bring home the guilt of the appellant.

37. In the light of the discussion above, we find no merit in the appeal. It is, accordingly, dismissed.

38. The bail bonds of the appellant are cancelled and he is directed to surrender within four weeks from today, failing which the trial court is directed to take all possible measures to apprehend him to make him undergo the remaining sentence.

R.P. Appeal Dismissed.

RAM PAL @ BUNDA
v.
STATE OF HARYANA
(Criminal Appeal No. 120 of 2012)

APRIL 11, 2013

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

Penal Code, 1860 - ss.302 and 376 - Rape and murder - Case based on circumstantial evidence - Conviction of accused-appellant with 10 years RI - Justification - Held: Justified - Medical evidence revealed that the victim was subjected to sexual intercourse before her death - PW-10, mother of the victim found the accused present at the scene of crime immediately after the occurrence - Accused ran away from the scene of occurrence without responding to the queries of PW-10 and remained absconding for two days - All the circumstances only supported the prosecution version - No missing link in any of the circumstances found proved against the accused - Further, accused had inimical relationship with the family of the victim and thus, motive aspect demonstrated by the prosecution also acceptable - Moreover, accused-appellant did not let in any evidence for his defence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 120 of 2012.

From the Judgment and Order dated 07.09.2011 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 686-DB of 2006.

R.K. Talwar, David Rao, K. Kaushik, Chander Shekhar Ashri for the Appellant.

Kamal Mohan Gupta for the Respondent.

The following order of the Court was delivered

O R D E R

1. The sole appellant is the accused who was convicted for the offences under Sections 302 and 376, Indian Penal Code (IPC). He was sentenced to undergo rigorous imprisonment for life and 10 years rigorous imprisonment for committing rape and murder of one Devi (real name disguised). According to the prosecution, a telephonic intimation was received in the police station regarding the dead body of Devi resident of Mangalore within the jurisdiction of Shahzadpur police station, Ambala, lying in the fields of one Prithi Pal. On reaching the spot PW-14, SHO recorded the statement of PW-10 Sumitra Devi the mother of the deceased. It was learnt through her that she had two daughters, that the elder one was married while the younger one who went to the fields on 18.2.2005 at 6.30 p.m. to ease herself did not return and their intensive search was in vain. In her statement she mentioned the name of the appellant who was stated to have been found at the place of search and on being asked, he pleaded ignorance about the victim. It was her further statement that only on the next day morning in day light they were able to trace the body of the victim whose neck was wrapped with a blue shawl owned by her. The complainant PW-10 raised suspicion about the involvement of the appellant in the commission of the offence in view of his past misbehavior towards her elder daughter on which occasion he was reprimanded before the local Panchayat and was forced to tender an apology. As it was a case of circumstantial evidence, the trial Court after scrutinizing the evidence of prosecution witnesses and after taking into account the stand of the appellant in his 313 Cr.P.C. statement noted the circumstances in paragraph 17 of the judgment.

2. The circumstances noted were as under:

1) Medical evidence

2) presence of accused at the scene of crime immediately after the occurrence

3) conduct of the accused in running away from the village and remaining absconding for two days after the occurrence and

4) motive for the offence.

3. While examining the above circumstances, on the motive aspect the trial Court found that PW-11 Natho Devi, the elder daughter of PW-10 in her evidence deposed that in the year 2002 when she along with her cousin was returning from the fields, the appellant met them on the way along with his cousin Sham Lal and that both of them teased deceased PW-11 and her cousin and the bundle of the grass carried by them fell down. It was also her statement that by providence they could save themselves from the onslaught of the appellant and his cousin on that occasion. She reported the same to her parents. Pursuant to her complaint, a Panchayat was convened in her village and in the Panchayat, the appellant and his cousin begged pardon and that the appellant thereafter used to tell her that one day or other he would take a revenge for the said incident. It was also in her evidence that she belonged to labour class and the appellant was nurturing a long standing grievance and grudge in his mind against the family of the complainant as he felt that he was humiliated in the Panchayat. The said version of PW-11 was also corroborated by PW-10, the mother of the victim and Natho Devi, PW-11. In the 313 statement except making a simple denial, the appellant did not come forward with any explanation insofar as the motive aspect was concerned.

4. As far as the presence of the appellant at the scene of occurrence was concerned PW-10 in her evidence categorically explained as to how while searching for her daughter she found the appellant in the fields and that on being questioned about the whereabouts of her daughter the appellant

without responding to her query ran away from the place of occurrence. Though at the instance of the appellant it was suggested that there were certain variations as compared to her statement to the police as regards the presence of the appellant, the trial Court found that such variation did not materially affect the evidence of PW-10 as regards the presence of the appellant in the place of occurrence at the relevant point of time and his running away from the scene of occurrence without responding to the queries of the complainant PW-10.

5. As far as the absence of the appellant from the village for two days after the occurrence enough evidence was let in. PW-12 father of the deceased who categorically stated that while the occurrence took place on 18.2.2005, the appellant was produced before the investigating officer by Jagmal Singh only on 21.2.2005 when he was arrested. It came to light that after 18.2.2005 the appellant could be traced in the village only on 21.2.2005 when he was arrested. Though PW-13 Jagmal Singh who stated to have produced the appellant, turned hostile, having regard to the record of proceedings which was not contradicted in the manner known to law, the above factum about the absence of the appellant in the village for more than two days was quite apparent and there was no reason to disbelieve the said factum.

6. When the medical evidence was analyzed, the trial Court has found that according to PW-1 Dr. Ramesh and Dr. Sushil Kumar Singal, the cause of death was asphyxia due to strangulation which was ante-mortem and was sufficient to cause death. Multiple aberrations and contusion of varying sizes on the face, chin and few superficial aberrations on the back were noted. Exhibit PD and PD/1, the report of the forensic science laboratory revealed blood on Shawl, Salwar and underwear of the deceased. Human semen was detected on the vaginal swab of the deceased. On examination of the accused, after his arrest, by PW-2 Dr. Vikas Pal who took into possession the underwear of the appellant revealed that human

semen was detected in that as per the FSL report. The medical evidence also revealed that the victim was subjected to sexual intercourse before her death.

7. Thus all the above circumstances only supported the prosecution version and there was no missing link in any of the circumstances found proved against the appellant.

8. The appellant did not choose to let in any evidence for his defence. In the 313 questioning what all the appellant said was that due to inimical relations with the family of the complainant, he was falsely implicated. The trial Court has rightly noted that apart from what was alleged by PWs-10 and 11 no other inimical aspect with the family of the complainant was brought forth as against the appellant. In the said circumstances, the stand of the appellant also fully supported the version of PWs-10 and 11. It is not the case of the appellant that there was no previous contact in any manner whatsoever as between the appellant and the family of the complainant. Further considering the version of PWs-10 and 11 and the stand of the appellant that there was inimical relationship with the family of the complainant, it can only be concluded that such inimical relationship would only relate to the appellant's misbehaviour in the past with PW-11 and as stated by her in her evidence the appellant who was forced to express his apologies in the presence of elders in Panchayat, developed a grudge in his mind to settle score with the family of the complainant. Therefore, the motive aspect demonstrated by the prosecution and accepted by the trial Court was also fully justified.

9. Having regard to our above conclusion, we are convinced that the conviction and sentence imposed on the appellant by the trial Court which was also confirmed by the High Court was perfectly justified and we do not find any good grounds to interfere with the same. The appeal fails and the same is dismissed.

B.B.B. Appeal Dismissed.

TEJINDER SINGH @ KAKA
v.
STATE OF PUNJAB
(Criminal Appeal No. 1279 of 2008 etc.)

APRIL 11, 2013

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

PENAL CODE, 1860:

ss. 302, 376(2)(g), 201 and 506 - Gang rape and murder - Conviction by trial court - Affirmed by High Court - Held: There is major discrepancy in the testimony of witnesses and also registration of FIR on the basis of information furnished by the informant - Further, the Sarpanch to whom the accused were stated to have made confessional statement, reported the matter to police after 16 days - His evidence is not believable - The narration of the alleged offences against the appellants and other accused by prosecution witnesses is most unnatural and unbelievable to convict and sentence them - Neither trial court nor High Court has examined their testimony properly by re-appreciating the same to record findings on the charges - There is no material evidence on record to convict and sentence the appellants - Their conviction and sentences are set aside - Circumstantial evidence.

Extra-judicial confession - Held: Is a weak form of evidence and based on such evidence no conviction and sentence can be imposed upon the appellants and other accused.

CONSTITUTION OF INDIA, 1950:

Art. 142 - Benefit of acquittal extended to non-appellant-

accused also - Penal Code, 1860 - ss. 302, 376 (2) (g), 201, 404 and 506 IPC.

An FIR was lodged at the Police Station on 25.5.2000 for offences punishable u/s 302, 376(2)(g), 148, 201 and 404 read with s. 34 IPC, alleging that on 24.5.2000 at about 9 A.M. the deceased had gone to the fields to bring fodder and did not return. At about 8 A.M. on 25.5.2000, the body of the deceased was found buried in a fresh dug pit in the sugar cane field belonging to accused 'SL'. The trial court convicted accused 'GS' u/ss 302, 376(2)(g) and 506 IPC amd accused 'RV'. 'HS', 'BS' and SL u/ss 302, 376(2)(g) and 404 IPC. All these five accused were sentenced to imprisonment for life. Accused 'TS' was convicted u/s 201 IPC and sentenced to 7 years RI. The High Court affirmed the conviction and the sentence. Except accused 'GS', all other accused filed the appeals.

Allowing the appeals, the Court

HELD: 1.1 In so far as appellant 'TS' is concerned, the charge is u/s 201 IPC. As could be seen from the evidence of PW-8 and PW-9, there is major discrepancy between their statements of evidence. PW-8 has stated that appellant 'TS' started digging a pit with spade in the sugarcane field, whereas PW-9 has stated that the said appellant was not present at that time. In view of the major discrepancy and contradiction between the statements of the witnesses, it not only creates a grave suspicion regarding the said appellant being part of the offence but also makes his presence doubtful at the place of occurrence. Therefore, placing reliance by trial court upon the testimony of the said witnesses and recording the finding against appellant 'TS' on the charge and passing an order of conviction and sentence which is affirmed by the High Court is without proper appreciation of the major discrepancy in the statements of PWs 8 and 9 regarding the presence of appellant 'TS' at the place of

occurrence. The courts below have also failed to take into consideration the evidence of PW-10, wherein she had deposed about the presence of other accused near the place of occurrence, but she has not named appellant 'TS. Moreover, there is nothing substantive and positive evidence placed on record against appellant 'TS" by the prosecution to prove its case against him. It cannot be said that the prosecution has proved its case beyond reasonable doubt. The benefit of doubt should have been extended to 'TS' in the impugned judgment by the High Court while re-appreciating the evidence on record in exercise of its jurisdiction. [para 18, 20 and 21] [817-D-E, F-H; 818-A-E, F-H]

Sukhram Vs. State of Maharashtra **2007 (9) SCR 44 = 2007 (7) SCC 502 - relied on.**

1.2 Thus, this Court holds that there is major discrepancy in the testimony of witnesses PW-8 and PW-9 and also registration of FIR on the basis of information furnished by the informant. The finding of the trial court in this regard is erroneous in law for the reason that the evidence of PWs 8 and 9 has raised serious suspicion and doubt. Therefore, the same must be extended to the other appellants. [para 22] [820-A-C]

1.3 Further, PW-7, to whom the co-accused namely, 'GS', 'HS' and 'SL', made a disclosure statement describing the whole incident to him on 12.06.2000, has neither recorded the alleged extra judicial confession nor made the disclosure of the said statement within reasonable time but took 16 days to disclose the extra judicial confessions made by the accused persons to inform the police. The delay in informing the police regarding the extra judicial confessional statement alleged to have made to him by some of the accused has not been explained by PW-7 and the reason sought to be given by him for non disclosure of the same to the police

cannot be accepted by this Court as it is not natural and also not satisfactory. His evidence is not believable. Therefore, the reliance placed upon the evidence of PW-7 by both the trial court and the High Court to convict the appellant and sentencing him for the offence u/s 201 IPC is erroneous in law. [para 23 and 25] [820-D-F; 823-G]

Dwarkadas Gehanmal Vs. State of Gujarat **1999 (1) SCC57 - relied on.**

1.4 Besides, the extra judicial confession is a weak form of evidence and based on such evidence no conviction and sentence can be imposed upon the appellants and other accused. [para 24] [821-B]

Pancho Vs. State of Haryana **2011 (12) SCR 1173 = 2011 (10) SCC 165; and** *Sahadevan & Anr. Vs. State of Tamil Nadu* **2012 (4) SCR 366 = 2012 (6) SCC 403 - relied on.**

1.5 In so far as the other appellants in connected appeals are concerned, the trial court after placing reliance upon the evidence of PW-7, PW-8 and PW-9 has recorded the findings on charges against them, which is wholly untenable in law. Neither the trial court nor the High Court has examined their testimony properly by re-appreciating the same to record the findings on the charges. The narration of the alleged offences against the appellants and other accused by the prosecution witnesses is most unnatural and unbelievable to convict and sentence them. The courts below should have appreciated the evidence on record properly and should not have believed the statement of evidence of PW-8 for the reason that neither he has disclosed the alleged offences said to have been committed by the appellants and other accused nor did he depose before the trial court or to anyone of the villagers. The explanation given by him that he was held out of fear and, therefore, he did

not disclose the incident to anyone of the villagers cannot be accepted as it is unnatural. Therefore, the evidence of PW-8 cannot be believed by this Court. [para 27] [824-D-H; 825-A]

1.6 The testimonies of PW-8 and PW-9 would clearly go to show that there is a discrepancy regarding the narration of the offences said to have been committed by the accused. Therefore, the courts below should not have placed reliance on the evidence of PW-8 and PW-9 and recorded the finding that the charges levelled against the appellants/accused were proved. Both the courts below have committed serious error in placing reliance upon the untrustworthy testimonies of PW-8 and PW-9 and passing an order of conviction and sentence against them. Further, from the evidence of the other witness, namely, PW-10, the offence alleged to have been committed by said accused also cannot be accepted. [para 27 & 28] [825-A-C; D-E]

1.7 The courts below have convicted and sentenced the appellants on the charges framed against them based on the circumstantial evidence, even though the chain of events are not proved by the prosecution to bring home the guilt of the appellants/accused on the charges leveled against them. The concurrent finding recorded by the High Court on the charges is opposed to the legal principles laid down in this regard by this Court. The conviction of the appellants/accused for the alleged offence on the basis of evidence of the prosecution witnesses suffers from error in law. [para 28 and 31] [825-G-H; 826-H; 827-A-B]

1.8 There is no material evidence on record to convict and sentence the appellants. After going through the deposition of the prosecution witnesses, this Court is satisfied that the case of the prosecution against the appellants/accused on the charges creates suspicion and doubt in the absence of legal evidence on record and,

therefore, the same should enure to the benefit of accused for their acquittal. Their conviction and sentences are set aside. [para 30 and 32] [826-G; 827-C]

2. Accused, viz. 'GS' who has also been convicted u/ss 302, 376(2)(g) and 506 IPC and sentenced to undergo imprisonment as awarded by trial court and affirmed by the High Court is extended the same benefit in exercise of jurisdiction of this Court under Article 142 of the Constitution, and he is also directed to be released. [para 33] [827-D-E]

T. Subramanium v. State of Tamil Nadu **2006 (1) SCR 180 = (2006) 1 SCC 401 - cited.**

Case Law Reference:

2006 (1) SCR 180	**cited**	**para 12**
1999 (1) SCC 57	**relied on**	**para 12**
2011 (12) SCR 1173	**relied on**	**para 12**
2012 (4) SCR 366	**relied on**	**para 12**
2007 (9) SCR 44	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1279 of 2008.

From the Judgment and Order dated 05.06.2006 of the High Court of Punjab and Haryana at Chandigarh in Crl. A. No. 716-DB of 2004.

WITH

Crl. A. No. 1280, 1281 and 1282 of 2008.

K.T.S. Tulsi, Fakhruddin (A.C.), Kuber Boddh, Kartikay (For Arun Kumar Beriwal), Sheeba Fakhruddin, Surya Kamal Mishra for the Appellant.

Sanchar Anand, AAG, Arun K. Sinha, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. These Criminal Appeals are directed against the Judgment and Order dated 05.06.2006 passed by the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No 716-DB of 2004. The Punjab and Haryana High Court affirmed the conviction and sentence of the accused for offences punishable under Sections 302, 376(2)(g), 148, 201,404 read with Section 34 of the Indian Penal Code with different sentences of imprisonment which will be referred to in the later portion of the judgment to run concurrently and fine imposed upon them. The same is under challenge in these appeals by the appellants urging various grounds. However, the High Court acquitted the appellants of the charges framed under Sections 3 and 4 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The appellants have prayed for allowing the appeals by setting aside the impugned judgment of the High Court and to acquit them from all the charges urging various facts and grounds in support of the questions of law framed in these appeals.

For proper appreciation of rival factual and legal submissions made by the learned counsel for the parties the relevant facts in relation to the prosecution case are briefly stated as under:

3. On 25.05.2000, FIR No. 73 was lodged at Police Station Banga, Nawanshahar on the basis of statement of Nago Ram, S/o Munshi Ram who is relative of Seeso, the deceased, for offences under Sections 302, 376(2) (g), 148, 201, 404 read with Section 34 IPC alleging that on 24.05.2000 at about 9.00 a.m. the deceased went to the field to bring fodder and when she did not return home till afternoon, the informant

along with family members of the deceased and villagers started searching her but they could not gather any information. It was alleged that on 25.05.2000 at 8.00 a.m., the informant along with other people went to the sugarcane field searching for the deceased where they found a fresh pit dug filled back with earth inside which the dead body was lying buried in the soil covered with a palli. It was further alleged that the gold ear rings, silver bangles and anklets from the dead body of the deceased were found missing. It was alleged by the informant that Sunny Lal Paswan, the owner of the land along with three-four persons after committing the murder buried the body of the deceased.

4. On the basis of the registration of the said FIR the case was investigated and report under Section 173 of the Code of Criminal Procedure was filed before the committal court and thereafter it has committed the case to the learned Additional Sessions Judge, Nawanshahar and the case went for trial as the accused pleaded not guilty of charges and prayed to try them for the charges. The charges were framed for offences punishable under Sections 302, 376(2)(g), 148, 201, 404 read with Section 34 IPC and also under Sections 3 and 4 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The prosecution witnesses PW-1 to PW-15 were examined and the statement of evidence of the witnesses were recorded by the learned Addl. Sessions Judge. The learned Additional Sessions Court has convicted the accused with various sentences for different offences along with fine as has been set out in detail in the later part of the judgment. The same is affirmed by the High Court by passing the impugned judgment. The correctness of the same is challenged in these appeals by the appellants by raising certain legal questions and urging grounds in support of the same.

5. It is contended by the learned senior counsel for the appellant Mr. K.T.S. Tulsi that the High Court ignored the vital aspect of the case, namely, PW-9 Niranjan Ram, the so-called sole eye witness of the alleged offences who has categorically

stated in his evidence that on 24.05.2000 at about 10.30 a.m. in order to ease himself, he had gone towards the eastern side of the village where a fair was being held. In order to get his hands washed he had gone towards the tube well, where he heard some shrieks, and found that Seeso, wife of Bhajan Ram was lying on the ground and accused Gurdeep Singh was holding her arms, accused Balwinder Singh and Rajinder Kumar had lifted the legs of Seeso upwards and accused Harnek Singh was committing rape on her. Accused Sunny Lal and Harnek were holding the arms of Seeso. Thereafter accused Gurdeep Singh gave a Kassi blow on the neck of Seeso. On seeing this he shrieked. On seeing PW-9, the accused Gurdeep Singh chased him with a Kassi in his hand and threatened him that in case he discloses the incident in the village, he and his family will be dealt with the same manner. Out of fear because of the threat having been inflicted by Gurdeep Singh, PW-9 did not disclose the incident to any one of the villagers or to the family members of the deceased.

6. It is urged by Mr. K.T.S. Tulsi, the learned senior counsel for the appellant in Crl.A. No.1279 of 2008 and Mr. Fakhruddin, the learned senior counsel who is appearing as amicus curiae in the connected appeals that the statement of evidence of the witnesses narrating the offences said to have been committed by the appellants is most unnatural and improbable to believe. This aspect of the matter in relation to these appellants is not properly appreciated by the High Court while affirming the conviction and sentences imposed upon them by the learned Additional Sessions judge. The learned senior counsel Mr. Tulsi submits that the High Court placing reliance upon the testimony of PW-9 by extracting his brief statement of evidence in the impugned judgment has concurred with the conviction and sentences imposed upon the appellant by the Additional Sessions judge and the same is erroneous on the part of the High Court. Hence, he submits that the same is liable to be set aside.

7. It is further contended by the learned senior counsel that the High Court has erroneously placed reliance upon the testimony of PW-8 Chet Ram, the brother-in-law of the deceased, who is not even an eye-witness to the incident. PW-8 deposed in his evidence that he saw accused Gurdeep Singh, Harnek Singh, Balwinder Singh, Tejinder Singh and Sunny Lal Paswan carrying some heavy material in a palli and they had placed the same in the sugarcane field. Accused Tejinder Singh dug a pit in the field with the help of a spade and buried the material underneath the earth. On his asking them as to what they had done, accused Gurdeep Singh told that he will also be treated in the same manner and uttered the words "Kutia Chamara Tera bhi iho hal karange". Thereafter the accused Gurdeep Singh with a Kassi in his hand, ran towards him. Out of fear, he ran away towards the village.

8. The learned senior counsel further submits that even presuming the aforesaid witness's statement to be true, it is very unusual and unnatural on his part being the brother-in-law of the deceased in not informing the incident either to the family members or to the police. This aspect of the matter has not been considered by the High Court thereby, it has overlooked the major discrepancy in the statements of witnesses between PW-8 and PW-9, on whose evidence the whole prosecution case is based. PW-8 has stated in his evidence that appellant Tejinder Singh started digging a pit while PW-9 has categorically deposed in his evidence that accused Tejinder Singh was not there at that time.

9. The deposition of the aforesaid witness creates a grave suspicion not only regarding the appellant Tejinder Singh being part of the conspiracy to commit offences but also his presence at the place of occurrence. Non consideration of this major discrepancy in the evidence of the aforesaid witness both by the Trial Court as well as the High Court, has rendered the findings on the charges erroneous in law and therefore the same is liable to be set aside. Further, the High Court has failed to

re-appreciate the evidence of PW-10 Krishna, who has in her deposition, stated the names of the accused persons but she has not named the appellant Tejinder Singh's involvement in committing offences as alleged, which casts a major suspicion in the statement of PW-8 Chet Ram.

10. It is further contended by the learned senior counsel appearing on behalf of the appellant Tejinder Singh in Crl.A. No. 1279 of 2008 that the High Court did not follow the well established principle of law that in appeal against the conviction, the appellate court has the duty to appreciate the evidence on record and benefit of reasonable doubt has to be given to the accused which has not been done by it. In support of this submission, reliance is placed upon the decision of this Court in the case of *T.Subramanium v. State of Tamil Nadu*[1]. Further, elaborating his submission, he has urged that if two views are possible from the very same evidence, it cannot be said that the prosecution had proved its case beyond reasonable doubt. There is a grave doubt regarding the presence of appellant Tejinder Singh at the place of occurrence, which goes to the root of the prosecution case as far as the role of the appellant is concerned in committing offences as alleged.

11. The learned senior counsel has further contended that the High Court has erroneously accepted the evidence of another witness Bhupinder Singh PW-7, (the erstwhile Sarpanch) treating him as a credible witness ignoring the inherent improbabilities in his statement of evidence regarding the alleged extra judicial confession said to have been made to him by the three accused persons other than the appellant in Crl.A. No.1279 of 2008 and the trial court and the High Court having placed reliance upon the same recorded the finding that the charge against the said appellant is proved and conviction and sentence imposed upon him for the alleged offence. This finding of the courts below is bad in law and is liable to be set

1. (2006) 1 SCC 401.

aside. According to the deposition of PW-7, who has deposed that on 28.5.2000 accused Gurdeep Singh, Harnek Singh and Sunny Lal Paswan made a disclosure statement to him describing the whole incident. He has disclosed the same to the police after 16 days of the alleged disclosure statements said to have made to him by the said accused and he had handed over the accused to police custody on 12.06.2000. The reason regarding the delay of 16 days given by him was that he was busy with some work and therefore, there was an inordinate delay of 16 days in informing the incident to the police remains unsatisfactory on the part of the said witness to whom the extra judicial confession alleged to have been made by the co-accused. This renders the conduct of PW-7 doubtful and the content of his testimony suspicious in nature. Further, he being the Sarpanch of the village instead of taking instant action against the accused persons who alleged to have committed rape, murder and destroyed the evidence, informed the police after a lapse of 16 days. This cannot be believed by this Court.

12. It is further contended by him that it is pertinent to mention that the urgency of the work with which he was busy was nowhere explained by him. Learned senior counsel placed reliance upon judgment of this Court in *Dwarkadas Gehanmal Vs. State of Gujarat*[2] in support of his legal submission that if the conduct of the witness is inconsistent with the conduct of an ordinary human being then his testimony has no credence for acceptance. Paragraph 14 of *Dwarkadas Gehanmal's* case (supra) reads as under:

> "14. .....Deva Ram PW-4 would not have waited for five days to disclose the alleged confession made by the appellant to him but on the contrary, he would have either on the same evening gone to the police station to lodge a complaint on the basis of the confessional statement of appellant and/or would have gone to the house of

2. (1999) 1 SCC 57.

> Noorbhai to inform the family members about the confessional statement of the appellant....."

Therefore, the learned senior counsel contends that the observations made in the above referred case would support the case of the appellants herein.

Learned senior counsel has placed reliance on various other judgments of this Court wherein extra judicial confession was made. Relevant paragraphs will be extracted in the appropriate reasoning portion of this judgment to appreciate the legal submission made by him and to set aside the impugned judgment and to pass an order of acquittal.

13. The learned senior counsel Mr. Tulsi has relied upon the following cases in support of his legal submissions contending that the same would with all fours be applicable to the case in hand, namely, *Pancho Vs. State of Haryana*[3], *Sahadevan & Anr. Vs. State of Tamil Nadu*[4] and *Sukhram Vs. State of Maharashtra*[5].

14. The learned senior counsel, Mr. Fakhruddin who is appearing for the appellants in the connected appeals has also made his submissions urging the similar grounds as urged by Mr. Tulsi, the learned senior counsel for the appellant in Crl.A. No.1279 of 2008 regarding the evidence of PW-7 in relation to the extra judicial confessional statement alleged to have made to him by some of the accused. Further, he has invited our attention to the depositions of prosecution witnesses to show that the findings recorded against the accused by the courts below is not only erroneous but also suffer from error in law and therefore the same is liable to be set aside by allowing the appeals.

15. On the other hand, Mr. Sanchar Anand, the learned

3. (2011) 10 SCC 165.
4. (2012) 6 SCC 403
5. (2007) 7 SCC 502.

Additional Advocate General for the State of Punjab, has sought to justify the findings and reasons recorded on the charges framed against the appellants herein by the courts below. The trial court being the court of original jurisdiction, in exercise of its power, appreciated the evidence on record and answered the charges levelled against the appellants and other accused holding that they are guilty of the offences committed against the deceased and accordingly after hearing them, the learned Sessions judge has imposed sentence of imprisonment upon the accused for different offences as mentioned in the table which is extracted hereunder:

Name of convict	Under Section	Sentence
Gurdeep Singh	302 IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	376(2)(g)IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	506 IPC	RI for 5 years and to pay fine of Rs.5000/ or in default further RI for 6 months.
Rajinder Kumar	302 IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	376(2)(g)IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	404 IPC	RI for 1 year and to pay fine of Rs.1000/ or in default further RI for 1 month.
Harnek Singh alias Naka	302 IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	376(2)(g)IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	404 IPC	RI for 1 year and to pay fine of Rs.1000/ or in default further RI for 1 month.
Balwinder Singh alias Binder	302 IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	376(2)(g)IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	404 IPC	RI for 1 year and to pay fine of Rs.1000/ or in default further RI for 1 month.
Sunny Lal Paswan	302 IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	376(2)(g)IPC	Life imprisonment and fine of Rs.10,000/- in default further RI for one year.
	404 IPC	RI for 1 year and to pay fine of Rs.1000/ or in default further RI for 1 month.
Tejinder Singh alias Kaka	201 IPC	RI for 7 years and to pay a fine ofRs.5000/ or in default further RI for 6 months

The sentences of imprisonment shall, however, run concurrently

16. It is further submitted by the learned Additional Advocate General that the correctness of the findings and reasons in the case recorded by the learned sessions judge in convicting and sentencing the appellants/accused has been examined by the High Court in exercise of its jurisdiction after extracting the testimony of the witnesses in the impugned judgment and applying its mind in the backdrop of legal grounds urged in the appeal before the High Court. The High Court has affirmed the conviction and sentence by recording the concurrent findings of fact on the charges by assigning valid and cogent reasons. Therefore, the same does not call for

interference by this Court in exercise of its jurisdiction under Article 136 of the Constitution of India.

17. With reference to the above factual and legal contentions urged on behalf of the parties, this court is required to examine as to whether the concurrent impugned findings on the charges levelled against the appellants in the impugned judgment are erroneous and require interference by this Court and whether the conviction and sentence imposed on the appellants on the basis of the evidence of PW-7, PW-8 and PW-9 and other prosecution witnesses is legal and valid and requires interference?

18. The aforesaid points are required to be answered in favour of the appellants for the following reasons:

In so far as the appellant Tejinder Singh is concerned, the charge is under Section 201 IPC. He has been convicted and sentenced with rigorous imprisonment for 7 years and a fine of Rs.5000/-or in default, to undergo a further rigorous imprisonment for 6 months. This aspect of the matter is considered by us in the backdrop of factual and legal contentions urged by learned senior counsel Mr. Tulsi.

19. It is pertinent to refer to the case of *Sukhram* (supra) in order to appreciate the scope of Section 201 IPC. The relevant paragraphs will be extracted to appreciate his contentions in the reasoning portion of the judgment.

20. As could be seen from the evidence of PW-8 and PW-9, there is □major discrepancy between their statements of evidence. PW-8 Chet Ram has stated in his evidence that the appellant Tejinder Singh started digging a pit with spade in the sugarcane field, whereas PW-9 has stated in his evidence that the said appellant was not present at that time. In view of the major discrepancy and contradiction between the statements of one witness and the other, it not only creates a grave suspicion regarding the said appellant being part of the offence

but also makes his presence doubtful at the place of occurrence. Therefore the ground urged in this regard by the learned senior counsel that the learned sessions judge in placing reliance upon the testimony of the said witnesses and recording the finding against the above appellant on the charges and passing an order of conviction and sentence which is affirmed by the High Court is without proper appreciation of the major discrepancy in the statements of the above named witnesses regarding the presence of the aforesaid appellant at the place of occurrence. The courts below have also failed to take into consideration the evidence of PW-10 Krishna, wherein she had deposed in the case that on 24.5.2000 at about 8 a.m. she along with Nimmo had gone to take fodder from the fields. At about 9.00 a.m. when they were coming back, they found that Sunny Lal was watering the fields. In the meantime, the deceased also entered the fields having a jute cloth in her hands. The accused Binder and Kaka were seen going towards the tube well. Accused Gurdeep Singh and Harnek Singh □were also seen going on the scooter towards the tube well side, but she has not named the appellant Tejinder Singh. This creates a major discrepancy in the statements of evidence of PW-8 and PW-9 regarding the participation of this appellant in committing offence as alleged against him.

21. Moreover, there is nothing substantive and positive evidence placed on record against the aforesaid appellant by the prosecution to prove its case against him. Therefore, the reliance placed in *Sukhram's* case (supra) regarding legal proposition should be applied to the case in hand. It cannot be said that the prosecution has proved its case beyond reasonable doubt. The benefit of doubt should have been extended to Tej inder Singh in the impugned judgment by the High Court while re-appreciating the evidence on record in exercise of its jurisdiction as it has failed to notice that the ratio laid down at para 18 in the case of *Sukhram* referred to supra that to constitute an offence under Section 201 IPC the following

four ingredients viz. (i) to (iv) have to be established:

"18. ……To bring home an offence under Section 201 IPC, the ingredients to be established are: (i) committal of an offence; (ii) person charged with the offence under Section 201 must have the knowledge or reason to believe that an offence has been committed; (iii) person charged with the said offence should have caused disappearance of evidence; and (iv) the act should have been done with the intention of screening the offender from legal punishment or with that intention he should have given information respecting the offence, which he knew or believed to be false. It is plain that the intent to screen the offender committing an offence must be the primary and sole aim of the accused. It hardly needs any emphasis that in order to bring home an offence under Section 201 IPC, a mere suspicion is not sufficient. There must be on record cogent evidence to prove that the accused knew or had information sufficient to lead him to believe that the offence had been committed and that the accused has caused the evidence to disappear in order to screen the offender, known or unknown.

19. In *Palvinder Kaur v. State of Punjab* this Court had said that in order to establish the charge under Section 201 IPC, it is essential to prove that an offence has been committed; that the accused knew or had reason to believe that such offence had been committed; with requisite knowledge and with the intent to screen the offender from legal punishment, caused the evidence thereof to disappear or gave false information respecting such offence knowing or having reason to believe the same to be false. It was observed that the court should safeguard itself against the danger of basing its conclusion on suspicions, however, strong they may be. (Also see *Suleman Rahiman Mulani v. State of Maharashtra, Nathu v. State of U.P, V.L. Tresa v. State of Kerala.*)"

22. For the reasons stated supra we have to record a finding in this judgment that there is major discrepancy in the testimony of witnesses PW-8 and PW-9 and also registration of FIR on the basis of information furnished by the informant. The FIR was registered, investigation was made and charge sheet was filed and the appellant was tried for the charges as he had pleaded not guilty and the Sessions Court convicted and sentenced him for the offence. This finding is erroneous in law for the reason that the statement of evidence of the prosecution witnesses referred to supra has raised serious suspicion and doubt. Therefore, the same must be extended to the other appellants.

23. Further, the learned senior counsel has rightly placed reliance upon the testimony of PW-7 to whom, according to him, the accused persons namely, Gurdeep Singh, Harnek Singh and Sunny Lal Paswan, co-accused, made a disclosure statement describing the whole incident to him on 12.06.2000 who has neither recorded the alleged extra judicial confession nor made the disclosure of the said statement within reasonable time but 16 days to disclose the extra judicial confessions made by the accused persons to inform to the jurisdictional police. The delay in informing the police regarding the extra judicial confessional statement alleged to have made to him by some of the accused has not been explained by PW-7 and the reason sought to be given by him for non disclosure of the same to the police cannot be accepted by this Court as it is not natural and also not satisfactory. Further, the learned senior counsel Mr. Tulsi has rightly placed reliance upon the judgment of this Court in *Dwarkadas Gehanmal's* case (supra) with regard to the conduct of the witness in the said case which is inconsistent with the conduct of an ordinary human being. The observations made in the abovementioned case with all fours applicable to the facts situations of the case in hand, that if extra judicial confessional statement was made by the accused as stated by him in his statement before the trial court were to be true, it was his duty to disclose the same immediately to the police or

to the relatives of the deceased. That has not been done by him and therefore his evidence is not believable.

24. The extra judicial confession is a weak form of evidence and based on such evidence no conviction and sentence can be imposed upon the appellants and other accused. In support of this proposition, the relevant paragraphs of *Pancho's* case are extracted hereunder:

> "16. The extra-judicial confession made by A-1, Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In *Gopal Sah v. State of Bihar* this Court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of a chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether the extra-judicial confession of A-1, Pratham inspires confidence and then find out whether there are other cogent circumstances on record to support it."
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> ……..
>
> 25. This Court further noted that: (*Kashmira Singh* case, AIR p. 160, para 10)
>
> > "10. … cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept."

> ……
>
> 27. This Court in *Haricharan* case further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right."

Further, relevant paragraphs from Sahadevan's case are extracted hereunder:

> "14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.
>
> ……..

16. Upon a proper analysis of the above referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extrajudicial confession alleged to have been made by the accused:

> (i) The extra-judicial confession is weak evidence by itself. It has to be examined by the court with greater care and caution.
>
> (ii) It should be made voluntarily and should be truthful.
>
> (iii) It should inspire confidence.
>
> (iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
>
> (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
>
> (vi) Such statement essentially has to be proved like any other fact and in accordance with law."

25. Reliance placed upon the decisions of this Court in the case of *Sahadevan's* case (supra) supports the case of the appellant herein. Hence, the reliance placed upon the evidence of PW-7 by both the Additional sessions judge and the High Court to convict the appellant and sentencing him for the offence under Section 201 IPC is erroneous in law for the reason that they have not appreciated the testimony of PW-7 in the backdrop of the legal principles laid down by this Court in the above referred cases on the question of extra judicial

confession said to have been made by some of the accused to him. Non disclosure of the same either on the same day or within reasonable time either to the police or to the family members of the deceased does not inspire confidence to be accepted as testimony to sustain the conviction and sentence. After 16 days he had disclosed it to the jurisdictional police which would clearly go to show that the conduct of the said witness is unnatural and improbable to believe and his conduct is not that of an ordinary human being.

26. Therefore, the conviction and sentence imposed upon the appellant in Crl. A. No.1279 of 2008 by placing reliance on the testimony of PW-7 along with testimony of PW-8 and PW-9 suffer from major discrepancy and therefore, the appeal in so far as Tejinder Singh is concerned must succeed.

27. In so far as the other appellants in connected appeals are concerned, the sessions court after placing reliance upon the evidence of PW-7, PW-8 and PW-9 has recorded the findings on charges against them, which is wholly untenable in law. Neither the learned additional sessions judge nor the High Court has examined their testimony properly by re-appreciating the same to record the findings on the charges. The narration of the alleged offences against the appellants and other accused by the prosecution witnesses is most unnatural and unbelievable to convict and sentence them. The courts below should have appreciated the evidence on record properly and they should not have believed the statement of evidence of PW-8 for the reason that neither he has disclosed the alleged offences said to have been committed by the appellant and other accused nor did he depose before the trial court or to anyone of the villagers. The explanation given by him regarding the non disclosure of the alleged offences said to have committed by the appellants and other accused that he was held out of fear and therefore, he did not disclose the incident to anyone of the villagers cannot be accepted as it is unnatural. Therefore, the evidence of PW-8 cannot be believed

by this Court. The testimonies of PW-8 and PW-9 would clearly go to show that there is a discrepancy regarding the narration of the offences said to have been committed by the accused. Therefore, the courts below should not have placed reliance on the evidence of PW-8 and PW-9 and recorded the finding that the charges levelled against the appellant/accused were proved. Both the courts below have committed serious error in placing reliance upon the untrustworthy testimonies of PW-8 and PW-9 and passing an order of conviction and sentence against them.

28. Further, the evidence of the other witness namely, PW-10 who deposed that on 24.5.2000 at about 8.00 a.m., she along with Nimmo had gone to bring fodder from the fields. At about 9.00. a.m. when they were coming back, they found that Sunny Lal was watering the fields. In the meanwhile she saw deceased Seeso also entered into the fields having jute cloth in her hands. And after sometime she saw the other accused Binder and Kaka going towards the tube well side. Thus, the offence alleged to have been committed by the said accused also cannot be accepted by us. Further the reliance placed by the courts below on the evidence of PW-7, the erstwhile Sarpanch of the village panchayat regarding the extra judicial confession said to have been made to him by some of the accused referred to supra should not have been accepted by the courts below. In this regard, we have already recorded our reasons and findings with reference to the case law of this Court while considering the case of Tejinder Singh, the appellant in Crl.A. No.1279 of 2008 in the earlier portion of this judgment. The same reasons hold good to the case of these appellants also. Further, the trial court has committed grave error in giving credence to improbable and unnatural evidence of PW-7 regarding extra judicial confession as he has taken 16 days to inform the police. The conviction of the appellants/ accused for the alleged offence on the basis of evidence of the above prosecution witnesses is not only erroneous in law but also suffers from error in law and therefore, the same is liable

to be set aside by allowing the connected appeals also.

29. Further, the post mortem examination conducted by Board of Doctors has noticed the following injuries on the dead body of Seeso which are relevant for the case:

> "(a) Incised wound 14 x 3 cm x 5 cm deep, on the left side of face and neck, horizontally placed on the lateral apsect of face and neck, anterior and was 8 cm from mid-line of face and 7 cm below the left eye-brow, clots were present in the vicinity of the wound. The internal juglar vein and external carotid artery were cut. Retraction of edges of the wound were seen.
>
> …….
>
> (h) There was no external mark of injury, labia, majora and minor were healthy. No blood or discharge, slides 1 and 3 were prepared from the intoritis. Swabs 5 and 7 were prepared. Per speculum examination showed no mark of injury on the vagina, cervix was normal and were sent to the Chemical examiner, Patiala for semen analysis."

The cause of death as per the opinion of the doctors was shock and haemorrhage due to injury No. (a) which was on the face and neck and was sufficient to cause death in the ordinary course of nature.

30. In our considered view, after going through the deposition of the prosecution witnesses from the original record of the trial court, we are satisfied that the case of the prosecution against the appellants/accused on the charges creates suspicion and doubt in the absence of legal evidence on record and therefore the same should enure to the benefit of accused for their acquittal.

31. The courts below have convicted and sentenced the

appellants on the charges framed against them based on the circumstantial evidence, even though the chain of events are not proved by the prosecution to bring home the appellants/ accused guilt on the charges leveled against them. The concurrent finding recorded by the High Court on the charges is opposed to the legal principles laid down in this regard by this Court.

32. We have examined the entire case in relation to these appellants and have come to the conclusion that there is no material evidence on record to convict and sentence the appellants. For the foregoing reasons, we accept the case of the appellants in the connected appeals. Accordingly, their appeals are also allowed and conviction and sentence are set aside and they are directed to be released forthwith if they are not required in any other □case.

33. The other accused, viz. Gurdeep Singh who has not filed appeal before this Court challenging the impugned judgment and who has also been convicted and sentenced to undergo imprisonment as awarded and imposed by the learned Additional Sessions Judge and affirmed by the High Court, we, in exercise of jurisdiction of this Court under Article 142 of the Constitution, extend the same benefit to him also and he is also directed to be released forthwith if he is not required in any other case.

34. For the foregoing reasons, all the appeals are allowed.

35. The bail bonds of the appellant-Tejinder Singh, who is on bail, are hereby discharged.

R.P. Appeals allowed.

BHARAT PETROLEUM CORPORATION LTD.
v.
M/S JAGANNATH & CO. & ORS.
(Civil Appeal Nos. 3838-3839 of 2013)

APRIL 12, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

PETROLEUM ACT, 1934:

s.20 read with Marketing Discipline Guidelines, 2005 - Dealership licence - Cancellation of - Held: Cancellation of dealership agreement is a serious matter and cannot be taken lightly - In the instant case, the Guidelines with regard to taking of samples, numbering them, and sending the same to Laboratory in the manner prescribed have not been followed by Inspecting Officer - Further, provision of s.20 was also not complied with - High Court, after considering all the specific claims of contesting respondents, rightly interfered with the order of termination of dealership agreement/licence and quashed the same - Appellants are directed to implement the directions given by High Court in impugned judgment - Marketing Discipline Guidelines, 2005 - Para 2.4.5.

Respondent no. 1-firm, a licensed dealer of the appellant-BPCL, was engaged in selling petroleum products from its retail outlet. During an inspection conducted on 22.8.2005, samples of MS/ULP/SPEED and HSD were taken, sale of all the products was suspended and dispensing units and tanks were sealed. By order dated 18.1.2006, the Territorial Manager of the appellant terminated the dealership agreement/licence of the respondents with immediate effect. The respondent-firm filed a writ petition before the High Court, which allowed the same, quashed the order dated 18.1.2006 and directed the appellant BPCL to restore the dealership.

Dismissing the appeal, the Court

HELD: 1.1 As per clause (c) of para 2.4.5 of the Marketing Discipline Guidelines, 2005, the samples so collected would be sealed and labeled and the labels so pasted over the containers must have batch number and other details enumerated therein. As per clause (a) of para 2.4.5, the Inspecting Officer has to draw three samples from one tank and all the three containers must have the same batch numbers. It is the complaint of the contesting respondents that the Inspecting Officer allotted three different numbers to the containers containing samples from the same tank. It is further pointed out that the numbers shown in the photocopies of the labels pasted over 7 sealed containers do not co-relate with the container numbers purported to have been sent by the Inspecting Officer to the Laboratory because all the three containers containing samples from the same tank had been differently numbered. It is also demonstrated by the contesting respondents that out of 8 samples so collected, only 5 samples were tested by the Company Laboratory. Also, no explanation was given about the other three samples. It is also highlighted that the Laboratory in its report has also not indicated the numbers of the containers so tested. In such circumstances, it is impossible to know which sample has been tested by the Laboratory. [para 7-8] [835-C-H; 836-A-D]

1.2 In order to ensure fairness in testing the samples, it has been provided in clause (D) of para 2.5 of the Guidelines that in case of sample failure, in the event of request for testing by the dealer, the same shall be tested at Company's Laboratory in the presence of representative(s) of the dealer. In the instant case, the tests were conducted in the company's laboratory itself. Therefore, in order to satisfy the conscience of the dealer about the authenticity of the tests so conducted, it has

been contemplated in the Guidelines that on the request of the dealer, the test(s) could be conducted in his presence. This Court has held in Super Highway Services* that the dealer should be given prior notice regarding the test. Strict adherence to the said requirement is essential. It was further held that the cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. [para 10] [836-G; 837-C-D, F-G]

Hindustan Petroleum Corporation Ltd. & Ors. vs. M/s Super Highway Services & Anr.,* **2010 (2) SCR 1053 = (2010) 3 SCC 321 - relied on.

1.3 In view of the Dealership Agreement, particularly, clause 10(k), the Petroleum Act, 1934 is applicable in the instant case. In terms of s. 20 of the Act, the contesting respondents had a right to have fresh samples drawn and get the same re-tested within seven days of intimation of the test results. It is the assertion of the contesting respondents that they moved an application before the trial court for fresh sampling/retest of the products. [para 13] [839-C-E]

1.4 It is also pointed out that it was respondent No.6 who made the inspection, collected the samples, issued show cause notice and passed an order of cancellation of the Dealership Agreement/Licence. By impleading him as one of the respondents - respondent No.4 in the High Court - specific allegations were made against him that he acted mala fidely in cancelling the same and those assertions cannot be lightly ignored. [para 14] [839-H; 840-A-B]

1.5 The High Court, after considering all the specific claims of the contesting respondents, rightly interfered with the order of termination of the dealership agreement/ licence dated 18.01.2006 and quashed the same. In view

of the same, the appellants are directed to implement the directions given by the High Court in the impugned judgment. [para 15] [840-B-C]

Case Law Reference:

2010 (2) SCR 1053 relied on para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3838-3839 of 2013.

From the Judgment and Order dated 09.10.2009 of the High Court at Allahabad in Civil Misc. Writ Petition No. 26181 of 2006 and order dated 06.11.2009 in Review Petition No. 286203 of 2009.

Sudhir Chandra, Parijat Sinha, Sunil Murarka, Reshmi Rea Sinha, S.C. Ghosh for the Appellant.

Shanti Bhushan, Harish Chandra, Mehul Milind Gupta, Sushendra K. Chauhan, Abha Jain, R.P. Gupta, Sunita Rani Singh, B.K. Prasad, Arvind Kumar Sharma, Gopal Balwant Sethe for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals have been filed against the final judgment and order dated 09.10.2009 passed by the High Court of Judicature at Allahabad in C.M.W.P. No. 26181 of 2006 and order dated 06.11.2009 in Civil Misc. Review Petition No. 286203 of 2009. By judgment dated 09.10.2009, the High Court allowed the writ petition filed by the contesting respondents herein and quashed the order dated 18.01.2006 passed by the Territory Manager (Retail), Meerut, BPCL terminating the dealership licence of the outlet of respondent No.1-Firm and directed restoration of their dealership. Review petition filed by the appellant herein against the said order was also dismissed on 06.11.2009 by the High Court.

3. **Brief facts:**

a) The appellant - Bharat Petroleum Corporation Ltd. (in short "BPCL") is a Government of India Undertaking under the administrative control of the Ministry of Petroleum & Natural Gas and is engaged in refining, distributing and selling petroleum products such as Motor Spirit (MS/Petrol), High Speed Diesel (HSD), Kerosene, Liquified Petroleum Gas (LPG) etc., all over the country. Respondent No.1-Firm is a licensed dealer of the BPCL, selling petroleum products from its Retail Outlet (RO) at Court Road, Saharanpur, U.P. Originally, the Dealership Licence was granted, vide agreement dated 24.07.1975.

b) It is the case of the BPCL that on 22.08.2005, a routine inspection of the said RO was conducted by a team consisting of Territory Manager, Senior Sales Officer and Senior Engineering Officer, Meerut in the presence of one of the signatories to the said Dealership Licence viz., Shri Alok Kumar Gupta-Respondent No. 3 herein. During the inspection, certain irregularities/variations were found for which samples of MS/ ULP, SPEED and HSD were taken and the sale for all the products was suspended and the dispensing units and tanks were sealed after taking meter readings. Thereafter, on 23.08.2005, the seized samples were sent to the Quality Control Laboratory at Shakurbasti, Delhi for testing. Vide test reports dated 24.08.2005, the Laboratory confirmed that the samples failed to meet the required specifications.

c) Being aggrieved, the respondents instituted a suit being O.S. No. 695 of 2005 before the Civil Judge (Sr. Division), Saharanpur for resumption of supply of petroleum products and for restraining the BPCL from interfering with the sales and supplies of petroleum products from their RO along with an application for temporary injunction.

d) On 02.09.2005, BPCL filed a report with regard to the samples taken from the outlet. Against the said report, the respondent-Firm moved an application raising objection that the

test reports are not based on the samples taken from the outlet and prayed for redrawal of the samples in the presence of independent witnesses.

e) On 07.09.2005, BPCL issued a show cause notice to the respondents as to why action should not be taken against them including termination of the dealership. The respondents put forth their stand by way of a reply dated 21.09.2005. By order dated 03.10.2005, learned Civil Judge dismissed the application for issuing of temporary injunction. Vide order dated 18.01.2006, the Territory Manager (Retail), Meerut, terminated the dealership agreement/licence of the respondents with immediate effect. Since the dealership licence of the respondents got terminated and the possession of the outlet was handed over to M/s Om Filling Station (Respondent No. 8 herein), they filed an application for withdrawal of the suit and by order dated 22.02.2006, the said suit was withdrawn.

f) Thereafter, the respondent-Firm filed a writ petition being C.M.W.P. No. 26181 of 2006 before the High Court for quashing the termination order dated 18.01.2006. By impugned judgment dated 09.10.2009, the High Court allowed the petition and quashed the termination order and directed the BPCL to restore the dealership.

g) Aggrieved by the said order, the BPCL filed a Review Petition being No. 286203 of 2009 before the High Court. The High Court, by order dated 06.11.2009, dismissed the said review petition.

h) Being aggrieved by the judgment dated 09.10.2009 for restoring the dealership and order dated 06.11.2009 dismissing the review petition, the appellant-BPCL has filed these appeals by way of special leave.

4. Heard Mr. Sudhir Chandra, learned senior counsel for the BPCL, Mr. Shanti Bhushan, learned senior counsel for Respondent No-1, Mr. R.P. Gupta, learned counsel for

Respondent No. 3 and Mr. Harish Chandra, learned senior counsel for the Union of India.

5. Before going into the contentions, learned counsel for the contesting respondents highlighted the background of the case as a long and chequered history in order to consider the stand put forth by them. As per the information furnished, it is seen that 37 years back, vide agreement dated 24.07.1975, M/s Burmah Shell Oil Storage & Distributing Company (now BPCL) has entered into a dealership agreement with the respondent-firm. Since its beginning in the year 1975, not even a single deficiency has been reported in the matter of measurement or purity either by the parent company - M/s Burmah Shell or by the BPCL during the course of regular inspection carried out every month. It is also pointed out that only once a notice was issued on 09.03.1995 for lesser sales. It is also pointed out that on 22.08.2005, one Amit Garg, impleaded as respondent No.4 in the High Court (respondent No.6 herein), who was holding the post of Territory Manager (Retail), Meerut and against whom allegations of mala fide had been made in paragraph Nos. 11 & 12 of the writ petition, has conducted regular inspection and found no deficiency in the measurement. However, he took into custody Sales and Density Registers and collected 8 samples - two samples of ULP from ULP 20KL Tank, two samples of ULP from 10KL Tank, two samples of Speed from Speed Tank, one sample of HSD from HSD Tank and one sample from barrel. After collecting the samples, he sealed all the five pumps, viz., two of ULP, two of Speed and one of HSD. It is pointed out that although, in total, eight samples were collected but respondent No.6 herein has filed photocopies of only seven sealed covers of wooden containers duly signed by the dealer but the photocopy of one of the two samples of ULP collected from 10KL Tank has not been filed.

6. Mr. Sudhir Chandra, learned senior counsel for BPCL, after taking us through the impugned order of the High Court,

submitted that in view of the perversity in the conclusion, the same has to be interfered with. On the other hand, Mr. Shanti Bhushan, learned senior counsel for respondent No.1-Firm, submitted that inasmuch as the BPCL failed to follow the principles of natural justice contrary to Section 20 of the Petroleum Act, 1934 and Marketing Discipline Guidelines, 2005 (in short, "the Guidelines"), the High Court was fully justified in setting aside the order of termination and no interference is warranted exercising jurisdiction under Article 136 of the Constitution of India.

7. In view of the above, it is important to consider the relevant provisions of the Guidelines. As per clause (c) of para 2.4.5 of the Guidelines, the samples so collected would be sealed and labeled and the labels so pasted over the containers must have the product name, name of the retail outlet, package type, sample source, quantity of sample, sampling date, batch number etc., and should be jointly signed by the dealer or his representative(s) and the Inspecting Officer. As per clause (a) of para 2.4.5, the Inspecting Officer has to draw three samples from one tank- one for the dealer, second for the Company and the third will be sent to the Laboratory for testing. In order to ensure that all the three containers are containing samples from the same tank, all the three containers must have the same batch numbers duly signed by the dealer and the Inspecting Officer, otherwise it would be difficult to know as to whether the container left with the dealer was containing sample from the same tank as has been sent for testing to the laboratory. It is the complaint of the contesting respondents that the said officer, however, allotted three different numbers to the containers containing samples from the same tank. Moreover, the BPCL has filed photocopies of the labels pasted over 7 sealed containers duly signed by the dealer, each containing aluminium container Nos. 008997, 008950, 008923, 008976, 008949, 008916 and 008952 along with wooden container Nos. 008960, 008957, 008923, 008976, 008949, 008916 and 008952 in which aluminium containers have been placed. It is

further pointed out by the contesting respondents that these numbers do not co-relate with the container numbers purported to have been sent by the Inspecting Officer to the Laboratory because all the three containers containing sample from the same tanker had been differently numbered.

8. It is also demonstrated by the contesting respondents that out of 8 samples so collected, only 5 samples were tested by the Company Laboratory. Also, no explanation was given about the other three samples. It is the claim of the contesting respondents that the BPCL has filed report in respect of only 5 samples and report of 3 samples has either been suppressed or has not been sent to the Laboratory and only a forwarding letter has been filed. It is also highlighted that the Laboratory has also not indicated the numbers of the containers so tested in its report. In such circumstances, as rightly pointed out, it is impossible to know which sample has been tested by the Laboratory. It has also not been mentioned in the report that the Laboratory has received the samples in sealed covers and the seals were opened by them as is the practice in every report received from forensic laboratory. It is further highlighted that the absence of container numbers in the report raises a doubt as to whether the laboratory has tested the same samples as had been sealed and counter signed by the dealer or some other contaminated samples. These important questions were raised before the writ Court alleging that the samples tested were not of those collected from the respondent-Firm.

9. In order to ensure fairness in testing the samples, it has been provided in clause (D) of para 2.5 of the Guidelines that in case of sample failure, in the event of request for testing by the dealer, the same shall be tested at Company's Laboratory in the presence of representative(s) of the dealer. The relevant extract of clause (D) of para 2.5 reads as under:

> "In case of sample failure, in the event of request for testing by the dealer, the same to be considered on merits by the State Office/Regional/Zonal General Manager of the

concerned Oil Company. If approved by GM, the sample of retail outlet retained by the dealer alongwith the counter sample retained with the Field Officer/Oil Company are to be tested as per the guidelines, preferably in presence of the Field Officer, RO dealer/representative and representative of QC department of the Oil Company after due verification of samples."

10. It is rightly pointed out that the samples were not tested in any government laboratory and these tests were conducted in the company's laboratory itself. Therefore, in order to satisfy the conscience of the dealer about the authenticity of the tests so conducted, it has been contemplated in the Guidelines that on the request of the dealer, the test(s) could be conducted in his presence. In *Hindustan Petroleum Corporation Ltd. & Ors. vs. M/s Super Highway Services & Anr.,* (2010) 3 SCC 321, this Court held that the Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer. Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer. It was further held that the cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. As pointed out in the said decision, in order to justify the action taken to terminate such an agreement, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose.

11. It is further seen that after sealing of the petrol pump

in the night of 22.08.2005 by respondent No.6 herein, the respondent-dealer waited for the result but no copy of the same was given to them. Since the dealer suspected some foul game on the part of the said officer, they filed Civil Suit being O.S. No. 695 of 2005 before the Civil Judge (Senior Division), Saharanpur seeking injunction against the interference with the sale and supply of petroleum products. It is brought to our notice that immediately upon filing of the said suit, on 31.08.2005, the BPCL supplied one copy of the report alleging it to be of the samples collected from the RO. The respondent-Firm did not believe the said report and requested for fresh sampling of products and examination by some independent laboratory. As the respondent-Firm did not get any response, they filed an application in the pending suit seeking collection of fresh samples from the sealed tanks in the presence of Court Commissioner and its examination by an independent agency.

12. In this regard, it is relevant to refer Section 20 of the Petroleum Act, 1934 which reads as under:

"20. Right to require re-test - (1) The owner of any petroleum, or his agent, who is dissatisfied with the result of the test of the petroleum may, within seven days from the date on which he received intimation of the result of the test, apply to the officer empowered under Section 14 to have fresh samples of the petroleum taken and tested.

(2) On such application and on payment of the prescribed fee, fresh samples of the petroleum shall be taken in the presence of such owner or agent or person deputed by him, and shall be tested in the presence of such owner or agent or person deputed by him.

(3) If on such re-test, it appears that the original test was erroneous the testing officer shall cancel the original certificate granted under Section 19, shall make out a fresh certificate, and shall furnish the owner of the petroleum, or his agent, with a certified copy thereof, free of charge."

13. Though the appellant-BPCL protested the said application contending that the said provision in the Petroleum Act,1934 is not applicable and the very same objection was raised by learned senior counsel for the appellant before us, it is relevant to quote clause 10(k) of the Dealership Agreement with which the parties are bound is as under:

> "10(k) - To abide by the Petroleum Act, 1934 and the rules framed hereunder for the time being in force as also in other laws, rules or regulations either of the Government or any local body as may be in force."

In view of the Dealership Agreement, particularly, clause 10(k) referred above, the contention of learned senior counsel for the BPCL is liable to be rejected. In terms of Section 20 of the Petroleum Act, 1934 the contesting respondents had a right to have fresh samples drawn and get the same re-tested within seven days of intimation of the test results. It is the assertion of the contesting respondents that the test reports were intimated to them only upon filing of a suit before the trial Court. After getting the above reports, on 02.09.2005, the contesting respondents moved an application before the trial Court in the said suit for fresh sampling/retest of the products. Though an objection was raised for filing counter statement in the said application, it is brought to our notice that in spite of several opportunities given by the Court, no such objection was ever filed. It was further pointed out by learned counsel for the contesting respondents that they timely exercised their right available in law. In view of the application filed by the contesting respondents on 02.09.2005 and in the light of Section 20 of the Petroleum Act,1934 as well as the terms of Dealership Agreement, the objection raised by learned senior counsel for the BPCL is liable to be rejected.

14. It is also pointed out that it was respondent No.6 herein who made the inspection, collected the samples, issued show cause notice and passed an order of cancellation of the

Dealership Agreement/Licence. By impleading him as one of the respondents - respondent No.4 in the High Court - specific allegations were made against him that he acted mala fidely in cancelling the same and those assertions cannot be lightly ignored.

15. The High Court, after considering all the above specific claims of the contesting respondents, rightly interfered with the order of termination of the dealership agreement/licence dated 18.01.2006 and quashed the same. We are in entire agreement with the said conclusion. In view of the same, the appellants are directed to implement the directions given by the High Court in the impugned judgment dated 09.10.2009 within a period of four weeks from the date of receipt of this judgment.

16. In the light of the above discussion, the civil appeals are dismissed with no order as to costs.

R.P. Appeal dismissed.

ASHOK KUMAR JAIN
v.
SUMATI JAIN
(Civil Appeal No. 3861 of 2013)

APRIL 15, 2013

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

HINDU MARRIAGE ACT, 1955:

ss.13 and 23- Petition for divorce by husband on the grounds of cruelty and desertion - Dismissed by courts below - Held: Both the courts below have noticed the relevant facts and have come to a definite conclusion that appellant has not only been cruel to respondent, but has also brought the situation to the point where respondent had no option but to leave the matrimonial home – In this situation, as appellant was trying to take advantage of his own wrong, courts below rightly disallowed the relief sought for – Order of High Court does not suffer from any infirmity, illegality or perversity – Non interference is called for.

The appellant-husband filed a petition for dissolution of his marriage u/s 13 of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion alleged to have been caused to him by the respondent-wife. The petition was dismissed. The High Court also dismissed husband's appeal.

Dismissing the appeal, the Court

HELD: 1.1. It is not in dispute that even prior to the present marriage the appellant had married and from that marriage he has a son. This fact was never revealed by the appellant to the respondent or to her parents prior to

the solemnisation of the present marriage or thereafter. [para 10] [846-H; 847-A]

1.2. The High Court perused the divorce petition as was filed by the appellant against his first wife as well as the divorce petition filed by the appellant against the present respondent and noticed that they are almost identical in their content. This clearly shows the modus operandi of the appellant. Taking into consideration this fact and the fact that even during the pendency of the appeal the appellant came out with a fresh matrimonial advertisement to re-marry for the third time even before getting divorce from his second wife, the High Court rightly held that the appellant played fraud upon the respondent. [para 11] [847-D-F]

1.3. In view of s.23(1)(a) of the Act, if it is found that the person is taking advantage of his or her wrong or disability it is open to the court to refuse to grant relief. In the instant case, both the courts below noticed the relevant facts and came to a definite conclusion that the appellant has not only been cruel to the respondent, but has also brought the situation to the point where the respondent had no option but to leave the matrimonial home. In this situation as the appellant was trying to take advantage of his own wrong, the courts rightly disallowed the relief as was sought for. The order of the High Court does not suffer from any infirmity, illegality or perversity and no interference is called for. [para 13-14] [848-C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3861 of 2013.

From the Judgment & Order dated 09.03.2007 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Civil Miscellaneous Appeal No. 332 of 1998.

S.K. Keshote, Shashank P., for the Appellant.

Sushil Kumar Jain, Puneet Jain, Anurag Gohil for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. The appellant has preferred this appeal against the judgment dated 9th March, 2007 passed by the Rajasthan High Court at Jaipur in DB Civil Miscellaneous Appeal No. 332 of 1998 whereby the Division Bench upheld the judgment dated 13th February, 1998 passed by the Judge, Family Court, Jaipur dismissing the appellant's petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act" for short).

3. The facts of the case are as follows:

The appellant and respondent are married to each other. The appellant preferred a petition for dissolution of marriage under Section 13 of the Act before the Judge, Family Court, Jaipur and brought on record the following facts:

The appellant and the respondent were married according to Hindu rites on 30th October, 1990 at Jaipur. For the first few days the respondent stayed at her matrimonial home and behaved well with family members of the appellant. However, upon her return from her parental house, after a few days of the marriage, her behaviour suddenly changed. Appellant claimed to be the only son of the family having two small sisters and old father to look after. The aforesaid fact was known to the respondent even prior to her marriage when appellant informed the respondent's family that since there is no one to look after his aged father, his wife would have to look after him. But, upon her return from her parental place, the respondent started abusing her father-in-law by calling his name and by neglecting

his welfare. She also pressurized the appellant to abandon his father and shift to another house. Since the appellant refused to succumb to her pressure, her behaviour became more and more cruel towards the appellant and his family members. Thereafter, without any rhyme or reason on 30th March, 1991 in the absence of appellant and his father, the respondent packed up her bags, collected her jewellery and left the matrimonial home. Since that date, she has refused to come back to the matrimonial home. On 5th December, 1991 she gave birth to a son, but the appellant was never informed either by the respondent or by his in-laws. When the appellant came to know about the birth of son, he went to see his wife at the Hospital, but he found her missing. Thereafter, the appellant went to his in-laws' place but they refused to let him enter inside the house. Hence, the appellant could neither see his newly born child nor meet his wife. Furthermore, according to the appellant despite sending many persons to reconcile with his wife, the respondent consistently refused to come back to him. In this background, the appellant filed a petition under Section 13 of the Act before the Judge, Family Court, Jaipur for the divorce on the grounds of cruelty and desertion.

4. The respondent, on the other hand, filed written statement in the Family Court and narrated a totally different set of facts. She alleged that since from first night, the appellant came deadly drunk into the room and abused her for bringing insufficient dowry. Subsequently, she was shocked to learn that the appellant was earlier married to a woman known as 'Shanta' and had a son from the said marriage. According to the respondent, the aforesaid fact relating to first marriage was not revealed by the appellant in the matrimonial advertisement given by him on 8th April, 1990 in the daily newspaper "Rajasthan Patrika". When she inquired about his first marriage she realized that the appellant had sought divorce on the exact same grounds as are pleaded by him in the present case. The respondent further claimed that once when the appellant had lost Rs.3,000/- in gambling, he forced her to go to her parental

place and to bring Rs.3,000/- for him. Moreover, when her father retired from the service and had received retiral benefits of Rs.1,20,934/-, the appellant pressurized her to convince her father to part with Rs.50,000/- for him. Whenever, she refused to talk to her father on this topic, the appellant assaulted her. She further alleged that despite the fact that she was a woman from a Jain community, the appellant would force her to cook meat or to drink with him. Since the respondent believed in non-violence according to her religious tenance, she could never convince herself to eat non-vegetarian food and to drink. The respondent further alleged that finally on 30th March, 1991, the appellant mercilessly bashed her up and threw her out of the matrimonial home. She had no option but to return to her parental place. According to the respondent, when she was hospitalized and required blood and even after the birth of her son, the appellant never visited the hospital to see her and the son and enquired about her welfare. Therefore, according to the respondent, in fact the cruelty and desertion have been committed by the appellant and not by her.

5. In the Family Court the appellant examined four witnesses including himself and submitted a number of documentary evidence. The respondent also examined four witnesses including herself and submitted the large number of documentary evidence. The learned Judge after going through the oral and documentary evidence and on hearing the parties, by the judgment dated 13th February, 1998 dismissed the petition for divorce with cost.

6. The Appellate Court, as noticed above, dismissed the appeal. The Appellate Court held that the appellant has not only been cruel to the respondent, but has also brought the situation to the point where the respondent had no option but to leave her matrimonial home. Hence the appellant has committed constructive desertion of the respondent.

7. Learned counsel appearing on behalf of the appellant submitted that the cruelty and desertion were committed by the

respondent. He has taken us to the factual matrix narrated above and submitted that these facts as alleged by the appellant and supported by evidence clearly shows that the respondent has neglected her matrimonial duties both towards the appellant and his family. The respondent's persistent demand to separate from her father-in-law, depriving the husband of the matrimonial relationship, refusal to resume cohabitation with the appellant, all these acts and omissions amount to cruelty and desertion. The cruelty was constituted to the extent that it was impossible for the husband to live with such a wife. It was also submitted by the learned counsel for the appellant that the approach of the High Court was incorrect as it failed to notice that when the appellant and the respondent have been living separately for about sixteen years, there is no purpose in compelling both the parties to live together. The High Court ought to have granted decree of divorce. It was further contended that where the marriage is irretrievably broken down with no possibility of the appellant and the respondent to live together again, the best recourse for the High Court to adopt was to dissolve their marriage and thereby allow the appellant and the respondent to live remaining part of their life peacefully both having already lost valuable part thereof.

8. On the other hand, learned counsel for the respondent highlighted the facts not disputed by the appellant that the appellant is in the habit of marrying and remarrying. Even prior to the present marriage, the appellant had married one 'Shanta' from whom he has a son. This fact was never revealed by the appellant to the respondent or to her parents prior to the solemnisation of the present marriage. Therefore, while playing fraud with woman, the appellant wishes to continue solemnising number of marriages.

9. We have heard learned counsel for the parties and perused the record.

10. It is not in dispute that even prior to the present marriage the appellant had married one 'Shanta' from whom

he has a son. The aforesaid fact was never revealed by the appellant to the respondent or to her parents prior to the solemnisation of the present marriage or thereafter. Even in the matrimonial advertisement (Ex. A-11), the appellant had not revealed the fact that he is already a divorcee. Moreover, the appellant had written a letter to his father-in-law (Ex. A-10) but therein also not mentioned that he is a divorcee and a father of a son. Moreover, even during the pendency of the appeal, the Court noticed that the appellant has placed a matrimonial advertisement in the paper as he wishes to enter into a third marriage.

11. The High Court perused the divorce petition as was filed by the appellant against his first wife as well as the divorce petition filed by the appellant against the present respondent and noticed that they are almost identical in their content. The same sets of allegations were levelled against the first wife as levelled against the present respondent. This clearly shows the modus operandi of the appellant.

Taking into consideration the aforesaid fact and the fact that even during the pendency of the appeal the appellant came out with a fresh matrimonial advertisement, the High Court rightly held that the appellant played fraud with the respondent. The High Court noticed that surprisingly the subsequent matrimonial advertisement published by him clearly reveals his intention to re-marry for the third time even before getting divorce from his second wife. The High Court observed that this is against the Section 15 of the Act, whereunder it is stipulated that even after dissolution of marriage by a decree of divorce, upto certain period no party to the marriage can marry again.

12. In the present case admittedly marriage has not been dissolved by any of the Court of Law. On the other hand, the petition under Section 13 for dissolution of marriage was dismissed by the Judge, Family Court. In such case there was no occasion for the appellant to come out with another advertisement for third marriage

In this background, the High Court rightly held that the aforesaid acts during the pendency of the appeal clearly reveals appellant's psychology of disobeying the law and of entering into a number of marriages.

13. Under sub-clause (a) of clause (1) of Section 23, in any proceeding under the Act, if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, the Court shall grant relief under Section 23 (1) (a) of the Act. Therefore, it is always open to the Court to examine whether the person seeking divorce "is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief". On such examination if it is so found that the person is taking advantage of his or her wrong or disability it is open to the Court to refuse to grant relief.

14. In the present case, both the Courts noticed the relevant facts and came to a definite conclusion that the appellant has not only been cruel to the respondent, but has also brought the situation to the point where the respondent had no option but to leave the matrimonial home. In this situation as the appellant was trying to take advantage of his own wrong, the Courts disallowed the relief as was sought for. We find that the order to that effect of the High Court does not suffer any infirmity, illegality or perversity; no interference is called for.

15. In the result and in absence of any merit, the appeal is dismissed but there shall be no separate orders as to costs.

R.P. Appeal dismissed.

M/S TATA SKY LTD.
v.
STATE OF M.P. AND OTHERS
(Civil Appeal No. 3882 of 2013 etc.)

APRIL 16, 2013

[AFTAB ALAM AND R.M. LODHA, JJ.]

MADHYA PRADESH ENTERTAINMENT DUTY AND ADVERTISEMENTS TAX ACT, 1936:

ss.2(a),2(b),2(d)(iv), 3 and 4 – Levy of entertainment duty on Direct to Home (DTH) entertainment service for the period 5-5-2008 to 1-4-2011 – Held: DTH is not covered by provisions of s.3 read with ss.2(a), 2(b) and 2(d) – Further, neither the provision of s.4(1) nor any of modes provided u/ s.4(2) can be made applicable for collection of duty on DTH – Therefore, 1936 Act cannot be extended to cover DTH operations being carried out by appellants –Indian Telegraph Act, 1885 – s. 4 – Indian Telegraphy Act, 1933 – Madhya Pradesh Entertainment Duty and Advertisements Tax Rules 1942.

Administrative Law

Delegated legislation – Notification – Held: Notification issued in exercise of powers under the Act cannot amend the Act – In the context of instant case, since no duty could be levied on DTH operation under 1936 Act prior to issuance of notification dated 5-5-2008, duty can not be levied under the said Act after issuance of notification - Madhya Pradesh Entertainment Duty and Advertisements Tax Act, 1936.

On May 5, 2008, the State Government of Madhya Pradesh, in exercise of powers conferred u/s.3(1) of the Madhya Pradesh Entertainment Duty and Advertisements

Tax Act, 1936, issued a gazette notification fixing 20% entertainment duty in respect of every payment made for admission to an entertainment other than cinemas, videos cassette recorders and cable service. Consequently, a demand notice dated June 10, 2009 was issued by the Excise Commissioner to the appellant raising a demand of Entertainment Duty on Direct to Home Entertainment Service. Subsequently, a number of notices were issued. The appellant filed a writ petition, challenging the demand and collection of entertainment duty u/ s.3(1) of the 1936 Act. It was the case of the appellant that on 24-3-2006, it got a licence from the Government of India u/s 4 of the Indian Telegraph Act, 1885 and Indian Telegraphy Act, 1933 to establish, maintain and operate DTH platform for a period of 10 years on the terms and conditions stipulated in the licence agreement. The writ petition was dismissed by the High Court.

In the instant appeals, the questions for consideration before the Court were "whether the provisions of the 1936 Act have the necessary expanse and flexibility to include DTH as an "entertainment" chargeable to tax", and "whether the notification dated May 5, 2008 in any manner extended the scope of chargeability under the 1936 Act."

Allowing the appeals, the Court

HELD: 1.1. On a careful examination of the Madhya Pradesh Entertainment Duty And Advertisements Tax Act, 1936 as a whole, and more particularly, on a conjoint reading of clauses (a) ["Admission to an entertainment"], (b) ["Entertainment"] and (d) ["Payment of admission"] of s.2 along with s.3 creating the charge and s.4 providing the collection machinery, it becomes clear that the provisions of 1936 Act are applicable only to place-

related entertainment and cover an entertainment which takes place in a specified physical location to which persons are admitted on payment of some charge as defined under clause (d) of s. 2. The legislative history and the amendments introduced in the 1936 Act also show that it was how the scheme of the 1936 Act was viewed by the State itself. The provisions of the 1936 Act were inadequate to bring shows by video cassette recorder or video cassette and player cable T.V. operations within the taxing net and, therefore, ss. 3-A and s. 3-B were inserted respectively with effect from May 1, 1999 and April 1, 2001. In this regard, it is also very important to note that both in the case of shows by video cassette recorder or video cassette and player, cable T.V. operations, the collection machinery is in-built and provided within the respective provisions of s.3-A and s. 3-B. and in those two cases the collection of duty does not take place u/s. 4 of the 1936 Act. [para 35] [866-F-H; 867-A-C]

1.2. The reliance placed on behalf of the State on Sub-clause(iv) of clause (d) of s.2 is untenable for more reasons than one: First, s. 2(d)(iv) is only the measure of tax and it does not create the charge which is created by s. 3. The question of going to the measure of the tax would arise only if it is found that the charge of tax is attracted. Under s.3 read with s. 2(d) and s. 2(a), the charge or levy of tax is attracted only if an entertainment takes place in a specified place or locations and persons are admitted to the place on payment of a charge to the proprietor providing the entertainment. In the instant case, as DTH operation is not a place-related entertainment, it is not covered by the charging s. 3 read with ss. 2(a) and 2(b) of the 1936 Act. Consequently, the question of going to s. 2(d)(iv) does not arise. Moreover, even if s. 2(d)(iv) is to be read as an extension of s. 3 and, thus, as a part of the charge, it does not make any

difference at all because s. 2(d)(iv) refers to "entertainment" which relates back to s. 2(b) and finally to s. 2(a). Thus, DTH is not covered by the provisions of s. 3 read with ss. 2(a), 2(b) and 2(d) of the 1936 Act. [para 36-38] [867-C-E-H; 868-A-B]

1.3. The issue gets further settled on reference being made to the mechanism of collection of the charge as provided u/s. 4 of the 1936 Act. Section 4(1) mandates that no person shall be admitted to any entertainment other than entertainment by V.C.R. except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp issued by the State Government of nominal value equal to the duty payable u/s 3; sub-s. (2) of s. 4 provides for different modes specified thereunder for payment of the amount of duty due on the entertainment. Neither the provision of s.4(1) nor any of the modes provided u/s. 4(2) can be made applicable for collection of duty on DTH operation. Further, a perusal of the Madhya Pradesh Entertainment Duty and Advertisements Tax Rules 1942 makes it absolutely clear that the collection mechanism under the 1936 Act is based on revenue stamps stuck to the tickets issued by the proprietor for entry to the specified place where entertainment is held. The machinery for collection of duty provided under the 1936 Act has no application to DTH. It is well settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute. [para 38-39] [868-B-G]

Commissioner of Income Tax v. B.C. Srinivasa Setty **1981 (2) SCR 938 = (1981) 2 SCC 460,** *Commissioner of Income-Tax Ernakulam, Kerala v. Official Liquidator, Palai Central Bank Ltd.* **1985 (1) SCR 971 = (1985) 1 SCC 45;** *PNB Finance Limited v. Commissioner of Income Tax I, New Delhi* **2008 (15) SCR 556 = (2008) 13 SCC 94 - relied on.**

1.5. Therefore, the 1936 Act cannot be extended to cover DTH operations being carried out by the appellants. [para 40] [869-A]

2. As regards, the notification dated 5-5-2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20% in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection u/s. 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operation under the 1936 Act prior to the issuance of the notification dated May 5, 2008, duty can not be levied under the said Act after the issuance of the notification. [para 41] [869-B-D]

Case Law Reference

1981 (2) SCR 938	**relied on**	**para 39**
1985 (1) SCR 971	**relied on**	**para 39**
2008 (15) SCR 556	**relied on**	**para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3882 of 2013.

From the Judgment & Order dated 20.08.2010 of the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 10148 of 2009.

WITH

C.A. Nos. 3888, 3889, 3890, 3891 & 3892 of 2013.

Vivek Tankha, ASG, S. Ganesh, Gopal Subramanium,

Dushyant Dave, D.K. Singh, Pradeep Shukla, Sarvesh Singh Baghel, Abhijit Sengupta, Aniruddha P. Mayee Charudatta Mahindrakar, G. Umapathy (for Rakesh K. Sharma), Pankaj Bhagat, Dr. Sushil Balwada, Vivek Sarin, Surbhi Mehta, Vibha Datta Makhija, Aniruddha Deshmukh, Yashvardhan Roy, Rishabh Sancheti, Varun Chopra, Sumeer Sodhi, B.S. Banthia for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted in all the special leave petitions.

2. All these appeals relate to the demand of entertainment tax raised by the Government of Madhya Pradesh under the Madhya Pradesh Entertainment Duty and Advertisements Tax Act, 1936 (hereinafter referred to as "the 1936 Act") on DTH (direct to home) broadcast provided by the appellants to their respective customers on payment of subscriptions. The appellants in all the appeals challenged the demand by the State Government by filing writ petitions before the Madhya Pradesh High Court. The High Court dismissed the writ petitions, upholding the demand by the State Government by the judgment and order dated August 20, 2010. That judgment was rendered in a batch of three writ petitions, taking Writ Petition No. 10148 of 2009, filed on behalf of *Tata Sky Limited* (appellant in the appeal arising from SLP (C) No.2752 of 2011) as the lead case. The rest of the writ petitions were dismissed following the judgment dated August 20, 2010.

3. For the sake of convenience, we too have taken the facts from civil appeal arising out of special leave petition (civil) No.27595 of 2010.

4. The appellant operates under a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933. It is, however, the case of the appellant that DTH broadcast is a "service" and it

is chargeable to service tax. As a matter of fact, one of the several grounds on which the demand of entertainment tax by the State Government on DTH broadcasting is challenged by the appellant is that DTH broadcasting is one of the notified services under the Finance Act, 1994 and is chargeable to service tax by the Central Government. In that regard, it is stated on behalf of the appellant, that in 1991 the Government of India appointed a Tax Reform Committee under the Chairmanship of Dr. Chelliah. The recommendations made by the Tax Reform Committee were accepted and the service tax was introduced in the budget for the year 1994-1995 through the Finance Act, 1994 under the residuary entry 97 of List 1 of the 7th Schedule of the Constitution of India. Under the Act, service tax is levied on the notified services provided or to be provided.

5. For the purpose of levy of service tax on broadcasting, the expression "broadcasting" has been defined specifically under section 65(15) of the Finance Act. The broadcasting services were brought within the purview of the service tax under section 65(105)(zk) of the Finance Act, 1994 as amended with effect from July 16, 2011. Later on, DTH service was brought within the purview of the service tax with effect from June 16, 2006.

6. Under section 67 of the Finance Act, the value of taxable service is the gross amount charged by the service provider for provision of service.

7. On March 24, 2006, the appellant got a licence from the Government of India under section 4 of the Indian Telegraph Act, 1885 and the Indian Telegraphy Act, 1933 to establish, maintain and operate DTH platform for a period of 10 years on the terms and conditions stipulated in the licence agreement. The appellant paid Rs.10 crores as licence fee and furnished a bank guarantee for the sum of Rs.40 crores that is to remain valid for the entire duration of the licence. In terms of the licence the appellant is further required to pay an annual fee equivalent to 10 percent of its gross revenue as reflected in the audited

accounts of the company for every financial year within one month from the end of the financial year. The appellant is also required to pay, in addition to licence fee, royalty for spectrum use as prescribed by the Wireless Planning and Coordination Authority (WPC) under the Department of Telecommunications.

8. The licence granted by the Central Government is for the whole of India and the appellant is not obliged to take any permission or any other licence from any other authority for making DTH broadcast.

9. In August 2006, the appellant launched its operations all over India, including the State of Madhya Pradesh. The appellant is having a single broadcasting centre at Chhattarpur, Delhi. This centre downlinks the signals from satellite and then uplinks those signals to the designated transponders for their transmission in *Ku* band. These signals are received by the dish antenna installed at the subscribers' premises. The TV signals transmitted from the broadcasting centre at Chhattarpur, Delhi, are in encrypted format and those are decrypted/ decoded by the set top boxes and the viewing card inside the set top box supplied by the appellant to its subscribers. The subscribers are required to pay certain charges for viewing DTH broadcasts by the appellant on their TV sets.

10. The appellant does not use any infrastructure from the State for its DTH broadcasts.

11. On May 5, 2008, the State Government in exercise of powers conferred under section 3(1) of the 1936 Act, issued a gazette notification fixing 20 percent entertainment duty in respect of every payment made for admission to an entertainment other than cinemas, videos cassette recorders and cable service. As the aforesaid notification forms the basis of the demand raised by the State Government it is useful to reproduce it here in full:-

"No. (63) B-5-9-2006-2-V- In exercise of the powers

conferred by sub section (1) of Section 3 of the Madhya Pradesh Entertainment Duty and Advertisements Tax Act 1936 (No 30 of 1936) the State Government hereby prescribed the rate of Entertainment Duty at 20 percent in respect of every payment for admission to an Entertainment other than Cinema, Video Cassette Recorder and Cable service.

This notification shall come into force with effect from the date of publication.

By order and in the name of the Governor of Madhya Pradesh."

12. Following the notification dated May 5, 2008, a demand notice dated June 10, 2009 was issued by the Excise Commissioner Madhya Pradesh, Gwalior, to the appellant. The contents of the notice, insofar as relevant for the present, are as under:

"S.No.7-Ent./2009-10/173 Gwalior Date 10.06.2009

To,

Tata Sky,

…

…

Sub: Levy of Entertainment Duty on Direct to Home Entertainment Service

You are providing entertainment in the State of Madhya Pradesh by Direct to Home (DTH) to registered consumers on monthly payment basis. Whereas:

(1) Under section 3(1) of the Madhya Pradesh Entertainment Duty and advertisements Tax Act, 1936 except cinema hall, videos and cable in all

entertainments including entertainment provided through registered consumers through DTH on monthly subscription basis is included. In the aforesaid payment by the consumers, entertainment duty @ 20% is liable to be paid in advance in the treasury of the Government.

…"

13. The appellant was directed to provide the information as asked for in the notice failing which, the notice declared, an *ex parte* assessment would be made of the entertainment tax payable by it.

14. The appellant replied to the notice by its letter of July 22, 2009 stating that under the provisions of the 1936 Act, there is no specific entry with respect to DTH broadcasting and in absence of such an entry, the provisions of the Act are not applicable to DTH broadcasting and, therefore, the notice was illegal and without jurisdiction. The appellant also referred to a decision of the Uttarakhand High Court in a case relating to a similar demand raised by the Uttarakhand Government and the order of this Court in the special leave petition filed by the Uttrakhand Government against the judgment of the High Court.

15. On August 1, 2009, the State of Madhya Pradesh passed the Madhya Pradesh Entertainment Duty and Advertisements Tax (Amendment) Act, 2009. By the Amendment Act, the failure to produce accounts and documents as required by the Excise Commissioner or any officer authorized by the State Government was made a penal offence. The Amendment Act, however, did not introduce any provision in the Parent Act with respect to levy of entertainment duty on DTH broadcasting.

16. On August 18, 2009, the Excise Commissioner Madhya Pradesh wrote to the Deputy Commissioner Excise,

Flying Squad, Gwalior Division, Gwalior, telling him that entertainment duty at the rate of 20 percent was payable on subscription amounts received by the DTH entertainment service provider and directing to ensure the realization of entertainment duty from DTH entertainment service providers. The direction of the Excise Commissioner was followed by a number of notices given to the appellant and on October 1, 2009, the Vice President (Operation) and Area Operation (Manager) of the appellant company were arrested and later released on bail for non-compliance with the provisions of section 5(E) of the 1936 Act.

17. On October 3, 2009, the appellant filed a writ petition, being Writ Petition No.10148 of 2009, challenging the demand and collection of entertainment duty at the rate of 20 percent under section 3(1) of the 1936 Act. The writ petition was eventually dismissed by the High Court by its judgment and order dated August 20, 2010 and the matter is now brought to this Court.

18. Before proceeding further, it needs to be stated that the controversy in all the appeals relates to the demand and realization of entertainment tax under the 1936 Act, which means for the period between the commencement of operation by the appellant in the year 2006 and March 31, 2011, i.e., the day prior to the coming into force of the new Act, called the *Madhya Pradesh Vilasita, Manoranjan, Amod Evam Vigyapan Kar Adiniyam,* 2011. Further, in course of hearing of the appeals Mr. Dave learned counsel appearing for the State of Madhya Pradesh submitted that he proposed to defend the demand and realization of the impugned tax only for the period between May 5, 2008, the date of the notification issued under section 3(1) of the 1936 Act and the coming into force of the new Act on April 1, 2011. It is, therefore, made clear that this judgment deals with the question of levy of entertainment tax on DTH broadcast under the 1936 Act for the period between the issuance of the notification (May 5, 2008) and the

coming into force of the new Act (April 1, 2011). The judgment is not concerned with the legal position arising after the new Act came into force.

19. We now propose to examine whether on the basis of the provisions of the 1936 Act, it is permissible or possible for the State of Madhya Pradesh to levy on what in the lexicon of broadcasting is called direct-to-home or in short DTH. Here it needs to be clearly understood that the issue in this case is not whether direct to home broadcast is "entertainment" in the broader sense. Entry 62 of List 2 of Schedule 7 to the constitution may indeed be wide enough to include DTH as yet another form of entertainment but that is not the issue rising for consideration. The issue under consideration is whether the provisions of the 1936 Act have the necessary expanse and flexibility to include DTH as an "entertainment" chargeable to tax and whether the notification dated May 5, 2008 in any manner extended the scope of chargeability under the 1936 Act.

20. The preamble to the 1936 Act reads as under:-

> "An Act to impose a duty in respect of **admission to entertainments** and a tax in respect of certain forms of advertisement exhibited at such entertainments in Madhya Pradesh."

21. Section 2 of the 1936 Act contains the definition clauses and clause (a) defines the expression "admission to an entertainment":

> "2(a) "admission to an entertainment" includes admission to any place in which the entertainment is held;"

22. **Clause (aaaa) was inserted in the Act with effect from May 1, 1999** to define 'Cable Operator", "Cable Service", "Cable Television Network" and "Subscriber".

> "2(aaaa) "Cable Operator", "Cable Service", "Cable

Television Network" and "Subscriber" shall have the same meaning as assigned to them in the Cable Television Network (Regulation) Act, 1995 (No.7 of 1995)"

23. Clause (b) defines "entertainment":

"2(b) "Entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment;"

24. Clause (c) defines "entertainment duty":

"2(c) "entertainments duty" means a duty levied under section 3;"

25. Clause (d) defines the expression "Payment for admission" as under:

"2(d) "Payment for admission" includes –

(i) any payment for seats or other accommodation in any form in a place of entertainment;

(ii) any payment for a programme or synopsis of an entertainment;

(iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing or enjoyment of the entertainment, which without the aid of such instrument or contrivance such person would not get;

(iv) **any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;**

(v) any payment, by whatever name called for any purpose

whatever, connected with an entertainment, which a person is, required to make in any form as a condition of attending, or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admission;

(vi) any payment, made by a person, who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof, for admission to which a payment involving tax or more tax is required;

Explanation - I. – Any subscription raised or donation collected in connection with an entertainment in any form shall be deemed to be payment for admission;

[Explanation - II. – Where entertainment is provided as part of any service by any person, whether forming an integral part of such service or otherwise the charges received by such person for providing the service shall be deemed to include charges for providing entertainment or access to entertainment also];

26. Clause (f) defines "proprietor":

"2(f) "proprietor" in relation to any entertainment, includes any person responsible for or for the time being in-charge of the management thereof;"

27. "Video Cassette Recorder" and "Video Cassette Player" are defined in clauses (g) and (h) of section 2.

28. The charging provision is contained in Section 3 of the 1936 Act which, insofar as relevant for the present, is extracted hereunder:

"Entertainment Duty payable by proprietor of an entertainment - (1) Every proprietor of an entertainment other than proprietor of an entertainment by Video

Cassette Recorder (hereinafter referred to as V.C.R.) or Video Cassette Player (hereinafter referred to as V.C.P.) or a Cable Operator, shall in respect of every payment for admission to the entertainment pay to the State Government a duty at the rate as prescribed by the State Government not exceeding seventy five per centum thereof:

Provided …

Provided further …

Provided also ….

Explanation …

(2) xxx

(3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any person, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission without further payment or at a reduced charge, the entertainments duty shall be paid on the amount of such lump sum:

Provided that where the State Government is of opinion that the payment of a lump sum represents payment for other privileges, rights, or purposes besides the admission to an entertainment, or covers admission to the entertainment during any period for which the duty has not been in operation, the duty shall be charged on such an amount as appears to the State Government to represent the right of admission to entertainment in respect of which the entertainment duty is payable."

(4) xxx

(i) xxx

(ii) xxx"

29. Section 3-A deals with entertainment duty payable by proprietor of V.C.R. or V.C.P. and **this provision was inserted in the Act with effect from May 1, 1999**.

30. Section 3-B was inserted in the 1936 Act with effect from April 1, 2001. Sub-section (1) of section 3-B deals with entertainment duty payable by cable operator and it makes a cable operator, providing access to entertainments through cable service to subscribers of such service, not being owner or occupants of rooms of hotel or lodging house, liable to pay duty at the rate of twenty rupees per month per subscriber in urban and cantonment areas. Sub-section (2) of section 3-B makes every proprietor of hotel or lodging house, providing access to entertainments in the rooms of a hotel or lodging house through the cable service of his own or obtained through any cable operator liable to pay a consolidated amount of duty per month determined on the basis of number of rooms.

31. Section 3-C deals with levy of Advertisement Tax.

32. The machinery for effectuating the charge created by section 3 is provided under section 4 of the 1936 Act which, insofar as relevant for the present, is quoted below:

"4. Method of levy – (1) Save as otherwise provided by this Act, no person shall be admitted to any entertainment other than entertainment by V.C.R., **except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp, (not before used) issued by the State Government, of nominal value equal to the duty payable under section 3**.

(1A) Omitted.

(2) The State Government may, on the application of a

proprietor of any entertainment other than entertainment by V.C.R. in respect of which entertainments duty is payable under section 3, allow such proprietor to pay by one of the modes specified hereunder as it may think fit, in such manner and subject to such conditions as may be prescribed, the amount of the duty due, namely:-

(a) by a consolidated payment of such percentage as determined by the State Government of the gross sum received by the proprietor on account of payments for admission to the entertainment and on account of the duty to be fixed by the State Government;

(b) in accordance with returns of the payments for admission to the entertainment and on account of the duty;

(c) in accordance with the results recorded by any mechanical contrivance which automatically registers the number of persons admitted;

(d) xxx

(e) xxx

(f) xxx

(3) xxx

(4) xxx"

33. Section 4-B imposes restriction on admission without payment or at concession rates and provides as under:

"4-B Restriction on admission without payment or at concession rates. – No proprietor shall admit any person to an entertainment other than entertainment by V.C.R. without payment for admission thereto or at concession

rates unless the entertainments duty payable in respect thereof or on the full value of the ticket for the class to which such person is admitted has been paid.

Provided that nothing in this section shall apply in respect of admission at concessional rates –

(i) to such class of persons; and

(ii) to such entertainment or class of entertainments;

As the State Government may, by notification, specify."

34. Section 4-C gives the power to impose penalty and section 5 deals with penalties. 5-A deals with composition of offences and section 5-B deals with suspension or revocation of licence for entertainment. Section 8 provides the rule making powers. Section 9 gives the power of entry and inspection and section 9-A makes production and inspection of accounts and documents obligatory. Section 10 deals with recovery of arrears of entertainment duty. Section 10 provides protection to persons acting in good faith and bars any suit or prosecution or other proceedings against officers and servant of the Government. Section 11 deals with delegation of powers and section 12 bars imposition of entertainment duty by any local authority.

35. On a careful examination of the 1936 Act as a whole, and more particularly on a conjoint reading of clauses (a) ["Admission to an entertainment"], (b) ["Entertainment"] and (d) ["Payment of admission"] along with section 3 creating the charge and section 4 providing the collection machinery, we find ourselves in agreement with the submission made on behalf of the appellants that the provisions of 1936 Act are applicable only to place-related entertainment. In other words, the provisions of the 1936 Act cover an entertainment which takes place in a specified physical location to which persons are admitted on payment of some charge as defined under clause (d) of section 2 of the 1936 Act. The legislative history and the

amendments introduced in the 1936 Act also show that it was how the scheme of the 1936 Act was viewed by the State itself. It was earlier found that the provisions of the 1936 Act were inadequate to bring shows by video cassette recorder or video cassette and player cable T.V. operations within the taxing net and hence, the legislature considered it necessary to amend the 1936 Act and to insert section 3-A and section 3-B respectively with effect from May 1, 1999 and April 1, 2001. In this regard, it is also very important to note that both in the case of shows by video cassette recorder or video cassette and player, cable T.V. operations, the collection machinery is in-built and provided within the respective provisions of section 3-A and section 3-B. and in those two cases the collection of duty does not take place under section 4 of the 1936 Act.

36. On behalf of the State the imposition of levy on DTH was sought to be justified on the basis of sub-clause(4) of clause (d) of section 2 which reads as under:

> "(iv) any payment made by a person by way of contribution or subscription or installation and connection charges or any other charges, by whatever name called, for providing access to any entertainment, whether for a specified period or on a continuous basis;"

37. In our view, the submission is untenable for more reasons than one. First, section 2(d)(iv) is only the measure of tax and it does not create the charge which is created by section 3. The question of going to the measure of the tax would arise only if it is found that the charge of tax is attracted. Under section 3 read with section 2(d) and section 2(a), the charge or levy of tax is attracted only if an entertainment takes place in a specified place or locations and persons are admitted to the place on payment of a charge to the proprietor providing the entertainment. In the present case, as DTH operation is not a place-related entertainment, it is not covered by the charging section 3 read with section 2(a) and 2(b) of the 1936 Act. Consequently, the question of going to section 2(d)(iv) does not

arise. Moreover, even if section 2(d)(iv) is to be read as an extension of section 3 and, thus, as a part of the charge, it does not make any difference at all because section 2(d)(iv) refers to "entertainment" which takes us back to section 2(b) and finally to section 2(a).

38. We have held that DTH is not covered by the provisions of section 3 read with section 2(a), 2(b) and 2(d) of the 1936 Act. The issue gets further settled on reference being made to the mechanism of collection of the charge as provided under section 4 of the 1936 Act. Section 4(1) mandates that no person shall be admitted to any entertainment other than entertainment by V.C.R. except with a ticket stamped with an impressed, embossed, engraved or adhesive stamp issued by the State Government of nominal value equal to the duty payable under section 3; sub-section (2) of section 4 provides for different modes specified thereunder for payment of the amount of duty due on the entertainment. Neither the provision of section 4(1) nor any of the modes provided under section 4(2) can be made applicable for collection of duty on DTH operation. Further, it is noted above that section 8 provides rule making powers. In exercise of the powers under that provision the Madhya Pradesh Entertainment Duty and Advertisement Tax Rules 1942 were framed. A perusal of the Rules makes it absolutely clear that the collection mechanism under the 1936 Act is based on revenue stamps stuck to the tickets issued by the proprietor for entry to the specified place where entertainment is held.

39. The machinery for collection of duty provided under the 1936 Act has no application to DTH. It is well settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute. See: *Commissioner of Income Tax v. B.C. Srinivasa Setty*, (1981) 2 SCC 460, *Commissioner of Income-Tax Ernakulam, Kerala v. Official Liquidator, Palai Central Bank Ltd.*. (1985) 1 SCC 45 (pages 50-51), *PNB Finance Limited v. Commissioner of Income Tax*

I, New Delhi (2008) 13 SCC 94 (paragraphs 21 and 24 pages 100 to 101).

40. In light of the discussions made above, we are clearly of the view that the 1936 Act cannot be extended to cover DTH operations being carried out by the appellants.

41. Coming now to the notification dated May 5, 2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act. Moreover, the notification merely prescribes the rate of entertainment duty at 20 percent in respect of every payment for admission to an entertainment other than cinema, video cassette recorder and cable service. The notification cannot enlarge either the charging section or amend the provision of collection under section 4 of the Act read with the 1942 Rules. It is, therefore, clear that the notification in no way improves the case of the State. If no duty could be levied on DTH operation under the 1936 Act prior to the issuance of the notification dated May 5, 2008 as fairly stated by Mr. Dave, we fail to see how duty can be levied under the 1936 Act after the issuance of the notification.

42. We have held that the 1936 Act does not cover DTH operations on an interpretation of the provisions of 1936 Act itself. We, therefore, see no need to refer to the cases relied upon by the appellants relating to demand of duty on DTH operations under the Uttar Pradesh Entertainments and Betting Tax Act, 1979 and under the Bihar Entertainment Tax Act.

43. Further, as we have held that the 1936 Act does not cover the DTH operations we need not go to the other submissions made on behalf of the appellants *inter alia* regarding the legislative competence of the statute legislature to impose tax on DTH operation as it was a notified service chargeable to service tax under the Finance Act, 1994.

44. In the result, the appeals are allowed but with no order as to costs.

R.P. Appeals allowed.

ANNAPURNA
V.
STATE OF U.P.
(Criminal Appeal No. 1039 of 2008)

APRIL 17, 2013

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

Penal Code, 1860 - s.302 - Death of 22 year old married woman within 2 months of marriage due to burn injuries - Dying declaration given by the victim alleging that she was subjected to cruelty for dowry and that her mother-in-law (appellant) sprinkled kerosene oil on her and burnt her - Conviction of appellant u/s.302 alongwith life imprisonment - Held: The victim got injured in her in-laws house while the appellant was present - In her dying declaration, the victim had disclosed that her sister-in-law was also present there but did not make any allegation, whatsoever, against her - Thus, the veracity of her dying declaration cannot be doubted and there is no cogent reason to interfere with the conviction of the appellant - However, the appellant has already served 14 years and 6 months of imprisonment in jail and her case has not been considered by the State for premature release u/s.432 CrPC - Authorities concerned to consider the case of the appellant for premature release strictly in accordance with law - Evidence Act, 1872 - s.113B - Code of Criminal Procedure, 1973 - s.432.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1039 of 2008.

From the Judgment and Order dated 13.04.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 3443 of 2000.

Manoj Prasad, S.S. Gupta for the Appellant.

Ravi Prakash Mehrotra, Ram Kishor Singh Yadav for the Respondent.

The following order of the Court was delivered

O R D E R

1. This appeal has been filed against the impugned judgment and order dated 13.4.2007 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 3443 of 2000 by way of which, the High Court has affirmed the impugned judgment and order dated 15.12.2000 of the Sessions Court passed in Sessions Trial No. 3 of 2000, convicting the appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as `IPC') and sentencing her to undergo imprisonment for life.

2. As per the prosecution case, the appellant is alleged to have poured kerosene oil on her daughter in law Santoshi and set her on fire. On hearing hue and cry of the deceased, her neighbour Ram Singh took her daughter in law to the hospital. In the hospital, two dying declarations were recorded, one by the Investigating Officer and another by Shri Ved Priya Arya, Naib Tehsildar-cum-Magistrate (PW.8). The dying declaration was recorded by the said Magistrate on 26.6.1999 after getting a certificate from Dr. P.K. Pathak that she was fit to make the statement. In her dying declaration, she had clearly stated that she had married to Satish on 4.5.1999 and she was pregnant. She was not sent to her parental house because her in laws were demanding ring and money. Her mother in law sprinkled kerosene oil on her and burnt her. She was subjected to cruelty for dowry.

3. The trial court also applied the provisions of Section 113-B of the Evidence Act, 1872 (hereinafter referred to as `the Evidence Act'), which gives a presumption of demanding of dowry in such a case and recorded the findings of guilty of the

appellant. The said findings had been affirmed by the High Court.

4. We have gone through the entire record and we are not impressed by any of the argument advanced by Shri Manoj Prasad, learned counsel appearing on behalf of the appellant, and we are of the view that no fault can be found with the judgment and order impugned before us. Undoubtedly, the deceased Santoshi, was only 22 years of age when she got married on 4.5.1999. She got injured in the said incident on 25.6.1999 and died on 17.7.1999, i.e. within a period of two months from the date of marriage. She got injured at 8.00 a.m. in her in laws house when the appellant, her mother in law, was present there. In her dying declaration, she had also disclosed that her sister in law was also present there. She did not make any allegation, whatsoever, against her. Thus, the veracity of her dying declaration cannot be doubted and we do not find any cogent reason to interfere with the impugned judgment and order. The appeal lacks merit and is dismissed.

5. It is submitted by Shri Manoj Prasad, learned counsel for the appellant, that the appellant has already served 14 years and 6 months of imprisonment in jail and her case has not been considered by the State for premature release under Section 432 Cr.P.C. Further, Shri Mehrotra, learned standing counsel appearing on behalf of the State of U.P., assured the Court that her case for premature release would be considered within a period of 3 months from today. In view of the above, Shri Mehrotra will send a copy of this judgment to the concerned authorities. We request the said authorities to consider the case of the appellant for premature release strictly in accordance with law.

B.B.B. Appeal dismissed.

MASHYAK GRIHNIRMAN SAHAKARI SANSTHA MARYADIT
v.
USMAN HABIB DHUKA & ORS.
(Civil Appeal No. 3917 of 2013)

APRIL 18, 2013

[P. SATHASIVAM, M.Y. EQBAL AND ARJAN KUMAR SIKRI, JJ.]

CODE OF CIVIL PROCEDURE, 1908 :

O.6, r.17 read with O.2, r.2 – Amendment of plaint – Declined by City Civil Court, but permitted by High Court – Held: The statement that plaintiffs were not aware of conveyance dead, prima facie, is not correct – Plaintiffs had come to know of conveyance dead much before filing of suit, but relief was not sought for in the plaint – There is no ground for allowing the amendment sought for by plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence – Order of High Court set aside and that of City Civil Court restored.

The appellant Co-operative Housing Society entered into a development agreement with respondent no.4 - developer in respect of development of Society's property. The plaintiffs-respondent nos.1 to 3, claiming themselves to be the members of the appellant- Society filed a suit in the City Civil Court challenging amalgamation of two plots owned by the Society and praying for directions, *inter alia,* **for demolition of the construction raised on the amalgamated plot. While declining the interim injunction, it was observed that the plaintiffs never raised any objection to conveyance deed dated 8.2.1989. The plaintiffs took out Chamber Summary for amending the plaint and seeking to incorporate the**

relief of declaration of conveyance deed dated 8.2.1989 as illegal, *mala fide* **and bad in law. The City Civil Court dismissed the Chamber Summons. However, the High Court in writ petition under Art. 227 of the Constitution set aside the order of City Civil Court and permitted the plaintiffs to amend the plaint.**

Allowing the appeal, the Court

HELD: 1.1. The amendment petition reveals that the main ground for seeking relief is that the plaintiff-respondent Nos.1 to 3 were allegedly not aware of the conveyance deed dated 08.02.1989. Indisputably, plaintiff-respondent no.1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society he was authorized to complete the transaction. Therefore, it is incorrect to allege that the plaintiff-respondent No.1 was not aware about the transaction of 1989. [paras 6 and 7] [879-D; 880-B-C]

1.2. Moreover, before the institution of the suit in the year 2010, the plaintiffs allegedly came to know about the Conveyance Deed dated 8.2.1989, some time in the year 2009, but relief was not sought for in the plaint which was filed much later i.e. 14.10.2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in O.6, r.17 of the Code of Civil Procedure. There is no ground for allowing the amendment sought for by the plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence. The High Court has committed serious error of law in setting aside the order passed by the trial court whereby the amendment sought for was dismissed. The order of the High Court is set aside and that passed by the trial court restored. [paras 7 and 8] [880-C-F]

CIVIL APPELLATE JURISDICTON : Civil Appeal No. 3917 of 2013.

From the Judgment & Order dated 14.2.2012 of the High Court of Bombay in WP No. 130 of 2012.

Shekhar Naphade, Pallav Shishodia, Shrish Kumar Misra, I.A. Siddiqui, S.P. Bharati, K.D. Jha, Rahul Gupta, Gaurav Jain, Abha Jain, N.K. Jain, S. Sukumaran, Uday H. Kedar, Anand Sukumar, Bhupesh Kumar Pathak, Debjyoti Basau, Meera Mathur for the Appearing parties.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the order dated 14th February, 2012 of the High Court of Judicature at Bombay in Writ Petition No. 130 of 2012 whereby the order dated 3rd December, 2011 passed by the learned Judge of City Civil Court, Dindoshi, Goregaon, Mumbai was set aside and the plaintiffs (respondent Nos. 1 to 3 herein) were permitted to amend the plaint.

3. The facts of the case are that the plaintiffs are allegedly the members of the appellant – a Co-operative Housing Society (defendant No. 1 in the suit) (in short "the Society") which had entered into a development agreement in the month of November 2006 with Respondent No. 4 M/s. Universal Builders (in short "the Developer") in respect of the development of the Society's property. The plaintiffs challenged the re-development in the Co-operative Court at Mumbai but failed. The Co-operative Appellate Court also refused to grant any relief to them. They thereafter filed a suit in the City Civil Court at Mumbai inter alia challenging amalgamation of plots bearing CTS Nos. 978 and 979 (both owned by the appellant-Society), praying for directions to Municipal Corporation of Greater Mumbai as regards demolition of fully/partially constructed buildings of appellant-Society on the amalgamated plot,

seeking injunction restraining the Society and the Developer from utilizing the entire available balance TDR/FSI of the plot and praying for directions that the entire amount received/ receivable by the Society by selling its balance FSI/TDR be kept in fixed deposit to be utilized for reconstruction of the existing buildings etc. The plaintiffs also took out Notice of Motion in the suit for getting interim relief seeking that the Society and the Developer be restrained from carrying out any construction over the plot. The Civil Judge vide order dated 4th January, 2011 rejected the Notice of Motion holding that the plaintiffs were aware of all the facts but they did not raise any objection on dispute; they allowed the Society and the Developer to enter into agreement to obtain amalgamation order, IOD and CC and to raise construction; and when the substantial construction had been raised the plaintiffs were seeking relief of restraining the Society and the Developer from raising further construction. It was further held by the City Civil Court that the plaintiffs never raised any objection or protested against the Conveyance Deed dated 8th February, 1989. The matter was carried in appeal before the High Court by filing Appeal from Order (A.O.), but no relief was granted by the High Court and the plaintiffs sought adjournment to seek amendment in the suit. Thereafter, the plaintiffs took out Chamber Summons for amending the plaint thereby seeking to incorporate the relief of declaration of Conveyance Deed dated 8th February, 1989 as illegal, mala fide and bad in law stating that due to oversight and bona fide mistake the relief could not be sought earlier and to add certain other facts which were allegedly not incorporated in the plaint. The said application was opposed by the opposite parties on several grounds including that Order II Rule 2 leave was not obtained and that the decision not to challenge the conveyance at the time of filing suit was in order to get out of clutches of limitation. The Chamber Summons was dismissed by the learned Judge of City Civil Court vide order dated 3rd December, 2011 holding :

"18. Thus, on going through record, prima facie it

appears that the proposed amendment in the schedule of Chamber Summons was within the knowledge of Plaintiffs at the time of filing of the Suit. However, at the time of filing the suit, they have failed to challenge execution of conveyance deed dated 8.2.1989, mala fide and bad in law. On the contrary it has come on record that they do not want to challenge the same as same was obtained by fraud or misrepresentation. Moreover, Plaintiffs are not party to execution of said Conveyance deed nor legal heirs of deceased Jamal Gani. So also the Plaintiffs have not made party to six executants of the said conveyance deed to Chamber Summons nor sought any relief against them. It also appears from record that Plaintiffs in their Chamber Summons stated that due to oversight and inspite of "due diligence" they could not bring the said facts on record at the time of filing of suit. But the said statement appears to be contrary to their pleading in the Plaint as well as in A.O. Therefore, cannot be accepted.

xxx xxx xxx

20. …….. In the present case, I have already held that the Plaintiffs were within the knowledge of proposed amendment at the time of filing of the suit. But they have failed to incorporate same in the suit. So also Plaintiffs failed to show that inspite of the "due diligence" they could not … relief against them. It also appears from record that Plaintiffs in their chamber summons stated that due to oversight and inspite of "due diligence" they could not incorporate said facts in the Plaint. On the contrary record shows that they have omitted to incorporate the same in the Plaint. Plaintiffs also failed to show that the proposed amendment is necessary for the purpose of determining the real controversy and dispute between the parties. Therefore, observations made in the above authorities are not helpful to the Plaintiffs in support of their submission.

xxx xxx xxx

26. In the present case also deed of conveyance was executed in the year 1989 and prior to 1988 Plaintiff No. 1 is a member of the society and also was chairman of the society from 1997-2002 and he was aware about execution of said conveyance deed since 1989. So also he was aware about the said facts prior to filing of the suit. In spite of the same he has failed to seek declaration. …..

27. Thus, considering the facts and circumstances of the case, it appears from record that the facts mentioned in the schedule of Chamber Summons which Plaintiffs want to incorporate in Plaint as well as prayer clause were of the year 1989 and Plaintiffs were within knowledge of the same prior to filing of the suit. However, the Plaintiffs have failed to bring the said facts before the Court. So also Plaintiffs have only challenged amalgamation of Plot No. 978 and 979 in the Suit. So also Plaintiffs were not a party to the conveyance deed nor legal heirs of deceased Jamal Gani. Plaintiffs also failed to show that the proposed amendment is necessary for determining the real question in controversy between parties. So also the Plaintiffs failed to show that inspite of "due diligence" they could not bring the same on record, therefore, they are not entitled for same. Hence they are not entitled to amend the Plaint as prayed. ……

…. Chamber Summons No. 322/11 is hereby dismissed with cost."

4. Aggrieved by the above-quoted order, the plaintiffs filed a writ petition under Article 227 of the Constitution of India before the High Court. The High Court vide order dated 14th February, 2012 set aside the order dated 3rd December, 2011 of the City Civil Court permitting the plaintiffs to amend the plaint observing :

"3. The basis upon which the opposition is considered and the order is made is not in accordance

with law. A party must be entitled to aver whatever the party requires. The averments in the plaint would not show whether the case is truthful or false. That would be agitated on merits. That has been agitated upon in the interim application as also in the Appeal from Order.

4. It may be clarified that amendments allowed can be defended by the defendants in a separate written statement if an earlier written statement is filed. Consequently, the impugned order disallowing the amendments sought by the plaintiff and dismissing the Chamber Summons with costs required to be revised. ….."

5. Hence, defendant No. 1-Society (appellant herein) has filed this appeal by special leave.

6. We have heard learned counsel appearing for both sides and have minutely gone through the pleadings of the parties and the amendment petition. From perusal of the amendment petition, it reveals that the main ground for seeking relief is that the plaintiff-respondent Nos.1 to 3 were allegedly not aware of the conveyance deed dated 08.02.1989. For better appreciation, para 32-(b) of the amendment petition is reproduced hereinbelow:-

"The Plaintiffs say that all documents were applied under RTI and some of the same were received by Plaintiffs on 2.3.2009. The Plaintiffs further say that prior thereto Plaintiffs were unaware of any such Conveyance dated 8.2.1989. The Plaintiffs further say that for the first time after going through the certified copies received under RTI Act the Plaintiffs came to know about such manipulation and forgery in he registered Conveyance dated 8.2.1989. The Plaintiffs further say that the signature of the deceased Jamal Gani Khorajia has been got forged and documents executed and registered and a signature got manipulated through some fake persons, who must have impersonated deceased Mr. Jamal Gani Khorajia.

The Plaintiffs say that is the matter of common sense that when Jamal Gani Khorajia had expired on 14.8.1984 then how could he execute the said Conveyance dated 8.2.1989 after 5 years from the date of his death."

7. *Prima facie* the aforesaid statement made in the amendment petition is not correct. Indisputably, the plaintiff-respondent no.1 was the office-bearer of the Society at the relevant time and by Resolution taken by the Society respondent No.1 was authorized to complete the transaction.

Hence, it is incorrect to allege that the plaintiff-respondent No.1 was not aware about the transaction of 1989. Moreover, before the institution of the suit in the year 2010, the plaintiffs allegedly came to know about the Conveyance Deed dated 8th February, 1989, some time in the year 2009, but relief was not sought for in the plaint which was filed much later i.e. 14th October, 2010. The High Court has not considered these undisputed facts and passed the impugned order on the general principles of amendment as contained in Order VI Rule 17 of the Code of Civil Procedure. Hence we do not find any ground for allowing the amendment sought for by the plaintiffs which was not only a belated one but was clearly an after-thought for the obvious purpose to avert the inevitable consequence. The High Court has committed serious error of law in setting aside the order passed by the trial court whereby the amendment sought for was dismissed. The impugned order of the High Court cannot be sustained in law.

8.For the aforesaid reasons, the appeal is allowed, the impugned order passed by the High Court is set aside and the order passed by the trial court is restored. No order as to costs.

R.P. Appeal allowed.